UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COOK COUNTY, ILLINOIS, an Illinois governmental entity; and **ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS, INC.**,

Plaintiffs,

vs.

KEVIN K. McALEENAN, in his official capacity as Acting Secretary of U.S. Department of Homeland Security; **U.S. DEPARTMENT OF HOMELAND SECURITY,** a federal agency; **KENNETH T. CUCCINELLI II,** in his official capacity as Acting Director of U.S. Citizenship and Immigration Services; and **U.S. CITIZENSHIP AND IMMIGRATION SERVICES,** a federal agency,

Defendants.

Case No. 19-cv-6334

Judge Gary Feinerman

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR STAY OF INJUNCTION PENDING APPEAL

Defendants' motion for stay should be denied for the same reasons this Court entered an injunction. Indeed, Defendants acknowledge that this Court will apply the same standard to their motion to stay pending appeal as it did to determine whether to issue a preliminary injunction in the first instance. *See* Mot. to Stay at 2; *see also Matter of Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1300 (7th Cir. 1997). Because this Court already evaluated the parties' likelihood of success on the merits—and ruled in Plaintiffs' favor—the Defendants face an even *higher* burden in seeking to stay the preliminary injunction. *See Forty-Eight*, 115 F.3d at 1301 ("[I]n the context of a stay pending appeal, where the applicant's arguments have already been evaluated on the success

scale, the applicant must make a stronger threshold showing of likelihood of success to meet his burden."); *see also, e.g.*, *Heitmann v. City of Chicago*, No. 04 C 3304, 2008 WL 1943239, at *1 (N.D. Ill. May 1, 2008) (requiring defendant to make a "strong" or "substantial showing of likelihood of success" when moving to stay a preliminary injunction pending appeal). Here, Defendants' burden is higher still because five other courts around the country, addressing precisely the same APA claims, *all* agreed that Plaintiffs are likely to succeed on the merits.[1] *See Forty-Eight*, 115 F.3d at 1301 (movants' burden was "one notch higher" because "two courts" below already concluded that claimants were not likely to succeed on the merits).

Despite this heightened burden, Defendants' motion to stay simply rehashes the same arguments that this Court already considered—and rejected—when ruling on Plaintiffs' motion for a preliminary injunction. Courts routinely deny motions to stay in similar circumstances. *See, e.g.*, *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-cv-943-PP, 2016 WL 8846573, at *2 (E.D. Wis. Oct. 3, 2016) (denying motion to stay preliminary injunction because "[e]very argument which the defendants raise[d] in their motion for stay pending appeal was raised in their objection to the motion for preliminary injunction," and "[t]he defendants g[a]ve no explanation for why the court should find in their favor now"); *Nat'l Ass'n of Mfrs. v. Taylor*, 549 F. Supp. 2d 68, 75 (D.D.C. 2008) ("Mere repetition of [plaintiff's] arguments [did] not demonstrate that the [plaintiff] [was] any more likely to succeed on the merits of its claims than it was when

[1] *See New York v. U.S.s Dep't of Homeland Sec.*, No. 19 Civ. 7777 (GBD), 2019 WL 5100372 (S.D.N.Y. Oct. 11, 2019); *Make the Road New York, et al. v. Cuccinelli, et al.*, No. 19 Civ. 7993 (GBD), 2019 WL 5484638 (S.D.N.Y. Oct. 11, 2019); *Washington v. U.S. Dep't of Homeland Sec.*, No. 4:19-cv-5210-RMP, 2019 WL 5100717 (E.D. Wash. Oct. 11, 2019); *City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs.*, No. 19-cv-04717-PJH, 2019 WL 5100718 (N.D. Cal. Oct. 11, 2019); *Casa De Maryland, Inc. v. Trump*, No. PWG-19-2715, 2019 WL 5190689 (D. Md. Oct. 14, 2019). A sixth court—the Maryland district court—denied the government's motion to dismiss a similar challenge. *See, Mayor & City Council of Baltimore v. Trump*, No. CV ELH-18-3636, 2019 WL 4598011, at *9 (D. Md. Sept. 20, 2019).

the Court issued its Memorandum Opinion."); *U.S. E.E.O.C. v. Laidlaw Waste, Inc.*, 934 F. Supp. 286, 288 n.3 (N.D. Ill. 1996) (denying motion to stay order pending appeal because the court "considered all of the arguments raised in [defendant's] earlier briefs before issuing the Order"). Because Defendants fail to meet their burden of showing that they are entitled to the "extraordinary relief" of staying the injunction pending appeal, Defendants' motion should be denied. *Chan v. Wodnicki*, 67 F.3d 137, 139 (7th Cir. 1995).

ARGUMENT

I. Defendants Are Not Likely To Succeed On The Merits Of Their Appeal.

Defendants offer nothing new in support of their arguments on the merits. A stay should be denied for the same reasons that supported the Court granting a preliminary injunction.

A. Plaintiffs Have Standing And Their Claims Are Ripe.

Defendants' standing arguments lack merit. With respect to Plaintiff Cook County, Defendants repeat their argument that the alleged harms are "based on the independent decisions of nonparty aliens," and thus are too "speculative" to confer standing. Mot. to Stay at 3. This Court already considered and rejected that argument. *See* Op. at 6–7. Defendants try to distinguish the Supreme Court's decision in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), on which this Court relied, on the ground that "Cook County has not proffered non-speculative evidence" of harm. Mot. to Stay at 3. But again, this Court already addressed this exact argument, expressly finding that "Cook County adduce[d] evidence showing" that, as a result of the Final Rule, it would incur additional costs in the form of uncompensated emergency care and community health epidemics. Op. at 7–8. In light of that evidentiary finding—which will be subject to a deferential clear error standard of review on appeal—Defendants' argument is not likely to prevail. *See Valencia v. City of Springfield, Ill.*, 883 F.3d 959, 966 (7th Cir. 2018) (district court's evidentiary findings are reviewed for clear error in a preliminary injunction appeal).

Next, Defendants argue that ICIRR's diversion of resources is a "self-inflicted" spending decision. Mot. to Stay at 4. The Court rejected this argument, too. Op. at 10. In doing so, the Court relied on binding Seventh Circuit case law. Op. at 10 (quoting *Common Cause Ind. v. Lawson*, 937 F.3d 944, 956 (7th Cir. 2019)).

Finally, the Court already has held that ICIRR and Cook County's claims are ripe because the agency action is final, Plaintiffs raise "purely legal challenges," and "Cook County and ICIRR allege a direct and immediate impact of the Rule on them." Op. at 11 (citing *OOIDA v. FMCSA*, 656 F.3d 580, 586–87 (7th Cir. 2011)).

B. Plaintiffs Fall Within The Zone Of Interests.

This Court similarly held that Cook County satisfied the APA's zone-of-interests test because the County has suffered and will continue to suffer "financial harms" as a result of the Final Rule. Op. at 15. Defendants assert that the County must "identif[y] [a] provision of the INA that protects it from potential downstream harms to its fisc . . . " Mot. to Stay at 4. But as this Court explained, the APA's zone-of-interests test "does not require any 'indication of congressional purpose to benefit the would-be plaintiff.'" Op. at 12 (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012)).

This Court further held that ICIRR satisfies the zone-of-interests test because "[t]here is ample evidence that ICIRR's interests are not merely marginal to those of the aliens more directly impacted by the public charge provision," and "ICIRR [is] precisely the type of organization that would reasonably be expected to police the interests that the statute protects." Op. at 13–14 (internal quotation marks and citation omitted). Defendants now rely on *City & Cty. of San Francisco v. U.S. Citizenship and Immigration Servs.* to argue this Court's conclusion is "infirm."

Mot. to Stay at 5.[2] But that court squarely held that, had plaintiffs "identified specific references to the role of pro bono legal organizations within the challenged statute itself," that would have been "sufficient" to bring the organizations within the zone of interests. *City & Cty. of San Francisco*, 2019 WL 5100718, at *43 (citing *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 768 (9th Cir. 2018)). ICIRR did precisely that: it cited a specific example of a relevant INA provision that gives organizations like ICIRR a role in the statutory scheme, and this Court also identified no fewer than *five* INA provisions that "give[] organizations like ICIRR a role in helping immigrants navigate immigration procedures[.]" Op. at 14 (citing statutory provisions); *see also* PI Mem. at 30; PI Reply at 8.

C. Plaintiffs Are Likely To Succeed On The Merits Of Their APA Claims.

This Court further held that DHS's definition of "public charge" in the Final Rule is inconsistent with the "clear" statutory meaning of that term, and thus that Plaintiffs are likely to succeed on the merits of their APA claims. Op. at 15–27. Numerous other courts recently reached the same conclusion. *See* note 1, *supra*. In reaching this conclusion, the Court relied in part on the Supreme Court's decision in *Gegiow v. Uhl*, 239 U.S. 3 (1915). As the Court explained, "[t]he Supreme Court told us in *Gegiow* what the statutory term 'public charge' meant in that era," and that decision "plainly conveys" that the term "public charge" refers to "*permanent personal objections*." Op. at 24, 18–19 (quoting *Gegiow*, 239 U.S. at 10).

[2] Defendants fail to mention the other public charge cases in which district courts have held that organizations like ICIRR *do* fall within the zone of interests protected by the INA. *See, e.g.*, *Make the Road New York*, 2019 WL 5484638, at *6 (holding that plaintiff nonprofit organizations "plainly fall within the INA's zone of interests" and that "[t]he interests of immigrants and immigrant advocacy organizations such as Plaintiffs are inextricably intertwined"); *Casa De Maryland*, 2019 WL 5190689, at *8–10 (holding that plaintiff organization satisfied the zone-of-interests test under the INA).

Trying once again to evade *Gegiow*, Defendants repeat their failed argument that Congress "abrogated" *Gegiow*'s holding through a 1917 amendment. Mot. to Stay at 6. But the Court already rejected Defendants' argument that *Gegiow* was "negated," and explained at length why "the 1917 Act did not change the meaning of 'public charge' in the manner urged by DHS," citing subsequent agency commentary and extensive case law that refutes Defendants' characterization of the 1917 amendment. Op. at 20–23.

Defendants' next attempt to get around *Gegiow* is to take a position diametrically opposed to their preliminary injunction argument: they now argue that the 1996 statute enacted a "significantly different public-charge regime" from what had existed at the time of *Gegiow* and before. Mot. to Stay at 6; *see also id.* at 6 n.1. These assertions flatly contradict Defendants' previous arguments to this Court. In their brief opposing the preliminary injunction, Defendants expressly stated that "[a]n unbroken line of predecessor statutes going back to at least 1882 have contained a similar inadmissibility ground for public charges, and those statutes have, *without exception, delegated to the Executive Branch the authority to determine who constitutes a public charge for purposes of that provision*." PI Opp. at 3 (emphases added); *see also id.* at 22 ("Congress's comprehensive delegation of interpretive authority is well-established in precedent dating back to the early public charge statutes."); *id.* at 23 (noting "[t]he long history of congressional delegation of definitional authority over the meaning of 'public charge'" and "the longstanding delegation to the Executive Branch to exercise definitional authority over … the meaning of 'public charge'"). Defendants even went so far as to say that, "in 1996 and 2013, . . . Congress left the public charge provision unchanged." *Id.* And when asked directly by the Court whether the late nineteenth century was "the key time to consider" in interpreting the

statutory term "public charge," Defendants answered unambiguously "Yes." 10/11/2019 Hrg. Tr. at 21:23-22:2.

Having failed with their initial litigation strategy, Defendants "cannot be heard to contend that the pertinent timeframe is, on second thought," 1996. Op. at 20 (referring to Defendants' "arguable waiver" on this point); *Pohl v. United Airlines, Inc.*, 213 F.3d 336, 340 (7th Cir. 2000) ("[E]ven arguments raised in the district court may be waived if not presented in a timely manner, such as those raised for the first time in a motion for reconsideration."). Indeed, "[t]he principle of waiver is designed to prohibit this very type of gamesmanship." *Lott v. Levitt*, 556 F.3d 564, 568 (7th Cir. 2009) (holding that plaintiff was "not entitled to get a free peek at how his dispute will shake out under Illinois law and, when things don't go his way, ask for a mulligan under the laws of a different jurisdiction").

In any event, nothing in Defendants' new argument supports granting a stay either. The Court exhaustively reviewed the authorities that Defendants cited in their brief opposing a preliminary injunction and concluded that Defendants "cite[d] no case from any era holding that the public charge provision covers noncitizens who receive public benefits—let alone modest public benefits—on a temporary basis. And against that statutory and case law backdrop, Congress retained the 'public charge' language in the INA of 1952 and the IIRIRA of 1996." Op. at 27. Defendants' motion for stay likewise cites no case that supports their reading of the statute, and the statutory and case law backdrop that existed when Congress enacted the current public-charge provision in 1996 is just as the Court previously described. For these reasons, nothing in the motion for stay disturbs the Court's prior ruling that "Cook County and ICIRR are likely to prevail on the merits of their challenge to the Final Rule." *Id.*

II. Defendants Have Not Shown That They Will Suffer Irreparable Harm Absent A Stay.

In their brief opposing a preliminary injunction, Defendants claimed irreparable harm only to the extent the injunction would "impede" their ability to "administer[] the national immigration system …" PI Opp. at 41–42. The Court acknowledged that a preliminary injunction would cause a "temporary delay in implementing the Rule," which would "impose some harm on DHS." Op. at 29. However, the Court noted that Defendants failed to supply an "explanation of the practical consequences of the delay and whether those consequences are irreparable." *Id.*

Now, for the first time in their motion to stay, Defendants belatedly attempt to cure that evidentiary deficiency by offering a new declaration from Daniel Renaud, an Associate Director at USCIS.[3] But Defendants have forfeited arguments about harms that they did not already raise before this court. *See Sansone v. Brennan*, 917 F.3d 975, 983 (7th Cir. 2019); *see also, e.g., Zoller v. UBS Sec. LLC*, No. 16 C 11277, 2019 WL 2371724, at *1 (N.D. Ill. June 5, 2019) (holding that plaintiffs forfeited arguments about the arbitral forum "by failing to raise them in their original response to [defendant's] motion to compel arbitration"). Moreover, district courts in similar postures have refused to consider evidence that was not before the court when ruling on the underlying preliminary injunction. *See, e.g., Graveline v. Johnson*, No. 18-12354, 2018 WL 4184577, at *3 (E.D. Mich. Aug. 30, 2018) (denying motion to stay preliminary injunction pending appeal where State of Michigan's motion was based on new evidence and arguments because in "weighing the four factors in consideration of a motion to stay, the Court is not permitted to examine new evidence"). Nor will the Seventh Circuit consider evidence that was not provided to

[3] Defendants also claim that "[t]he federal government sustains irreparable injury whenever it 'is enjoined by a court from effectuating statutes enacted by representatives of its people.'" Mot. to Stay at 7 (quoting *Maryland v. King*, 567 U.S. 1301 (2012)). However, unlike in the *King* case where the lower court invalidated a Maryland *statute* as unconstitutional, this Court already has recognized that the Final Rule is inconsistent with the relevant statute.

the district court at the time it issued the preliminary injunction order. *See, e.g.*, *Stagman v. Ryan*, 176 F.3d 986, 994 (7th Cir. 1999) (refusing to consider affidavit that "was not before the district court at the time [plaintiff] asked to depose [defendant]," but rather filed later, because "[w]e will not consider evidence that was not before the district court in making its decision"). Accordingly, the new declaration is irrelevant to Defendants' likelihood of success on the merits of their appeal.[4]

In any event, the new declaration fails to establish irreparable harm. Renaud states that, while the injunctions are in place, USCIS "will grant adjustment of status to some number of those estimated 382,264 people annually who, pursuant to the now-enjoined rule, should be denied," and that USCIS will not be able to "reexamine or reconsider those applications" in the future. Renaud Decl. ¶ 4. This kind of "harm," however, necessarily occurs *any* time an administrative rule changes but has not yet gone into effect. In short, Renaud's declaration just says what this Court has already recognized: that there will be a "temporary delay in implementing the Rule" while courts determine its legality. Op. at 29. The remaining injuries alleged in Renaud's declaration—*i.e.*, that USCIS put hiring, training, and outreach plans on hold—are all sunk costs that the agency incurred as soon as the injunctions were issued and that will not be recovered regardless of when the injunction is lifted. Renaud Decl. ¶¶ 5–6. Relatedly, if USCIS ever prevails, it will have to incur additional costs in the future to "start [the implementation] process over," regardless of whether this Court stays the preliminary injunction pending appeal. Renaud Decl. ¶¶ 5–6.

[4] If Defendants appeal both the preliminary injunction order and the eventual stay order, the Seventh Circuit will only consider the evidence that was before this Court at the time it issued the preliminary injunction order when ruling on the propriety of the preliminary injunction. *See Joseph P. Caulfield & Assocs., Inc. v. Litho Prods., Inc.*, 155 F.3d 883, 888 (7th Cir. 1998) (holding that, where plaintiff appealed both the summary judgment ruling and the final judgment after trial, the court's review of the summary judgment order was "limited to the record presented to the district court at that time," and it would "not rely on evidence later introduced at trial").

III. The Balance Of Harms And Public Interest Strongly Favor Permitting The Preliminary Injunction To Remain In Effect Pending Appeal.

The remaining factors strongly favor keeping the preliminary injunction in place pending appeal. First, the irreparable harm to the Plaintiffs and other parties far outweighs any risk of harm to the Defendants. The new declaration identifies only burdens of the nature that this Court anticipated Defendants would face—namely, a "temporary delay." Op. at 29. In stark contrast, the Court rightly determined that if the Final Rule goes into effect, immigrants would disenroll or refrain from enrolling in medical benefits, forgo routine treatment, and rely on emergency care provided by Plaintiff Cook County, and that Cook County's risk of vaccine-preventable and other communicable diseases would increase. *Id.* at 28. Ultimately, the Court concluded that "the Final Rule is likely to impose on [Cook County and ICIRR] financial and programmatic consequences for which there is no effective remedy at law." *Id.* at 29.

Second, the public interest weighs against a stay because the Final Rule poses "public health risks" and because "[t]here is generally no public interest in the perpetuation of unlawful agency action." Op. at 29–30 (quoting *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016)). Defendants claim that the injunction will "result in the additional expenditure of government resources" and "undermine[]" the rule's operation in the future, but fail to explain why that is so. Mot. to Stay at 8. Moreover, any expenditure of additional public resources and funds to administer and implement the Final Rule, *see* Renaud Decl., actually weighs in favor of keeping the preliminary injunction in place pending appeal. After all, it makes little sense for the agency to expend those scarce public resources now since the agency is "likely" to be required to revert back to its prior policy at the conclusion of this litigation, as this Court already has determined.

Ultimately, "[t]he purpose of a stay is simply to preserve the status quo," *Flynn v. Sandahl*, 58 F.3d 283, 287 (7th Cir. 1995); *Nken v. Holder*, 556 U.S. 418, 429 (2009). Because the Final Rule represents a fundamental shift in longstanding federal policy, this Court's preliminary injunction ruling effectively preserves the status quo pending litigation. *See, e.g.*, *Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017), *cert. denied sub nom. Golden v. Washington*, 138 S. Ct. 448 (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"). And the balance of harms "should inure to the benefit of those who oppose grant of the extraordinary relief which a stay represents." *Williams v. Zbaraz*, 442 U.S. 1309, 1315–16 (1979) (denying motion to stay preliminary injunction pending appeal).

IV. The Court Should Not Partially Stay The Injunction Pending Appeal.

Finally, the scope of the preliminary injunction is coextensive with the need to redress Plaintiffs' injuries. As the Court already determined, a statewide preliminary injunction is appropriate here because "the record shows that ICIRR 'represent[s] nearly 100 nonprofit organizations and social and health service providers *throughout Illinois*." Op. at 31 (quoting Doc 27-1 at p. 341, Decl. of L. Benito, ¶ 5). Defendants' argument that the injunction should only apply to specifically identified persons or entities who have demonstrated harm has been rejected and described as an argument that "reeks of bad faith, demonstrates contempt for the authority that the Constitution's Framers have vested in the judicial branch, and, ultimately, deprives successful plaintiffs of the full measure of the remedy to which they are entitled." *Make the Road New York v. McAleenan*, No. 19-CV-2369 (KBJ), 2019 WL 4738070, at *44 (D.D.C. Sept. 27, 2019); *see also* Opinion & Order at 144–46, *New York, et al. v. U.S. Dep't of Health and Human Servs.*, Case No. 19-cv-4676 (S.D.N.Y Nov. 6, 2019) (rejecting the government's "audacious" argument that relief under the APA should be limited to the specific plaintiffs because "[i]n some cases the

'agency action' will consist of a rule of broad applicability; and if the plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual") (quoting *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998)). Likewise, this Court should continue to reject Defendants' argument that the injunction sought and obtained by the State of Illinois in other litigation should impact the Court's decision as to whether to issue an injunction in this case. *See* Op. at 30. Defendants have not made the extraordinary showing required to obtain a stay of that aspect of the Court's ruling.

CONCLUSION

For the aforementioned reasons, Plaintiffs respectfully request that Defendants' motion to stay be denied.

Dated: November 6, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that on November 6, 2019, she caused the attached **PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR STAY OF INJUNCTION PENDING APPEAL** to be served via the Court's ECF system and by email upon:

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