No. 19A785

IN THE SUPREME COURT OF THE UNITED STATES

DEPARTMENT OF HOMELAND SECURITY, ET AL., APPLICANTS

v.

NEW YORK, ET AL.

RESPONSE IN OPPOSITION TO RESPONDENTS' MOTION TO TEMPORARILY LIFT OR MODIFY THE COURT'S STAY

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The Solicitor General, on behalf of applicants Department of Homeland Security (DHS) et al., respectfully files this response to respondents' motion to temporarily lift or modify the January 27, 2020 stay entered by this Court of the nationwide injunctions issued by the United States District Court for the Southern District of New York (Mot. App. 6-32).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., provides that an alien is "inadmissible" if, "in the opinion of the [Secretary of Homeland Security] at the time of application for admission or adjustment of status, [the alien] is likely at any time to become a public charge." 8 U.S.C. 1182(a)(4)(A); see Stay Appl. 5-8. In August 2019, following notice and comment rulemaking, DHS promulgated a rule regarding public-charge inadmissibility determinations under the INA. 84 Fed. Reg. 41,292, 41,501 (Aug. 14, 2019) (Rule). The Rule defines

"public charge" -- which the statute itself does not define -- to mean "an alien who receives one or more [designated] 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)." Ibid. The designated public benefits include cash assistance for income maintenance and certain federally funded or administered non-cash benefits, including most Medicaid benefits, Supplemental Nutrition Assistance Program benefits, and federal housing assistance. Ibid. They do not, however, include emergency medical services under Medicaid. Id. at 41,363, 41,483-41,484, 41,501. Nor do they include non-cash benefits that are not federally funded or administered, such as state and local public benefits. Id. at 41,312. Receipt of those benefits therefore will not be considered in making a public-charge inadmissibility determination under the Rule.

In August 2019, movants -- a group of three States and the City of New York -- challenged the Rule in the United States District Court for the Southern District of New York. Movants argued that the Rule's definition of "public charge" is not a permissible construction of the INA, that the Rule is arbitrary and capricious, and that the Rule violates the Rehabilitation Act of 1973, 29 U.S.C. 701 et seq. On October 11, 2019, the district court granted movants' request for a nationwide preliminary

injunction and stay under 5 U.S.C. 705 barring DHS from implementing the Rule. See Mot. App. 6-29. The district court also granted identical relief in another case filed by private plaintiffs. See Stay Appl. 9.

On January 27, 2020, this Court stayed the nationwide injunctions issued by the district court in their entirety, "pending disposition of the Government's appeal in the United States Court of Appeals for the Second Circuit and disposition of the Government's petition for a writ of certiorari, if such writ is timely sought." 140 S. Ct. 599, 599. In a concurring opinion, Justice Gorsuch, joined by Justice Thomas, expressed concerns about "the underlying equitable and constitutional questions raised by the rise of nationwide injunctions." Id. at 601. Justices Ginsburg, Breyer, Sotomayor, and Kagan would have denied the application for a stay. Id. at 599.

2. The government also has been litigating challenges to the Rule in four other district courts. See Stay Appl. 12-13 (describing other litigation). Two of those district courts issued nationwide injunctions against implementation of the Rule, while the remaining two issued more limited injunctions. See ibid.

The United States Court of Appeals for the Ninth Circuit granted the government's motions for stays pending appeal in the cases filed in that circuit, including one case in which the district court had entered a nationwide injunction. City & County

of San Francisco v. USCIS, 944 F.3d 773 (2019). In a lengthy published opinion that canvassed the history of the public-charge provision and related immigration laws, the Ninth Circuit held that "DHS has shown a strong likelihood of success on the merits, that it will suffer irreparable harm, and that the balance of the equities and public interest favor a stay." Id. at 781. The United States Court of Appeals for the Fourth Circuit also granted a stay pending appeal of the nationwide injunction entered by a district court in Maryland. Order, Casa de Maryland, Inc. v. Trump, No. 19-2222 (Dec. 9, 2019).

The United States Court of Appeals for the Seventh Circuit did not grant the government's motion for a stay pending appeal of an injunction against the Rule issued by a district court in Illinois, and denied the government's renewed motion for a stay following this Court's issuance of a stay in this case. See 2/10/2020 Order, Cook County v. Wolf, No. 19-3169. In its subsequent application to this Court for a stay of the Illinois injunction, the government explained that by staying the nationwide injunctions here, the Court had "necessarily determined that the government had a fair prospect of success * * * on the merits of its defense of the challenged Rule." Stay Appl. at 15, Wolf v. Cook County, No. 19A905 (Feb. 13, 2020). This Court granted a stay of the Illinois injunction "pending disposition of the Government's appeal in the United States Court of Appeals for

the Seventh Circuit and disposition of the Government's petition for a writ of certiorari, if such writ is timely sought." Wolf v. Cook County, 140 S. Ct. 681, 681 (2020) (No. 19A905).

3. On March 13, 2020, President Trump issued a proclamation stating "that the COVID-19 outbreak in the United States constitutes a national emergency." Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 18, 2020). That same day, U.S. Citizenship and Immigration Services (USCIS) issued guidance explaining that it "encourages all those, including aliens, with symptoms that resemble Coronavirus Disease 2019 (COVID-19) (fever, cough, shortness of breath) to seek necessary medical treatment or preventive services. Such treatment or preventive services will not negatively affect any alien as part of a future Public Charge analysis." Mot. App. 44 (emphasis added). The guidance specifically states that "[t]o address the possibility that some aliens impacted by COVID-19 may be hesitant to seek necessary medical treatment or preventive services, 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." Ibid.

ARGUMENT

This Court has twice stayed the effect of preliminary injunctions preventing implementation of the Rule. Both times, the Court's entry of a stay reflected its assessment of whether

challenges to the Rule are likely to succeed. Movants do not argue that the current public-health crisis has any bearing on that assessment, and they do not ask this Court to revisit it. Remarkably, movants nevertheless ask the Court to enter relief that would require DHS to modify the status quo nationwide by halting its ongoing implementation of the Rule. In other words, even though movants' suit is likely to fail as a legal matter, they want this Court to block the Rule in the interim by evaluating new declarations and making a factual assessment of how the Executive Branch should best respond to the COVID-19 pandemic.

Movants identify no case in which this Court has ever granted that sort of relief. The Executive Branch has moved aggressively to address the current public-health emergency. As relevant here, it has made clear that aliens' use of publicly funded prevention and treatment services related to COVID-19 will not be considered in making predictions about whether aliens are likely to become public charges in the future. Movants' attempt to discount that guidance is more than incorrect; it is unhelpful by creating confusion about the Rule and the government's COVID-19 response in an effort to advance this litigation. In any event, movants' declarations -- submitted for the first time in this Court -- provide no basis for this Court to second-guess the Executive's response to the COVID-19 pandemic.

1. To the government's knowledge, this Court has never articulated the standard applicable to a motion to vacate a stay previously issued by the full Court. That is unsurprising, given that movants have not identified any instance in which the Court has granted a contested motion to vacate or even temporarily lift a stay that the full Court had previously granted. Cf. Cities Serv. v. Mobil Oil Corp., 487 U.S. 1245, 1245 (1988) (partially granting a "[j]oint application to vacate the stay"); Stephen M. Shapiro, et al., Supreme Court Practice § 17.12, at 897 (10th ed. 2013) (explaining that even stay orders entered by individual Justices are reviewed and reversed by the Court "only in the most extraordinary circumstances").

When, as here, a motion asks this Court to vacate or lift a stay in a manner that would materially change the status quo, the correct legal standard should be similar to the one that the Court would apply if it were vacating or lifting a lower court's order, or enjoining an administrative rule in the first instance. See Mot. 14 (invoking the All Writs Act, 28 U.S.C. 1651, and Section 705 of the Administrative Procedure Act, 5 U.S.C. 705). The status quo secured by a prior order of this Court should not be entitled to less respect than the status quo secured by an order of a lower court. Cf. Supreme Court Practice § 15.6, at 837-840 (describing the heightened standard this Court applies to petitions for rehearing).

But even assuming that movants in effect seek reconsideration, at a minimum they bear the burden of showing that the Court's previous determination that the government had satisfied the factors for obtaining a stay -- a reasonable probability of certiorari, a fair prospect of success on the merits, and a likelihood of irreparable harm absent a stay -- is now incorrect in light of the current public-health crisis. See Conkright v. Frommert, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (setting forth the factors to obtain a stay). Movants have not attempted to make that showing; their motion does not even cite those factors, much less explain how the COVID-19 pandemic renders incorrect the Court's legal judgment as to those factors. That is reason enough to deny the motion.

2. In particular, as the government has explained (Stay Appl. 18-31), and as the Ninth Circuit has recognized in a lengthy published opinion addressing materially identical challenges to the Rule, see City & County of San Francisco v. USCIS, 944 F. 3d 773 (2019), the government is likely to succeed on the merits of its defense of the Rule because the Rule "easily" qualifies as a permissible interpretation of the INA, id. at 799. Movants' challenge to the Rule is inconsistent with the INA's broader structure, express statutory statements of national immigration policy, and DHS's careful and considered judgment about how best

to implement its responsibilities under the INA. See Stay Appl. 18-31; Stay Appl. Reply Br. 3-10.

This Court has twice granted relief to the government based on those arguments about the likelihood that challenges to the Rule would fail -- first in its January 27 order in this case, and later in its order staying the Illinois-specific injunction in Wolf v. Cook County, 140 S. Ct. 681 (2020) (No. 19A905). Yet movants make no attempt to show that the intervening COVID-19-related events on which their motion relies have any bearing on the legal merit of their challenge. Nor could they: all of those events post-date the finalization of the Rule and are thus legally irrelevant in their underlying challenge. Movants' attempts to set aside the Rule are thus just as unlikely to succeed now as they were three months ago. And because the Rule is lawful, the Court should not lift its January 27 stay simply because movants believe the Rule reflects bad policy.

Movants' reliance (Mot. 17) on Orloff v. Willoughby, 72 S. Ct. 998 (1952) (Douglas, J., in chambers), and King v. Smith, 88 S. Ct. 842 (1968) (Black, J., in chambers), is misplaced. In Orloff, Justice Douglas did not lift the stay that he had previously entered (as movants request here); rather, he simply clarified that the stay -- which he had issued solely to preserve this Court's jurisdiction over a service member's habeas petition -- would not prevent the government from reassigning the service

member to another military base. See 72 S. Ct. at 998-989. In King, Justice Black vacated his own previously issued stay in light of "[a] recent congressional amendment to the" relevant federal statute that altered his earlier assessment of the stay factors, see 88 S. Ct. at 842, and the full Court eventually ruled in favor of the parties that had sought the stay modification, see King v. Smith, 392 U.S. 309, 333 (1968). The motion in King was thus unlike the motion here in at least three important respects: (i) it concerned a single Justice's modification of his own previously issued stay; (ii) the movants had a likelihood of success on the merits; and (iii) the motion depended on an intervening legal change, rather than contested arguments about the effect of intervening factual developments.

3. Rather than explain how the Court erred in its evaluation of any of the traditional stay factors when issuing its January 27 order, movants argue (Mot. 14) that the current public-health crisis has "shifted the balance of equities." When evaluating an application for a stay, such considerations are relevant only "in a close case." Conkright, 556 U.S. at 1402 (Ginsburg, J., in chambers) (citation omitted); see ibid. ("[I]n a close case it may be appropriate to 'balance the equities' -- to explore the relative harms to applicant and respondent, as well as the interests of the public at large.") (citation omitted). Accordingly, to the extent the Court granted the January 27 stay because the government had

made a strong showing on the traditional stay factors set forth above, it would not have had occasion to engage in that balancing -- and nothing in the present motion would even be relevant to the propriety of the existing stay.

To the extent that the balance of equities factored into the Court's prior order, movants have not met their burden to show that those equities have shifted in a way that would warrant revisiting the Court's earlier decision. Movants assert (Mot. 14) that the Rule 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." They therefore contend (Mot. 22) that it would be in "the public interest" to lift the stay, which would have the effect of suspending the Rule, in its entirety, nationwide. But the public has an interest in both addressing the COVID-19 crisis and enforcing lawful immigration policy -- and it is the Executive Branch that is charged with determining how best to do both. See Nken v. Holder, 556 U.S. 418, 435-436 (2009). The Executive Branch has considered the arguments movants advance, and has concluded that movants' preferred outcome -- a wholesale suspension of the Rule, just as they sought before the COVID-19 crisis -- is not warranted. Movants provide no basis for this Court to overrule that judgment about how the Nation's lawful immigration policies should be implemented during the COVID-19 crisis.

Rather than a wholesale suspension, the Executive Branch has instead opted to take more targeted steps to ensure that the Rule is being administered in an appropriate way in light of current conditions. Specifically, USCIS's March 13 guidance makes clear that the government will exclude from consideration the receipt of any public benefits related to COVID-19 care -- including testing, treatment, preventive care, and vaccinations -- when making public-charge inadmissibility determinations under the Rule. Mot. App. 44. The guidance also reiterates that the Rule, by its own terms, does not consider the receipt of emergency medical services under Medicaid; "CHIP, or State, local, or tribal public health care services/assistance that are not funded by federal Medicaid"; or various other non-federal benefits in public-charge inadmissibility determinations. Ibid. And it makes clear that in all events, "USCIS considers the receipt of public benefits as only one consideration among a number of factors and considerations in the totality of the alien's circumstances over a period of time with no single factor being outcome determinative." Ibid.

Movants seek to undermine that guidance, claiming that an alien "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." Mot. 13; see Mot. 24-25. But movants

are incorrect: under USCIS's guidance (as DHS has reaffirmed to this Office), if an alien enrolls in Medicaid to receive COVID-19-related care, that enrollment will not be a negative factor in a public-charge inadmissibility determination, so long as the alien disenrolls from Medicaid once he or she no longer needs COVID-19-related care, or provides evidence of a request to disenroll. That is why USCIS explicitly advised the public that COVID-19-related "treatment or preventive services will not negatively affect any alien as part of a future Public Charge analysis." Mot. App. 44 (emphasis added).

Movants also assert that "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 a public-charge inquiry." Mot. 13; see Mot. 23-24. But as the USCIS guidance explains, if an alien "must rely on public benefits for the duration of the COVID-19 outbreak and recovery phase" as a result of extrinsic factors -- such as enforced social distancing or an employer's shutting down -- "the alien can provide an explanation and relevant supporting documentation" and "[t]o the extent [those materials are] relevant and credible, USCIS will take all such evidence into consideration" when making public-charge inadmissibility determinations. Mot. App. 44.

Even if USCIS had not undertaken those discretionary steps, the Rule's effects on current benefits usage during the COVID-19

crisis still would have been modest. That is because most aliens to whom the Rule could potentially apply are not presently eligible for federal means-tested benefits like Medicaid. See 8 U.S.C. 1613(a), 1641(b), and 1642(a). The Rule cannot possibly prevent or deter aliens from using benefits for which they are not eligible. Conversely, many aliens who are eligible for means-tested federal benefits (such as refugees and asylees) are not subject to the Rule in the first place. See Mot. App. 46. And while certain lawfully present aliens who are pregnant or under age 21 may be both subject to the public-charge ground of inadmissibility and also eligible for Medicaid, the Rule itself exempts their receipt of Medicaid benefits from public-charge inadmissibility determinations. See 84 Fed. Reg. at 41,297.

Movants assert (Mot. 14) that notwithstanding USCIS's COVID-19-related guidance and the limited relevance of the Rule to aliens who are actually eligible for benefits, "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." But their accompanying declarations make clear that this asserted effect is not the result of the Rule itself, but rather of "mistaken belief[s]" about the Rule's application and content. Mot. App. 171 (emphasis added).* In fact, nearly every example

* See also, e.g., Mot. App. 60 ("[U]ninsured people may be able to receive medical care free through safety net facilities, such as community health centers or government clinics; evidence

movants cite (Mot. 19-20) involves aliens who wrongly believe that obtaining COVID-19-related care will affect a public-charge inadmissibility determination in the future, contrary to the USCIS guidance. Plaintiffs identify no case holding that the "balance of the equities" favors suspending a lawful Rule because some subset of people misunderstands its legal effects.

That is not to say that movants are without recourse. If, as they say, members of their communities are avoiding COVID-19-related care and treatment because of mistaken beliefs about the Rule, then movants should address that problem by helping to correct those misunderstandings -- not by filing motions that, if anything, only reinforce them.

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suggests that the chilling effect leads to reductions in use of services like these, even though the public charge determinations do not apply to such programs."); ibid. ("[A]lthough the public charge rule does not apply to benefits from the Women, Infants and Children (WIC) nutrition assistance program, many immigrants have avoided enrolling in WIC because of public charge fears."); id. at 140 ("Many New Yorkers mistakenly believe they are receiving Medicaid as defined in the public charge rule, due to misunderstanding the program in general. * * * [W]e have encountered many noncitizens who are afraid to get COVID-19 testing" because "people are afraid that testing requires Medicaid, which would get them deported."); id. at 220 ("[S]ome families that organizers speak with have withdrawn their U.S. citizen children from healthcare coverage out of a mistaken fear that their children's coverage will trigger immigration consequences related to public charge."); id. at 221 ("[C]lasses of immigrants to whom the public charge rule does not apply, such as Lawful Permanent Residents, have also disenrolled from services out of the mistaken fear that they could face immigration consequences for receiving benefits.").

4. In all events, movants are not entitled to reinstatement of the nationwide injunctions. As the government has explained (Stay Appl. 32-39; Stay Appl. Reply Br. 10-12), the nationwide aspect of the preliminary injunctions here is an independent issue warranting this Court's attention. This Court stayed the injunctions in their entirety, making it unnecessary to address the issue at that time. See 140 S. Ct. at 599-601 (Gorsuch, J., concurring). But if the Court were inclined to grant this motion now, it would have to confront that issue, which was squarely raised and presented. If the district court lacked authority under Article III and traditional principles of equity to enter injunctions that applied outside movants' jurisdictions, see Stay Appl. 32-39; Stay Appl. Reply Br. 10-12, there would be no basis to lift or modify the Court's January 27 stay, even on a temporary basis, to the extent the stay precludes the injunctions from operating in that universal fashion.

5. Finally, the Court also should reject movants' alternative request (Mot. 16) that the Court "clarify" that its January 27 stay order "does not preclude the district court from considering whether the current COVID-19 crisis warrants temporary, tailored relief from the Public Charge Rule." As movants recognize (ibid.), the district court probably lacks the authority to modify the nationwide injunctions it issued, now that the Court has stayed those injunctions. See Heckler v. Turner,

468 U.S. 1305, 1308-1309 (1984) (Rehnquist, J., in chambers). Even if it has that authority, movants do not explain why the district judge should in effect be permitted to second-guess and modify a stay issued by this Court. Judicial economy alone counsels against that course, for the losing party would, as movants recognize (Mot. 16), inevitably seek "appellate review" of any adverse decision.

To the extent movants seek to obtain a new injunction, the district court probably lacks authority to issue one. Such a "new" injunction would for all intents and purposes be identical to the injunctions that the Court already has stayed -- but simply issued based on the district judge's "new" evaluation of the applicable equitable factors. If the district court lacks the authority to modify the existing injunctions, it also must lack the authority to end run that rule by issuing a materially identical "new" injunction. And even setting aside the question of the court's authority, movants would be precluded by ordinary law-of-the-case principles from re-litigating in district court the issues that this Court necessarily decided in granting the January 27 stay, including that the government has a fair prospect of success on the merits of its defense of the Rule's lawfulness, and that the government -- and thus the public -- would suffer irreparable harm were the Rule enjoined. Movants thus could not demonstrate the likelihood of success and irreparable harm required to secure new

injunctive relief against the Rule's enforcement. See Winter v. NRDC, Inc., 555 U.S. 7, 20 (2008).

* * * * *

Movants identify no prior case in which the Court has granted the kind of relief they request here -- and this case should not be the first. The Executive Branch has taken aggressive actions to address the current public-health crisis. Those actions include issuing guidance about the Rule that clearly assures the public that USCIS will exclude from consideration the receipt of public benefits for COVID-19-related care when making public-charge inadmissibility determinations. In light of that guidance, the Executive Branch has determined that a wholesale suspension of the Rule is unwarranted. Nothing in the motion or in the accompanying new declarations provides any basis for this Court to second-guess that policy judgment.

CONCLUSION

The motion should be denied.

Respectfully submitted.

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