**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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| CITY AND COUNTY OF SAN FRANCISCO, and COUNTY OF SANTA CLARA,<br>Plaintiffs-Appellees,<br><br>v.<br><br>UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, et al.,<br>Defendants-Appellants. | No. 19-17213 |
| STATE OF CALIFORNIA, et al.,<br>Plaintiffs-Appellees,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,<br>Defendants-Appellants. | No. 19-17214 |
| STATE OF WASHINGTON, et al.,<br>Plaintiffs-Appellees,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,<br>Defendants-Appellants. | No. 19-35914 |

**MOTION TO STAY THE MANDATE**

Pursuant to Fed. R. App. P. 41(d)(1), the government hereby respectfully requests that this Court stay issuance of its mandate pending resolution of a petition for a writ of certiorari, which the government intends to file promptly if the Supreme Court grants certiorari in one or both of two parallel petitions that are currently scheduled to be considered at the Court's January 8, 2021 conference. This Court affirmed two preliminary injunctions barring the Department of Homeland Security from implementing its August 2019 public-charge rule (Rule), but narrowed their geographic scope. Because this Court previously stayed those injunctions pending appeal, however, the Rule remains in effect. The Supreme Court likewise has stayed three parallel injunctions against the Rule (two arising out of the Second Circuit; one out of the Seventh Circuit) pending its resolution of the government's petitions for writs of certiorari in those cases. Briefing is complete on those petitions, and, as noted, the Supreme Court will consider them at its January 8, 2021 conference. The Supreme Court's stays and the divided decisions issued by this Court and other courts of appeals demonstrate that the government's petition in this case will "present a substantial question" warranting Supreme Court review. Fed. R. App. P. 41(d)(1).

There is also "good cause" to stay the mandate. Fed. R. App. P. 41(d)(1). By issuing stays in the Second and Seventh Circuit cases, the Supreme Court has made clear that the Rule should remain in effect until it has had an opportunity to weigh in on the Rule's merits. But if this Court were to issue its mandate, thereby terminating the stay pending appeal it previously entered, the Rule would be enjoined in plaintiffs'

jurisdictions absent further relief from the Supreme Court. Moreover, the Supreme Court is poised to decide in the near future whether to grant plenary review, and, if it grants review, the Court likely would resolve the Rule's validity by June. Given that action from the Supreme Court likely is imminent, there is no reason to upset the status quo—thus risking confusion among immigration officials, the public, and aliens regarding the applicability of the Rule—before the Supreme Court weighs in.

Counsel for plaintiffs in each of the three consolidated cases have informed us that they take no position on this motion.

## STATEMENT

1. On August 14, 2019, the Department of Homeland Security (DHS) published a final rule implementing the Immigration and Nationality Act's public-charge inadmissibility provision, 8 U.S.C. § 1182(a)(4)(A). Plaintiffs filed suits in this and other Circuits challenging the Rule and seeking preliminary injunctive relief. District courts in California, Washington, Illinois, New York, and Maryland entered preliminary injunctions barring the Rule's enforcement. *See City & County of San Francisco v. USCIS*, 981 F.3d 742, 749-50 (9th Cir. 2020). In each case, the central question is whether the Rule's definition of "public charge" is contrary to the INA. Several of the cases also present other related questions, such as the question whether the Rule is arbitrary and capricious.

On December 5, 2019, this Court granted the government's request for a stay pending appeal of the California and Washington preliminary injunctions. *See City &*

*County of San Francisco*, 944 F.3d 773 (9th Cir. 2019). The stay panel concluded, among other things, that the government was likely to prevail in establishing that the Rule was a reasonable interpretation of the INA and was not arbitrary and capricious. *Id.* at 790-805.

One year later, the merits panel issued a divided opinion rejecting the stay panel's analysis and affirming preliminary injunctions against the Rule (though limiting their geographic scope). *City & County of San Francisco*, 981 F.3d at 756-62. The merits panel concluded that plaintiffs were likely to prevail in establishing that the Rule was contrary to the settled meaning of the public-charge inadmissibility provision and was arbitrary and capricious. *Id.* In light of this Court's previously entered stay, however, the district courts' preliminary injunctions will not take effect until the mandate issues.

2. Like this Court, the Fourth Circuit issued a stay pending the government's appeal of the preliminary injunction entered by the district court in Maryland. *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 237 (4th Cir. 2020). The Fourth Circuit subsequently issued a decision reversing the preliminary injunction on the merits after concluding that the Rule was likely a reasonable interpretation of the statute. *Id.* On December 4, 2020, the Fourth Circuit granted the plaintiffs' request for rehearing en banc. Oral argument had been tentatively scheduled for the week of January 22-29, 2021; but after the government moved to postpone the argument in light of pending petitions for writs of certiorari raising the same issues about the Rule's validity, the Fourth Circuit postponed the argument.

Unlike this Court and the Fourth Circuit, the Second and Seventh Circuits declined to issue stays pending the government's appeals of preliminary injunctions entered by district courts in Illinois and New York. *See City & County of San Francisco*, 981 F.3d at 750 (explaining the litigation history). The Supreme Court granted the government's request for stays of the injunctions pending disposition of any petitions for writ of certiorari in the Second and Seventh Circuit cases. *DHS v. New York*, 140 S. Ct. 599 (2020); *Wolf v. Cook Cty.*, 140 S. Ct. 681 (2020).

The Second and Seventh Circuits subsequently entered decisions affirming the preliminary injunctions on the merits (though, in the case of the Second Circuit, limiting its geographic scope); the Second Circuit's decision was unanimous, while the Seventh Circuit affirmed the relevant injunction over a dissent by then-Judge Barrett. *See New York v. U.S. Dep't of Homeland Security*, 969 F.3d 42 (2d Cir. 2020); *Cook County v. Wolf*, 962 F.3d 208 (7th Cir. 2020). Although their reasoning differed in some important respects, both courts ultimately concluded that the Rule was not a reasonable interpretation of the INA. *New York*, 969 F.3d at 74-80; *Cook County*, 962 F.3d at 229. The Second Circuit also held that the plaintiffs were likely to prevail in establishing that the Rule is arbitrary and capricious. *New York*, 969 F.3d at 81-86. The injunctions are still not in effect, however, because of the stays that had been issued by the Supreme Court.

As noted, the government has filed petitions for writs of certiorari in the Supreme Court in the Second and Seventh Circuit cases. *See Department of Homeland*

*Security v. New York*, No. 20-449 (S. Ct.); *Wolf v. Cook County*, No. 20-450. The plaintiffs filed their responses to those petitions on December 9, 2020. In each case, the plaintiffs had sought a further extension of time in which to file a response. The government opposed delay on the ground that the filing of a response by December 9 would allow the Supreme Court to consider the matter at its conference of January 8, 2021, and to decide the issue before the Court adjourns for the summer if the Court grants review. The Supreme Court denied the extension, and the petitions have been distributed for consideration at the conference of January 8, 2021.

Two of the district courts overseeing cases discussed above have also issued subsequent rulings barring enforcement of the Rule, but each has been stayed. The district court presiding over the *New York* litigation entered a second preliminary injunction barring enforcement of the Rule during the COVID-19 crisis. The Second Circuit stayed that injunction, holding that the government was likely to prevail in establishing that the district court lacked jurisdiction to issue a second preliminary injunction while the first injunction was on appeal. *See New York v. DHS*, 974 F.3d 210 (2d Cir. 2020). Meanwhile, the district court overseeing the *Cook County* litigation entered a Rule 54(b) partial final judgment vacating the Rule nationwide. The Seventh Circuit stayed that judgment, first through an administrative stay issued the next day, *see* Order, *Wolf v. Cook County*, No. 20-3150 (7th Cir. Nov. 3, 2020), and later through an order that both stayed the judgment and suspended briefing in the Rule 54(b) appeal pending the Supreme Court's evaluation of the government's petition for writ

of certiorari in that case, *see* Order, *Wolf v. Cook County*, No. 20-3150 (7th Cir. Nov. 19, 2020).

In sum, in light of stays entered by the Supreme Court, this Court, and other courts of appeals, the Rule remains in effect nationwide, as it has been for much of the past year.

## ARGUMENT

To obtain a stay of the mandate, a movant "must show that the [certiorari] petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(1). This standard is easily met here.

The government's petition for certiorari in this case will raise substantial questions, including whether the Rule represents a reasonable interpretation of the INA and whether it is arbitrary and capricious. The Supreme Court has twice granted stays of parallel preliminary injunctions presenting those same questions. The Fourth Circuit has explained that the Supreme Court's actions "would have been improbable if not impossible had the government, as the stay applicant, not made a strong showing that it was likely to succeed on the merits." *CASA de Maryland v. Trump*, 971 F.3d 220, 229 (4th Cir. 2020) (quotation marks omitted). And the Supreme Court's issuance of a stay likewise indicates a reasonable probability that the Court will grant certiorari. *See Conkright v. Frommert*, 556 U.S. 1401 (2009) (Ginsburg, J., in chambers). That three judges of this Court have concluded that the government is likely to prevail in this litigation, while three have concluded that plaintiffs are likely to prevail, *see City*

*& County of San Francisco*, 981 F.3d at 753-54, underscores that the legal questions at issue are substantial. So too do the divided opinions of the various other courts of appeals to consider challenges to the Rule. *See supra* pp. 4-5.

This Court also has good cause to stay the mandate. In granting stays pending its dispositions of the government's petitions for writs of certiorari in the Second and Seventh Circuit cases, the Supreme Court has indicated that the Rule should remain in effect until the Supreme Court has had an opportunity to decide whether to review the Rule's validity (and to conduct that review if it so decides). As this Court recently recognized in other litigation arising in a similar posture, those circumstances present good cause to stay the mandate. *See* Order, *Sierra Club v. Trump*, No. 19-17501 (9th Cir. Dec. 30, 2019) (declining to lift a stay of an injunction pending appeal because the Supreme Court's stay of a related injunction "appear[ed] to reflect the conclusion of a majority of that Court that the challenged [action] should be permitted to proceed pending resolution of the merits"); *see also* Order, *Sierra Club v. Trump*, No. 19-17501 (9th Cir. Oct. 26, 2020) (staying mandate after affirming injunction in the same case). By contrast, allowing the district courts' injunctions to go into effect before the Supreme Court has had an opportunity to consider the government's certiorari petition would run counter to the Supreme Court's clear intent. Accordingly, in a similar circumstance, the Seventh Circuit, acting through a panel that included both judges who joined the majority opinion affirming a preliminary injunction, stayed a partial final judgment vacating the Rule pending the Supreme Court's consideration of

the government's petition for certiorari in that case. *See* Order, *Wolf v. Cook County*, No. 20-3150 (7th Cir. Nov. 19, 2020).

Disrupting the status quo at this time is also likely to create needless confusion among immigration officials, the public, and aliens. With a few brief exceptions, *see supra* p. 6, DHS has been applying the Rule nationwide since February 2020. Moreover, the Supreme Court will consider the government's petitions in the Second and Seventh Circuit cases at its January 8, 2021 conference. If the Supreme Court grants the petitions at that conference or shortly thereafter, it likely would issue a decision on the merits by the end of its current Term. Barring DHS from implementing the Rule in plaintiffs' jurisdictions for that period is not likely to alleviate the harms of which plaintiffs complain and is likely to spark confusion regarding the Rule's applicability among the public, aliens, and immigration officials.

If the Supreme Court grants certiorari to consider the validity of the public-charge rule in the Second or Seventh Circuit cases, the government intends to file a petition for a writ of certiorari in this case within 30 days thereafter, requesting that it be held pending the Supreme Court's merits decision. Thus, just as a stay of the injunctions currently pending before the Supreme Court was warranted, a continuation of this Court's stay is warranted here. The government will alert this Court as soon as the Supreme Court acts on the pending petitions in the Second and Seventh Circuit cases.

## CONCLUSION

For the reasons discussed above, this Court should stay the mandate pending the Supreme Court's resolution of the government's petition for a writ of certiorari.

Respectfully submitted,

JEFFREY BOSSERT CLARK
*Acting Assistant Attorney General*

DAVID L. ANDERSON
*United States Attorney*

DANIEL TENNY

*s/ Gerard Sinzdak*
GERARD SINZDAK
JOSHUA DOS SANTOS
JACK STARCHER
*Attorneys, Appellate Staff*
*Civil Division, Room 7242*
*U.S. Department of Justice*
*950 Pennsylvania Avenue NW*
*Washington, DC 20530*
*(202) 514-0718*
*gerard.j.sinzdak@usdoj.gov*

## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation of Circuit Rule 27-1(d) because it contains 2,161 words.

/s/ Gerard Sinzdak

Gerard Sinzdak
Counsel for the United States
gerard.j.sinzdak@usdoj.gov

## CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2020, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. I also hereby certify that the participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

s/ *Gerard Sinzdak*

Gerard Sinzdak
Counsel for the United States
gerard.j.sinzdak@usdoj.gov