No. 20-2537

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATE OF NEW YORK, CITY OF NEW YORK, STATE OF CONNECTICUT, STATE OF VERMONT, MAKE THE ROAD NEW YORK, AFRICAN SERVICES COMMITTEE, ASIAN AMERICAN FEDERATION, CATHOLIC CHARTIES COMMUNITY SERVICES (ARCHDIOCESE OF NEW YORK), and CATHOLIC LEGAL IMMIGRATION NETWORK INC.,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, SECRETARY CHAD F. WOLF, in his official capacity as Acting Secretary of the United States Department of Homeland Security, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, DIRECTOR KENNETH T. CUCCINELLI II, in his official capacity as Acting Director of United States Citizenship and Immigration Services, and UNITED STATES OF AMERICA,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

APPELLANTS' RESPONSE OPPOSING APPELLEES' MOTION FOR CLARIFICATION OF ORDER GRANTING STAY PENDING APPEAL

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INTRODUCTION AND SUMMARY

On September 11, 2020, this Court concluded that the government is likely to succeed on the merits of its appeal, granted the government's motion for a stay pending appeal, and ordered that the district court's preliminary injunction of the Department of Homeland Security's public charge rule (the Rule) be "stayed pending further order of this Court." *State of New York v. Dep't of Homeland Sec.*, 974 F.3d 210, 216 (2d Cir. 2020) (Stay Order). That order remains in effect, and the district court's preliminary injunction remains stayed. Because the preliminary injunction is stayed and no longer binds the government, U.S. Citizenship and Immigration Services (USCIS) announced that it will "resume implementing the [Rule]" and will therefore "apply the [Rule]" to all applications and petitions going forward, including those that were submitted while the preliminary injunction was in effect. *See Injunction on Inadmissibility on Public Charge Grounds Final Rule*, USCIS (last updated Oct. 9, 2020), available at https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge/injunction-of-the-inadmissibility-on-public-charge-grounds-final-rule.

Organizational plaintiffs ask this Court to "clarify" that the district court's preliminary injunction somehow still binds the government's conduct prospectively despite this Court's stay, requiring the government to apply 1999 field guidance governing public-charge inadmissibility determinations to applications for adjustment of status submitted while the preliminary injunction was in effect. That request

should be denied. The preliminary injunction is stayed and thus no longer constrains the government's conduct. The government may therefore resume implementation of the Rule, and apply the Rule to adjudications going forward.

None of plaintiffs' arguments to the contrary has merit. The government is not attempting to give this Court's stay retroactive effect, or to "negate" the preliminary injunction (except insofar as the stay already neutralizes its effects on a prospective basis). To the contrary, the government is simply applying the law as it exists at the time of action. For example, as plaintiffs acknowledge, the government complied with the preliminary injunction while it was in effect by applying 1999 field guidance governing public charge inadmissibility determinations to all applications adjudicated during that time—including applications and petitions submitted before entry of the preliminary injunction—because that was the law in effect during that period. Consistent with that black-letter principle, the government has announced that it will apply the Rule prospectively to adjudications that take place after this Court issued its stay order. There is nothing retroactive about that course of action.

Organizational plaintiffs alternatively complain that some individuals who filed applications while the preliminary injunction was in effect might have relied on the preliminary injunction, thereby making it unfair to apply the Rule to their applications now. But plaintiffs provide no support for the assertion that the mere filing of an application during the pendency of a temporary injunction subject to appeal (not to mention a stay motion) creates such a weighty reliance interest that the agency is

prohibited from applying the Rule that is lawfully in effect at the time an application is adjudicated. In any event, questions about whether individual reliance interests render application of the Rule unfair in certain applications are not properly presented in this case or in this motion. The motion should be denied.

STATEMENT

This appeal arises out of a challenge to the Department of Homeland Security's promulgation of a final rule implementing the Immigration and Nationality Act's (INA) public-charge inadmissibility provision, 8 U.S.C. § 1182(a)(4). After numerous similar preliminary injunctions were stayed by the Supreme Court and courts of appeals, the Rule went into effect on February 24, 2020. While an appeal from earlier preliminary injunctions the district court had entered against the Rule in these cases was pending in this Court, and while those earlier preliminary injunctions were stayed pursuant to an order by the Supreme Court, plaintiffs sought a new preliminary injunction that would bar DHS from implementing the Rule in light of the COVID-19 pandemic. On July 29, 2020, the district court (Daniels, J.) entered a new nationwide preliminary injunction enjoining DHS from enforcing the Rule "for any period during which there is a declared national health emergency in response to the COVID-19 outbreak." *State of New York v. Dep't of Homeland Sec.*, 2020 WL 4347264, at *14 (S.D.N.Y. July 29, 2020). The government appealed.

In the meantime, the government immediately took steps to comply with the preliminary injunction. On July 31, 2020, USCIS issued an alert informing the public

that, "[a]s long as the July 29, 2020, SDNY decision is in effect, USCIS will apply the 1999 public charge guidance that was in place before the Public Charge Rule was implemented on Feb. 24, 2020 to the *adjudication* of any application for adjustment of status on or after July 29, 2020." Attachment A, 1 (emphasis added). In addition, USCIS explained that, "[f]or applications and petitions that USCIS adjudicates on or after July 29, 2020," USCIS "will not consider any information provided by an applicant or petitioner that only relates to the evidence required by the Public Charge Rule." *Id.*

On appeal to this Court, the government sought an emergency stay of the preliminary injunction. On August 12, 2020, this Court issued a stay of the preliminary injunction's nationwide scope, limiting the preliminary injunction to the Second Circuit while this Court considered the governments' motion for a stay. Order, *New York v. Dep't of Homeland Sec.*, No. 20-2537 (2d Cir. Aug. 12, 2020), Dkt. 35.

On September 11, 2020, this Court granted the government's motion for a stay pending appeal and ordered that the preliminary injunction be "stayed pending further order of this Court." *State of New York v. Dep't of Homeland Sec.*, 974 F.3d 210, 216 (2d Cir. 2020). In issuing the stay, this Court concluded that the government is likely to succeed on the merits of its appeal because the motions panel "doubt[ed] that the district court had jurisdiction to issue the July 29 preliminary injunction while the appeal of its virtually identical prior preliminary injunction[s] w[ere] pending before

this Court." *Id.* at 212. The Court also "conclude[d] that DHS has shown irreparable injury from the district court's prohibition on effectuating the new regulation." *Id.* at 215. The Court made clear that its views regarding the district court's jurisdiction and the nationwide scope of the injunction "are intended solely as informing our assessment of whether the moving party demonstrated likelihood of success on the merits and are not intended to bind the merits panel on that question." *Id.* at 216.

In response to this Court's stay, USCIS issued an updated alert on September 22, 2020, informing the public that, because the preliminary injunction was stayed, USCIS would resume implementation of the Rule and "apply the [Rule] to all applications and petitions postmarked (or submitted electronically) on or after Feb. 24, 2020, including pending applications and petitions." *Injunction on Inadmissibility on Public Charge Grounds Final Rule*, USCIS (last updated Oct. 9, 2020), available at https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge/injunction-of-the-inadmissibility-on-public-charge-grounds-final-rule. USCIS made clear, however, that it would "not re-adjudicate any applications and petitions that were approved" during the time when the preliminary injunction was in effect. *Id.*[1]

[1] On November 2, 2020, the Northern District of Illinois granted summary judgment against the government and issued a Rule 54(b) judgment vacating the Rule. Mem. Opinion & Order, *Cook County v. Wolf*, No. 19-cv-6334 (N.D. Ill. Nov. 2, 2020), ECF No. 222. The government is appealing that decision and will seek a stay pending appeal. But in any event, that decision has no bearing on this motion, which concerns

Organizational plaintiffs filed this motion on October 22, 2020.

ARGUMENT

I. The Preliminary Injunction Is Stayed And Cannot Bind The Government's Prospective Conduct

Organizational plaintiffs ask this Court to "clarify" that, despite this Court's Stay Order, the district court's preliminary injunction continues to restrict the government's conduct. In particular, organizational plaintiffs argue that the government should not be allowed to apply the Rule to current or future adjudications of applications, if those applications happen to have been submitted when the preliminary injunction was in effect. That request should be rejected because the preliminary injunction is currently stayed and therefore cannot require the government to take or refrain from taking any action at this time. *See Nken v. Holder*, 556 U.S. 418, 428-29 (stay pending appeal "temporarily suspend[s] . . . the order or judgment in question," thereby "suspend[ing] judicial alteration of the status quo" (internal quotation marks omitted)); Stay, Black's Law Dictionary (11th ed. 2019) ("The postponement or halting of a proceeding, judgment, or the like."). The government is thus no longer prohibited from "enforcing, applying, implementing, or treating as effective" the Rule, *State of New York v. Dep't of Homeland Sec.*, 2020 WL

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the meaning of this Court's stay order and what is required under the preliminary injunction issued by the district court in this case.

4347264, at *14 (S.D.N.Y. July 29, 2020), and does not violate the preliminary injunction by applying the Rule while the stay is in effect.

There is simply nothing to clarify about this Court's stay order. The preliminary injunction was in effect from July 29, 2020, until September 11, 2020, and during that time the government was prohibited from implementing or applying the Rule. Accordingly, on July 31, 2020, USCIS issued an alert explaining that, "[a]s long as the July 29, 2020, SDNY injunction is in effect, USCIS will apply the 1999 public charge guidance that was in place before the Public Charge Rule was implemented." Attachment A, 1. In addition, USCIS clarified it would adjudicate all applications—even those submitted before the preliminary injunction issued—using the 1999 public charge guidance while the preliminary injunction was in effect. *See id.* USCIS further explained that, "[f]or applications and petitions that USCIS adjudicates on or after July 29, 2020," USCIS "will not consider any information provided by an applicant or petitioner that only relates to the evidence required by the Public Charge Rule." *Id.*

Since September 11, 2020, the preliminary injunction has been stayed by this Court and no longer constrains the government's conduct. Organizational plaintiffs' motion is not really for "clarification" of this Court's stay order, which was clear in that it suspended the effectiveness of the preliminary injunction. Instead, plaintiffs seek to continue to restrict the government's conduct after the preliminary injunction is no longer in effect, so long as the application on which the government is acting was submitted while the preliminary injunction was in effect. Such relief would not

be a clarification of the stay, but rather a new order from this Court that would constrain the government's conduct independent of the stayed preliminary injunction. Plaintiffs provide no basis for that relief, particularly given that this Court has already concluded that the government, not plaintiffs, is likely to succeed on the merits of this appeal. *State of New York*, 974 F.3d at 215-16.

II. This Court Does Not Need To Clarify The Effect Of Its Stay Order

A. Applying The Rule To Future Adjudications Does Not Give This Court's Stay Order Retroactive Effect

Organizational plaintiffs are wrong to claim that applying the Rule to adjudications of applications and petitions submitted while the preliminary injunction was in effect would give this Court's stay "retroactive effect." Pls.' Mem. of Law in Support of Mot. for Clarification (Mem.) 5. Agencies apply the law as it exists at the time they are applying it. *Cf. Henderson v. United States*, 568 U.S. 266, 271 (2013); *Ex parte McCardle*, 74 U.S. 506, 514 (1868). For adjudications that took place when the preliminary injunction was in force, that meant applying the 1999 guidance, not the Rule, even to adjustment-of-status applications submitted before the injunction was entered. For adjudications that take place after USCIS resumed implementation of the Rule in light of this Court's stay, that means applying the Rule, not the 1999 guidance, even to applications submitted before the stay was entered (absent an independent reason not to apply the Rule, *see supra* n.1).

That straightforward and commonsense course does not give the stay order retroactive effect. As organizational plaintiffs acknowledge, Mem. 3-4 & n.4, the government fully complied with the preliminary injunction while it was in effect by applying the 1999 guidance to adjustment of status adjudications during that time.[2] Plaintiffs do not suggest that the government is now attempting to reopen and readjudicate applications that were adjudicated while the injunction was in effect, or that the government is trying to retroactively justify some past conduct that violated the preliminary injunction while it was in effect. Nor could they: USCIS's new alert makes explicit that the agency will not re-adjudicate any applications and petitions that were approved under the 1999 field guidance while the preliminary injunction was in effect. The only conduct plaintiffs identify—the government's decision to apply the Rule to adjudications of applications that take place on or after September 11—is about the prospective, not retroactive, effect of this Court's stay.

B. There Is No Basis For This Court to Prohibit The Government From Applying The Rule To Individuals Who Applied While The Preliminary Injunction Was In Effect

Organizational plaintiffs alternatively argue that, for some individual applicants, it might be unfair to apply the Rule to their applications because they relied on the preliminary injunction when they submitted their applications. As discussed, even if it

[2] In that way, USCIS's earlier alert is consistent with the approach the agency is now taking: In both instances, the agency indicated that it will apply the law as it exists when the agency acts on an application.

were accurate, this would not be a basis for any "clarification" of this Court's stay order. But in any event, it is mistaken on its own terms.

For starters, plaintiffs are wrong to suggest that submitting an application for adjustment of status while the preliminary injunction was in effect could create the kind of reliance interests that might prevent the government from applying the Rule. As courts have recognized in similar contexts, "an application with an agency does not generally confer upon the applicant an inviolable right to have the agency rule on the application pursuant to the regulations in effect at the time of filing." *Bellsouth Telecomms., Inc. v. Se. Tel., Inc.*, 462 F.3d 650, 660-61 (6th Cir. 2006); *Pine Tree Med. Assocs. v. Sec. of Health and Human Servs.*, 127 F.3d 118, 121 (1st Cir. 1997) (holding that "the mere filing of an application is not the kind of completed transaction in which a party could fairly expect stability of the relevant laws as of the transaction date"). It is particularly implausible to think that the mere filing of an application might engender significant reliance interests where, as here, the agency's change in policy was driven by a temporary preliminary injunction subject to reversal on appeal, especially where materially similar injunctions had already been stayed by other courts of appeals and the Supreme Court—including in this very case. *See U.S. Department of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020) (mem.); *Wolf v. Cook County*, 140 S. Ct. 681 (2020) (mem.); *City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs.*, 944 F.3d 773 (9th Cir. 2019); Order, *Casa de Maryland, Inc. v. Trump*, No. 19-2222 (4th Cir. Dec. 9, 2019).

In any event, even assuming some individual applicants and petitioners might later argue that the government should not apply the Rule to their applications and petitions because they relied on the preliminary injunction, this motion does not provide an appropriate vehicle to evaluate those issues. As organizational plaintiffs acknowledge, those arguments would turn on whether individual applicants and petitioners—none of whom is a plaintiff here—"relied on the [preliminary] injunction in deciding whether to move forward with their applications and in deciding to use benefits." Mem. 7. Plaintiffs are not well suited to raise those applicant-specific claims. Nor does this motion provide this Court an opportunity to consider whether "basic principles of due process and fairness" should bar the government from applying the Rule to particular applicants. Mem. 6. Instead, plaintiffs seek "clarification" from this Court that the (now stayed) preliminary injunction itself continues to prevent the government from applying the Rule to *any* individual who submitted an application or petition while the preliminary injunction was in effect. *See* Mem. 2. As explained above, it does not. And this Court can resolve that question without considering whether an as-yet unidentified individual applicant could, in some hypothetical future case, invoke "due process and fairness" to avoid application of the Rule to his or her case.

CONCLUSION

The motion for clarification should be denied.

Respectfully submitted,

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November 2020

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2,746 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Jack Starcher
Jack Starcher

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2020, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Jack Starcher
Jack Starcher

ATTACHMENT A

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Injunction of the Inadmissibility on Public Charge Grounds Final Rule

On July 29, 2020, the U.S. District Court for the Southern District of New York (SDNY) in State of New York, et al. v. DHS, et al. and Make the Road NY et al. v. Cuccinelli, et al. enjoined the Department of Homeland Security (DHS) from enforcing, applying, implementing, or treating as effective the Inadmissibility on Public Charge Grounds Final Rule for any period during which there is a declared national health emergency in response to the COVID-19 outbreak. (84 FR 41292, Aug. 14, 2019, final rule; as amended by 84 FR 52357, Oct. 2, 2019, final rule correction)

On Jan. 31, 2020, the Secretary of Health and Human Services declared a public health emergency, effective Jan. 27, 2020, under section 319 of the Public Health Service Act (42 U.S.C. 247d), in response to COVID-19. On Feb. 24, 2020, DHS implemented the Public Charge Rule to be applied prospectively to any application or petition postmarked, or if applicable, submitted electronically on or after that date. On March 13, 2020, the President issued Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak. On the same day, USCIS issued an alert addressing COVID-19 and public charge determinations under the Public Charge Rule.

As long as the July 29, 2020, SDNY decision is in effect, USCIS will apply the 1999 public charge guidance that was in place before the Public Charge Rule was implemented on Feb. 24, 2020 to the adjudication of any application for adjustment of status on or after July 29, 2020. In addition, USCIS will adjudicate any application or petition for extension of nonimmigrant stay or change of nonimmigrant status on or after July 29, 2020, consistent with regulations in place before the Public Charge Rule was implemented; in other words, we will not apply the public benefit condition.

For applications and petitions that USCIS adjudicates on or after July 29, 2020, pursuant to the SDNY injunction, USCIS will not consider any information provided by an applicant or petitioner that only relates to the evidence required by the Public Charge Rule, including information provided on the Form I-944 or any supporting documentation included with that form, or information on the receipt of public benefits in Part 5 on Form I-539, Part 3 on Form I-539A, Part 6 on Form I-129, or Part 6 on Form I-129CW, or any additional documentation pertaining to the public benefit condition. Applicants and petitioners whose applications or petitions are postmarked on or after July 29, 2020, should not include the Form I-944 or provide information about the receipt of public benefits on Form I-485, Form I-129, Form I-129CW, Form I-539, or Form I-539A.

USCIS will issue guidance regarding the use of affected forms. In the interim, USCIS will not reject any Form I-485 on the basis of the inclusion or exclusion of Form I-944, nor Forms I-129 and I-539 based on

whether Part 6, or Part 5, respectively, has been completed or le blank.

In any public charge inadmissibility determination, USCIS will consider the receipt of public benefits consistently with prior public charge guidance – the 1999 Interim Field Guidance (PDF) and AFM Ch. 61.1. (PDF, 77.92 KB)

Last Reviewed/Updated: 08/04/2020

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