No. 19A785

In the
Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, et al.,

Applicants,

v.

NEW YORK, et al.,

Respondents.

MOTION BY GOVERNMENT PLAINTIFFS TO TEMPORARILY LIFT OR MODIFY THE COURT'S STAY OF THE ORDERS ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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Dated: April 13, 2020

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INTRODUCTION

In January 2020, this Court stayed two orders of preliminary relief issued by the United States District Court for the Southern District of New York (Daniels, J.) pending the Second Circuit's disposition of defendants' appeal and this Court's disposition of any subsequent petition for certiorari, if such a petition is timely filed. (App. 1.) In reliance on the stay order, the United States Department of Homeland Security (DHS) implemented the Public Charge Rule, altering its prior interpretation of "public charge" as well as the test for evaluating whether an immigrant is likely to become a public charge under 8 U.S.C. § 1182(a)(4)(A), and thus be ineligible for a green card. The Rule took effect on February 24, 2020.

Since that time, the novel coronavirus SARS-CoV-2 has triggered a devastating global pandemic, afflicting at least half a million people in the United States with a potentially lethal illness, coronavirus disease 2019 (COVID-19). The rapid and ongoing spread of COVID-19 is causing a nationwide public-health crisis and wreaking havoc on the economy. The President has declared a state of national emergency. And state and local authorities—including plaintiffs here, the States of New York, Connecticut, and Vermont, and the City of New York—have also declared states of emergency and are undertaking extraordinary efforts to stop the spread of COVID-19 and protect the health and well-being of our residents. But the Public Charge Rule is hindering those efforts by deterring immigrants from accessing healthcare and public benefits that are essential tools for protecting the public at large by limiting the spread and severity of COVID-19 and promoting our nation's recovery from the economic crisis that the disease has caused.

Accordingly, plaintiffs respectfully request that the Court temporarily lift or modify its stay to halt implementation of the Public Charge Rule during the national emergency concerning COVID-19 declared by the President. In the alternative, plaintiffs request that the Court clarify

that its stay does not preclude the district court here from considering whether the new circumstances caused by the novel coronavirus warrant temporarily halting implementation of the Rule.[1]

Such narrow and temporary relief from the stay is warranted because the Rule is now causing additional irreparable harms to the public—citizens and noncitizens alike—that were not present when the Court initially considered defendants' motion for a stay. By deterring immigrants from accessing publicly funded healthcare, including programs that would enable immigrants to obtain testing and treatment for COVID-19, the Rule makes it more likely that immigrants will suffer serious illness if infected and spread the virus inadvertently to others—risks that are heightened because immigrants make up a large proportion of the essential workers who continue to interact with the public. The Rule also deters access to public benefits, including nutrition benefits, that are critical for both immigrants and the country as a whole to weather the economic crisis triggered by COVID-19. These irreparable harms have tipped the balance of the equities decidedly against maintaining the stay during the national emergency concerning COVID-19.

[1] Plaintiffs here are authorized to state that the plaintiffs in the companion case, *Make the Road New York v. Cuccinelli*, support this motion, including the alternative relief sought. The *Make the Road New York* plaintiffs were parties to the stay proceedings in this Court and are subject to the Court's stay order. Because the two cases are consolidated for pre-trial purposes in the district court, *see* Order, *New York v. Dep't of Homeland Sec.*, No. 19-cv-7777 (S.D.N.Y. Feb. 14, 2020), ECF 142, any relief afforded to plaintiffs here should also apply in that case.

STATEMENT

A. Prior Litigation

In August 2019, DHS issued its Public Charge Rule, which modified its criteria for determining inadmissibility on public charge grounds. 84 Fed. Reg. 41,292 (Aug. 14, 2019). Under the Rule, DHS officials must now deem an immigrant to be a "public charge" if the immigrant is likely to receive any amount of certain "public benefits," including supplemental benefits such as Medicaid, Supplemental Nutrition Assistance Program (SNAP) benefits, and Section 8 housing assistance, during "more than 12 months in the aggregate within any 36-month period" during the immigrant's life. *Id.* at 41,501. In an earlier notice of proposed rulemaking, DHS had acknowledged that this regulatory change could lead immigrants who are otherwise eligible for certain public benefits to disenroll or forgo enrollment in those programs, and that such withdrawal or avoidance "could lead to . . . [i]ncreased prevalence of communicable diseases, including among members of the U.S. citizen population who are not vaccinated." 83 Fed. Reg. 51,114, 51,270 (Oct. 10, 2018).

On October 11, 2019, the district court issued two orders that preliminarily enjoined the enforcement of the Public Charge Rule on a nationwide basis, and postponed the Rule's effective date pursuant to 5 U.S.C. § 705. On January 27, 2020, this Court issued a stay of the district court's orders, thereby allowing the Public Charge Rule to take effect. The stay applies pending disposition of defendants' expedited appeal from the district court's orders in the Second Circuit and disposition of defendants' petition for a writ of certiorari, if such a writ is timely sought.[2] (App.

[2] On March 2, 2020, the Second Circuit heard oral argument on defendants' expedited appeal. That appeal remains pending.

1.) Justices Ginsburg, Breyer, Sotomayor, and Kagan would have denied the application for a stay. (App. 1.)

On February 21, 2020, this Court issued a similar stay of a preliminary injunction issued by the United States District Court for the Northern District of Illinois that had prevented enforcement of the Public Charge Rule in Illinois alone.[3] *Wolf v. Cook Cty., Ill.*, 140 S. Ct. 681, 681 (2019). Justices Ginsburg, Breyer, Sotomayor, and Kagan would have denied the application for a stay. *Id.*

In reliance on this Court's stay orders, defendants began enforcing the Public Charge Rule nationwide on February 24, 2020.

B. The Nationwide COVID-19 Crisis

After the Court issued its stays, coronavirus disease 2019 (COVID-19) began sweeping across the United States. The spread of COVID-19 and the novel coronavirus SARS-CoV-2 that triggers this illness has become a global pandemic that has thrown the country into an unprecedented crisis with devastating consequences for public health and the economy. The novel coronavirus can cause severe and life-threatening respiratory illness marked by fever, coughing, and difficulty breathing. *See* Center for Disease Control & Prevention, *Coronavirus Disease 2019 (COVID-19): Frequently Asked Questions* (internet) (last updated Apr. 11, 2020) (see *What are the symptoms and complications that COVID-19 can cause?*).[4] COVID-19 is already spreading quickly in communities throughout the country, with cases reported in all fifty States. *See* Center

[3] On February 26, 2020, the Seventh Circuit heard oral argument on defendants' appeal in that court. The Seventh Circuit appeal remains pending.

[4] *At* https://www.cdc.gov/coronavirus/2019-ncov/faq.html.

for Disease Control & Prevention, *Coronavirus Disease 2019 (COVID-19): Situation Summary* (Mar. 26, 2020) (internet) (last updated Apr. 7, 2020).[5]

COVID-19 has already exacted a tremendous toll on the nation, and the pace of its spread continues to increase rapidly. In the United States, 525,704 individuals have confirmed cases of COVID-19, and at least 20,486 people have died from the disease. Center for Disease Control & Prevention, *Coronavirus Disease 2019 (COVID-19): Cases in U.S.* (internet) (last updated Apr. 12, 2020).[6] Plaintiffs and their residents have been particularly hard hit. In New York, which has become the current epicenter of the pandemic in the United States, 188,694 people have confirmed cases of COVID-19, and at least 9,384 people have died from the disease. *See* New York Dep't of Health, *NYSDOH COVID-19 Tracker* (internet) (last updated Apr. 12, 2020);[7] New York Dep't Health, *Fatalities by County* (internet) (last updated April 12, 2020).[8] In New York City alone, there are currently more than 104,410 confirmed positive cases and more than 6,182 confirmed deaths. *See* New York City Dep't of Health & Mental Hygiene, *COVID-19: Data: Cases, Hospitalizations and Deaths* (internet) (last updated Apr. 12, 2020).[9] Connecticut and Vermont have also been experiencing rapidly increasing rates of infection, with 12,035 confirmed COVID-19 cases in Connecticut and 727 confirmed cases in Vermont to date. *See COVID-19 Update April*

[5] *At* https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html.

[6] *At* https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html.

[7] *At* https://coronavirus.health.ny.gov/county-county-breakdown-positive-cases.

[8] *At* https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Fatalities?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n.

[9] *At* https://www1.nyc.gov/site/doh/covid/covid-19-data.page.

12, 2020, at 1 (internet) (April 12, 2020);[10] *Novel Coronavirus (COVID-19):* Vermont Dep't of Health, *Coronavirus (COVID-19): Current Activity in Vermont* (internet) (last updated Apr. 12, 2020).[11] And other jurisdictions across the country have likewise seen rising numbers of infections and fatalities. *See, e.g.*, *Corona Virus: Michigan Data* (internet) (last updated Apr. 12, 2020) (24,638 confirmed infections and 1,487 confirmed deaths in Michigan);[12] Florida Dep't of Health, Division of Disease Control and Health Protection, *Florida's COVID-19 Data and Surveillance Dashboard* (internet) (last updated Apr. 12, 2020) (19,347 confirmed infections and 452 confirmed deaths in Florida).[13] These figures likely vastly underrepresent the number of actual infections and related deaths for a number of reasons, including that many people who likely have the virus have not been tested for it. *See* Jacqueline Howard, *US coronavirus death count likely an underestimate. Here's why*, CNN (Apr. 6, 2020) (internet).[14]

On March 13, 2020, the President declared a state of national emergency concerning the COVID-19 outbreak, invoking his authority under the National Emergencies Act. Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020); *see generally* 50 U.S.C. § 1601 et seq. The President declared that "[t]he spread of COVID-19 within our Nation's communities threatens to strain our Nation's healthcare systems." 85 Fed. Reg. at 15,337. He directed "hospitals and medical facilities throughout the country," many of which are operated by plaintiffs or located within

[10] *At* https://portal.ct.gov/-/media/Coronavirus/CTDPHCOVID19summary 4122020.pdf?la=en.

[11] *At* https://www.healthvermont.gov/response/coronavirus-covid-19/current-activity-vermont.

[12] *At* https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html.

[13] *At* https://experience.arcgis.com/experience/96dd742462124fa0b38ddedb9b25e429.

[14] *At* https://www.cnn.com/2020/04/06/health/us-coronavirus-death-count-cdc-explainer/index.html.

plaintiffs' jurisdictions, "to assess their preparedness posture and be prepared to surge capacity and capability" to address COVID-19. *Id.* He also declared that because additional measures "are needed to successfully contain and combat the virus in the United States," he was authorizing the Department of Health and Human Services and the Social Security Administration to temporarily waive or modify certain requirements of various public-health and medical-insurance related statutes "throughout the duration of the public health emergency declared in response to the COVID-19 outbreak." *Id.*

The governors of each of the plaintiff States, as well as the mayor of plaintiff New York City, have each declared public-health emergencies in their respective jurisdictions based on the COVID-19 pandemic.[15] *See* New York Exec. Order No. 202, 9 N.Y.C.R.R. § 8.202 (2020); Connecticut Office of the Governor, Declaration of Public Health and Civil Preparedness Emergencies (Mar. 10, 2020);[16] Vermont Exec. Order No. 01-20 (2020).[17] In each of plaintiffs' jurisdictions, state officials and agencies have also been taking increasingly drastic measures to slow the spread of the novel coronavirus and provide testing and treatment for residents who are already infected. For example, state officials have required all nonessential employees to work from home, closed schools, and issued orders to increase hospital capacity to care for COVID-19 patients.[18]

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[15] New York declared a state of emergency on March 7, 2020; Connecticut, on March 10, 2020; Vermont, on March 13, 2020.

[16] *At* https://portal.ct.gov/-/media/Office-of-the-Governor/News/20200310-declaration-of-civil-preparedness-and-public-health-emergency.pdf?la=en.

[17] *At* https://governor.vermont.gov/sites/scott/files/documents/EO%2001-20%20Declaration%20of%20State%20of%20Emergency%20in%20Response%20to%20COVID-19%20and%20National%20Guard%20Call-Out.pdf.

[18] *See, e.g.*, New York Exec. Order No. 202.4, 9 N.Y.C.R.R. § 8.202.4 (2020) (closing schools in New York); New York Exec. Order No. 202.8, 9 N.Y.C.R.R. § 8.202.8 (2020) (ordering

C. The Importance of Public Benefits in Responding to the COVID-19 Crisis

Experts in infectious disease control and public health have warned that everyone should be minimizing the spread of the virus to the greatest extent possible. *See* Center for Disease Control & Prevention, *Coronavirus Disease 2019 (COVID-19): How to Protect Yourself and Others* (internet) (last updated Apr. 8, 2020).[19] Testing for the novel coronavirus and medical treatment for COVID-19 are critically important to slowing infection rates, preserving hospital capacity and medical equipment, and saving lives. (App. 37, 54-63.) If individuals are deterred from testing and thus do not know that they are infected, they are more likely to inadvertently spread the virus to other people—who will then spread the virus to still more people. (App. 55-56, 61, 63, 114.) *See* Washington State Dep't of Health, *Testing for COVID-19* (internet) (last visited Apr. 12, 2020) (testing allows public-health officials to "keep people with COVID-19 and their contacts away from others to prevent spread of the virus").[20] And if individuals suffering from COVID-19 delay obtaining proper medical care, they are more likely to spread the virus, experience serious illness and need intensive care in a hospital, and potentially die from the disease. (App. 56, 61, 63, 160-161, 225.)

Individuals who lack health insurance are much less likely to obtain necessary treatment for COVID-19 because of the prohibitive costs of medical care and hospital stays. (App. 54-55, 58-61, 175.) A recent report from a nonprofit organization that analyzes healthcare costs estimated

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all nonessential workers in New York to work from home); New York Exec. Order No. 202.10, 9 N.Y.C.R.R. § 8.202.10 (2020) (ordering various measures to increase hospital capacity); Connecticut Exec. Order No. 7H (2020) (ordering all nonessential workers in Connecticut to work from home); Vermont Exec. Order No. 01-20, add. 6 (2020) (ordering all nonessential businesses in Vermont to cease in-person business operations).

[19] *At* https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html.

[20] *At* https://www.doh.wa.gov/Emergencies/NovelCoronavirusOutbreak2020COVID19/TestingforCOVID19.

that a six-day hospital stay for COVID-19 treatment will cost approximately $73,300. FAIR Health, *COVID-19: The Projected Economic Impact of the COVID-19 Pandemic on the US Healthcare System* 2, 8, 13, 16 (Mar. 25, 2020). And the cost of treatment will be higher for patients who suffer more severe symptoms or require longer hospital stays. *See* Center for Disease Control & Prevention, *Coronavirus Disease 2019 (COVID-19): Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)* (internet) (last updated Apr. 6, 2020) (median time in intensive care unit for severely ill COVID-19 patient ranges from ten to twelve days, and median length of hospitalization among survivors ranges from ten to thirteen days).[21]

Many immigrants residing in plaintiffs' jurisdictions and in other jurisdictions are highly vulnerable to COVID-19 because they work in industries that have been deemed "essential" and thus continue to operate during the crisis. For example, executive orders in New York, Connecticut, and Vermont that direct residents to work from home do not apply to workers in essential sectors such as healthcare, grocery stores, food and retail delivery, building maintenance, farms and agriculture, and sanitation. *See* New York Exec. Order No. 202.8, *supra*; Connecticut Exec. Order No. 7H § 1 (2020) (internet);[22] Vermont Exec. Order No. 01-20, add. 6 (2020) (internet).[23] Because immigrants compose a significant proportion of the workers in these front-line industries, they must often interact with others or spend time in high-risk environments—such as providing healthcare in hospitals, caring for the aging in nursing homes, cleaning and

[21] *At* https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html.

[22] *At* https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7H.pdf?la=en.

[23] *At* https://governor.vermont.gov/sites/scott/files/documents/ADDENDUM%206%20TO%20EXECUTIVE%20ORDER%2001-20.pdf.

disinfecting public spaces, and preparing or delivering food and supplies to other residents who are required to stay at home. (*See* App. 126-127, 225.) These workers are as a result more likely to be exposed to the virus, and, without adequate testing and treatment, these workers, if infected, are more likely to suffer worse health outcomes and to spread the virus to others inadvertently. (*See* App. 55-56, 61, 63, 114; *see also* App. 225 (immigrant workers in Colorado meatpacking plants and dairies are essential workers at high risk of contracting and spreading COVID-19).)

In addition to the urgent public-health crisis, the COVID-19 pandemic has also triggered a severe economic crisis, with millions of workers losing significant income or their employment, and thereby needing to turn to supplemental benefit programs like Medicaid and SNAP in order to weather this economic crisis. (*See* App. 63-65.) Approximately sixteen million individuals applied for unemployment benefits in the three-week period from March 19 to April 4. Patricia Cohen & Tiffany Hsu, *'Sudden Black Hole' for the Economy With Millions More Unemployed*, N.Y Times (Apr. 10, 2020) (internet).[24] And the number of individuals seeking unemployment benefits in plaintiffs' jurisdictions has steeply increased due to the pandemic. In New York, for example, the number of new unemployment claims rose from 14,272 in the week ending March 21, 2020, to 79,999 in the week ending March 28, 2020—an increase of 460%. News Release, United States Dep't of Labor, *Unemployment Insurance Weekly Claims* 7 (Apr. 2, 2020) (internet).[25] In that same week, the rate of unemployment-insurance claims in Connecticut rose by approximately 620% compared to the prior week, and in Vermont the rate increased by approximately 450%. *Id.* Immigrant workers, particularly in the hospitality and service industries, have been

[24] *At* https://www.nytimes.com/2020/04/09/business/economy/unemployment-claim-numbers-coronavirus.html.

[25] *At* https://oui.doleta.gov/press/2020/040220.pdf.

disproportionately impacted by layoffs and furloughs. (App. 119 (immigrants in New York have lost jobs in restaurants and as domestic workers); App. 202-203 (immigrants in Illinois have lost jobs as domestic workers, personal care aides, and nannies).)

Workers who lose their jobs because of the pandemic are likely to turn temporarily to supplemental benefit programs, including Medicaid and SNAP, until they can get back on their feet. (*See* App. 63-65.) For example, many workers who lose their jobs and their employer-sponsored health insurance because of the pandemic are likely to need Medicaid coverage until they can find another job. (*See* App. 64-65.) And SNAP benefits respond rapidly to changing economic conditions by allowing newly eligible individuals to obtain benefits and allowing existing participants to receive higher amounts of benefits if their incomes decrease. U.S. Dep't of Agriculture, *Building a Healthy America: A Profile of the Supplemental Nutrition Assistance Program*, at 1, 3 (Apr. 2012). Programs like SNAP will also be particularly important to immigrants and their family members, many of whom are ineligible for unemployment insurance benefits or certain COVID-19 related benefits recently enacted by Congress. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 6428(d), 134 Stat. 281, 335 (2020).

D. The Harms Imposed by the Public Charge Rule and the COVID-19-Related Guidance Issued by the Department of Homeland Security

As DHS has acknowledged, *e.g.*, 83 Fed. Reg. at 51,270, and the record evidence here confirms, the Public Charge Rule's expansion of the grounds for deeming immigrants inadmissible as a public charge has already deterred many immigrants from using supplemental public benefits, including Medicaid and SNAP benefits, or led them to disenroll from programs that provide such benefits. Since the Public Charge Rule came into effect following this Court's stay orders, increasing numbers of immigrants have begun forbearing from Medicaid coverage and other

publicly funded healthcare benefits based on concerns that using such benefits will render them a "public charge" and thus jeopardize their ability to obtain legal permanent resident (LPR) status and, eventually, citizenship. (App. 194-195, 220-222.) Immigrants have also increasingly been declining to use SNAP benefits, as well as other nutrition programs, such as the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), that are not implicated in the public-charge analysis.[26] (App. 139-140, 178-179, 194-196.) And the Public Charge Rule's deterrent effects have not been limited to the LPR applicants or public-benefit programs that are directly subject to the Rule, since substantial fear and confusion, along with the complicated nature of many benefits programs, have led immigrants and their family members to avoid state-funded health insurance programs, reduce their use of medical services, and forbear from using other public benefits not covered by the Rule. (App. 145-146, 194-195, 220-222.)

The Rule's impacts have become particularly acute as the COVID-19 crisis has escalated. See *infra*, at 18-24. As a result, on March 6, the Attorneys General of the plaintiff States, fifteen other state Attorneys General, and over fifty other elected officials sent a letter to DHS requesting that the agency temporarily halt implementation of the Public Charge Rule given the harms to public health from implementing the Rule during the COVID-19 crisis. (App. 40-43; *see also* App. 226-229 (letter from New York City agencies to DHS).) DHS did not respond.

On March 13, DHS posted an alert on the website of the U.S. Citizenship and Immigration Services (USCIS). The alert stated that DHS officials conducting public-charge determinations

[26] Agencies and nonprofit organizations that work with immigrants experienced a substantial increase in inquiries about the Public Charge Rule after the Rule took effect in February 2020. (App. 116 (during February 2020, calls to New York City's immigration-related telephone hotline "increased to 2,973, a 57% increase from the monthly average in 2019," and the "number of those calls that related to the Rule also increased"); App. 171 (health educator received "more questions about public charge" during February and March than she had ever previously received).)

would not "consider testing, treatment, nor preventative care (including vaccines, if a vaccine becomes available) related to COVID-19 as part of a public charge inadmissibility determination . . . even if such treatment is provided or paid for by one or more public benefits" targeted by the Rule, such as federally funded Medicaid. (App. 44.) However, the alert also stated that the Rule will still require DHS officials to treat as a negative factor an applicant's receipt of public benefits, including federally funded Medicaid, even when such benefits "may be used to obtain testing or treatment for COVID-19." (App. 44.) Thus, under the alert, an LPR applicant who obtains or maintains Medicaid coverage that helps him access COVID-19 testing or treatment will still receive an automatic negative factor in the public-charge analysis based on his Medicaid coverage, even if his COVID-19 test or treatment will not itself be considered. *See* 84 Fed. Reg. at 41,422 (DHS will consider "any application, approval, or certification for, or receipt of, public benefits as a negative factor").

DHS's alert appears to leave in place other aspects of the Rule during the COVID-19 crisis, even though these aspects of the Rule deter immigrants from using supplemental benefits that will help plaintiffs' residents and the country recover from the current economic crisis. Thus, an applicant who applies for SNAP benefits because a COVID-19 public-health order forced him out of his job will continue to receive a negative factor in the public-charge inquiry. *See* 84 Fed. Reg. at 41,422. At most, the alert states that an applicant may inform DHS if "disease prevention methods" such as social distancing prevent him from working or attending school during the outbreak, and DHS officials will consider such information to the extent it is "relevant and credible."[27] (App. 44.)

[27] After DHS posted the alert on its website, the Attorneys General of the plaintiff States and fifteen other state Attorneys General sent DHS another letter explaining that the alert did not

ARGUMENT

THE COURT SHOULD TEMPORARILY LIFT OR MODIFY ITS STAY DURING THE NATIONAL PUBLIC-HEALTH EMERGENCY CREATED BY THE COVID-19 PANDEMIC

Pursuant to Rules 21 and 23 of the Rules of this Court; the All Writs Act, 28 U.S.C. § 1651; and § 705 of the Administrative Procedure Act, 5 U.S.C. § 705, plaintiffs request that the Court temporarily lift or modify its stay to halt implementation of the Rule until the end of the national emergency declared by the President on March 13 concerning the COVID-19 pandemic. *See* Proclamation No. 9994, *supra*. Such targeted relief is warranted despite this Court's prior ruling on petitioners' stay application because the unprecedented public-health and economic crisis facing the country has dramatically shifted the balance of equities in allowing defendants to enforce the Public Charge Rule while the Second Circuit considers defendants' appeal.

As explained further below, the Rule's deterrent effect on immigrants' access to healthcare and other public benefits for which they are indisputably eligible is impeding efforts to stop the spread of the coronavirus, preserve scarce hospital capacity and medical supplies, and protect the lives of everyone in our communities—citizens and noncitizens alike. In particular, the Rule is deterring many immigrants and their family members, including those who are U.S. citizens, from seeking testing or treatment for COVID-19, obtaining publicly funded health insurance, and using other supplemental benefits such as SNAP. Without proper testing and medical care, immigrants are more likely to suffer serious illness or death from COVID-19, and more likely to spread the novel coronavirus to others inadvertently. And immigrants who delay needed medical care, whether for COVID-19 or other serious conditions, are more likely to use hospitals, emergency

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address the harms imposed by the Public Charge Rule during the pandemic. (App. 48-51.) DHS did not respond to this letter.

rooms, and publicly funded clinics when they fall ill, thereby taxing public-health systems that are already under intense strain.

The record that this Court considered in issuing a stay in these proceedings did not and could not include these newly apparent harms. In light of these new circumstances, the Court should temporarily lift or modify its stay to halt implementation of the Public Charge Rule during the national emergency concerning COVID-19. Alternatively, this Court should clarify that its stay does not preclude the lower court from considering whether the new circumstances presented by the COVID-19 crisis warrant a narrow and time-limited delay of the Public Charge Rule.

A. Plaintiffs Seek Temporary Relief from the Stay Tailored to the National COVID-19 Crisis.

Plaintiffs are not seeking wholesale reconsideration of this Court's previous decision to stay the district court's preliminary injunction and § 705 orders. Rather, the drastically changed circumstances presented by the COVID-19 crisis provide new grounds for this Court to consider whether the balance of the equities continues to support a stay of the lower court's orders. To respond to these circumstances, this Court can either temporarily lift its stay during the national emergency, thereby allowing the district court's orders of preliminary relief to take effect; or temporarily postpone the effective date of the Rule under 5 U.S.C. § 705 until the national emergency ends.[28] Pursuant to the National Emergencies Act, the COVID-19 national emergency will end when the President issues a proclamation terminating the emergency, Congress enacts

[28] Section 705 provides that "[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705.

into law a joint resolution terminating the emergency, or the President declines to renew the emergency at any annual expiration of the declaration, whichever is earlier. *See* 50 U.S.C. § 1622.

In the alternative, plaintiffs request that the Court clarify that its stay order does not preclude the lower court from considering whether the new circumstances arising out of the COVID-19 pandemic warrant temporary relief halting implementation of the Public Charge Rule. *Cf. Cities Serv. Gas Co. v. Mobil Oil Corp.*, 487 U.S. 1245 (1988) (modifying stay and remanding to district court to consider whether to approve parties' proposed settlement). In making such a determination, the lower court could consider evidence and issue factual findings about, inter alia, the proper duration and scope of any temporary relief. And the district court's findings and determinations would then be subject to appellate review.

Plaintiffs are seeking temporary relief directly from this Court rather than from the district court or Second Circuit as an initial matter because of the urgency of the COVID-19 pandemic and substantial doubt as to whether the lower courts could provide any meaningful relief given the Court's stay. *See Heckler v. Turner*, 468 U.S. 1305 (1984) (Rehnquist, J, in chambers) (issuing stay where grant of certiorari made it doubtful that lower courts "had the authority to modify the injunction"). The Court's stay applies until both the Second Circuit resolves defendants' appeal and this Court resolves a petition for certiorari, if any such petition is timely filed. Accordingly, the district court's orders will remain stayed, and the Rule will remain in effect, even if the Second Circuit affirms the district court's decision to postpone the effective date of the Rule during this litigation. This Court is thus the appropriate forum to either modify the stay or clarify that the stay does not preclude the district court from considering whether the current COVID-19 crisis warrants temporary, tailored relief from the Public Charge Rule.

B. The COVID-19 Pandemic Has Drastically Changed the Balance of the Equities Against Enforcing the Public Charge Rule During the Current National Emergency.

The appropriateness of a stay pending appeal is "an exercise of discretion and judgment" that depends primarily on the "equities of a given case." *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). In the course of exercising such discretion, a court "'may mold its decree to meet the exigencies of the particular case.'" *Id.* (quoting 11A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2947 (3d ed. Aug. 2019 update) (Westlaw)). And a court may lift or modify a previously granted stay when new circumstances arise that significantly alter the balance of the harms to the public or the parties. *See, e.g.*, *King v. Smith*, 88 S. Ct. 842, 843 (1968) (Black, J., in chambers) (vacating previously issued stay where subsequent events meant that stay would further harm public welfare and the plaintiffs); *Orloff v. Willoughby*, 72 S. Ct. 998, 998-99 (1952) (Douglas, J., in chambers) (modifying previously issued stay). Indeed, the Court always retains authority to alter an ongoing equitable order "if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong." *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932); *see Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 437 (1976) ("[S]ound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen." (quotation marks omitted)).

The Court should exercise its discretion to temporarily lift or modify the stay here. The catastrophic COVID-19 pandemic has drastically altered the nature and magnitude of the irreparable harms faced by plaintiffs, their residents, and the nation due to the Public Charge Rule

and tipped the balance of the equities decisively against maintaining the stay while the national COVID-19 emergency continues.

1. The Public Charge Rule is impeding efforts to mitigate the spread of the virus.

The Public Charge Rule is irreparably harming public health in plaintiffs' jurisdictions and throughout the country during the unprecedented public-health disaster caused by the COVID-19 pandemic. By deterring immigrants and their family members from obtaining publicly funded health insurance and medical care, the Rule is undermining efforts to slow the spread of the virus—putting everyone at higher risk of infection. A temporary lifting or modification of the stay is thus warranted to prevent these dangerous public-health harms.

As DHS itself has acknowledged, the Public Charge Rule's expanded criteria for finding inadmissibility will deter immigrants from enrolling (or maintaining enrollment for) themselves and their family members in Medicaid, due to the understandable fear that even just applying for Medicaid will be deemed a negative factor in any future public-charge analysis. *See* 84 Fed. Reg. at 41,422. Widespread fear and confusion about the Rule are also driving many immigrants to forgo *any* publicly funded health coverage for fear that using such supplemental public benefits will jeopardize their ability to obtain LPR status and, eventually, citizenship. (App. 60, 171-173, 217, 220-222.) Indeed, since the Rule took effect, medical personnel, state and local officials, and staff at nonprofit organizations have encountered many immigrants who have refused to enroll in Medicaid or other publicly funded healthcare coverage based on concerns that receiving such coverage will increase the risk of being deemed a "public charge" under the Rule. (*See, e.g.*, App. 187 (patients at health clinics in Virginia refusing to participate in financial screening needed for care because screening involves Medicaid application); App. 220-221.)

Such avoidance of Medicaid and other publicly funded healthcare programs will prevent immigrants from receiving testing for the novel coronavirus or treatment for COVID-19, materially impeding public-health officials' efforts to stem the current crisis. Without Medicaid or other health insurance, the costs of COVID-19 treatment are prohibitively high for most patients—particularly if they develop severe symptoms necessitating hospitalization. For example, recent analyses of healthcare costs estimate that a six-day hospital stay for COVID-19 treatment will cost approximately $73,300 (see *supra*, at 8-9)—far more than the annual income of many low- and moderate-income Americans. (*See* App. 55 (cost of treatment for one early COVID-19 patient for less than a week of treatment was $34,927.43).) And since the pandemic began, doctors and others working on the front lines of the crisis have seen many immigrants avoid COVID-19 testing and treatment altogether, even if they might be able to obtain publicly funded care, due to the substantial fear generated by the Public Charge Rule. (App. 113, 120, 160-161, 167-168, 187, 224.)

These effects of the Public Charge Rule on COVID-19 testing and treatment are not hypothetical or speculative. For example:

- A physician in Connecticut has spoken with patients who had symptoms consistent with COVID-19, but were afraid to obtain COVID-19 testing or seek treatment due to concerns about the Public Charge Rule and fears that they could not afford to pay for treatment. (App. 113.)

- The New York Legal Assistance Group has already observed immigrants and their family members declining or delaying medical treatment they needed because of COVID-19, due to concerns about the Public Charge Rule. (App. 145-146.)

- Telephone hotlines operated by Catholic Charities Community Services, Archdiocese of New York, in partnership with state or city agencies in New York, have been receiving public-charge-related inquiries from callers who are fearful of seeking medical treatment for COVID-19. (App. 150-151.)

- Staff at Bronx Legal Services in New York have spoken with noncitizen clients who are afraid to obtain COVID-19 testing or treatment because they fear that doing so will require them to obtain Medicaid coverage. (App. 140.)

- Multiple other community organizations in New York City have reported that immigrant clients are afraid to obtain testing or treatment for COVID-19, even if they are feeling ill, based on concerns that doing so will jeopardize their immigration status. (App. 120-121.)

- Physicians in Monterey County, California, are working with an increasing number of immigrant patients who have symptoms of COVID-19, but are refusing to seek medical care for these symptoms based on concerns about the Public Charge Rule and the costs of treatment. (App. 160-161, 167-168.)

- Nonprofit organizations in Chicago, Illinois, have received calls from immigrants who are afraid to seek virus-related testing and treatment because of the Public Charge Rule. Many of these immigrants are seniors or individuals with underlying health conditions, who are at greater risk of suffering severe illness or death from COVID-19. (App. 202-203.)

- In February and March 2020, even as the COVID-19 crisis became increasingly severe, health clinics in Virginia have continued to see an increasing number of immigrant families declining to seek Medicaid coverage (or withdrawing from existing coverage) because of the Public Charge Rule. (App. 186-187.)

- During the past two months, a health educator in Los Angeles, California, has worked with multiple clients who have forgone publicly funded health insurance benefits for themselves or their citizen children based on fears about the Public Charge Rule. (App. 172-173.)

Immigrants' inability or unwillingness to obtain testing and treatment for COVID-19 due to their concerns about the Public Charge Rule jeopardizes the health and safety of not only immigrants and their families but also the public at large. Without proper testing and treatment, immigrants and their family members who become infected are more likely to suffer severe illness or death from the virus. (App. 55-56, 114.) Immigrants who lack testing and treatment are also more likely to spread the virus to other people inadvertently, contributing to the current exponential growth of infection rates and fatalities. (App. 55-56, 61-63, 114, 160-161, 225.)

This risk of virus spread is further increased by the high number of immigrants who work in essential industries and who thus must continue to work outside of their homes and interact with others by, for example, providing healthcare, preparing and delivering food to residences, cleaning hospitals and public spaces, and caring for the sick or aging. See *supra*, at 9-10. Indeed, in New York City, the current epicenter of the COVID-19 crisis, noncitizens make up approximately 42.4% of home health aides, 42.3% of cooks, 37.1% of food preparation workers, and 26.9% of janitors and building cleaners. (App. 126-127.) And in other areas of the country, large numbers of noncitizens continue to work in essential industries such as agriculture or food packing and distribution. (App. 163-164, 203, 225.) By deterring these essential workers from obtaining health insurance and medical care for COVID-19, the Public Charge Rule is increasing the risk of infection for the public at large.

The Public Charge Rule further impedes current attempts to stem the COVID-19 crisis by deterring immigrants and their family members from obtaining needed medical treatment for preexisting conditions that either make individuals more vulnerable to the virus or make their COVID-19 symptoms worse. Immigrants who decline Medicaid or other health insurance coverage because of the Rule often stop seeking primary care for conditions like diabetes, asthma, and heart disease. (App. 141.) But these conditions put patients at higher risk of suffering severe symptoms or death from COVID-19. (App. 66, 141.) For example, staff at Bronx Legal Services have already seen noncitizen clients who declined Medicaid coverage rather than risk their immigration status, did not treat their serious medical conditions as a result, and have now fallen extremely ill with COVID-19 symptoms such as shortness of breath, high fevers, headaches, body aches, and chills. (App. 141; *see also* App. 145-146 (staff at New York Legal Assistance Group have seen clients declining or delaying medical treatment based on concerns about the Public

Charge Rule).) Such uninsured individuals will wait to seek medical care until their condition gets serious (*see* App. 56, 66, 186), thus further straining hospitals and clinics that are already reaching capacity and facing challenges obtaining ventilators and other critical medical supplies. And without insurance, these patients will likely be forced to make in-person visits to hospitals and clinics rather than use telehealth services, placing themselves and medical staff at higher risk of infection. (App. 63.) These substantial harms to public health warrant lifting or modifying the stay temporarily during the COVID-19 pandemic.

2. The Public Charge Rule deters access to public benefits that are necessary to respond to the severe economic crisis caused by COVID-19.

The Public Charge Rule is further injuring plaintiffs and the public interest by undermining efforts to mitigate the vast economic consequences of the COVID-19 pandemic. The unemployment rates in plaintiffs' jurisdictions and across the country are already reaching unprecedented levels due to the virus outbreak. See *supra*, at 10-11. And the economic downturn is likely to grow worse as the virus continues to spread. (App. 63-65.) Supplemental benefits like Medicaid and SNAP are crucial to helping employable individuals through a sudden emergency like losing a job or incurring substantial medical bills for COVID-19 treatment. (*See* App. 64-65, 121, 142, 202-203.) And by providing short-term help to individuals until they can get back on their feet, supplemental benefits promote economic stability and recovery for all of plaintiffs' residents and the nation.

Many hard-working immigrants, who are not "public charges" under any reasonable interpretation of that term, have begun to face sudden financial strains as their employers cut jobs due to the current economic crisis and government mandates ordering "nonessential" businesses to limit their services or have their employees work from home. (*See* App. 63-65, 121.) Indeed,

the U.S. Bureau of Labor Statistics recently estimated that between February and March 2020, the number of immigrant adults who are unemployed rose by 26%. (App. 64-65.) But the Public Charge Rule is deterring immigrants and their family members from using such benefits to maintain health and nutrition during the crisis. (*See* App. 113, 138-139, 161.) These irreparable harms further warrant lifting or modifying the stay temporarily during the current national emergency.

For example, since the Rule went into effect, immigrants have increasingly been declining to participate in SNAP or other publicly funded nutrition programs due to fear that doing so will jeopardize their immigration status. (App. 26-27, 138, 161, 217.) The Rule's deterrent effect on SNAP usage has become particularly inequitable during the COVID-19 pandemic, when many hard-working immigrants have suddenly lost substantial amounts of income or their employment. Indeed, under the Rule, using SNAP for just a few months during the current economic crisis places an LPR applicant at risk of being deemed a public charge. *See* 84 Fed. Reg. at 41,422 (mere application for SNAP is negative factor); *id.* at 41,506 (using SNAP and another public benefit during a single month counts as two months of benefits use for calculating heavily weighted negative factor of 12 out of 36 months of benefits use).

Immigrants' avoidance of the public benefits covered by the Rule has already resulted in worse harms to both immigrants and plaintiffs during this difficult economic period. For example, immigrants who decline SNAP for fear of being deemed a "public charge" are increasingly turning to emergency food assistance programs, such as food pantries. (App. 142, 203; *see also* App. 156-157 (Make the Road New York has been receiving many calls from immigrants seeking food assistance, including from food pantries).) But many food pantries have closed or sharply reduced their hours due to COVID-19. And many of the emergency food programs that are still operating

"are running out of food at alarming rates." (App. 142; *see* App. 179 (food banks and pantries are facing increased food costs and "new challenges for accepting donated food"); App. 203 (many food pantries in Chicago, Illinois have "either closed or are seeing a marked increase in requests for food assistance").) The Court should lift or modify its stay temporarily to avoid such irreparable public-health and economic harms.

3. The alert issued by defendants fails to address the new harms imposed by the Rule during the COVID-19 crisis.

By revising its application of the Public Charge Rule during the current COVID-19 crisis, USCIS has effectively acknowledged the Rule's deterrent effect on immigrants' willingness to obtain necessary medical care. On March 13, USCIS issued an alert that purports to limit this deterrent effect by providing that "USCIS will neither consider testing, treatment, nor preventative care (including vaccines, if a vaccine becomes available) related to COVID-19 as part of a public charge inadmissibility determination . . . even if such treatment is provided or paid for by one or more public benefits, as defined in the rule (e.g. federally funded Medicaid)." (App. 44.) But this alert does not fully address the grave harms that the Rule is causing during the ongoing pandemic and is thus no substitute for the relief requested here.

First, although the alert excludes "testing, treatment, [and] preventative care . . . related to COVID-19" from future public-charge determinations (App. 44), it simultaneously continues to treat as an automatic negative factor an LPR applicant's application for or receipt of public benefits "that may be used to obtain testing or treatment for COVID-19," including federally funded Medicaid (App. 44). In other words, an LPR applicant who applies for federally funded Medicaid will have that application count against him in the public-charge inquiry, even if subsequently obtained COVID-19 treatment paid for by federally funded Medicaid does not itself count in the

public-charge inquiry. See *supra*, at 13. But deterring immigrants from accessing the public benefits that they need to get healthcare effectively prevents them from getting necessary testing and treatment for COVID-19. This aspect of the alert thus preserves the very problem USCIS has purported to address.

Second, the alert does not provide sufficiently clear direction to assure immigrants that they will not be penalized in a future public-charge determination for accessing critical healthcare now. For example, it is unclear how the alert would apply to an individual who receives medical treatment for COVID-19-like symptoms but is never tested, perhaps because of a shortage of testing kits. Furthermore, although the alert clarifies that the Public Charge Rule will not apply to state or local benefits, it is unclear how an immigrant is supposed to discern or control whether federal, state, or local benefits apply—especially if she may require urgent or emergency care. And under the alert, an LPR applicant will continue to be penalized for having Medicaid coverage to obtain treatment for medical conditions such as asthma, diabetes, or heart disease, even though these conditions place patients at high risk of suffering more severe symptoms or death if they contract COVID-19.

Tellingly, even after DHS posted the alert on its website, the Rule has continued to deter immigrants from accessing needed medical care during the pandemic. For example, in the weeks following DHS's issuance of the alert, physicians and others working on the front lines of the current emergency have continued to see many immigrants and their family members expressing fear about and declining to obtain COVID-19 testing and treatment based on their persistent concerns about the Public Charge Rule. (*See, e.g.*, App. 167, 187-188, 208, 224.) Given the alert's statement that the Public Charge Rule will continue to penalize immigrants who access federally funded Medicaid during the pandemic, the alert has likely increased fear and confusion about the

Rule and thus increased the Rule's dangerous deterrent effects, rather than alleviating such harms to public health. (*See* App. 140, 157-158, 202.)

Third, the alert is limited to testing and treatment for COVID-19, but the Public Charge Rule will also deter immigrants from accessing public benefits that are especially critical for their well-being in light of the dire public-health and economic crisis that COVID-19 has triggered. In just the last three weeks, this country has lost approximately sixteen million jobs, with worse losses likely to follow. See *supra*, at 10. Placing immigrants in a situation where they must choose between forgoing essential aid for healthcare, food, or housing or risking their future chances of obtaining LPR status is particularly inequitable during this unprecedented moment in our history, and will inhibit the country's ability to recover from the current economic crisis.

* * *

The nature and magnitude of the harms currently being imposed by the Rule warrant temporary relief from the stay, particularly when these harms were not known to the parties or the Court when the Court considered defendants' stay application. *See King*, 88 S. Ct. at 842. Although this case has always concerned issues of public health and welfare, the COVID-19 outbreak and its ramifications on public health and the economy present sudden and stark new circumstances not previously considered by the Court and have vastly changed and amplified the irreparable harms caused by the Rule. And the likelihood of these harms occurring is no longer a prediction. The Rule's devastating effects are happening now. Given these new circumstances, the Court should modify or lift its stay temporarily to meet the exigencies and equities of the current public-health and economic crisis.

CONCLUSION

The Court should temporarily lift or modify its stay to halt implementation of the Public Charge Rule during the national emergency declared on March 13, 2020. In the alternative, the Court should clarify that its stay does not preclude the district court from considering whether changed circumstances from the COVID-19 outbreak warrant temporary relief from implementation of the Public Charge Rule.

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