UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MAKE THE ROAD NEW YORK, AFRICAN SERVICES COMMITTEE, CATHOLIC CHARITIES COMMUNITY SERVICES, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., CENTRAL AMERICAN RESOURCE CENTER-NY, ALICIA DOE, BRENDA DOE, CARL DOE, DIANA DOE, and ERIC DOE,

Plaintiffs,

- against -

Mike POMPEO, in his official capacity as Secretary of State; the DEPARTMENT OF STATE; Alex AZAR, in his official capacity as Secretary of the Department of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH and HUMAN SERVICES,

Defendants.

1:19-cv-11633 (GBD)

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR A STAY OF THE PRELIMINARY INJUNCTION PENDING APPEAL

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Plaintiffs Make the Road New York, African Services Committee, Central American Refugee Center New York, Catholic Charities Community Services (Archdiocese of New York), Catholic Legal Immigration Network, Inc. ("Organizational Plaintiffs"), Alicia Doe, Brenda Doe, Carl Doe, Diana Doe, and Eric Doe ("Individual Plaintiffs", together with Organizational Plaintiffs, "Plaintiffs") respectfully submit this memorandum of law in opposition to Defendants' Motion in Support of Defendants' Motion for Stay of Injunction Pending Appeal.

PRELIMINARY STATEMENT

Defendants' belated and half-hearted motion for a stay pending appeal should be summarily denied.

On July 29 of this year, this Court enjoined implementation of: (1) the public charge guidelines in the Department of State's ("DOS") Foreign Affairs Manual ("FAM"), which sets policy for consular processing of intending immigrants seeking admission (the "FAM Revisions"); (2) the Interim Final Rule that would have replaced the FAM Revisions, which would have altered the public charge definition that applies during consular processing, and, if implemented, would have barred thousands more immigrants from admission ("the "IFR"); and (3) the "Presidential Proclamation Suspending the Entry of Immigrants Who Will Financially Burden the Health Care System," which, together with implementing guidelines, would have barred entry by tens of thousands of immigrant visa applicants and visa holders who do not have certain forms of health care coverage (the "Proclamation") (together with the FAM and the IFR, the "Consular Rules"). As the Court found, these radical changes to the family-based immigration system, if enacted, were likely to unlawfully revise the public charge statute absent Congressional authority.

For nearly two months, the government did nothing. Then, on September 22, Defendants filed this motion seeking a stay pending appeal on some but not all of the claims, claiming some

purported urgency. Notably, they limited their stay application to the IFR. A stay pending appeal, however, is an extraordinary remedy that requires a showing of irreparable injury, which Defendants do not remotely satisfy. Indeed, their dilatory conduct belies the purported need for the motion, and should be the beginning and end of the matter.

Taking each element of the analysis in turn, Defendants fail to carry their burden on each. On the merits, Defendants must make a "strong showing" they are likely to succeed on appeal, but that is simply the flip side of the "likelihood of success on the merits" prong of the preliminary injunction test. The Court has already concluded Plaintiffs showed they were likely to succeed on the merits, and Defendants' motion largely just rehashes arguments the Court has already considered and rejected. The Court should thus reject Defendants' motion for the same reasons that it enjoined the IFR in the first place.

Notably, Defendants reassert their unprecedented and unsupportable arguments that the IFR is not reviewable by this or any court. But of course, as this Court concluded in granting the preliminary injunction and denying Defendants' motion to dismiss, the Department of State is subject to the jurisdiction of the court and required to comply with the statutes passed by Congress. Its rules are subject to judicial review just like any other agency rules, and the rules at issue here are flatly contrary to the APA and the INA.

Moreover, there will be no irreparable harm to Defendants if the injunction stands pending appeal, but implementing the IFR will cause enormous harm to the Individual Plaintiffs, as well as the Organizational Plaintiffs and the immigrant communities that they serve. Defendants' entire showing of irreparable harm boils down to the illogical assertion that they are harmed simply by having to continue processing visa applications in the same manner as they and their predecessors have been doing for more than 20 years, through administrations of both

parties. That does not come close to making an adequate showing. And the public interest strongly favors a nationwide injunction, where, as here, a piecemeal injunction would be completely unworkable and no other district court has enjoined the IFR.

ARGUMENT

Defendants bear the "difficult burden" of establishing that a stay pending appeal is necessary. *Floyd* v. *City of N.Y.*, 959 F. Supp. 2d 691, 693 (S.D.N.Y. 2013) (quoting *United States* v. *Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc.*, 44 F.3d 1082, 1084 (2d Cir. 1995)). To establish the right to such a stay, defendants must make a "strong showing" that they are likely to succeed on the merits of the appeal. *Ligon* v. *City of N.Y.*, No. 12 Civ. 2274 (SAS), 2013 WL 227654, at *1 (S.D.N.Y. Jan. 22, 2013) (quoting *In re World Trade Center Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007)). Defendants must also establish that they will suffer irreparable harm absent a stay. *Id.*; *Chevron Corp.* v. *Donziger*, 37 F. Supp. 3d 653, 657 (S.D.N.Y. 2014) (characterizing a showing of irreparable harm as "indispensable"). The Court should also consider "whether issuance of the stay will substantially injure the other parties interested in the proceeding," and "where the public interest lies." *Donziger*, 37 F. Supp. 3d at 657. Defendants cannot establish any of these factors.

I. Defendants Cannot Make the Requisite Strong Showing That They Are Likely to Succeed on the Merits

A. All Plaintiffs Have Standing, and Their Claims are Ripe and in the Zone of Interests

The Court correctly held that Plaintiffs are likely to establish that they have standing and that their claims are ripe for review and fall within the zone of interests regulated by the IFR. Defendants do not challenge the standing of all Plaintiffs, focusing only on the Individual Plaintiffs. They thus effectively waive any argument on the standing of Organizational Plaintiffs, as indeed they must, given that the Second Circuit has already held that many of the

same organizations challenging the near-identical rule by the Department of Homeland Security have standing and are in the zone of interests of the Immigration and Nationality Act. *New York* v. *U.S. Dep't of Homeland Sec.*, 969 F.3d 42, 63 (2d Cir. 2020) ("Organizations have Article III standing to challenge the Rule and . . . fall within the zone of interests of the public charge statute").

As Defendants well know, where there are multiple plaintiffs, only one plaintiff need demonstrate standing for the court to have jurisdiction. *Comer* v. *Cisneros*, 37 F.3d 775, 788 (2d Cir. 1994) (citing *Village of Arlington Heights* v. *Metro. Hous. Dev. Corp.,* 429 U.S. 252, 263–64(1977)). Even assuming *arguendo* the validity of Defendants' argument that Individual Plaintiffs lack standing, which they do not, the Court need not address the argument as the case would proceed based on the clear and uncontested standing of the remaining plaintiffs. Defendants do no more than rehash the proposition—already rejected by this Court—that individuals must have effectively purchased a ticket to depart the United States in order to bring suit. Defs.' Mot. at 6, ECF No. 97; Mem. Op. at 16, ECF No. 88. In fact, as the Court clearly laid out, it is indisputable that plaintiffs bringing pre-enforcement facial challenges to unlawful statutes "'need not demonstrate to a certainty' that they will be negatively affected, 'but only that [they have] 'an actual and well-founded fear that the law will be enforced against' [them]." Mem. Op. at 16 (quoting *Pac. Capital Bank, N.A.* v. *Connecticut*, 542 F.3d 341, 350 (2d Cir. 2008)). Indeed, as the Court recognized, an individual need show only that her fear of enforcement is "not imaginary or wholly speculative" to establish Article III standing. *Id.* (quoting *Babbitt* v. *United Farm Workers Nat. Union*, 442 U.S. 239, 302 (1979)). Plaintiffs have amply met their burden here, and Defendants provide no new facts or law to alter the Court's earlier conclusion.

B. The Second Circuit Has Already Affirmed The Court's Rationale for Deciding that the Public Charge Rule is Contrary to the INA and Arbitrary and Capricious.

As it did in *Make the Road New York* v. *Cuccinelli*, 419 F. Supp. 3d 647 (S.D.N.Y. 2019), this Court ruled that the Department of State's definition of "public charge" at issue here is also likely contrary to Congressional intent and the term's plain meaning in the INA, that "there is no evidence that Congress ever intended for a redefinition of the term as that set forth in the DOS Rule or DHS Rule," and that "Defendants' definition is plainly outside the bounds of the statute." On August 4, 2020, in a unanimous ruling, a panel of the Second Circuit affirmed the district court's decision and analysis, finding it "plain . . . that the Rule falls outside the statutory bounds marked out by Congress." *New York*, 969 F.3d at 75; *see id*. ("Congress's intended meaning of 'public charge' unambiguously forecloses the Rule's expansive interpretation"). In addition, the Second Circuit found the DHS Rule to be "arbitrary and capricious" in violation of the Administrative Procedure Act because DHS did not provide a "'satisfactory explanation'" for expanding the definition of public charge to include anyone who might use 12 months of cash or non-cash benefits in a 36-month period. *Id*. at 83 (quoting *Motor Vehicles Mfrs.' Ass'n* v. *State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)).

Given the Second Circuit's analysis of the unlawfulness of public charge rule issued by DHS, Plaintiffs' likelihood of success on the merits of their challenge to the near-identical IFR issued by DOS is extremely high.

C. Defendants Do Not Challenge the Court's Analysis of the Lawfulness of Presidential Proclamation 9945.

Defendants have not asked this Court to stay the preliminary injunction as it pertains to Presidential Proclamation 9945. In doing so, they effectively waive any arguments that it does not violate the INA or the APA. Such a request would have required denial, as Defendants are

unlikely to prevail on the merits of those claims. *See Doe #1* v. *Trump*, 957 F.3d 1050, 1070 (9th Cir. 2020) (declining motion to stay nationwide injunction as to Proclamation 9945); *see also Nat'l Ass'n of Mfrs.* v. *U.S. Dep't of Homeland Sec.*, No. 20 CV 04887 JSW, 2020 WL 5847503, at *9-10 (N.D. Cal. Oct. 1, 2020) (enjoining Presidential Proclamation regarding nonimmigrant worker visas that "eviscerated" the statutory visa program).

D. Defendants Offer No Justification for Staying the Court's Finding that They Violated the Procedural Requirements of the APA.

Defendants cannot show that they are likely to succeed on their argument that they met the good cause standard for evading notice-and-comment procedures when they released the DOS IFR four days before it was to go into effect. The APA limits the "good cause" exception to circumstances where notice-and-comment would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b).

Defendants do not even try to show that they met any of those three prongs. Instead, they mischaracterize the Court's reasoning by suggesting that the Court limited the exception to matters of "public safety." Defs.' Br. at 8. But nowhere does the Court state that good cause is established only in matters of public safety. To the contrary, the Court spelled out the standard set forth in 5 U.S.C. §553(b) and clearly found that Defendants met *"[n]one* of the circumstances warranting invocation of the good cause exception are present." Mem. Op. at 36 (emphasis added).

Defendants' arguments that DOS's decision to wait until just four days before the IFR was to go into effect was "reasonable" is irrelevant, Defs.' Br. at 8, because reasonableness is not the standard for good cause under 5 U.S.C. §553(b). Nowhere do they explain why DOS "failed to act during the entire year in which DHS considered comments on its proposed rule, as well as during the two months following the release of the DHS Rule in August 2019." Mem. Op. at 36

(adding that "Defendants had ample time before then to realize any purported need to align the DOS's public charge standard with the standard proposed and ultimately adopted by DHS"). Rather, the failure to follow proper administrative procedure was the result of a "self-inflicted, artificial emergency to evade the notice-and-comment rulemaking process mandated under the APA." *Id.* The Second Circuit has repeatedly found that it "cannot agree . . . that an emergency of [the agency's] own making can constitute good cause." *Natural Res. Def. Council* v. *Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 115 (2d Cir. 2018) (quoting *Natural Res. Def. Council* v. *Abraham*, 355 F.3d 179, 205 (2d Cir. 2004)). There is simply no support for Defendants' contention that the Second Circuit or the Supreme Court is likely to reverse the Court's straightforward holding that Defendants' failure to proceed with notice-and-comment rulemaking violated the APA.

E. The Consular Rules are Subject to the APA, and Are Therefore Reviewable.

There is no exception in the APA for rules promulgated by the Department of State. Defendants reiterate in this motion the unsupported and indeed radical assertion, which this Court has rejected, that the Court lacks the jurisdiction to review the legality of the IFR. It cannot reasonably be disputed that the IFR is a final agency action plainly reviewable under the APA, which does not except immigration regulations or policies from review.

To support this argument, Defendants half-heartedly rehash their arguments about the import of *Fiallo* v. *Bell*, 430 U.S. 787 (1977). But in *Fiallo*, the Supreme Court evaluated whether duly enacted provisions of the INA were unconstitutional because they failed to give preferential status to the relationship between "illegitimate children" and their natural fathers. *Id.* at 788–89. The Court did not consider the issue unreviewable. Instead, as the Court concluded in issuing the preliminary injunction, Mem. Op. at 25, it "underscore[d] the limited scope of judicial inquiry into immigration *legislation*," noting the Court had "repeatedly

emphasized that 'over no conceivable subject is the *legislative* power of Congress more complete than it is over' the admission of aliens." *Id.* at 792. *Fiallo* does not speak *at all* to Executive or administrative regulations implementing Congressional legislation. Mem. Op. at 25. And the fact that the Second Circuit did not address the Defendants' radical arguments for unreviewability in the *New York v. Department of Homeland Security* opinion does not render them any more meritorious; they were correctly rejected by the Court for good reason, and are not a basis for a stay pending appeal.[1]

F. Plaintiffs Did Not Seek, and the Court Did Not Grant, Preliminary Relief Based on Equal Protection Claims.

It is unclear why Defendants' motion address Plaintiffs' equal protection claims at all, which were not at issue in the preliminary injunction motion, and thus have no bearing on whether the Court should grant a stay. The Court's denial of Defendants' motion to dismiss Plaintiffs' equal protection claims is also irrelevant to Defendants' motion to stay the injunction.

G. The Supreme Court Has Never Ruled on the Merits of Any of the Claims Asserted Here.

Defendants' lone argument challenging the Court's finding is based on the stay issued by the Supreme Court in January of 2020. But the Supreme Court's order made no findings at all on the substance of the injunction, the APA claims, or the history of public charge provision. *U.S. Dep't of Homeland Sec.* v. *New York*, 140 S. Ct. 599 (2020); *see also Wolf* v. *Cook Cty., Illinois*, 140 S. Ct. 681, 682, 206 L. Ed. 2d 142 (2020) (Sotomayor, J., dissenting) ("No Member of the Court discussed the application's merit apart from its challenges to the injunction's nationwide scope"). Indeed, the Court had no opportunity to review the substantive decisions or

[1] Whatever arguments Defendants may have previously made with respect to the FAM Revisions, they do not, on this motion, argue that the FAM Revisions are unreviewable under the APA, or otherwise immune from review under the "good cause" exception. Mot. at 6-8. In any case, Defendants appear to seek a stay only of the "October 2019 rule," i.e. the IFR. Defs.' Br. at 14.

analysis by the circuit courts of appeals as the public charge litigation percolated through the lower courts. A stay of the injunction containing no analysis of the merits of Plaintiffs' challenge is not a sufficient basis for predicting what the Supreme Court might do if it grants certiorari and reviews the full record.

Further, the Supreme Court has never had the opportunity to review Plaintiffs' procedural claims that the IFR violated the APA on procedural grounds. There is simply no basis for this Court to assume that the Supreme Court will allow Defendants to go against decades of precedent requiring that federal agencies comply with the APA's procedural requirements.

* * *

In sum, the Defendants have shown no likelihood of success on the merits on any part of their challenge to this Court's injunction, much less the "strong showing" they are required to make.

II. The Remaining Factors Weigh Against a Stay

A. Defendants Cannot Show Irreparable Injury Absent a Stay

Irreparable harm is the most critical among the four factors that a court must consider, and a stay pending appeal cannot be granted unless the movant makes a sufficient showing of such harm. *See Church & Dwight Co.* v. *SPD Swiss Precision Diagnostics, GmbH*, No. 14 CV 585 (AJN), 2015 WL 5051769, at *2 (S.D.N.Y. Aug. 26, 2015) ("Irreparable harm is 'perhaps the single most important prerequisite' before a stay of a permanent injunction pending appeal can be issued") (quoting *Bell & Howell: Mamiya Co.* v. *Masel Supply Co. Corp.*, 719 F.2d 42, 45 (2d Cir.1983); *Donziger*, 37 F. Supp. 3d at 657 ("[A] showing of likely irreparable harm absent a stay pending appeal is indispensable."); *see also Nken* v. *Holder*, 556 U.S. 418, 434–35 (2009). Here, Defendants have not shown any such harm.

First, any purported urgency is belied by the Defendants' two-month delay in seeking a stay. *See In re Aso*, No. 19 MC 190 (JGK) (JLC), 2019 WL 2572491, at *3 (S.D.N.Y. June 21, 2019) ("Respondent's delay in seeking a stay undermines his claim of irreparable harm. If he was so concerned about [the effects of the court's order allowing the petitioner to issue subpoenas], then he should have filed a motion for a stay as soon as practicable following the Court's decision, instead of 17 days later (and after the return date of the subpoenas)").

Second, the Court should reject Defendants' principal argument that the extant injunction of the IFR somehow impairs the authority purportedly delegated to Defendants by Congress. Halting implementation of a rule that has been found likely to violate the INA and APA is not a cognizable form of irreparable harm to Defendants. Mem. Op. at 47 ("[T]here is no public interest in allowing Defendants to proceed with unlawful, arbitrary, and capricious executive or agency actions that exceed their statutory authority.").

Authorities cited by Defendants on this point are inapposite. *See* Defs.' Br. at 10. The Second Circuit's September 11, 2020 decision to stay the Court's July 29, 2020 injunction of the DHS public charge rule provides no support for Defendants' position. *See generally New York* v. *U.S. Dep't of Homeland Sec.*, No. 20-2537, 2020 WL 5495530 (2d Cir. Sept. 11, 2020). In deciding to stay the injunction there, the Second Circuit questioned whether the Court had jurisdiction to issue that limited injunction because of the appellate posture of that case. *Id.* at *1. The Court's jurisdiction to grant the relief at issue here is not in question.

Nor does Defendants' citation to *Maryland* v. *King*, 567 U.S. 1301, 1303 (2012) (Roberts, C. J., in chambers) support their position. In that case, there were no allegations of harm to an administrative agency at all. *See id.* The Supreme Court decided in favor of a stay where the underlying injunction prevented Maryland from enforcing a state statute while the

legality of that statute was under review. *Id*. Finally, this Court has already rejected the argument based on *Trump* v. *Hawaii*, 138 S.Ct. 2392 (2018), that Defendants' interest in regulating the admission and exclusion of foreign nationals removes the regulations at issue from the purview of judicial scrutiny. Mem. Op. at 24 ("[T]he APA does not exempt from review agency action that pertains to the admission or exclusion of immigrants."). This argument does not support a finding of irreparable harm any more than it succeeds on the merits.

Third, Defendants' arguments about a lack of "alignment" between the DHS public charge rule and the DOS public charge rule do not amount to irreparable harm. For one, the lack of alignment between the public charge policies used by DOS and DHS is nothing new to the agency. When Defendants adopted the January 2018 FAM revisions, DHS was still using the 1999 Guidance to govern public charge determinations despite material differences between the two policies, such as DOS looking behind the affidavit of support to question the relationship between the intending immigrant and the joint sponsor. Over the past 33 months, since January 2018, the two agencies' policies have only been the same during the five-month period from February 24, 2020 through July 29, 2020. Defendants offer no factual basis to support its argument that the differing standards will result in conflicting determinations at the point of consular processing under the 1999 Guidance and from Customs and Border Patrol ("CBP") under the DHS public charge rule any likelihood of conflicting determinations made at the point of consular processing, citing no example of intending immigrants who were "returned to their countries of origin" or "subject to detention" on such basis. Defs.' Br. at 7-8. Nor do the Defendants indicate that CBP is actually making independent determinations at any point of entry.

Furthermore, the record shows no independent, urgent need to implement the DOS Public Charge Rule. This Court found that Defendants failed to justify their need to redefine public charge both at this moment in time and in the manner outlined by the Rule. Mem. Op. at 33 ("A 'desire' for consistency is far from a sufficient explanation for upending a framework that has been in place for decades, particularly where there is neither support for such a change in the history of U.S. immigration law, nor any indication that Congress wanted such a change"). Indeed, this Court's order simply returns the DOS to the longstanding status quo for considering public charge as a basis for inadmissibility prior to January 2018. The preliminary injunction does no more than require the government to continue processing immigrant visa applications pursuant to the same 1999 Field Guidance standards that had been in effect for more than 20 years.

Moreover, as this Court and Second Circuit have held, the approach applied under the Field Guidance is consistent with the way in which the public charge provision of the INA has been interpreted and applied for more than 100 years. Enjoining Defendants from adopting a dramatic—and unwarranted—change in that settled practice is not irreparable harm. *See Washington* v. *Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017) (denying government's motion to stay preliminary injunction pending appeal, in part because "the district court's order merely returned the nation temporarily to the position it has occupied for many previous years").

B. Plaintiffs and the Public Will Suffer Irreparable Harm if the Preliminary Injunction Is Stayed

The Court has already concluded that Individual Plaintiffs, and the Organizational Plaintiffs and the immigrant communities they serve, will suffer immediate and irreparable harm absent an injunction. *See* Mem. Op. at 47–50 (concluding that the challenged actions will result in irreparable harm to Individual Plaintiffs in the form of family separation and being treated

negatively for using benefits for which they are eligible and to the Organizational Plaintiffs in the form of "diversion of resources and irretrievable frustration of their missions," including the dedication of significant resources to performing additional work on cases that but for the new standards being imposed were effectively complete). In such circumstances, "it would be 'logically inconsistent' to then find that Plaintiffs would not suffer irreparable harm were the injunction stayed pending appeal." *Am. Freedom Def. Initiative* v. *Metro. Transp. Auth.*, 889 F. Supp. 2d. 606, 614 (S.D.N.Y. 2012) (quoting *Rodriguez* v. *DeBuono*, 175 F.3d 227, 234–35 (2d Cir. 1999)).

Defendants' attempt to relitigate whether the harms asserted by Plaintiffs are irreparable should be rejected. Defendants cannot predict when individual Plaintiffs will undergo consular processing and face the IFR and certainly have no basis for asserting that they face no risk of family separation and can wait until final judgment to address any harm. Defs.' Br. at 11. Nor do Defendants present any cause to question the Court's findings with respect to irreparable harm faced by the organizational Plaintiffs. Defendants merely cite to lines of the declarations submitted on behalf of organizational Plaintiffs indicating that injunctive relief does not bring organizational Plaintiffs' work on related issues to a standstill. *See* Defs.' Br. at 12 (citing Decl. of Andrew J. Ehrlich in Supp. of Pls. Mot. for a Prelim Inj., ECF No. 45 (Ehrlich Decl.), Ex. 20 ¶¶ 13-14 (Decl. of Elise de Castillo) (Plaintiff CARECEN's work educating clients about the healthcare proclamation and the DHS Rule—not at issue in this stay motion—continued despite being enjoined in Oregon), Ex. 21 ¶ 35 (Decl. of C. Mario Russell) (indicating that Plaintiff Catholic Charities Community Services planned public education efforts to get the word out about court actions that would affect the legal landscape)). Given the complexities of the policies at issue, the tremendous impact they have on non-citizens and their families, and the

volume of litigation concerning the rules at issue, this is hardly surprising. More importantly, the standard for justifying relief is *irreparable* harm, not a showing that an injunction will cure all harm.

Defendants do not contest the Court's findings that the public interest favors injunctive relief. *See* Mem. Op. at 48 (citing "extensive reports of the adverse consequences that implementation of the 2018 FAM Revisions, DOS Rule, and Proclamation will have on Plaintiffs, as well as on individual Plaintiffs' families, organizational Plaintiffs' clients, immigrant communities throughout the country, and the general public"). Nor do Defendants attempt to rebut the allegations of twenty-one states, two localities, and six cities describing the significant harm that they will endure with the 2018 FAM Revisions, DOS Rule and Proclamation in effect, including "diminishing revenue collection, dampening the creation of small businesses, and reducing employment in key sectors of the economy." *See* Br. of Amicus Curiae in Supp. of Pls.' Mot. for a Prelim. Inj., ECF No. 49-2. Finally, the Defendants ignore the Court's finding that the "ongoing COVID-19 pandemic highlights the potentially devastating effects that the government's new public charge framework could have on public health and safety," including that "the new public charge framework continues to have a chilling effect on immigrants, who have foregone coronavirus-related medical care to which they are legally entitled out of fear that seeking such care will jeopardize their immigration status." Mem. Op. at 49 (citing Miriam Jordan, '*We're Petrified': Immigrants Afraid to Seek Medical Care for Coronavirus*, N.Y. Times, Mar. 18, 2020; Maanvi Singh, *'I Have a Broken Heart': Trump Policy Has Immigrants Backing Away from Healthcare Amid Crisis*, Guardian, Mar. 29, 2020)[2].

[2] *Available at* https://www.nytimes.com/2020/03/18/us/coronavirus-immigrants.html; https://www.theguardian.com/world/2020/mar/29/i-have-a-broken-heart-trump-policy-has-immigrants-backing-away-from-healthcare-amid-crisis.

The Court properly found that the hardships Defendants allege they will face if the injunction is not stayed—the inconsistent application of the public charge rule and the disruption in training on the new rule, Declaration of Brianne Marwaha, ECF No. 98 at ¶¶ 5, 7—cannot outweigh harms to Plaintiffs and the public should the DOS Public Charge Rule go into effect. The balance of equities and public interest clearly tip in Plaintiffs' favor.

III. The Nationwide Injunction is Appropriate Under the Standard Set Forth by the Second Circuit.

The Court properly concluded that a nationwide injunction is necessary to afford Plaintiffs and other interested parties complete redress. Mem. Op. at 50. This Court also correctly concluded that a nationwide injunction was necessary given the unworkability of a piecemeal injunction that would apply to consular offices all over the world. *See id.* ("The likely unlawful agency actions in this case apply universally to determinations by U.S. immigration officials regarding the inadmissibility of immigrant visa applicants around the world. Limited relief would simply not protect the interest of all stakeholders."). As the Court found, a geographically-limited injunction would also be unworkable and invite arbitrary enforcement particularly in determining which jurisdiction's rules should apply to the applicant for admission (where the intending immigrant lived in the U.S. previously, where they have family residing, or where Organizational Plaintiffs the immigrant works with are located). Mem. Op. at 51.

The Second Circuit's August 4, 2020 decision to limit the scope of the nationwide injunction entered against the DHS public charge rule—a decision that came out days after the Court had already issued the injunction issued here—is not a basis for staying the DOS Public Charge Rule injunction, as claimed by Defendants. Defs.' Br. at 12. A nationwide injunction complies with the Second Circuit's guidelines as set forth in *New York* v. *Department of*

Homeland Security, 969 F.3d 42 (2d Cir. 2020). There, the Second Circuit cautioned that nationwide injunctive relief may be "less desirable" when courts in multiple jurisdictions are considering the same issue. *Id.* at 88. In view of the fact that multiple courts were considering the issue presented on that appeal, the Court exercised its discretion to limit the scope of the first injunction to the States within this Circuit. *Id.*

Contrary to Defendants' argument, no such circumstances are presented here. There are no other pending cases or motions seeking to preliminarily enjoin the Department of State Public Charge Rule. Although Defendants cite *Mayor & City Council of Baltimore* v. *Trump*, No. 18-cv-3636 (D. Md. filed Nov. 28, 2018), there, the plaintiffs are not seeking preliminary injunctive relief. The present injunction also does not thwart the continuation of litigation challenging the DHS Public Charge Rule in other areas of the country, including those where stays of preliminary injunctions were granted.

Finally, the Court should reject Defendants' argument that injunctive relief should be limited to the named Plaintiffs. Defs.' Br. at 13. Not only is this argument baseless, but it also completely ignores the evidence that complete relief for the Plaintiffs in this case requires nationwide relief. Plaintiff CLINIC has offices in ten states and Mexico and member organizations in 49 states and the District of Columbia. *See* Ehrlich Decl. Ex. 22, Decl. of Charles Wheeler ¶ 3. Notwithstanding the fact that individuals who are served by Organizational Plaintiffs could choose to settle in any state of the union, the interests of Plaintiff CLINIC alone require uniform, nationwide relief. As the Second Circuit recognized, there is no bar to nationwide injunctions in appropriate circumstances such as there are here. 969 F.3d at 87-88.

This Court soundly concluded that a nationwide injunction is necessary and appropriate.

CONCLUSION

The Court should deny defendants' motion to stay the injunction of the IFR pending appeal.

Dated: New York, New York
October 6, 2020

By: */s/ Andrew J. Ehrlich*

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