

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

A.C.R., *et al.*,

Plaintiffs-Appellant,

v.

MARKWAYNE MULLIN, in his
official capacity as the Secretary of the
United States Department of Homeland
Security, *et al.*,

Defendants-Appellees.

No. 26-236

**DEFENDANTS-APPELLEES’
REPLY IN SUPPORT OF
MOTION TO DISMISS APPEAL
AS MOOT**

INTRODUCTION

The District Court’s stay of U.S. Citizenship and Immigration Services’ (“USCIS”) SIJ-DA 2025 Recission was to remain in place pending a “valid rescission by USCIS or further order by the District Court.” A-314-316. The present appeal concerns only the scope of the District Court’s stay. After USCIS looked at the issue afresh and issued a new recission of the SIJ-DA policy on April 10, 2026 (the “SIJ-DA 2026 Recission”), the agency effectively superseded the SIJ-DA 2025 Recission. This appeal prevents the District Court from determining whether the stay should be dissolved in light of the SIJ-DA 2026 Recission. *See New York State Nat. Org. for Women v. Terry*, 886 F.2d 1339, 1349–50 (2d Cir. 1989); *see also Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) (“The filing of a notice of appeal ... confers jurisdiction on the court of

appeals and divests the district court of its control over those aspects of the case involved in the appeal.”) (citations omitted). Accordingly, at this preliminary stage of the proceedings, this Court should dismiss this appeal as moot and allow the District Court to dissolve the stay of the now inoperative SIJ-DA 2025 Rescission and allow the case to proceed on the merits.¹

ARGUMENT

I. This Appeal is Moot Because the SIJ-DA 2026 Rescission Supersedes the SIJ-DA 2025 Rescission.

This appeal is moot and should be dismissed because USCIS’s issuance of the SIJ-DA 2026 Rescission constitutes superseding agency action. Plaintiffs argue that the plain language of the SIJ-DA 2026 Rescission does not make it clear that it supersedes the SIJ-DA 2025 Rescission. Pls’ Opp’n at 17. (Dkt. No. 64.1). Plaintiffs are incorrect. It is clear from the course of this litigation and practical effect of the SIJ-DA 2026 Rescission that its purpose was to look at the issue afresh and rectify the shortfalls identified by the District Court. Further, the SIJ-DA 2026 Rescission references the SIJ-DA 2025 Rescission and the District Court’s preliminary

¹ Plaintiffs state that the Government failed to file its responsive brief by the May 22 deadline. Pls’ Opp’n at 23 n.3. Local Rule 31.2 provides that the filing of a dispositive motion tolls the time periods until the motion is determined or the appeal is reinstated. *See* LR 31.2(a)(3). Before the May 22 deadline, counsel for USCIS confirmed his understanding of rule’s applicability in cases on the expedited docket with an Administrative Appeals Attorney. If this honorable Court desires, counsel for USCIS will provide a declaration in support of its assertions.

injunction and stay of the SIJ-DA 2025 Rescission. Defs' Mot., Ex. B. (Dkt No. 63.1).

First, Plaintiffs argue that the SIJ-DA 2025 Rescission and the Strong Factors Standard² continue to have legal effect. Plaintiffs' view of the SIJ-DA 2025 Rescission being only partially stayed is wrong. *See* Pls' Opp'n at 11, 18. The District Court unambiguously stated "for the avoidance of doubt, this order should not be read to suggest that USCIS remains bound by the [] Policy Manual or any prior presumption in favor of granting deferred action to SIJ[] recipients." A-315 n.24.

Second, Plaintiffs provide no support for their assertion that subsequent agency action does not automatically displace prior agency action beyond attempting to contrast it with the express language used in the October Memorandum in *Biden v. Texas*. Pls' Opp'n at 18. It is clear from the purpose and underlying litigation that the issuance of the SIJ-DA 2026 Rescission displaced the SIJ-DA 2025 Rescission that is at issue in this case. In its SIJ-DA 2026 Rescission, USCIS indicates that it previously rescinded the underlying policy on June 6, 2025, and "subsequently looked at the SIJ deferred action policy afresh" to rectify the District Court's findings. *See* Defs' Mot., Ex. B at 1.

² Under this Standard, Plaintiffs indicate that "SIJS approvals and underlying eligibility determinations weighed as 'strong positive factors' in favor of granting deferred action." Pls' Opp'n at 5.

Plaintiffs also overlook USCIS’s citation to and application of *Regents* in this case. See *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 591 U.S. 1 (2020). USCIS relies on *Regents*, for its two-step framework illustrating the options an agency may exercise in correcting its previous actions. In *Regents*, the Supreme Court explained that “a court may remand for the agency to do one of two things: First, the agency can offer ‘a fuller explanation of the agency's reasoning *at the time of the agency action*.’ ... Alternatively, the agency can ‘deal with the problem afresh’ by taking *new* agency action.” 591 U.S. at 20 (alterations in original) (citations omitted). When an agency offers a fuller explanation, “the agency may elaborate later on [its] reason (or reasons) but may not provide new ones.” *Id.* at 20-21.

In the instant case, the first step under *Regents* does not apply because USCIS did not provide a fuller explanation for the SIJ-DA 2025 Rescission. Instead USCIS looked at the issue afresh and issued an entirely new agency action. Because the second step of *Regents* applies, *Biden* dictates the procedures for the superseding agency action here. See *Biden v. Texas*, 597 U.S. 785, 811 (2022). In *Biden*, the Department of Homeland Security (“DHS”) issued a memorandum in June 2021 rescinding the Migrant Protection Protocols (“MPP”) program (“June Memorandum”). 597 U.S. at 793. After the States of Texas and Missouri filed a lawsuit challenging the June Memorandum, the district court vacated the June Memorandum and imposed a nationwide injunction ordering the government to

enforce and implement the MPP. *Id.* at 793-94. While the case was on appeal to the Fifth Circuit, the government sought a stay of the injunction, which the district court and the Fifth Circuit denied. *Id.* at 794-95. During litigation, the then-Secretary of Homeland Security released a new memorandum in October 2021 again terminating the MPP program “along with a 39-page addendum explaining his reasons for doing so,” (the “October Memoranda”). *Id.* The government moved to vacate the injunction because the October Memoranda superseded the June Memorandum, but the Fifth Circuit denied the motion. *Id.* at 796. The Fifth Circuit also affirmed the district court’s judgment in full, holding that the October Memoranda “did not constitute a new and separately reviewable ‘final agency action.’” *Id.* (citation omitted). It characterized the October Memoranda as “simply explain[ing] [the] DHS’s decision.” *Id.* at 797 (emphasis removed). The Supreme Court reversed, holding that the October Memoranda constituted new agency action under the second *Regents* path. *Biden*, 597 U.S. at 811.

Under *Biden*, a new agency action is an action that supersedes a prior action. *See* 597 U.S. at 811 (stating that “the Secretary [] chose the second option from *Regents*” by dealing with the matter afresh “by taking new agency action.”); *accord Rocky Mountain Wild v. Dallas*, 98 F.4th 1263, 1288-89 (10th Cir. 2024) (interpreting *Biden* to require a superseding action); *see also Cahaba Safeguard Adm’rs, LLC v. United States*, 165 Fed. Cl. 318, 328 (2023) (finding that agency’s

action was a new agency action because it was “a new decision and supersedes the [a]gency’s original decision.”).

Applying *Biden* here, USCIS’s issuance of the SIJ-DA 2026 Rescission supersedes the SIJ-DA 2025 rescission and it is unnecessary for that issuance to state explicitly that it does. Plaintiffs’ argument focusing on the form of the SIJ-DA 2026 Rescission over its substance is unavailing. Pls’ Opp’n at 17-18. It is clear from the underlying litigation and the SIJ-DA 2026 Rescission’s context that it replaces the SIJ-DA 2025 Rescission entirely. Defs’ Mot., Ex. B. Further, because the SIJ-DA 2026 Rescission identifies the insufficiencies cited by the District Court in the SIJ-DA 2025 Rescission, including inadequate consideration of the reliance interests of SIJ petitioners, and specifically acknowledges the SIJ-DA 2025 Rescission, its purpose—to supersede and replace the SIJ-DA 2025 Rescission—is clear. *Id.* The entire purpose of the SIJ-DA 2026 Rescission, just like the October 29 Memorandum in *Biden*, was to issue a new rescission bolstered by new reasons absent from the previous memo—addressing the District Court’s concerns from the first go-round. *See Biden*, 597 U.S. at 811. Accordingly, USCIS returned to the drawing board and issued a new agency action that supersedes the SIJ-DA 2025 Rescission.

Because USCIS’s issuance of the SIJ-DA 2026 Rescission constitutes superseding agency action, the Court should dismiss this appeal as moot and allow the District Court to dissolve the stay of the SIJ-DA 2025 Rescission.

II. The Validity of the SIJ-DA 2026 Rescission Should be Decided by the District Court.

The SIJ-DA 2026 Recission is “prospective,” and Plaintiffs may wish to continue to litigate the scope of “the policy that this memorandum terminates.” *See* Pls’ Opp’n at 18; Defs’ Mot., Ex. B. at 9 (“Implementation”). In other words, for SIJ petitioners who file their petitions before May 10, 2026, and are considered for deferred action, Plaintiffs may wish to continue arguing the 2022 SIJ-DA policy includes the strong factors from the prior USCIS policy manual. Additionally, Plaintiffs may wish to challenge the validity of the SIJ-DA 2026 Recission of the 2022 SIJ-DA policy itself. The Court of Appeals, however, should not address these challenges in this first instance on this appeal. Instead, if there is still a dispute as to what was included in the “2022 Policy” that Plaintiffs seek to reinstate and whether the SIJ-DA 2026 Rescission terminates all aspects of that policy, the parties should address that issue on the merits in the District Court, not at the preliminary stage on this appeal involving the stay of a now rescinded agency action.

III. This Court should dismiss appeal as moot because it cannot provide meaningful relief to the Plaintiffs in this lawsuit.

Defendants filed this motion because USCIS’s new agency action superseded the agency action that is the subject of this lawsuit. In response, Plaintiffs argue that this appeal “is not moot because tens of thousands of SIJS beneficiaries and DA renewal applicants will receive deferred action adjudications under a standard to be

determined by this appeal.” Pls’ Opp’n at 13-14. Those individuals, however, are neither parties to this lawsuit, nor present on this appeal. The District Court has not certified Plaintiffs’ proposed classes or sub-classes. A-318. And the District Court deferred ruling on whether the organizational plaintiffs have standing or are likely to suffer irreparable harm. A-283 n.9; A-310 n.22. Instead, in its preliminary injunction and stay order, the District Court only analyzed the merits and harms of the individual plaintiffs and limited its remedy to requiring USCIS to “conduct deferred-action and employment-authorization adjudications pursuant to the 2022 Policy Alert, pending promulgation of a valid rescission policy or further order from this Court.” A-314-315. Because the District Court declined to determine whether the organizational plaintiffs had standing or could establish irreparable harm to support a preliminary injunction, and because Plaintiffs do not challenge that portion of the District Court’s decision, this Court should not analyze those issues here. There are nine individual plaintiffs in this lawsuit who stood to benefit from the District Court’s preliminary injunction and stay. A-279. Because this appeal would no longer benefit the individual plaintiffs, this Court should dismiss this appeal and allow the District Court to dissolve the stay.

Four individual plaintiffs—A.C.R., J.G.V., E.A.R., and C.V.R.—alleged that they were harmed by USCIS’s *sub silentio* rescission of the 2022 SIJ-DA policy between April 7, 2025 and June 6, 2025. Compl. ¶ 2; ECF No. 1. The District Court

ruled that they were likely to prevail on their claim that USCIS violated the *Accardi* doctrine, and later clarified in its order on the motion for reconsideration that USCIS must apply the “Strong Factors” from the former USCIS Policy Manual in adjudicating their deferred action applications. A-308; A-330-331. All four of these individual plaintiffs have received deferred action, and thus their claims are not at issue in this appeal. *See* Ex. A. at 1-4 (Amended I-797 Approval Notices for SIJs with Deferred Action).

Two individual plaintiffs—L.M.R. and S.M.M.—already had deferred action when they filed this lawsuit, but alleged that the SIJ-DA 2025 Recission terminated their eligibility to receive employment authorization. *See* Compl. ¶ 3; ECF No. 1. Their deferred action is still valid until January 2029. *See* Ex. A. at 5-6. Accordingly, any harm to them caused by the lack of the Strong Factors consideration is too remote to state a claim. *See Lee v. Bd. of Governors of the Fed. Rsrv. Sys.*, 118 F.3d 905, 912 (2d Cir. 1997) (stating that, to establish standing based on a “future injury,” the prospective harm “must be ‘certainly impending’ . . . and ‘real and immediate.’”) (citations omitted). Indeed, it is likely that within the next three-and-a-half years these individual plaintiffs will have an immigrant visa available and will no longer be eligible for SIJ DA. Their claims are not at issue in this appeal.

The remaining three plaintiffs—Y.A.M., B.R.C., and J.C.B.—alleged in the complaint that they would not be eligible to renew their DA classification when they

reached “their deferred action expiration dates in and after May 2026.” Compl. ¶ 3; ECF No. 1. The District Court’s preliminary injunction and stay order, however, requires USCIS to consider their renewal applications, and that aspect of the District Court’s order is not at issue in this appeal. In any event, Y.A.M., B.R.C., and J.C.B. all have pending applications for adjustment of status. *See* Ex. A. at 7-9 (indicating that they have submitted fingerprints in support of their adjustment applications). According to the U.S. Department of State’s Visa Bulletin, the current priority date for the EB4 category—which applies to SIJs—is July 15, 2022. *See* Ex. B. at 3. Because these three plaintiffs all have priority dates before July 15, 2022, there are visas available for them to adjust status. Thus, they are ineligible to receive deferred action under the 2022 Policy because they already have available visas,³ and they would receive no meaningful relief on this appeal.

CONCLUSION

For the reasons stated, this Court should dismiss this appeal as moot.

³ The 2022 Policy provided that “USCIS is updating its policy guidance to provide that USCIS will consider granting deferred action on a case-by-case basis to noncitizens classified as SIJs who are ineligible to apply for adjustment of status *solely due to unavailable immigrant visa numbers.*” (emphasis added). A-258.

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Respectfully submitted,

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