No. 20-3214

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MAKE THE ROAD NEW YORK, AFRICAN SERVICES COMMITTEE, CENTRAL AMERICAN REFUGEE CENTER NEW YORK, CATHOLIC CHARITIES COMMUNITY SERVICES (ARCHDIOCESE NEW YORK), CATHOLIC LEGAL IMMIGRATION NETWORK, INC., ALICIA DOE, BRENDA DOE, CARL DOE, DIANA DOE, AND ERIC DOE,

Plaintiffs-Appellees,

v.

MICHAEL POMPEO, in his official capacity as Secretary of State, UNITED STATES DEPARTMENT OF STATE, and ALEX AZAR, in his official capacity as Secretary of Health and Human Services,

Defendants-Appellants.

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

APPELLANTS' OPENING BRIEF

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INTRODUCTION AND SUMMARY

The Immigration and Nationality Act (INA) provides that an alien is inadmissible if the alien is, in the Executive Branch's opinion, "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). On October 11, 2019, the State Department published an interim final rule implementing this public-charge inadmissibility provision. *See* Visas: Ineligibility Based on Public Charge Grounds, 84 Fed. Reg. 54,996 (Oct. 11, 2019) (State Rule or Rule). The State Department did so to align the standard that consular officers apply when evaluating whether a visa applicant is inadmissible with the standard that Department of Homeland Security (DHS) officers apply to all aliens seeking admission, including visas holders, at the border. The parallel DHS and State Department rules define "public charge" to mean an alien who receives one or more specified public benefits, including certain noncash benefits, for more than twelve months in the aggregate within any thirty-six month period. They also set forth the framework consular officers and DHS will use to determine whether an alien is likely at any time to become a public charge.

The INA also authorizes the President to suspend entry of any class of noncitizens or impose any restrictions on their entry that he deems appropriate whenever he finds that their entry would be detrimental to the interests of the United States. 8 U.S.C. § 1182(f); *see also id.* § 1185(a)(1). Pursuant to that authority, the President issued Proclamation 9945 (Proclamation), which suspends entry of those aliens who are expected to financially burden the United States healthcare system.

On July 29, 2020, the district court entered a preliminary injunction barring consular officers from enforcing the State Rule and the Proclamation. The district court's order should be set aside, as none of the traditional factors supports the entry of an injunction here.

Plaintiffs are not likely to succeed on the merits. The Supreme Court and Congress have long recognized that separation-of-powers principles bar courts from reviewing Executive Branch decisions regarding the exclusion of classes of aliens. Those separation-of-powers principles are just as applicable to the challenges here, which are brought in anticipation that a consular officer will deny a visa, as they would be to challenges brought in response to the denial of a visa.

Even if plaintiffs' claims were reviewable, plaintiffs would not be entitled to a preliminary injunction, even taking into account this Court's prior ruling against the government in the appeal of the preliminary injunction regarding the DHS rule. Because the DHS rule—which is currently in effect as a result of a Supreme Court stay—applies to *all* aliens seeking admission at the border who are subject to the public-charge provision (including those to whom the State Department has granted visas), plaintiffs, their family members, and their clients remain subject to the challenged public-charge standard. Plaintiffs thus cannot show that the State Rule will cause them irreparable harm absent a preliminary injunction or that the State Department acted unreasonably in aligning its Rule with DHS's rule. And because the State Department needed to align its Rule with the DHS rule on short notice to avoid

the confusion and adverse consequences that inconsistent standards would produce, it was not required to engage in notice-and-comment rulemaking before promulgating the interim rule.

Plaintiffs are likewise unlikely to prevail in their challenge to the Proclamation. The Proclamation represents a straightforward exercise of the President's broad authority to exclude classes of aliens whose entry the President finds will be detrimental to the interests of the United States. The Proclamation does not conflict with—let alone expressly override—any INA provision. It supplements the INA's inadmissibility provisions by adding a class of aliens who will be deemed inadmissible if they do not meet the specified criteria. That is precisely how the statute is intended to operate.

The remaining factors likewise weigh against an injunction. So long as the State Rule is enjoined, the State Department cannot align its public-charge standards with the standards applied by DHS officers at the border. The existence of different standards threatens to sow confusion among aliens and the public—the very harm that plaintiffs allege forms the basis of their irreparable injury—with little or no corresponding benefit, given that all relevant aliens remain subject to the DHS rule at the border. Preventing consular officers from applying the Proclamation threatens to exacerbate the very harm the Proclamation is designed to prevent—the entry of individuals who are likely to burden the country's healthcare system. The balance of the equities and the public interest thus favor the government.

STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the district court pursuant to 28 U.S.C. §§ 1331 and 1343, raising claims under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, and the Constitution. Joint Appendix (JA) 38. Plaintiffs' standing is contested. *See infra* pp. 24-25. The district court entered a preliminary injunction on July 29, 2020. Special Appendix (SA) 52. The government filed a timely notice of appeal on September 22, 2020. JA2045. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether plaintiffs' challenges to the State Department Rule and Presidential Proclamation are justiciable.

2. Whether the Rule's definition of "public charge" is based on a permissible construction of the INA and is not arbitrary and capricious.

3. Whether the President exceeded his authority in issuing the Proclamation, and whether the associated Notice of Information Collection violates the APA.

STATEMENT

A. Public Charge Ground Of Inadmissibility

1. Statutory Background

Under the INA, a person seeking to enter the United States who is not a U.S. citizen or lawful permanent resident generally must obtain a visa. There are two main types of visas: immigrant visas, for persons seeking to reside in the United States permanently, and nonimmigrant visas, for temporary stays in the United States. *See* 8 U.S.C. § 1181(a); *id.* § 1182(a)(7). A person seeking a visa of either type must complete an application and in most cases must schedule an in-person interview with a consular officer at a U.S. embassy or consulate. *See* 8 U.S.C. § 1202(a), (e); 22 C.F.R. § 42.62.

An individual is ineligible for a visa if the individual is inadmissible to the United States under the INA. 8 U.S.C. § 1182. One INA provision, the public-charge inadmissibility provision, provides that

> [a]ny alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the [Secretary of Homeland Security] at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.

8 U.S.C. § 1182(a)(4)(A).[1] In evaluating whether an alien is likely to become a public charge, a consular officer and DHS "shall at a minimum consider the alien's (I) age;

[1] The statute refers to the Attorney General, but in 2002 Congress transferred the Attorney General's authority to the Secretary of Homeland Security. *See* 8 U.S.C. § 1103; 6 U.S.C. § 557.

(II) health; (III) family status; (IV) assets, resources, and financial status; and (V) education and skills." *Id.* § 1182(a)(4)(B).

Although a visa normally is necessary for admission to the United States, it does not guarantee admission; a visa holder still must be found admissible upon inspection at a port of entry by a U.S. Customs and Border Protection (CBP) officer. *See* 8 U.S.C. §§ 1182(a)(4), 1185(d), 1201(h), 1225(a), 1361; *see also id.* § 1101(a)(4) (specifying that an application for a visa is distinct from an application for admission); *Trump v. Hawaii*, 138 S. Ct. 2392, 2414 (2018) ("A visa does not entitle an alien to enter the United States if, upon arrival, an immigration officer determines that the applicant is inadmissible under this chapter, or any other provision of law."). Thus, DHS is in *all* cases ultimately responsible for deciding whether an alien is inadmissible, including whether the alien is inadmissible on the public-charge ground.

2. DHS Final Rule And State Department Interim Rule

Congress has never defined the term "public charge," instead leaving the term's definition and application to the Executive's discretion. In 1999, the Immigration and Naturalization Service (INS) issued guidance defining "public charge" to mean an alien "who is likely to become primarily dependent on the Government for subsistence as demonstrated by either: (i) the receipt of public cash assistance for income maintenance purposes, or (ii) institutionalization for long-term care at Government expense." 64 Fed. Reg. 28,676, 28,681 (May 26, 1999). The State

Department subsequently issued guidance to its consular officers adopting the INS's definition. *See* 9 Foreign Affairs Manual 302.8-2(B)(1) (2017) (JA161).

In August 2019, DHS promulgated a rule setting forth a new framework for the public-charge inquiry. The DHS rule defines "public charge" to mean "an alien who receives one or more [specified] public benefits . . . for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months)." 84 Fed. Reg. 41,501, 41,501 (Aug. 14, 2019). The specified public benefits include cash assistance for income maintenance and certain noncash benefits, including most Medicaid benefits, Supplemental Nutrition Assistance Program benefits, and federal housing assistance. *Id.* The DHS rule's definition of "public charge" thus differs from the INS's 1999 definition in that: (1) it incorporates certain noncash benefits; and (2) it replaces the "primarily dependent" standard with the 12-month/36-month measure of dependence.

The DHS rule also sets forth a framework for evaluating whether, considering the "totality of an alien's individual circumstances," the alien is "[l]ikely at any time in the future to become a public charge." 84 Fed. Reg. at 41,501-04. Among other things, the framework identifies factors the adjudicator must consider in making public-charge inadmissibility determinations. *Id.* The DHS rule's effective date was October 15, 2019.

In October 2019, in response to DHS's promulgation of its final rule in August, the State Department published an interim final rule amending its regulations

governing the application of the public-charge inadmissibility provision. 84 Fed. Reg. at 54,996. The interim rule mirrors the definition and framework adopted by DHS in its August 2019 rule. In adopting the Rule, the State Department emphasized the importance of keeping its public-charge standards in alignment with the standards adopted by DHS, so as to prevent situations in which individuals to whom consular officers issued visas to travel to the United States are deemed inadmissible at the border by DHS officers applying a different standard. *See* 84 Fed. Reg. at 55,000.

3. Legal Challenges To DHS Rule

Numerous plaintiffs filed suits challenging the DHS rule. District courts in New York, California, Washington, Illinois, and Maryland issued preliminary injunctions barring enforcement of the DHS rule, all of which have been stayed. *See New York v. USDHS*, 969 F.3d 42, 58 n.15 (2d Cir. 2020). The Fourth and Ninth Circuits granted the government's request for stays, while this Court and the Seventh Circuit denied the government's requests. *See id.* The Supreme Court then granted the government's request for a stay pending disposition of any petition for writ of certiorari in the Second and Seventh Circuit cases. *See id.* at 58. The DHS rule thus went into effect nationwide on February 24, 2020. *Id.* The district court overseeing this litigation entered a second nationwide injunction barring enforcement of the DHS rule on July 29, 2020, which this Court has since stayed. *See New York v. USDHS*, -- F. Supp. 3d --, No. 19-cv-7777, 2020 WL 4347264 (S.D.N.Y. July 29, 2020), *stayed by* 974 F.3d 210 (2d Cir. 2020).

On August 4, 2020, this Court issued a decision affirming the district court's initial preliminary injunction of the DHS rule. *New York*, 969 F.3d at 50. As relevant here, this Court concluded that the organizational plaintiffs had standing to challenge the DHS Rule and fell within the public-charge provision's zone of interests. *See id.* at 60-63. This Court also concluded that the plaintiffs were likely to prevail in establishing that the DHS rule was contrary to the INA because the rule's definition of public charge was inconsistent with the settled meaning of the term. *See id.* at 74-80. This Court further concluded that the DHS rule was likely arbitrary and capricious. *See id.* at 80-86.

On October 7, 2020, the government filed petitions for writs of certiorari seeking review of the decisions of this Court and of the Seventh Circuit, which had affirmed the Illinois preliminary injunction. Petition, *DHS v. New York*, No. 20-449 (S. Ct.); Petition, *Wolf v. Cook County*, No. 20-450 (S. Ct.). In light of the Supreme Court's stays, the DHS rule remains in effect.[2]

B. Presidential Proclamation 9945

1. Statutory Background

The INA provides, under 8 U.S.C. § 1182(f), that:

> Whenever the President finds that the entry of . . . any class of aliens into the United States would be detrimental to the interests of the

[2] On November 2, 2020, the district court for the Northern District of Illinois entered an order vacating the DHS rule nationwide, but the Seventh Circuit entered an administrative stay of that order the next day. *See* Order, *Wolf v. Cook County*, No. 20-3150 (7th Cir.).

> United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of . . . any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate. . . .

Id. The Supreme Court has held that this provision grants "the President broad discretion to suspend the entry of aliens into the United States." *Hawaii*, 138 S. Ct. at 2408. Complementary authority is provided under 8 U.S.C. § 1185(a)(1), which makes it unlawful "for any alien to . . . enter or attempt to . . . enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." *Id.*

2. Proclamation 9945

On October 4, 2019, pursuant to his authority under §§ 1182(f) and 1185(a)(1), the President signed Presidential Proclamation 9945. *See* Presidential Proclamation 9945, Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System, 84 Fed. Reg. 53,991 (Oct. 4, 2019). The President issued Proclamation 9945 to address the "substantial costs" U.S. healthcare providers and taxpayers bear "in paying for medical expenses incurred by people who lack health insurance or the ability to pay for their healthcare." *Id.* Hospitals and other healthcare providers "often administer care to the uninsured without any hope of receiving reimbursement from them," and these costs are passed on to the American people in the form of higher taxes, higher premiums, and higher fees for medical services. *Id.* Uncompensated care costs have exceeded $35 billion in each of the last

10 years, a burden that can drive hospitals into insolvency and strain federal and state government budgets. *Id.* The uninsured also cause "overcrowding and delay" for emergency rooms and unnecessarily burden our emergency care system by using those essential facilities to obtain remedies for non-emergency conditions. *Id.*

The President issued the Proclamation to address a significant contributor to the uncompensated care problem: the admission to the United States of "aliens who have not demonstrated any ability to pay for their healthcare costs." 84 Fed. Reg. at 53,991; *see also id.* (noting that "data show that lawful immigrants are about three times more likely than United States citizens to lack health insurance"). To that end, the Proclamation suspended entry into the United States of certain immigrants "who will financially burden the United States healthcare system." *Id.* at 53,992. In particular, subject to certain exceptions, the Proclamation suspended entry of immigrants who fail to show either that they will be covered by approved health insurance, as set out in the Proclamation, within 30 days of entering the United States, or that they otherwise have "the financial resources to pay for reasonably foreseeable medical costs." *Id.* The President found that entry of these immigrants "who lack health insurance or the demonstrated ability to pay for their healthcare" is detrimental to the United States because it increases the burdens that uncompensated care imposes on healthcare providers and, ultimately, other healthcare consumers and taxpayers. *See id.* at 53,991.

The Proclamation applies only to certain persons seeking immigrant visas and does not apply to persons seeking to enter the United States on any type of nonimmigrant visa, as asylees, or as refugees. It also provides numerous exceptions for immigrant visa holders, such as an exception for unaccompanied minors. And applicants need not show they will have approved insurance coverage if they can establish that they have sufficient financial resources to pay for their reasonably foreseeable medical costs.

Moreover, immigrant visa applicants have many options for identifying approved health insurance plans that satisfy the Proclamation. 84 Fed. Reg. at 53,992. These include plans that are readily available to travelers, including various Affordable Care Act (ACA) compliant, unsubsidized health plans offered in a state's individual market, employer-sponsored plans, a family member's plan, visitor health insurance plans, and short-term limited duration health coverage. *Id.* There is also a private marketplace for plans that meet the Proclamation's requirements. *See, e.g.*, Visitors Coverage, *2019 Presidential Proclamation on Short-Term Insurance for Immigrants*, www.visitorscoverage.com/2019-Presidential-Proclamation-Immigrant-Insurance/ (offering range of visitor plans at range of prices). Alternatively, an intending immigrant can show that her entry is not barred by the Proclamation by establishing that she has "the financial resources to pay for reasonably foreseeable medical costs." 84 Fed. Reg. at 53,992.

The Proclamation was effective November 3, 2019, but its implementation has been suspended by a preliminary injunction issued by the District of Oregon in *Doe v. Trump*, 418 F. Supp. 3d 576 (D. Or. 2019), *appeal docketed*, No. 19-36020 (9th Cir. Dec. 4, 2019).

3. State Department's Notice Of Information Collection

The Paperwork Reduction Act of 1995 requires an agency to publish a notice in the Federal Register and obtain approval from the Office of Management and Budget (OMB) when it seeks to collect information from members of the public. *See* 44 U.S.C. § 3507. To satisfy the public-notice obligation, the State Department, on October 30, 2019, published a notice in the Federal Register that, in light of the Proclamation, it intended to begin soliciting information from visa applicants about their healthcare coverage. *See* Notice of Information Collection Under OMB Emergency Review: Immigrant Health Insurance Coverage, 84 Fed. Reg. 58,199 (Oct. 30, 2019) (Notice of Information Collection or Notice). The notice thus states that consular officers will "ask immigrant visa applicants covered by [Proclamation] 9945 whether they will be covered by health insurance in the United States within 30 days of entry to the United States and, if so, for details relating to such insurance." *Id.*

C. Prior Proceedings

Plaintiffs in this litigation—five nonprofit organizations that provide educational and legal services to immigrant communities and five individuals or family members of individuals who are unlawfully present in the United States and intend to

apply for a visa at a consular office abroad and then be admitted to the country—challenged the State Department's Rule, Proclamation 9945, and the Notice of Information Collection. As relevant to this appeal, plaintiffs allege that the State Rule adopts an impermissible construction of "public charge," is arbitrary and capricious, and was improperly promulgated without notice and comment. JA135-39. Plaintiffs further allege that the President exceeded his authority under § 1182(f) in issuing the Proclamation, that the Proclamation violates the INA, and that the State Department's Notice of Information Collection violated the APA's substantive and procedural requirements. *Id.*[3]

On July 29, 2020, the district court granted plaintiffs' request for a universal preliminary injunction barring the State Department from implementing the Rule, the Proclamation, and the Notice. SA1-52. The court concluded that the individual plaintiffs had standing because they had a reasonable fear that they would be deemed inadmissible under the State Rule and the Proclamation. SA14-16. The court determined that plaintiffs faced actual and imminent injury, notwithstanding their failure to specify when they intended to leave the country to apply for a visa, because

[3] Plaintiffs also challenged (and the district court enjoined) certain January 2018 revisions to the State Department's Foreign Affairs Manual (FAM). As the government explained in the district court, the 2018 FAM revisions were superseded by the Rule and associated updates to the FAM, and the State Department would not automatically revert back to the 2018 version of the FAM if the Rule is declared invalid. Dkt. 70, at 3. Thus, the district court's preliminary injunction of the 2018 FAM revisions is unlikely to have any practical consequences during the pendency of this litigation. The government is therefore not challenging it here.

"they or their family members are actively engaged in the process of" completing the preliminary steps before seeking a visa. SA15. The court concluded that the organizational plaintiffs had standing because the State Rule has required them to expend "significant time and resources to" counter the Rule's and the Proclamation's impact. SA17-18. The court also determined that the organizational plaintiffs were within the relevant INA provisions' zone of interests because their "mission . . . to aid immigrants [in] navigating procedures for visa applications" was in keeping with the INA's "basic purpose to provide intending immigrants with a framework for admission." SA22.

The district court rejected the government's argument that plaintiffs' statutory claims were unreviewable because they concerned decisions by consular officers regarding the admission or exclusion of aliens. SA25. The court reasoned that the relevant nonreviewability doctrine applied only to congressional legislation and did not limit "judicial review [of] *executive or agency action* implementing Congressional legislation." *Id.* With respect to the Proclamation in particular, the court concluded that plaintiffs' claim that the President exceeded the authority granted to him by Congress under the INA "implicated constitutional separation of powers concerns" and thus was "appropriately considered as [a] constitutional claim[] subject to judicial review." SA29.

The district court also rejected the government's argument that the State Department's Notice of Information Collection was not final agency action and thus

not subject to APA review. SA25. The court concluded that the Notice qualified as final agency action because, in the court's view, it "imposes distinct obligations on visa applicants to demonstrate that they will be covered by approved health insurance within 30 days of entry or possess financial resources to pay for reasonably foreseeable medical expenses." SA27.

On the merits, the district court concluded that plaintiffs were likely to prevail on their claim that the State Rule's definition of "public charge" was not consistent with the INA, for the same reasons it had previously concluded that the DHS rule violated the INA. SA31-32. The court likewise determined that the Rule was arbitrary and capricious in the same respects as the DHS rule. SA32-33.

The district court further concluded that plaintiffs were likely to succeed in demonstrating that the State Rule violated the APA because the State Department did not provide for notice and comment before issuing the rule. SA35-36. The court rejected the government's claim that it had "good cause" to forgo notice and comment given the impending effective date of the parallel DHS rule and the need to align the State Department's public-charge standard with DHS's standard. *Id.*

The district court likewise determined that plaintiffs were likely to prevail in demonstrating that the Proclamation "is *ultra vires* and violates the INA by replacing the totality-of-circumstances assessment required under 8 U.S.C. § 1182(a)(4) [the public-charge provision] with a single factor requirement." SA43. Specifically, the court held that the Proclamation improperly overrode § 1184(a)(4)'s requirement that

a consular officer consider at least five factors in making a public-charge inadmissibility determination and instead made one factor (health insurance coverage) determinative. SA44.

Finally, the district court concluded that plaintiffs were likely to succeed in establishing that the State Department's Notice of Information Collection was arbitrary and capricious because it failed to define "key terms needed to carry out the [Proclamation's] directive" and could "increase, rather than decrease, the number of underinsured." SA34-35. The court also determined that the Notice violated the APA's notice-and-comment requirements. SA40.

Regarding the other preliminary-injunction factors, the district court found that plaintiffs will be irreparably harmed absent a preliminary injunction. The court found that the individual plaintiffs were likely to be denied admission and separated from their families if the Rule and Proclamation were given effect, and that the organizational plaintiffs would be required to continue to divert their resources. The court further concluded that the balance of hardships and public interest weighed in favor of an injunction because the harms plaintiffs anticipated experiencing outweighed the "logistical burdens" and other harms the government would experience as a result of the injunction. SA49.

The district court also determined that a universal injunction was appropriate "given the strong federal interest in uniformity of" national immigration policies. SA50. The court further opined that "a geographically limited injunction would be

especially unworkable in a case such as this, where consular officers on foreign soil would have to determine how to apply different rules to different applicants." SA51.

On October 19, 2019, the government sought a stay pending appeal of the preliminary injunction insofar as it barred the State Department from implementing the Rule. The government's motion remains pending.

SUMMARY OF ARGUMENT

The district court erred in entering a preliminary injunction barring consular officers from enforcing the State Rule, Presidential Proclamation 9945, and the Notice of Information Collection.

I. As a threshold matter, plaintiffs lack standing to challenge the Rule, Proclamation, or Notice. The individual plaintiffs—who are currently present in the United States—assert that the Rule and Proclamation harm them because they fear a consular officer will deem them inadmissible and deny them a visa, thus stranding them abroad. But plaintiffs do not allege that they have plans to seek a visa abroad during the pendency of this litigation. The individual plaintiffs thus cannot establish that they face an "imminent" threat of injury on account of the Rule or Proclamation. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). Although we acknowledge that this Court has ruled to the contrary in the context of the DHS rule, the government preserves its argument that the organizational plaintiffs lack standing because their alleged injuries—the need to divert resources to educate their clients

about the State Rule and Proclamation—are insufficient to support their standing and do not fall within § 1182's zone of interests.

II. Plaintiffs are not likely to prevail on the merits of their claims.

A. Plaintiffs' claims are foreclosed by the general rule that courts may not review the political branches' decisions to exclude aliens abroad. Congress has never authorized judicial review of claims like plaintiffs', and the text, structure, and history of the INA show that Congress understood and intended that such review is unavailable. The separation-of-powers principles that dictate that plaintiffs' claims are not reviewable should apply with equal force to the claims at issue here, where plaintiffs raise their challenges in anticipation that a consular officer will deny a visa, as they would if the claims were pressed in response to the denial of a visa.

B.1. The State Rule is consistent with the INA and not arbitrary and capricious. The government acknowledges that this Court reached contrary conclusions in *New York v. USDHS*, 969 F.3d 42 (2d Cir. 2020), as to certain aspects of plaintiffs' claims. The government respectfully disagrees with this Court's conclusions in *New York* and preserves for further review the arguments it made in *New York* and in the district court. To the extent the district court concluded that the State Department acted arbitrarily and capriciously in aligning its public-charge standard with the standard applied by DHS officers' at the border—an issue not reached in this Court's prior decision—that was error. The State Department reasonably concluded that aligning its standards was necessary to avoid the harm and

confusion that would result if DHS officers were applying a different standard at the border than were consular officers abroad.

2. The State Department had good cause to forgo notice and comment when it issued the Rule. After a full public-comment period, DHS issued its final public-charge rule in August 2019, with an effective date of October 15, 2019. Those actions left the State Department with just two months to issue a conforming rule. Subjecting the Rule to notice and comment during that brief window would not have been practicable. Nor would notice and comment have produced a different result. Neither plaintiffs nor the district court has identified any reason why the State Department would have sensibly adopted a public-charge standard that was different from the one DHS ultimately applies to all relevant aliens.

C. Presidential Proclamation 9945 is a lawful exercise of the President's broad authority under 8 U.S.C. §§ 1182(f) and 1185(a)(1) to deny entry to or impose restrictions on the entry of any class of aliens whenever the President finds that their entry would be detrimental to the interests of the United States. The President found that the entry of aliens who could not demonstrate an ability to pay for their healthcare costs was detrimental to the interests of the United States, explained his reasons for that finding, and implemented a carefully crafted solution to the identified problem. Those actions place the Proclamation well within Congress's comprehensive delegation of authority to the President. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018).

The district court wrongly concluded that the Proclamation was unlawful because it purportedly conflicts with the INA's public-charge inadmissibility provision, 8 U.S.C. § 1182(a)(4). The Proclamation does not conflict with the public-charge provision. As the Supreme Court explained in *Hawaii*, § 1182(f) vests the President with the authority to impose *additional* limitations on the entry of aliens, beyond the inadmissibility grounds specified in the INA. 138 S. Ct. at 2408. The other inadmissibility provisions, including the public-charge provision, thus do not limit the President's authority to find that entry of aliens who may not be inadmissible under those provisions would nonetheless be detrimental to the interests of the United States.

The Proclamation also serves a purpose distinct from the public-charge provision and addresses a more targeted problem—the damage imposed by those without insurance on the healthcare system as a whole, including uncompensated healthcare costs borne by private healthcare providers and the burden on emergency services—with a tailored solution, requiring intending immigrants to show that they will obtain one of several approved types of insurance within 30 days of entry or be able to afford reasonably foreseeable medical expenses. The Proclamation thus addresses harms that are not explicitly covered by the public-charge provision.

D. The State Department's Notice of Information Collection did not violate the APA. The Notice merely informed the public that the State Department planned to begin asking visa applicants for information about their health-insurance coverage

and that the agency ment was seeking OMB's approval to do so. The Notice does not determine any rights or obligations, nor does it have any legal consequences for plaintiffs. Accordingly, the Notice is not final agency action subject to review and is not subject to the APA's notice-and-comment requirements. And the State Department's reason for issuing the Notice—to comply with its obligations under the Paperwork Reduction Act—was rational.

III. Plaintiffs cannot satisfy the remaining injunction factors. Because DHS officers at the border independently determine whether all relevant aliens are admissible, plaintiffs cannot show that the harms they assert (diversion of organizational resources and concerns over being found inadmissible) will be averted in the absence of an injunction barring consular officer from applying the State Rule. Indeed, an injunction preventing the State Department from aligning its standards with those DHS applies is likely to sow confusion among aliens and the public and threatens disruption in the administration of the immigration system. An injunction barring consular officers from applying the Proclamation, meanwhile, threatens to exacerbate the harms to the government and the public that the Proclamation is designed to prevent—spiraling uncompensated healthcare costs. For similar reasons, the public interest and balance of equities also weigh against an injunction.

IV. At a minimum, this Court should stay the district court's injunction insofar as it applies beyond the Second Circuit. The need for uniformity in the enforcement of immigration laws—the primary justification the district court gave for imposing a

universal injunction—cannot overcome the fundamental principle that an injunction "must be narrowly tailored to remedy the specific harm shown." *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1028-29 (9th Cir. 2019). An injunction barring enforcement of the Rule against the individual plaintiffs or against specifically identified individuals who are served by the organizational plaintiffs would fully remedy plaintiffs' alleged harms. To the extent the district court thought a narrower injunction would be difficult for the State Department to administer, that is an issue for the agency to resolve, and does not justify broadening an injunction beyond what is necessary to remedy the plaintiffs' asserted injuries.

STANDARD OF REVIEW

When reviewing a district court's decision on a preliminary injunction, this Court reviews the district court's legal conclusions de novo. *Malkentzos v. DeBuono*, 102 F.3d 50, 54 (2d Cir. 1996). Otherwise, the district court's entry of a preliminary injunction is reviewed for abuse of discretion. *Id.*

ARGUMENT

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). None of these factors is satisfied here.

I. Plaintiffs Lack Standing To Pursue This Suit

To establish Article III standing, plaintiffs must demonstrate an injury that is "concrete, particularized, and actual or imminent." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Plaintiffs' allegations do not meet this requirement. The individual plaintiffs allege that they or their relatives are currently unlawfully present in the United States, have either obtained or are seeking approval for a waiver of inadmissibility for unlawful presence, and intend to leave the United States and apply for a visa abroad. JA48-52. But plaintiffs' complaint does not specify when any of the prospective visa applicants plans to leave the United States, nor does it even generally specify that it will be in the near future. "'[S]ome day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of … 'actual or imminent' injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)). Even assuming the prospective visa applicants will someday follow through on their plans to apply for visas overseas, their individual circumstances may be different by that time, including in ways that affect the application of the State Rule or the Proclamation.

The organizational plaintiffs urge that they have injury in the form of a need to divert resources to educate clients and the public about the Rule. The government acknowledges that this Court previously concluded that several of the organizational plaintiffs in this case have suffered injuries that permit them to challenge DHS's

public-charge rule and that the organizational plaintiffs are within § 1182's zone of interests, *see New York*, 969 F.3d at 60-63, but preserves the arguments raised in the government's briefing in *New York* and in the district court here.[4]

II. Plaintiffs Are Not Likely To Succeed On The Merits

A. Plaintiffs' Claims Are Not Reviewable

1. Plaintiffs' statutory challenges to the State Rule, Proclamation, and Notice of Information Collection are not reviewable. The Supreme Court "ha[s] long recognized the power to . . . exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)). Because "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power," "[s]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). The Supreme Court has accordingly held that "[t]he conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for

[4] *See also CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 238-41 (4th Cir. 2019) (concluding that the organizational plaintiff lacked standing to challenge the DHS rule); *Cook County v. Wolf*, 962 F.3d 208, 221 (7th Cir. 2020) (declining to decide whether the organizational plaintiff fell within the public-charge provision's zone of interest given the difficulty of that question), *petition for cert. filed* No. 20-450 (U.S. Oct. 7, 2020).

determining such classification, the right to terminate hospitality to aliens, [and] the grounds on which such determination shall be based" are "wholly outside the power of this Court to control." *Fiallo*, 430 U.S. at 796.

Congress generally "may, if it sees fit . . . , authorize the courts to" review decisions to exclude aliens. *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892). Absent such affirmative authorization, however, judicial review of the exclusion of aliens outside the United States is unavailable. "Whatever the rule may be concerning deportation of persons who have gained entry into the United States," the Supreme Court has explained, "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950); *see id.* at 542-47 (Attorney General's decision to exclude alien wife of U.S. citizen "for security reasons" was "final and conclusive"); *see also Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999) (denial of visa to an alien abroad "is not subject to judicial review . . . unless Congress says otherwise"); *American Acad. of Religion v. Napolitano*, 573 F.3d 115, 123 (2d Cir. 2009) ("[A] consular officer's decision to deny a visa is immune from judicial review.").

This longstanding principle of nonreviewability is embodied in the INA. In 8 U.S.C. § 1252, Congress established a comprehensive framework for judicial review of decisions concerning aliens' ability to enter or remain in the United States, including aliens who lack a visa or are found inadmissible. But that review is available

only to aliens who are physically present in the United States. Neither § 1252 nor any other provision of the INA provides for judicial review of the denial of a visa or entry to an alien abroad, or of a determination that such an alien is inadmissible. Indeed, Congress has expressly rejected a cause of action to seek judicial review of visa denials. *E.g.*, 6 U.S.C. § 236(f) (no "private right of action" to challenge decision "to grant or deny a visa"); *see* 6 U.S.C. § 236(b)(1), (c)(1).

The one time the Supreme Court held that aliens physically present in the United States could seek review of their exclusion orders under the APA, the Court emphasized that it was not "suggest[ing]" that "an alien who has never presented himself at the borders of this country may avail himself of the declaratory judgment action by bringing the action from abroad." *Brownell v. Tom We Shung*, 352 U.S. 180, 184-186 & n.3 (1956). Congress then intervened to foreclose APA review even for aliens present here, *see Saavedra Bruno*, 197 F.3d at 1157-1162, because allowing such APA suits would "give recognition to a fallacious doctrine that an alien has a 'right' to enter this country which he may litigate in the courts of the United States against the U.S. government as a defendant," H.R. Rep. No. 87-1086 (1961). Congress therefore precluded APA suits challenging exclusion orders and permitted review only through habeas corpus—a remedy that is unavailable to an alien seeking entry from abroad. *See* Act of Sept. 26, 1961, Pub. L. No. 87-301, sec. 5(a), § 106(a), 75 Stat. 650, 651. Both the Court's decision in *Brownwell* and Congress's statutory response confirm the principle that aliens abroad have no right to judicial review of their exclusion.

Plaintiffs anticipate that their, their family members', or their clients' visa applications will be denied by consular officers applying the Rule or the Proclamation, and that they will be unlawfully excluded from the country. Such claims, if brought following the denial of a visa, are not subject to judicial review. *See American Acad. of Religion*, 573 F.3d at 123; *Wan Shih Hsieh v. Kiley*, 569 F.2d 1179, 1181 (2d Cir. 1978); *Saavedra Bruno*, 197 F.3d at 1161. And just as plaintiffs' claims would be unreviewable if they had been brought following such a denial, they should be unreviewable when brought in anticipation of a visa denial by a consular officer.

The district court erred in concluding that this nonreviewability principle applies only to judicial review of immigration legislation, and does not limit judicial review of "executive or agency action." SA25 (emphasis omitted). The quintessential application of the nonreviewability doctrine is to bar review of an executive action: a consular officer's denial of a visa. *See, e.g.*, *American Acad. of Religion*, 573 F.3d at 123. And the Supreme Court has emphasized that "[i]t is not within the province of any court, unless expressly authorized by law, to review the determination of the *political* branch[es] of the Government," not just the legislative branch. *Mezei*, 345 U.S. at 212 (emphasis added); *see also id.* (declining to review the Attorney General's conclusion that an alien was excludable). That this case involves executive action implementing the INA thus does not render plaintiffs' statutory claims reviewable.

In the district court, plaintiffs asserted that an Executive Branch official's visa-related actions are reviewable for compliance with the INA because, according to

plaintiffs, an official who violates the INA is operating contrary to the will of Congress. That assertion finds no support in the law. The courts of appeals have declined to review challenges to the exclusion of aliens abroad, even when plaintiffs asserted errors of law, including that a consular officer violated the INA. *Centeno v. Shultz*, 817 F.2d 1212, 1213 (5th Cir. 1987) (per curiam) (denial of visa "not reviewable" even though alien claimed it "was not authorized by the [INA]"); *De Castro v. Fairman*, 164 F. App'x 930, 932 (11th Cir. 2006) (per curiam) (refusing to consider challenge to denial of visa to plaintiff's wife despite allegation that it "constituted legal error" and "a violation of his rights under the INA"). And plaintiffs' argument is contrary to the reasoning of the Supreme Court's cases in this area, which have focused on the separation of powers between the "political departments" (plural) and the judiciary. *Fiallo*, 430 U.S. at 792.

In response to a related argument, the district court concluded that plaintiffs' allegation that the President exceeded his authority under the INA when he issued the Proclamation was reviewable because, according to the court, plaintiffs' allegation implicated separation-of-powers concerns and thus was "appropriately considered" a constitutional, not statutory, claim. SA29. That conclusion is deeply flawed and directly contravenes the Supreme Court's decision in *Dalton v. Specter*, 511 U.S. 462 (1994). As *Dalton* explained, almost any challenge to the President's exercise of discretion under a statute could be recast as an allegation that the President violated the Constitution by exceeding Congress's grant of discretion. *Id.* at 472. The district

court's conclusion would thus nullify the "longstanding" rule that "[h]ow the President chooses to exercise the discretion Congress has granted him"—here in 8 U.S.C. §§ 1182(f) and 1185(a)(1)—"is not a matter for [judicial] review." *Dalton*, 511 U.S. at 474, 476. And, in cases such as this one, it would likewise undermine the nonreviewability principle discussed above, as it would subject the President's decisions regarding the admission or exclusion of classes of aliens to review by the courts.

2. The State Department's Notice of Information Collection is not subject to APA review for an additional reason: it is not "final agency action." 5 U.S.C. § 704; *Bennett v. Spear*, 520 U.S. 154, 177 (1997). To qualify as "final," an agency action must, among other things, "be one by which rights or obligations have been determined or from which legal consequences will flow." *Bennett*, 520 U.S. at 178; *Paskar v. U.S. Dep't of Transp.*, 714 F.3d 90, 98 (2d Cir. 2013).

The Notice does not determine any legal rights or obligations, nor will it have legal consequences for plaintiffs. The Notice simply informs the public that consular officers will begin collecting information about visa applicants' health-insurance coverage and that the State Department is seeking OMB's approval to do so. 84 Fed. Reg. at 58,199-200. Contrary to the district court's conclusion, the Notice does not "impos[e] distinct obligations on visa applicants to demonstrate that they will be covered by approved health insurance within 30 days of entry or possess financial resources to pay for reasonably foreseeable medical expenses," SA27. It is the

Proclamation that imposes those obligations on visa applicants, not the Notice. But the district court properly recognized, SA21 n.4, and plaintiffs do not dispute, that the Presidential Proclamation is not subject to review under the APA. The President is not an "agency" covered by the APA and his actions are thus not subject to APA review. *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992).

Indeed, if the Notice were set aside, visa applicants would remain subject to the Proclamation's requirements and would remain obliged to establish that they meet those requirements. In short, "the rights and obligations of the parties, from which legal consequences may flow, are unaffected" by the Notice. *Air Espana v. Brien*, 165 F.3d 148, 153 (2d Cir. 1999); *see also Paskar*, 714 F.3d at 98 (agency action was not final where it did not "alter the legal regime to which the [plaintiff was] subject").

B. The State Rule Is Lawful

1. The Rule Adopts A Permissible Construction Of The INA And Is Not Arbitrary and Capricious

In *New York*, this Court concluded that the plaintiffs were likely to prevail in demonstrating that the parallel DHS rule was contrary to the INA and arbitrary and capricious. 969 F.3d at 74-86. Because the State Rule adopts the same definition of "public charge" as the DHS rule and, in all relevant respects, the same framework for determining whether an alien is likely to become a public charge, the government acknowledges that this Court's conclusions apply here with regard to the INA and DHS's rationale for implementing the new standards. The government respectfully

disagrees with the Court's determinations and preserves the arguments the government made in the district court and in *New York* in support of the conclusion that the parallel agency rules are consistent with the INA and not arbitrary and capricious.

To the extent the district court concluded that the State Rule was also arbitrary and capricious for reasons independent of the DHS rule, that was error. The State Department's primary justification for its Rule—to align its standard with DHS's standard—was plainly rational. The State Department sought to align its standard with the DHS standard "to avoid situations where a consular officer will evaluate an alien's circumstances and conclude that the alien is not likely at any time to become a public charge, only for DHS to evaluate the same alien when he seeks admission to the United States on the visa issued by the Department of State and finds the alien inadmissible on public charge grounds under the same facts." 84 Fed. Reg. at 55,000. There is no sound reason, and neither the district court nor plaintiffs have offered one, why the State Department should apply a different, less stringent standard in evaluating an alien's visa application than DHS will apply to the same alien at the border.

2. The State Department Had Good Cause To Forgo Notice And Comment In Issuing The Rule

Plaintiffs are also unlikely to prevail on their claim that the State Department violated the APA when it promulgated the Rule without a notice-and-comment

period. When an agency issues a legislative rule, notice and comment are not required "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B); *see also id.* § 553(d)(3). The State Department invoked this exception, explaining that it was necessary to put its rule in place immediately given the impending effective date of the rule issued by DHS, which was set to take effect October 15, 2019. 84 Fed. Reg. at 55,011. The State Department stressed that it was "critical" to promptly align the standards applied by consular officers with the standards applied by CBP officers at the U.S. border, to prevent situations in which consular officers "might issue visas to applicants who would later arrive at a port of entry and be found inadmissible by [CBP] under the new DHS public charge standards, based on the same information that was presented to the adjudicating consular officer." *Id.*

The need to avoid the application of inconsistent standards justifies the issuance of an interim rule without the typical notice-and-comment period. *See American Fed'n of Gov't Emps., AFL-CIO v. Block*, 655 F.2d 1153, 1157 (D.C. Cir. 1981). In *Block*, for example, the Department of Agriculture posted interim regulations, without notice and comment, after a district court enjoined the agency's previous guidance. *Id.* at 1155. The court of appeals concluded that the agency had good cause to forgo notice and comment with respect to the interim regulations, because the district court's injunction would otherwise have forced the agency to rely on

"antiquated guidelines," thereby "creating confusion among field administrators" and causing "economic harm and disruption" to regulated parties and consumers. *Id.* at 1157. Similarly, in this case, had the State Department not issued a conforming rule before the DHS rule went into effect, State Department consular officers and CBP agents would have been applying different standards, causing confusion for visa applicants and the organizations that support them and potentially resulting in a visa holder's expending the time and resources to acquire a visa and travel to the United States only to be deemed inadmissible at the border by a CBP agent. Plaintiffs have identified no reason why it would be sensible for the State Department to apply a different, narrower standard than DHS, which has ultimate responsibility for determining whether aliens subject to the public-charge provision are inadmissible on that ground.

The district court erroneously concluded that the State Department lacked good cause to issue the Rule without notice and comment because its need to issue a conforming rule on short notice was allegedly "self-inflicted" and "artificial." SA36. That is not the case. DHS issued its final rule in August 2019, only two months before it was set to take effect. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,292 (Aug. 14, 2019). And although DHS had issued a proposed rule several months earlier, as anticipated, the final rule took into account (and made changes in response to) public comments. *See id.* at 41,297-300. Thus, it was not unreasonable for the State Department to await DHS's final rule before issuing a

conforming regulation—at which point notice-and-comment procedures would not have been feasible.

A notice-and-comment period also would not have served any practical purpose. *See* 5 U.S.C. § 706 (The APA requires courts to take "due account . . . .of the rule of prejudicial error"). The DHS rule was promulgated only after that agency considered and responded to more than 265,000 comments, 84 Fed. Reg. at 41,297, including comments raising the same substantive challenges to the new public-charge definition and framework that plaintiffs raise here. In light of DHS's thorough and "length[y]" response to those comments, *City & County of San Francisco v. USCIS*, 944 F.3d 773, 801 (9th Cir. 2019), there was little, if anything, to be gained from a second round of public comment. Moreover, given that DHS is ultimately responsible for applying the public-charge inadmissibility provision to aliens seeking admission, the State Department reasonably concluded it was best to align its Rule with the DHS rule and avoid differing standards and inconsistent applications of the same statute. And, as noted, plaintiffs have identified no reason why the State Department would have adopted a different standard than DHS had a notice-and-comment period preceded the Rule's issuance.

C. The Proclamation Was A Lawful Exercise Of The President's Authority To Suspend Or Restrict Entry Of Aliens Abroad

Even if plaintiffs' challenges to Presidential Proclamation 9945 were reviewable, the Proclamation is a valid exercise of the broad authority Congress

granted the President in § 1182(f). Section 1182(f) provides that "[w]henever the President finds that the entry of . . . any class of aliens into the United States would be detrimental to the interests of the United States, he may . . . suspend the entry of . . . any class of aliens . . . or impose on the entry of aliens any restrictions he may deem to be appropriate." 8 U.S.C. § 1182(f); *see also id.* § 1185(a)(1). Section 1182(f) "exudes deference to the President in every clause," and in that statute Congress "entrusts to the President the decisions whether and when to suspend entry," "whose entry to suspend," "for how long," and "on what conditions." *Hawaii*, 138 S. Ct. at 2408.

Here, the President lawfully exercised this authority after "find[ing] that the unrestricted immigrant entry into the United States" of "thousands of aliens who have not demonstrated any ability to pay for their healthcare costs" "would . . . be detrimental to the interests of the United States." 84 Fed. Reg. at 53,991; *see also Hawaii*, 138 S. Ct. at 2408 (explaining that the "sole prerequisite" to the "comprehensive delegation" "set forth in § 1182(f) is that the President 'find[]' that the entry of the covered aliens 'would be detrimental to the interests of the United States'"). The Proclamation sets out the President's reasons for finding that entry of covered immigrant visa applicants would be detrimental to the United States, with the goal being to ensure that immigrants entering the country carry a minimum level of insurance or have sufficient financial resources to reduce uncovered healthcare costs borne by healthcare providers and the public. 84 Fed. Reg. at 53,991. The lack of insurance also causes new arrivals to unnecessarily disrupt the provision of emergency

services by using emergency rooms for treatment of a variety of non-emergency conditions. *Id.* This is a problem because new arrivals lack health insurance at rates around three times those of citizens. *Id.*

The Supreme Court's decision in *Hawaii* makes clear that plaintiffs cannot succeed on an attack on the sufficiency of the findings in a Presidential proclamation. 138 S. Ct. at 2409 (finding "questionable" the argument that the President must "explain [his] finding[s]"). The Supreme Court also emphasized that, "even assuming that some form of review is appropriate," the proclamation at issue in that case (like the one here) contained more detailed findings than prior proclamations. *Id.* (citing Proclamation No. 6958, where President Clinton explained in only "one sentence why suspending entry of members of the Sudanese government and armed forces" was in the interests of the United States, and Proclamation No. 4865, where President Reagan suspended entry of certain undocumented aliens from the high seas with a five-sentence explanation). A more "searching inquiry" into the findings "is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere." *Id.*

Plaintiffs thus cannot challenge the Proclamation based on their "perception of its effectiveness and wisdom," and courts "cannot substitute [their] own assessment for the Executive's predictive judgments." *Hawaii*, 138 S. Ct. at 2421. That is precisely what the district court did when it concluded that the Proclamation was unlawful because it "will likely result in the very harms [that] [it] purports to prevent."

SA34. That was so, the court reasoned, because some of the health-insurance options the Proclamation cites as satisfying its requirements could leave an alien underinsured, which could in turn cause the alien to generate "the uncompensated care costs the Proclamation professes to address." SA34-35. The district court's analysis plainly challenges the effectiveness and wisdom of the Proclamation and substitutes the court's assessment of the Proclamation's likely effects for the President's predictive judgments about its effects. That approach cannot be squared with *Hawaii*.[5]

The district court also concluded that the Proclamation violated the separation of powers because it purportedly conflicts with the INA's public-charge inadmissibility provision, 8 U.S.C. § 1182(a)(4). SA43-44. That conclusion was mistaken. The Proclamation does not conflict with the public-charge provision at all—much less have plaintiffs shown the sort of "express[ ] override" that would be necessary for them to prevail on their challenge. *Hawaii*, 138 S. Ct. at 2411.

[5] The district court's conclusion that the Proclamation might increase uncompensated care costs because some of the insurance options cited in the Proclamation do not provide comprehensive care is deeply flawed even if taken on its own terms. Even assuming that the Proclamation permits some underinsured aliens to enter, the Proclamation nonetheless reduces uncompensated care costs by barring admission to those who lack health insurance altogether or who have plainly inadequate coverage. The Proclamation plainly does not risk increasing uncompensated care costs by requiring at least some insurance coverage. And in any event the government need not tackle all aspects of a problem at once. *Cf. Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656, 1668 (2015) (explaining that "even under strict scrutiny," the government "need not address all aspects of a problem in one fell swoop").

Section 1182(f) vests broad authority in the President to impose additional limitations on entry beyond the inadmissibility grounds in the INA. The district court disregarded what the Supreme Court made clear in *Hawaii*: "[T]hat § 1182(f) vests the President with 'ample power' to impose entry restrictions *in addition* to those elsewhere enumerated in the INA." 138 S. Ct. at 2408 (emphasis added) (quoting *Sale v. Haitian Ctrs Council, Inc.*, 509 U.S. 155, 187 (1993)). Congress's enactment of particular bars to admissibility like the public-charge provision thus does not limit the President's authority under § 1182(f) to find that entry of other aliens would be detrimental to the United States. To the contrary, the plain purpose of § 1182(f) is to permit the President to restrict the entry of aliens who otherwise would be admissible to the United States. *Hawaii*, 138 S. Ct. at 2412.

In *Hawaii*, the Supreme Court rejected an argument virtually identical to the district court's reasoning. There, the plaintiffs argued that Presidential Proclamation No. 9645 exceeded the President's authority because it addressed vetting concerns that Congress had already addressed through the Visa Waiver Program and individualized vetting. 138 S. Ct. at 2410-12. Plaintiffs argued that the proclamation's entry restrictions overrode Congress's individualized vetting system. *Id.* The Court rejected these arguments because the proclamation did not "expressly override particular provisions of the INA." *Id.* at 2411. The Court refused to sanction a "cramped" reading of the President's authority under § 1182(f) based on plaintiffs' attempt to identify implicit limits on the President's authority in other provisions of

the INA. *Id.* at 2412. Instead, the Court held that § 1182(f) gives the President authority to impose additional limitations on entry. *Id.*

Critically, the statutory provisions setting forth grounds of inadmissibility do not affirmatively *permit* entry whenever they do not apply. So a Proclamation establishing additional bars on entry would not "expressly override," *Hawaii*, 138 S. Ct. at 2411, those provisions. Instead, those provisions may be supplemented by the President under the authority Congress conferred in § 1182(f). It is thus not uncommon for Presidential proclamations to address harms that are quite similar to existing statutory grounds of inadmissibility. For example, Presidential Proclamation 8342 bars entry of foreign government officials responsible for failing to combat human trafficking, 74 Fed. Reg. 4093 (Jan. 22, 2009), even though Congress separately made human traffickers inadmissible. *See* 8 U.S.C. § 1182(a)(2)(H); *compare also id.* § 1182(a)(3)(E) (inadmissibility for genocide, Nazi persecution, and acts of torture or extrajudicial killings), with Presidential Proclamation 8697, 76 Fed. Reg. 49,277 (Aug. 9, 2011) (covering persons participating in violence based on race, religion, and similar grounds or who participated in war crimes, crimes against humanity, and serious violations of human rights), and Presidential Proclamation 7452, 66 Fed. Reg. 34,775 (June 29, 2001) (covering persons responsible for wartime atrocities); *compare* 8 U.S.C. § 1182(a)(2) (setting out specific grounds of inadmissibility based criminal conduct), with Presidential Proclamation 7750, 69 Fed. Reg. 2,287 (Jan. 14, 2004) (covering persons engaged in or benefitting from corruption).

Consistent with this long line of authority, Proclamation 9945 complements the existing provisions of the INA and establishes an additional bar to entry based on a distinct harm to the national interest—the high rate at which new immigrants lack healthcare coverage, and the costs and burdens this imposes on the healthcare system. The Proclamation thus explicitly addresses harms that would not be covered by the public-charge ground, such as uncompensated healthcare costs borne by private healthcare providers and the burden imposed by those relying on emergency room care for basic needs. 84 Fed. Reg. at 53,991. These harms called for a tailored solution. The Proclamation addresses the problem of uninsured immigrants in a targeted way, by permitting a noncitizen to enter once she shows that she will be covered by approved health insurance—where there is already a developing market to meet needs through readily available plans at various price points—or has adequate financial resources to cover reasonably foreseeable medical costs.

The public-charge provision, on the other hand, renders inadmissible, with limited exceptions, an alien who is likely to become a public charge. Importantly, nothing in the Proclamation alters the public-charge analysis; consular officers must still evaluate inadmissibility under § 1182(a)(4) irrespective of the Proclamation. 84 Fed. Reg. at 53,993 ("The review required by [the Proclamation] is separate and independent from the review . . . required by other statutes . . . in determining the admissibility of an alien."). The Proclamation cannot "expressly override" the public-

charge provision, *Hawaii*, 138 S. Ct. at 2411, when it has no impact at all on how consular officers administer that provision.

D. The Notice of Information Collection Did Not Violate The APA

The district court also erred in concluding that plaintiffs were likely to prevail in establishing that the State Department's Notice of Information Collection was arbitrary and capricious and violated the APA's procedural requirements. Even if the Notice were subject to APA review, it would not violate the APA's requirements.

The agency's decision to issue the Notice was rational. As the agency reasonably explained, it issued the notice to inform the public that it would begin collecting information about their health insurance coverage to enable consular officers to conduct the assessment required by the Proclamation, and that it was seeking OMB's approval to do so. 84 Fed. Reg. at 58,199. The agency issued the Notice to comply with its obligations under the Paperwork Reduction Act. *Id.* There was nothing arbitrary or irrational about the State Department's modest and straightforward announcement.

In concluding that the Notice was arbitrary and capricious, the district court faulted the Notice for failing to establish a "workable standard for implementing the Proclamation" and failing to define terms contained in the Proclamation, such as "unsubsidized health plan" and "catastrophic plan." SA34. But the Notice does not purport to provide aliens with guidance as to the standards consular officers will use

when applying the Proclamation, how aliens can meet the Proclamation's requirements, or how the State Department interprets various terms the Proclamation uses. The Notice merely informs the public that consular officers will begin asking visa applicants "whether they will be covered by health insurance in the United States within 30 days of entry to the United States and, if so, for details relating to such insurance," including such details as "the specific health insurance plan, the date coverage will begin, and such other information related to the insurance plan as the consular officer deems necessary." 84 Fed. Reg. at 58,199-200. There is nothing confusing or arbitrary about that announcement.

The district court also concluded that the Notice was arbitrary and capricious because many of the health-insurance options listed in the Proclamation could leave aliens underinsured, thereby increasing, rather than decreasing, uncompensated care costs. SA34-35. But that is a criticism of the Proclamation, not the Notice. The Notice says nothing about what healthcare options will satisfy the Proclamation's requirements, and it certainly does not "limit[] adequate healthcare options for immigrants," SA34. All the Notice does is inform the public that the agency will begin collecting information. And, as explained above (and as the district court and plaintiffs agree), the Proclamation itself is not subject to APA review. The district court's attempt to shoehorn review of the Proclamation into a review of the Notice was plainly wrong.

The district court likewise erred in concluding that the Notice violated the APA's notice-and-comment requirements, 5 U.S.C. § 553(a)-(d). SA40. As the district court recognized, SA37, the APA's notice-and-comment requirements apply only to legislative rules. *See Sweet v. Sheahan*, 235 F.3d 80, 90 (2d Cir. 2000). They do not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A)-(B).

The Notice is not a legislative rule and thus not subject to the APA's notice-and-comment requirements. "[L]egislative rules are those that 'create new law, rights, or duties, in what amounts to a legislative act.'" *Sweet*, 235 F.3d at 91 (quoting *White v. Shalala*, 7 F.3d 296, 303 (2d Cir.1993)). As explained *supra* pp. 30-31, the Notice does not create any new law, rights, or duties. It simply informs the public that consular officers will begin collecting health-insurance-related information. In concluding that the Notice was a legislative rule, the district court found that the Notice "'create[d] new . . . duties' for immigrant visa applicants", because it imposed "health insurance requirements . . . on immigrant visa applicants" that "were not previously contained in statute or regulation." SA40. But, again, the Notice does not impose any health insurance requirements on visa applicants; it is the Proclamation that imposes those requirements. If the Notice were set aside, plaintiffs would remain subject to the Proclamation's requirements, underscoring that the Notice does not itself create the legal duties the district court supposed.

III. Plaintiffs Cannot Satisfy The Remaining Equitable Factors For A Preliminary Injunction

Setting aside the merits, plaintiffs are not "likely to suffer irreparable harm in the absence of preliminary relief"; conversely, an injunction would harm the government and the public interest, and "the balance of equities tips in" the government's favor. *Winter*, 555 U.S. at 20.

A. Plaintiffs cannot demonstrate that they will be irreparably harmed absent a preliminary injunction. The district court found that the individual plaintiffs would be harmed absent an injunction because they were likely to be deemed inadmissible and thus would be indefinitely separated from their family members in the United States. SA46. That harm will only occur, however, if the individuals leave the country, apply for a visa abroad, and then seek admission at the border. The individual plaintiffs have not established that they plan to leave the country during the pendency of this litigation. *See supra* p. 24. For that reason alone, the individual plaintiffs cannot show that they are likely to be separated from their families unless consular officers are preliminarily enjoined from applying the Rule or Proclamation.

In addition, DHS's parallel public-charge rule has taken effect and injunctions against it have been stayed while the Supreme Court considers the government's petitions for writs of certiorari in *DHS v. New York*, No. 20-449 (S. Ct.) and *Wolf v. Cook County*, No. 20-450 (S. Ct.). Moreover, in granting stays of the injunctions issued by the district courts in *New York* and *Cook County*, the Supreme Court necessarily

concluded that there is a "fair prospect" it will grant the petitions and reverse the injunctions. *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers).

The existence of the parallel DHS rule negates the district court's conclusion that plaintiffs will be irreparably harmed absent an injunction. Even assuming that the individual plaintiffs had established that they were likely to leave the country during this litigation and faced the prospect of being found inadmissible under the State Rule, plaintiffs cannot establish that they will be irreparably harmed absent an injunction barring consular officers from applying the Rule. That is so because, even if consular officers are enjoined, visa applicants remain subject to CBP officers' application of the parallel DHS rule at the border. Thus, the individual plaintiffs' fears that they or their family members may be deemed inadmissible on the public-charge ground under the new public-charge standard will not be alleviated by an injunction against the State Rule.

For the same reasons, the district court likewise erred in concluding that the organizational plaintiffs had shown that they will be irreparably harmed absent a preliminary injunction against the State Rule. The court found that the organizational plaintiffs had shown that they are "suffering an injury in fact based on the diversion of their resources and irretrievable frustration of their missions." SA47. But, in light of the DHS rule, the organizational plaintiffs must educate their clients about the new public-charge inadmissibility standards and must divert their resources to counter

those standards, whether or not the State Rule is enjoined. Indeed, an injunction preventing the State Rule from going into effect would subject aliens to two different standards, potentially sowing confusion among aliens and their family members and increasing the harm to them and the organizations that advise them. In short, plaintiffs cannot establish that consular officers' application of the State Rule causes them irreparable harm that an injunction during the pendency of this litigation would alleviate.

B. By contrast, both the government and the public will be harmed if the State Rule and Proclamation cannot go into effect. Interference with the exercise of authority granted to the State Department and the President under the INA is a substantial harm in itself. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). In addition, if the district court's injunction is affirmed, consular officers will apply standards for determining an alien's admissibility that differ from those CBP officers will apply to that same individual at the border. This circumstance raises the risk that DHS and State Department officers will make inconsistent determinations under the same facts. That could create significant practical difficulties, such as individuals being issued visas to travel to the United States but then being denied admission upon their arrival in the United States. Such situations would entail significant harm both for the aliens involved and for the government. The existence of inconsistent rules also threatens to create confusion among aliens and the organizations that serve them.

The district court cited a number of purported "adverse consequences" to the public that it attributed to the State Rule and Proclamation, including "family destabilization, shortages in the labor market, increased medical costs, uncompensated medical care, and other economic and public health harms." SA48-49. But even assuming subjecting aliens abroad to the new public-charge inadmissibility rule and the Proclamation's requirements caused the consequences the district court supposed, an injunction during the pendency of this litigation would not address or otherwise alleviate those harms. As already explained, all relevant aliens, including visa holders, will remain subject to the new public-charge standards whether or not consular officers are enjoined from applying the State Rule. Indeed, although the district court cited news reports claiming that the "new public charge framework" has "hamper[ed] efforts to contain the [corona]virus," SA49, those reports cite the DHS rule, underscoring that an injunction against the State Rule will have little, if any, practical impact.

Independently, an injunction barring consular officers from implementing the Proclamation would harm the government and the public. The President issued Proclamation 9945 to address the "substantial costs" U.S. healthcare providers and taxpayers bear "in paying for medical expenses incurred by people who lack health insurance or the ability to pay for their healthcare." 84 Fed. Reg. at 53,991. Hospitals and other healthcare providers "often administer care to the uninsured without any hope of receiving reimbursement from them," and these costs are passed on to the

American people in the form of higher taxes, higher premiums, and higher fees for medical services. *Id.* The uninsured also strain federal and state government budgets through reliance on publicly funded programs, which are ultimately funded by taxpayers. *Id.* If consular officers are unable to enforce the Proclamation, individuals who would otherwise be denied visas under the Proclamation will be permitted to enter the country (assuming they otherwise qualify), worsening the problem the Proclamation is designed to remedy.

C. In balancing the equities, this Court should also give weight to the Supreme Court's actions in related litigation challenging the DHS rule. In granting a stay of an injunction barring the DHS rule from going into effect, the Supreme Court necessarily concluded that the government has a fair prospect of success on the merits of its defense of the DHS rule, and that the government will be irreparably harmed if it cannot enforce the DHS rule. Those same conclusions should apply to the State Rule, which tracks the DHS rule in all relevant respects. While this Court reached contrary conclusions when it evaluated the injunction against the DHS rule that the Supreme Court had stayed, this Court should at least bear the Supreme Court's determinations in mind when evaluating whether an injunction against the State Rule is equitable. *See CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 230 (4th Cir. 2020) ("[E]very maxim of prudence suggests that we should decline to take the aggressive step of ruling that the plaintiffs here are in fact likely to succeed on the merits right

upon the heels of the Supreme Court's stay order necessarily concluding that they were unlikely to do so.").

IV. The Court Should At Least Vacate The Injunction In Part

At a minimum, the Court should vacate the injunction insofar as it sweeps more broadly than necessary to redress plaintiffs' alleged injuries. The district court justified its injunction's universal scope based on the need for uniformity in immigration enforcement. SA50. But that asserted need cannot overcome the fundamental principle that an injunction should be "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994); *see also New York*, 969 F.3d at 88 (noting that "inconsistent interpretations of immigration law across the circuits" is "hardly unusual" and may "persist without injustice or intolerable disruption"). The district court made no attempt to explain why a universal injunction was needed to provide complete relief to plaintiffs. And, in fact, an injunction barring consular officers from enforcing the Rule or Proclamation against the individual plaintiffs or against specifically identified individuals who are served by the organizational plaintiffs would fully remedy plaintiffs' alleged harms. Moreover, the State Rule and Proclamation have been challenged in other jurisdictions. *See Mayor & City Council of Balt. v. Trump*, No. 18-cv-3636 (D. Md.); *Doe v. Trump*, No. 19-36020. The court's universal injunction thus raises the "unseemly" possibility that it may be "imposing its view of the law within the geographic jurisdiction of courts that [will] reach[] contrary

conclusions." *New York*, 969 F.3d at 88. For these reasons, this Court limited the nationwide injunction the district court entered against the DHS rule. *See id.* It should do so again here.[6]

CONCLUSION

The preliminary injunction should be reversed.

Respectfully submitted,

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[6] The district court also suggested that a geographically limited injunction would be difficult for consular officers to administer. SA51. But whether the State Department could administer a more limited injunction is an issue for the agency to decide. The court's assumptions about the State Department's ability to implement a more narrow injunction do not justify granting plaintiffs relief beyond that which is necessary to remedy their harms.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 12,733 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.

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2020, I electronically filed the foregoing brief with the Clerk of the 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.

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