Nos. 19-17213 and 19-35914

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY AND COUNTY OF SAN FRANCISCO and
COUNTY OF SANTA CLARA,
Plaintiffs-Appellees,
vs.
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, et al.,
Defendants-Appellants,

On Appeal from the United States District Court, Northern District of California
Case No. 4:19-cv-04717-PJH (Hon. Phyllis J. Hamilton)

STATE OF WASHINGTON, et al.,
Plaintiffs-Appellees,
vs.
U.S. DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants-Appellants,

On Appeal from the United States District Court, Eastern District of Washington
Case No. 4:19-cv-05210-RMP (Hon. Rosanna Malouf Peterson)

PETITION FOR INITIAL HEARING EN BANC

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INTRODUCTION AND RULE 35 STATEMENT

Defendants-Appellants'[1] appeal of orders enjoining the Department of Homeland Security's new "public charge" rule presents issues of exceptional importance that should be resolved by this Court only after the benefit of full merits briefing and oral argument. Proceeding on an expedited basis, a divided motions panel of this Court issued a published opinion granting Defendants' motion for a stay pending their appeal in both of these cases. *See* Order Granting Stay, No. 19-17213, Dkt. No. 27 (Dec. 5, 2019); Order Granting Stay, No. 19-35914, Dkt. No. 27 (Dec. 5, 2019).[2] That decision reaches these issues of exceptional importance but contravenes precedent on a motions panel's proper, and limited, role in these circumstances. The City and County of San Francisco and the County of Santa Clara (collectively, the "Counties") and the 14 Plaintiff States in *Washington* (the "Plaintiff States") have sought en banc reconsideration of the stay decision. *See San Francisco*, Motion for Reconsideration En Banc, Dkt. No. 30 (Dec. 19, 2019) ("San Francisco et al. En Banc Motion"); *Washington*, Petition for Rehearing En Banc, Dkt. No. 34 (Dec. 19, 2019) ("Washington et al. En Banc Petition").

[1] Defendants-Appellants in both district court cases are the United States Citizenship and Immigration Services; the Department of Homeland Security (DHS); Kenneth Cuccinelli; and Kevin McAleenan (collectively, "Defendants").

[2] No. 19-17213 is referred to herein as *San Francisco*, and No. 19-35914 is referred to as *Washington*.

Should the Court determine that en banc reconsideration of the stay decision is warranted, the Counties and Plaintiff States respectfully request that the Court consolidate that reconsideration with the appeal of the merits of the district courts' preliminary injunction orders. *See* Order, *California ex rel. Becerra v. Azar*, No. 19-15974 (Aug. 1, 2019) (ordering parties to address the merits of the underlying preliminary injunction order before the en banc panel reconsidering a motions panel's stay order).

In the alternative, to the extent a merits panel might consider itself bound by the motions panel's conclusions or reasoning, the Counties and Plaintiff States respectfully request that the appeal instead be heard in the first instance by an en banc panel of this Court.

In either event, initial en banc consideration is warranted because this case involves questions of exceptional importance regarding the validity of DHS's new interpretation of federal immigration law which, if it goes into effect, will have grave, real-world impact. Fed. R. App. P. 35(b)(1)(B).

ARGUMENT

1. As explained in the motions for en banc reconsideration of the motions panel's published stay order, this case presents questions of exceptional importance. *See* San Francisco et al. En Banc Motion at 2–3; Washington et al. En Banc Petition at 13-19. Plaintiffs-Appellees briefly address those questions here.

Under the Immigration and Nationality Act (INA), the federal government may deny admission to persons it determines are "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). For nearly 140 years, as manifested in judicial and administrative decisions, the term "public charge" has meant a person primarily or entirely dependent upon the government for support. In 1999, DHS's predecessor formalized this definition. *See Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28,689 (May 26, 1999) ("1999 Field Guidance"). But in August 2019, DHS issued a final rule that would dramatically redefine the criteria for whether a person is a public charge. *See Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019) ("Rule").

These cases present novel and complicated questions about the validity of DHS's new interpretation of federal immigration law as well as the standards an agency must follow when promulgating regulations announcing and implementing a new policy preference. And the real-world stakes could not be higher. DHS acknowledges that the Rule would have dramatic consequences for both immigrant communities and localities. For example, DHS projects that the Rule would cause hundreds of thousands of immigrants nationwide—including naturalized citizens and noncitizens not subject to public charge assessments—to disenroll from critical public benefits, forgoing billions of dollars' worth of public aid, and shifting a

significant portion of those costs onto localities such as the Counties. *See* 84 Fed. Reg. at 41,463. DHS also notes the negative public health consequences that would likely flow from such disenrollment, including diminished vaccination rates and the spread of communicable illnesses. *Id.* at 41,412–13. Finally, the Rule would dramatically restrict who is able to secure admission to and legal permanent residence in this Country, and would deem a person a public charge if they were likely to access certain benefits that more than 40% of American citizens use over the course of their lives. *San Francisco*, ER 48. These are indisputably matters of "exceptional importance." *See* Fed. R. App. P. 35(b)(1)(B).

2. The motions panel's decision addressing these matters should not foreclose this Court's ultimate resolution of the issues on appeal.

It is inherent to a motions panel's adjudication of a stay decision that its analysis will be revisited after full merits briefing. Following Supreme Court precedent, this Court had made clear that a motions panel should not attempt to "predict with accuracy the resolution of often thorny legal issues without adequate briefing and argument" on the expedited schedule inherent to motions for stays. *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011). Such motions are not substitutes for fulsome merits resolution, and a court should not use a stay motion to offer "pre-adjudication adjudication" that "dol[es] out 'justice on the fly.'" *Id.* at 967 (quoting *Nken v. Holder*, 556 U.S. 418, 427 (2009)). Rather, stay motions

require a court simply to decide whether to maintain the status quo in order "to give the reviewing court the time to 'act responsibly.'" *Id.* (quoting same). Indeed, the entire purpose of a stay motion is to prevent irreparable harm *while an appeal is pending* in order to allow the Court time to resolve the underlying merits during the ordinary course.

Beyond the abbreviated nature of motions for stays, there are other reasons a merits panel should not consider itself bound by a motions panel's order as if it were the "law of the case." *United States v. Houser*, 804 F.2d 565, 568 (9th Cir. 1986). As a motions panel of this Court itself recently emphasized, a motions panel's finding that appellants have not made a "strong showing" of likelihood of success on the merits to obtain a stay "does not bind the merits panel in reviewing this aspect of the merits, as that is not the standard the merits panel will apply." *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1028 n.2 (9th Cir. 2019). So too here, where the motions panel determined that Defendants had made such a showing.[3] To conclude otherwise would allow a motions panel's interlocutory ruling on a stay motion pending appeal to effectively resolve the appeal itself.

[3] In *Lair v. Bullock*, 798 F.3d 736 (9th Cir. 2015), the Court discussed an earlier motions panel's holding and stated that a "motions panel's published opinion binds future panels the same as does a merits panel's published opinion." *Id.* at 747. But the Court ultimately did not rely on the motions panel's holding because another Ninth Circuit case had "arrived at th[e] same conclusion." *Id.* The statement in *Lair* was therefore dicta and should not be followed here, especially in light of the clear statement in *East Bay Sanctuary Covenant*.

But, in an abundance of caution, because the merits panel might believe it is bound by the conclusions or reasoning of the motions panel's stay decision, this Court should hear these appeals en banc in the first instance. This is particularly necessary here because, as explained in the motions for en banc reconsideration (*San Francisco*, Dkt. No. 30; *Washington*, Dkt. 34), the motions panel's published decision is deeply flawed. The analysis departs from U.S. Supreme Court and Ninth Circuit precedent at each of the four factors governing stays pending appeal. *See* San Francisco et al. En Banc Motion at 7–18; Washington et al. En Banc Petition at 14–19. Thus, in addition to exceptional importance of the issues presented, en banc review would be necessary to ensure uniformity with decisions of the Supreme Court and this Court on the proper interpretation and application of the stay factors and the related preliminary injunction factors.

CONCLUSION

For the foregoing reasons, the Counties and Plaintiff States respectfully request that this appeal be heard en banc in the first instance.

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Dated: January 16, 2020

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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