STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

BARBARA D. UNDERWOOD
SOLICITOR GENERAL
DIVISION OF APPEALS & OPINIONS

August 7, 2020

Catherine O'Hagan Wolfe, Esq.,
Clerk of Court
United States Court of Appeals
for the Second Circuit
40 Foley Square
New York, NY 10007

Re: *State of New York v. U.S. DHS*, No. 2020-2537

Dear Ms. Wolfe:

We represent plaintiffs-appellees New York, Connecticut, Vermont, and New York City in the above-captioned matter, in which defendants-appellants seek (i) a stay of a preliminary injunction issued by the United States District Court for the Southern District of New York (Daniels, J.) on July 29, 2020, pending defendants' appeal from that preliminary injunction; and (ii) an emergency administrative stay of the preliminary injunction while the Court resolves defendants' stay motion. We write to oppose the request for an administrative stay, and to inform the Court that we intend to file an opposition to defendants' motion for a stay pending appeal within ten days of defendants' motion, or pursuant to a schedule ordered by the Court.

The private organizations that are plaintiffs-appellees in the above-captioned matter, and which are represented by separate counsel, have informed us that they join in this submission.

Background

In this case, plaintiffs have challenged the Public Charge Rule issued by defendants. On October 11, 2019, the district court entered its first preliminary injunction halting the Public Charge Rule. Defendants appealed and sought a stay of the first preliminary injunction pending appeal. After this Court declined to stay the first preliminary injunction, the Supreme Court issued a stay pending the filing of any petition for certiorari and the Supreme Court's resolution of any such petition. *Department of Homeland Security v. New York*, 140 S. Ct. 599 (2020) (mem.).

On August 4, 2020, this Court affirmed the district court's October 2019 preliminary injunction, as modified to apply only to the plaintiff States' jurisdictions. *State of New York v. United States Dep't of Homeland Security*, Nos. 19-3591, -3595, -- F.3d --, 2020 WL 4457951 (2d Cir. 2020). The Court determined that plaintiffs have standing to challenge the Public Charge Rule and are within the zone of interests of the public-charge provision of the Immigration and Nationality Act (INA). The Court also determined that plaintiffs are likely to succeed on the merits of their claims because the Public Charge Rule is contrary to the INA and arbitrary and capricious. Finally, the Court held that the balance of the equities and the public interest weighed in favor of a preliminary injunction. The Supreme Court's stay remains in effect.

While this Court was considering the appeal in Nos. 19-3591, 19-3595, plaintiffs filed a motion in the Supreme Court to temporarily lift or modify its stay in light of the national emergency concerning the COVID-19 outbreak, or to clarify that the stay did not preclude plaintiffs from seeking new relief from the district court due to COVID-19. The Supreme Court denied the motion to temporarily lift or modify the stay, but stated that "[t]his order does not preclude a filing in the District Court as counsel considers appropriate." *Department of Homeland Security v. New York*, No. 19A785, 2020 WL 1969276 (Apr. 24, 2020) (mem.).

Plaintiffs accordingly returned to the district court and sought a second, more limited preliminary injunction against further implementation of the Public Charge Rule during the pendency of the COVID-19 national emergency. Defendants opposed the preliminary injunction in part based on their assertion that the district court lacked jurisdiction to issue a separate preliminary injunction during the pendency of the appeal in Nos. 19-3591, 19-3595. The district court ultimately concluded that it had jurisdiction and issued its July 2020 preliminary injunction. In response to defendants' jurisdictional

objection, the court also stated that, in the alternative, its order would constitute an indicative ruling stating that it would grant the preliminary injunction if this Court were to determine that the court had lacked jurisdiction to grant relief because of the then-pending appeals in Nos. 19-3591, 19-3595, and remanded to the district court to issue a ruling. *See* Fed. R. Civ. P. 62.1(a).

On August 3, 2020, defendants filed a notice of appeal from the district court's July 2020 preliminary injunction. That appeal has been docketed at No. 20-2537. Defendants sought a stay of the preliminary injunction pending appeal from the district court on Monday, August 3, 2020, informing the district court that by Friday, August 7, 2020, they intended to file a motion with this Court to stay the district court's July 2020 preliminary injunction pending appeal. Plaintiffs filed an opposition to defendants' stay motion with the district court on Wednesday, August 5.

To state the obvious, the district court has not yet had a meaningful opportunity to address defendants' stay motion, as it is entitled to do under Federal Rule of Appellate Procedure 8(a)(1)(a). Nonetheless, defendants today filed their motion with this Court seeking a stay of the preliminary injunction pending appeal and an emergency administrative stay of the preliminary injunction while the Court considers their motion.

Reasons to Deny the Administrative Stay

The Court should deny defendants' extraordinary request for an emergency administrative stay of the district court's July 2020 preliminary injunction. Given this Court's recent ruling and the district court's detailed analysis of the COVID-19-specific harms of the Rule, there is no basis to precipitously overturn the district court's considered judgment before this Court has received full briefing on defendants' stay motion.

First, defendants' request for emergency administrative stay should be denied at the outset because defendants have inappropriately failed to give the district court any meaningful opportunity to consider or rule on their request for a stay pending appeal. A motion for a stay pending appeal may be made to this Court only after the movant has previously made such a motion in the district court, and the district court has "denied the motion or failed to afford the relief requested." Fed. R. App. P. 8(a)(2)(A). Here, defendants sought a stay pending appeal from the district court in the late afternoon on Monday, August 3, and plaintiffs filed an opposition to that motion on Wednesday, August 5. But on the morning of Friday, August 7, three days after they filed their motion

and less than two days after plaintiffs filed their opposition, defendants have already prematurely sought emergency administrative relief from this Court—without giving the district *any* reasonable opportunity to consider or rule on their motion. Defendants do not provide any explanation—such as an imminent deadline or upcoming event—that would justify cutting off the district court's review in this manner. Accordingly, the Court should deny the request for emergency administrative relief. *Cf. Aurora Bancshares Corp. v. Weston*, 777 F.2d 385, 387-88 (7th Cir. 1985) (per curiam) (remanding a Rule 8 motion so the district court could first consider the issues).

Second, defendants have no likelihood of success on the merits of their appeal from the July 2020 preliminary injunction because this Court has already rejected defendants' arguments about the Public Charge Rule and determined that the Rule is likely contrary to the INA and arbitrary and capricious, in violation of the Administrative Procedure Act. *See State of New York*, 2020 WL 4457951, at *18-29. Specifically, this Court has already determined that the Public Charge Rule's radical transformation of the meaning of "public charge" is contrary to the "consistent and settled meaning of" that term, as ratified and incorporated by Congress into the INA. *Id.* at *18; *see id* at *18-25. This Court has already further determined that the Rule is arbitrary and capricious because it lacks a reasoned explanation and improperly assumes, without any factual basis, that every person who might use certain supplemental benefits at any time during their life lacks the means to provide for their basic necessities. *See id.* at *26-29. And this Court has already held, based on a record compiled before the COVID-19 crisis, that the balance of the equities and public interest weighed in favor of halting the Rule. *See id.* at *30-31. Under this Court's binding decision, defendants thus have no chance of success on the merits.

Third, the equities support the district court's preliminary injunction—and at minimum weigh heavily against an immediate administrative stay that would itself cause the very harms that the district court sought to avert. Here, based on the extensive and uncontroverted factual evidence presented by plaintiffs, the district court found that the Rule is currently deterring immigrants from seeking both essential health care and economic benefits that have become particularly important during the current COVID-19 crisis. (Op. 23, 26.) As the district court found, that deterrent effect "impedes public efforts in the Government Plaintiffs' jurisdictions to stem the spread of the disease"—risking the health and well-being of citizens and noncitizens alike. (*Id.* at 23.) And the Rule's ongoing deterrent effect further obstructs efforts to limit the

crushing economic consequences of the pandemic, which supplemental benefits like Medicaid and SNAP are designed to help ameliorate. (*Id.* at 26-27.)

Defendants' principal response is to dispute that the Rule causes these harms in light of the alert that USCIS issued limiting the Rule's application during the COVID-19 crisis. (Mot. 16-17.) That alert is itself an admission by defendants that the Rule inherently has the *in terrorem* effect of deterring immigrants from accessing even essential health care and other benefits, despite great cost to themselves and their communities. And contrary to defendants' characterization here, the Rule continues to have such effects even as modified by the alert. It is simply not the case that the continuing harms found by the district court are solely the result of immigrants' "mistaken beliefs about how the Rule will be applied in the COVID-19 context." (Mot. 17.) Indeed, the district court found based on the extensive and unrebutted evidence submitted by plaintiffs that the Rule is causing extensive harms to public health and economic welfare during the COVID-19 crisis, and that the time-limited preliminary injunction will help alleviate those harms.

For example, the alert excludes from the public-charge analysis an immigrant's enrollment in Medicaid "*solely* in order to obtain COVID-19-related testing, treatment, or preventative care." (Op. 25 (quotation marks omitted).) But as the district court found (and defendants do not dispute), "few enroll in Medicaid for a single purpose," and there is no mechanism for a Medicaid applicant to seek coverage solely for COVID-19-related treatment. (Op. 26.) In addition, the Rule continues to apply if immigrants obtain Medicaid for other treatment during the pandemic—including "treatment for medical conditions that place [them] at increased risk of suffering severe illness or death if they contract COVID-19." (Op. 27.) And defendants acknowledged below that, absent this preliminary injunction, they would be entitled to restore the full force of the Rule at any time, or to retroactively change their current policy in the future, even if immigrants relied on the alert to obtain COVID-19-related care now. (Op. 27-28.) The Rule thus will continue to deter immigrants from accessing health care that is essential for both their own well-being and for the public-health response to the COVID-19 crisis.

Defendants also have no response (and the alert says nothing about) the Rule's continuing application to immigrants' receipt of economic benefits. The COVID-19 pandemic has been not only a public-health crisis but an economic catastrophe as well. "Yet, the Rule offers no meaningful relief or incentive for immigrants in such circumstances to confidently access supplemental benefits, such as SNAP" (Op. 26), that are essential both to preserve individual well-

being and to prevent a vicious economic downturn that could cripple the Government Plaintiffs' finances and public programs for years.

On the other side of the ledger, this Court has now rejected defendants' claims of harm to the federal government from a temporary pause to the Rule—at minimum, until this Court can assess whether to grant a stay pending appeal on full briefing from the parties. As this Court recently held in upholding the district court's earlier and broader preliminary injunction, which was issued *before* the COVID-19 crisis, "we do not think DHS's inability to implement a standard that is as strict as it would like outweighs the wide-ranging economic harms that await the States and Organizations upon the implementation of the Rule." *State of New York*, 2020 WL 4457951, at *30. The COVID-19 crisis has only made the equities more lop-sided by undermining efforts to mitigate the public health and economic harms from the spread of a deadly disease that has already had devastating effects on plaintiffs' jurisdictions and their residents and constituents.

Defendants misplace their reliance on the Supreme Court's previously issued stay of the district court's earlier preliminary injunction. Contrary to defendants' characterization, the Supreme Court's stay cannot fairly be interpreted as a definitive adjudication on the merits or the equities here. Indeed, this Court has already necessarily rejected defendants' arguments about the import of the original stay in determining, after the original stay issued, that the Rule is likely unlawful, that plaintiffs' and the public are irreparably harmed by the Rule, and that the balance of equities tips in favor of halting the Rule during the pendency of plaintiffs' lawsuit. In any event, whatever the import of the original stay, it must be read against the Supreme Court's more recent order, which declined to modify the Court's stay but expressly contemplated plaintiffs returning to the district court to seek similar relief based on the drastic change of circumstances that had arisen since the Court issued its original stay.

Finally, defendants' arguments against the district court's jurisdiction to issue a new preliminary injunction at all (Mot. 10-11) provide no basis for an immediate administrative stay. For one thing, defendants' arguments are wrong: as the Supreme Court's most recent order acknowledged, and this Court has recognized, the district court was not precluded from considering whether new facts would warrant more limited relief. *See Webb v. GAF Corp.*, 78 F.3d 53, 55 (2d Cir. 1996); *International Ass'n of Machinists & Aerospace Workers v. Easern Air Lines, Inc.*, 847 F.2d 1014, 1019 (2d Cir. 1988). Those facts were not before this Court, and the district court appropriately focused its new findings

on the COVID-19 crisis's impacts. (Op. 22.) More fundamentally, whatever concerns there may previously have been that the district court would improperly intrude on this Court's adjudication of the then-pending appeal, those concerns are now obsolete given that this Court has *upheld* the district court's earlier preliminary injunction and endorsed both its legal conclusions and its balance of the equities. The congruence between this Court and the district court renders any jurisdictional question an academic dispute at best—not an independent basis to issue an immediate, administrative stay against the district court's carefully considered and COVID-19-specific preliminary injunction.

Respectfully submitted,

/s/ *Judith N. Vale*

Judith N. Vale
Senior Assistant Solicitor General
(212) 416-6274
judith.vale@ag.ny.gov

cc (via CM/ECF):

All counsel of record