20-2537

United States Court of Appeals for the Second Circuit

STATE OF NEW YORK, CITY OF NEW YORK, STATE OF CONNECTICUT, STATE OF VERMONT, MAKE THE ROAD NEW YORK, AFRICAN SERVICES COMMITTEE, ASIAN AMERICAN FEDERATION, CATHOLIC CHARITIES COMMUNITY SERVICES, (ARCHDIOCESE OF NEW YORK), CATHOLIC LEGAL IMMIGRATION NETWORK, INC.,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, DAVID PEKOSKE, in his official capacity as Acting Secretary of the United States Department of Homeland Security, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, KENNETH T. CUCCINELLI, in his official capacity as Acting Director of United States Citizenship and Immigration Services, UNITED STATES OF AMERICA,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR GOVERNMENT APPELLEES: STATES OF NEW YORK, CONNECTICUT, AND VERMONT AND CITY OF NEW YORK

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

BACKGROUND 3

A. The Public Charge Rule 3

B. The First Preliminary Injunction 5

C. The National Emergency Concerning COVID-19 8

1. The COVID-19 pandemic 8

2. The importance of public benefits in responding to the COVID-19 crisis 12

3. The harms imposed by the Rule and the COVID-19-related guidance issued by the Department of Homeland Security 17

D. The Second Preliminary Injunction 21

E. Other Challenges to the Public Charge Rule 24

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT 26

ARGUMENT 31

POINT I

THE DISTRICT COURT HAD JURISDICTION TO ISSUE A NEW PRELIMINARY INJUNCTION, AND IN ANY EVENT APPROPRIATELY ISSUED AN INDICATIVE RULING 31

A. The District Court Had Jurisdiction to Issue A New Injunction Based on New Facts and Circumstances. 31

Page

B. In Any Event, the District Court Had the Authority to Issue An Indicative Ruling. 36

POINT II

THE DISTRICT COURT PROPERLY ISSUED PRELIMINARY RELIEF HALTING THE PUBLIC CHARGE RULE DURING THE NATIONAL EMERGENCY CONCERNING COVID-19 38

A. Government Plaintiffs Are Exceedingly Likely to Succeed on the Merits of Their Challenge to the Rule. 38

B. The Balance of Harms and the Public Interest Warrant Preliminarily Halting the Rule's Implementation During the COVID-19 Pandemic. 40

1. The Public Charge Rule is irreparably harming government plaintiffs and the public during the pandemic. 41

a. The Rule is impeding efforts to mitigate the spread of the virus. 41

b. The Public Charge Rule deters access to public benefits that are necessary to respond to the severe economic crisis caused by COVID-19. 45

c. The alert issued by defendants fails to address the new harms imposed by the Rule during the COVID-19 crisis. 48

2. The harms caused by the Rule during the national pandemic vastly outweigh defendants' interests. 55

3. The district court properly found that nationwide relief is warranted during the pandemic. 56

CONCLUSION 58

TABLE OF AUTHORITIES

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Adams v. City of Chicago,
135 F.3d 1150 (7th Cir 1998) 32

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971 F.3d 220 (4th Cir. 2020) 26

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PRELIMINARY STATEMENT

The United States District Court for the Southern District of New York (Daniels, J.) issued a preliminary injunction temporarily halting implementation of the Public Charge Rule during the national emergency arising from the spread of coronavirus disease 2019 (COVID-19). This Court should affirm that time-limited relief given both its recent conclusion that the Public Charge Rule is likely unlawful, and the district court's careful factual findings about the Rule's exacerbation of the public health and economic crises caused by COVID-19.

This appeal concerns the district court's second preliminary injunction regarding the Rule. This Court recently affirmed the first preliminary injunction in substance, based on its determination that the Rule was likely invalid under the Administrative Procedure Act, and modified only the injunction's geographical scope, limiting it to the three States that brought this action. Although the Supreme Court stayed the first injunction in January 2020, it later clarified that its stay did not preclude government plaintiffs from seeking relief from the district court based on the COVID-19 crisis, which the Court had not considered in issuing its stay.

The district court did not abuse its discretion in issuing the second preliminary injunction at issue here. The COVID-19 pandemic, which began only after defendants appealed from the first injunction, has now afflicted more than 18 million people in the United States and caused both a public-health crisis and severe economic downturn. The unrebutted evidence before the court demonstrated that the Rule has impeded immigrants' access to essential healthcare and economic benefits, leaving them (and others who come in contact with them) vulnerable to the harms created by COVID-19, and interfering with government plaintiffs' efforts to control the spread of the disease and help our communities weather this crisis. Under these unprecedented circumstances, the Court should affirm the second injunction.

Contrary to defendants' arguments, the district court had jurisdiction to issue the second, pandemic-based preliminary injunction while the first, merits-based injunction was pending on appeal. The district court did not revisit any of the issues then being considered by this Court. Rather, it appropriately considered only whether newly arising facts about the COVID-19 crisis warranted equitable relief beyond the relief previously ordered and then stayed. In any event, the

district court's simultaneous issuance of an indicative ruling under Federal Rule of Civil Procedure 62.1 would allow this Court to resolve any jurisdictional problem with a remand.

BACKGROUND

A. The Public Charge Rule

Under the Immigration and Nationality Act (INA), noncitizens who have lawfully entered the country may adjust their status to legal permanent resident (LPR) if they are "admissible." 8 U.S.C. § 1255(a). One ground for inadmissibility is that that applicant is "likely at any time to become a public charge," *id.* § 1182(a)(4). The Public Charge Rule at issue here modified the criteria used by the Department of Homeland Security (DHS) for determining when an LPR applicant is inadmissible on that ground. *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019).

"Public charge" under federal immigration law is a term of art that has developed a settled meaning after more than a century of usage. *See New York v. United States Dep't of Homeland Sec.*, 969 F.3d 42, 65-72 (2d Cir. 2020). Until the issuance of the Rule, "public charge" had never included employed persons who receive modest or temporary amounts of

supplemental benefits—i.e., government benefits designed to promote health or upward mobility, and to assist employed or employable persons through a short-term emergency, rather than to provide basic subsistence. *See id.* at 65-71. Instead, from its inception, the term "public charge" has been limited to individuals who do not work and are consequently primarily dependent on the government for long-term subsistence. *See id.* Congress incorporated this settled understanding into the public-charge statute each time it reenacted the provision. *See id.* at 71-72.

In August 2019, DHS issued the Public Charge Rule. The Rule radically alters the meaning of "public charge" to include, for the first time, an immigrant likely to receive very small amounts of public benefits. The benefits to be counted for this purpose include, for the first time, supplemental benefits such as federally funded Medicaid, Supplemental Nutrition Assistance Program (SNAP) benefits, and Section 8 housing assistance. 84 Fed. Reg. at 41,501. The Rule deems an immigrant to be a "public charge" based on very short-term receipt of such benefits—specifically, receipt of "one or more public benefits" during "more than 12 months in the aggregate within any 36-month period" during his life. *Id.* The Rule further provides that "receipt of two benefits in one month

counts as two months." *Id.* Thus, for example, a person who receives housing assistance, food stamps, and Medicaid for a period of four months due to a sudden, short-term emergency, such as losing a job or falling ill, would receive twelve months of benefit use in the aggregate and be rendered a public charge under the Rule. *See id.*

B. The First Preliminary Injunction

In October 2019, the district court entered its first preliminary injunction, halting the Rule's implementation nationwide.[1] (Joint Appendix (J.A.) 265-267.) The court determined that the Rule is likely invalid under the APA. (J.A. 278-284.) The district court further determined that the balance of harms and public interest warranted preliminary relief, particularly given that the Rule "will expose individuals to economic insecurity" and "health instability." (J.A. 286-287.)

This Court denied defendants' request to stay the first injunction pending appeal. On January 27, 2020, the Supreme Court issued a stay pending the timely filing of a petition for certiorari and the

[1] The district court entered a preliminary injunction in government plaintiffs' lawsuit and also in a separate lawsuit brought by private organizations. The two lawsuits have since been consolidated.

Supreme Court's resolution of such petition. (J.A. 327.) Following the Supreme Court's stay, defendants began enforcing the Rule nationwide on February 24, 2020.

On August 4, 2020, this Court affirmed the district court's first preliminary injunction, as modified to apply only to the plaintiff States' jurisdictions. *New York*, 969 F.3d at 88-89. The Court held that government plaintiffs are likely to succeed on the merits of their claims that the Rule is (a) contrary to the INA and (b) arbitrary and capricious. The Rule is likely contrary to the INA, the Court determined, because of its sharp departure from "the settled meaning of 'public charge'" that Congress ratified when it enacted the public-charge provision. *Id.* at 74. Under that settled meaning, "public charge" was limited to "those non-citizens who were likely to be unable to support themselves in the future and to rely on the government for subsistence." *Id.* The Rule, by contrast, would sweep much more broadly, relying solely on applicants' likely short-term receipt of certain supplemental public benefits to render them inadmissible, even when they are indisputably able to work and support themselves. *Id.* at 74-80.

This Court further held that the Rule is likely arbitrary and capricious because DHS failed to adequately explain both (a) its departure from over a century of settled understanding of the term "public charge," and (b) its decision to expand the list of public benefits that would be considered as part of the admissibility determination. *Id.* at 80-86.

On the remaining preliminary-injunction factors, the Court agreed with the district court that the equities and public interest weighed in favor of a preliminary injunction. *Id.* at 86-87. As defendants had acknowledged—and the evidence confirmed—the Rule will likely result in "[i]ncreased rates of poverty and housing instability" and "[w]orse health outcomes"—including "[i]ncreased prevalence of communicable diseases." *Id.* at 87 (quotation marks omitted). The Court further concluded that "DHS's inability to implement a [public-charge] standard that is as strict as it would like" did not outweigh the wide-ranging and irreparable harms that the Rule imposes on government plaintiffs and the public. *Id.*

The Rule nevertheless remained in effect, pursuant to the Supreme Court's stay of the first injunction. On October 7, 2020, defendants filed a petition for a writ of certiorari to review this Court's decision affirming the first preliminary injunction. *See* Pet. for a Writ of Certiorari,

Department of Homeland Sec. v. New York, No. 20-449. Government plaintiffs opposed the petition, which remains pending as of the date of this brief.

C. The National Emergency Concerning COVID-19

1. The COVID-19 pandemic

After defendants appealed from the first preliminary injunction, and shortly after the Supreme Court stayed that injunction, COVID-19 began sweeping across the United States. The spread of COVID-19 has thrown the country into an unprecedented crisis with devastating consequences for public health and the economy.

COVID-19 has exacted—and continues to inflict—a staggering toll on government plaintiffs and their residents. The novel coronavirus can cause life-threatening respiratory illness marked by fever, coughing, and difficulty breathing. Centers for Disease Control & Prevention (CDC), *COVID-19 (Coronavirus Disease): Symptoms* (last updated Dec. 22, 2020) (internet).[2] In the United States, more than 18.9 million individuals have

[2] For sources available on the internet, full URLs appear in the Table of Authorities.

suffered confirmed cases of COVID-19, and at least 330,000 people have died from the disease. Johns Hopkins Univ. & Medicine, *COVID-19 Dashboard: Global Map* (last updated Dec. 26, 2020) (internet). Government plaintiffs and their residents have been particularly hard hit. In New York, for example, the virus has infected at least 914,522 people and killed at least 29,396 people. New York Dep't of Health, *NYSDOH COVID-19 Tracker* (last updated Dec. 26, 2020) (internet); New York Dep't of Health, *Fatalities by County* (last updated Dec. 26, 2020) (internet).[3]

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* 50 U.S.C. § 1601 et seq. The governors of each of the plaintiff States, and the mayor of plaintiff New York City, declared public-health emergencies in their respective jurisdictions based on the COVID-19 pandemic. 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.

[3] *See Connecticut Daily COVID-19 Update for 12/24/2020* (Dec. 24, 2020) (internet) (172,743 COVID-19 cases in Connecticut) (internet).

10, 2020); Vermont Exec. Order No. 01-20 (2020). In government plaintiffs' jurisdictions, state officials and agencies have taken and continue to take drastic measures to slow COVID-19's spread, such as requiring nonessential employees to work from home, closing some businesses, and imposing social-distancing and mask requirements on other businesses.

Although some nonessential businesses have reopened in government plaintiffs' jurisdictions, and although extraordinary efforts have reduced the numbers of deaths and cases that were previously being suffered in government plaintiffs' jurisdictions, the ongoing pandemic continues to impose enormous consequences for government plaintiffs and their residents. In particular, the government plaintiffs' jurisdictions are already experiencing a second wave of COVID-19 infections, with the numbers of confirmed cases, hospitalizations, and deaths beginning to rise sharply again. *See* Joseph Goldstein, *This Is How the Outbreak Is Resurging Across New York City*, N.Y. Times (Nov. 20, 2020) (internet).[4] The risks to public health and the economy in government plaintiffs' jurisdictions

[4] *See also* Dave Altimari, *As the second wave of COVID-19 tears through Connecticut, coronavirus deaths aren't concentrated in nursing homes this time; they're everywhere*, Hartford Courant (Nov. 15, 2020) (internet).

thus remain high—as demonstrated by the high number of COVID-19 cases currently overwhelming hospital systems in other States. *See* Reed Abelson, *Covid Overload: U.S. Hospitals Are Running Out of Beds for Patients*, N.Y. Times (Nov. 27, 2020) (internet); Heather Hollingsworth & Marion Renault, *One-day US deaths top 3,000, more than D-Day or 9/11*, AP News (Dec. 10, 2020) (internet).

It is thus critically important for government plaintiffs to maintain and update their COVID-19 policies and continue encouraging their residents to access healthcare and other public benefits that are essential to preventing or mitigating the harms posed by COVID-19. For example, many businesses remain shuttered, further restrictions on non-essential businesses are being reimposed, and those businesses that are open remain subject to stringent health and safety restrictions.[5] Hospitals in government

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[5] *See, e.g.*, Empire State Development, *Essential Business Guidance Related to Determining Whether A Business Enterprise Is Subject To a Workforce Reduction Under Executive Order 202.68, Related to New York's Cluster Action Initiative To Address COVID-19 Hotspots* ("*Hotspots Guidance*") (last updated Dec. 15, 2020) (internet); Jennifer Millman, *NYC Indoor Dining Shutters Monday; Winter Advisory Issued to Curbside Restaurants*, NBC New York (Dec. 13, 2020) (internet); New York Office of the Governor, *Reopening New York*: *Curbside and In-Store Pickup Retail Guidelines for Employers and Employees* (internet) (mandating

plaintiffs' jurisdictions have been ordered to increase capacity to prepare for further surges of COVID-19 cases. Orion Rummler, *Cuomo orders emergency hospital protocols as COVID capacity dwindles*, Axios (Nov. 30, 2020) (internet). And dangerously high rates of infection in many other States continue to pose risks to government plaintiffs and their residents, given the highly infectious nature of the virus and the practical difficulties in enforcing mandatory quarantine orders for each traveler arriving from these States. *See* New York Dep't of Health, Office of the Comm'r, *Interim Guidance for Quarantine Restrictions on Travelers Arriving in New York State Following Out of State Travel* (Nov. 3, 2020) (internet).

2. 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* CDC, *Coronavirus Disease 2019 (COVID-19): How to Protect Yourself and Others* (last updated Nov. 27, 2020) (internet). Testing for the novel coronavirus and medical treatment for

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physical distancing, reduced capacity, protective equipment, and disinfection protocols).

COVID-19 are critically important to slowing infection rates, preserving hospital capacity and medical equipment, and saving lives. (J.A. 357, 402-411.) 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. (J.A. 352, 403-404, 409, 411.) *See* U.S. Dep't of Health & Human Servs., Nat'l Inst. on Aging, *Why COVID-19 testing is the key to getting back to normal* (Sept. 4, 2020) (internet) (testing "enables individuals to isolate themselves—reducing the chances that they will infect others and allowing them to seek treatment earlier"). 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. (J.A. 397, 404, 409, 411, 460-461.)

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. (J.A. 402-403, 406-409.) *See* Cynthia Cox et al., *Five Things to Know about the Cost of COVID-19 Testing and Treatment*, Kaiser Family Found. (May 26, 2020) (internet) ("Many

uninsured individuals worry about being able to pay medical bills if they get sick, and forgo or delay seeking care as a result."). A recent report from a nonprofit organization that analyzes healthcare costs estimated that the median charge for hospitalization of a COVID-19 patient ranged from $34,662 for the 23-30 age group to $45,683 for the 51-60 age group. FAIR Health, *Key Characteristics of COVID-19 Patients* 2, 20-21 (July 14, 2020) (internet). And the cost of treatment will be higher for patients who suffer more severe symptoms or require longer hospital stays. *See* CDC, *COVID-19 (Coronavirus Disease): Clinical Care Guidance* (last updated Dec. 8, 2020) (internet) (median length of hospitalization among severely ill COVID-19 survivors ranges from ten to thirteen days).

Many immigrants residing in government plaintiffs' jurisdictions and in other jurisdictions are highly vulnerable to COVID-19 because they work in industries that have been deemed "essential" and thus have continued to operate during the crisis. For example, executive orders in New York, Connecticut, and Vermont that directed residents to work from home or imposed capacity restrictions on businesses often do not apply to workers or businesses in essential sectors such as healthcare, grocery stores, food and retail delivery, building maintenance, farms and

agriculture, and sanitation. *See Hotspots Guidance*, *supra*; Connecticut Exec. Order No. 7H § 1 (2020); Vermont Exec. Order No. 01-20, add. 6 (2020). Because immigrants comprise 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 disinfecting public spaces, and preparing or delivering food and supplies to other residents who are required to stay at home. (*See* J.A. 374-375, 397.) 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* J.A. 352, 403-404, 409, 411.)

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* J.A. 411-413.) Approximately 10.74 million individuals were unemployed in November 2020. Bureau of Labor Stats., U.S. Dep't of Labor, *The Employment*

Situation—November 2020 (Dec. 4, 2020) (internet). The unemployment rate in government plaintiffs' jurisdictions has steeply increased due to the pandemic. In New York, for example, the unemployment rate in November 2020 was 8.4 percent, more than twice the 3.9 percent rate a year earlier. *See* Bureau of Labor Stats., U.S. Dep't of Labor, *Local Area Unemployment Statistics: Over-the-Year Change in Unemployment Rates for States* (Dec. 18, 2020) (internet). Immigrant workers, particularly in the hospitality and service industries, have been disproportionately impacted by layoffs and furloughs. (*See, e.g.*, J.A. 466.)

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* J.A. 411-413.) 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* J.A. 412-413.) 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, Food & Nutrition Serv., *Building a*

Healthy America: A Profile of the Supplemental Nutrition Assistance Program 1, 3 (Apr. 2012) (internet). 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 enacted by Congress. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2201(a), 134 Stat. 281, 335 (2020).

3. The harms imposed by the Rule and the COVID-19-related guidance issued by the Department of Homeland Security

As DHS has acknowledged, *e.g.*, 83 Fed. Reg. 51,114, 51,270 (Oct. 10, 2018), 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 Rule came into effect following the Supreme 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. (J.A. 392-394, 475-476.) *See also* Caitlin Dickerson, *Undocumented and Pregnant: Why Women Are Afraid to Get Prenatal Care*, N.Y. Times (last updated Nov. 27, 2020) (internet); Jeremy Barofsky et al., *Spreading Fear: The Announcement of the Public Charge Rule Reduced Enrollment in Child Safety-Net Programs*, Health Affairs (Oct. 2020) (internet).

The Rule's impacts have become particularly acute as the COVID-19 crisis has escalated. Immigrants have been deterred from seeking COVID-19 testing and treatment and the health benefits that cover these critical services. (*See* J.A. 351, 364-365, 392-393, 460-461, 467, 475-476, 484, 499-500, 502-503, 514.) And 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. (J.A. 385-386, 475-477, 483-484.) The 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 forgo using other public benefits not covered by the Rule. (J.A. 392-393, 475-476, 502-503.)

As a result, on March 6, the Attorneys General of the government 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 Rule given the harms to public health from implementing the Rule during the COVID-19 crisis. (J.A. 338-341; *see also* J.A. 342-344 (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 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. (J.A. 334.) 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." (J.A. 334.)

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 government plaintiffs' residents recover from the current economic crisis. Thus, a noncitizen 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." (J.A. 334.)

D. The Second Preliminary Injunction

In April 2020, government plaintiffs filed a motion asking the Supreme Court to temporarily lift or modify its stay of the first preliminary injunction, or to clarify that the stay did not preclude government plaintiffs from seeking new relief from the district court due to the COVID-19 outbreak. 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 Sec. v. New York*, No. 19A785, 2020 WL 1969276, at *1 (U.S. Apr. 24, 2020) (mem.) (reprinted at J.A. 332).

Government plaintiffs, joined by the organizational plaintiffs, accordingly returned to the district court and sought a second, time-limited preliminary injunction against further implementation of the Rule during the COVID-19 national emergency declared by the President. Government plaintiffs submitted extensive evidence—which defendants never rebutted—demonstrating that the Rule is severely impeding efforts to mitigate the dire health and economic harms that the pandemic is inflicting on government plaintiffs, their residents, and the public.

Based on this new evidence, the district court issued a second preliminary injunction halting implementation of the Rule nationwide during the COVID-19 national emergency. (Special Appendix (S.A.) 18-31.)

First, the district court determined that it had jurisdiction to issue a new injunction. As the court explained, "a new, narrowly tailored" injunction based on "new, materially different evidence" did not disturb the first injunction and thus did not interfere with the issues that were then being reviewed in defendants' appeal from the first injunction. (S.A. 20.) The court also stated in the alternative that, if it lacked jurisdiction, its order would constitute an indicative ruling under Federal Rule of Civil Procedure 62.1. (S.A. 31.) Under that rule, a district court that lacks jurisdiction because of the pendency of an appeal may issue a statement that it would grant relief if the matter were remanded to it by the circuit court. *See* Fed. R. Civ. P. 62.1(a).

Second, the court adhered to its prior conclusion, subsequently affirmed by this Court, that government plaintiffs are likely to succeed on the merits of their claims that the Rule is unlawful and arbitrary and capricious. (S.A. 22.)

Third, the court found that the balance of harms and public interest weighed heavily in favor of preliminarily halting the Rule during the national COVID-19 emergency. (S.A. 22-29.) The court found that the Rule is deterring immigrants and their family members from using publicly funded healthcare, seeking testing and treatment for COVID-19, and obtaining treatment for other medical conditions that increase the risk of severe symptoms from COVID-19. These deterrent effects, the court determined, impede efforts to mitigate the disease's spread and increase the risk of infection for all of government plaintiffs' residents. The court found that the Rule was also causing many immigrants to forebear from temporarily using supplemental benefits to weather the economic crisis triggered by COVID-19. And the court concluded that defendants' general interest in implementing the Rule "fails to measure up to the gravity of this global pandemic that continues to threaten the lives and economic well-being" of government plaintiffs' residents. (S.A. 28.)

On August 12, 2020, Judge Hall issued an administrative stay limiting the second preliminary injunction's application to government plaintiffs' jurisdictions. On September 11, this Court stayed the second

preliminary injunction pending appeal, thereby allowing the Rule to take affect again in government plaintiffs' jurisdictions. (J.A. 566-577.) The Court reasoned that it had "doubt" about the district court's jurisdiction to issue the second injunction while the appeal from the first injunction was pending and about the nationwide scope of the second injunction. (J.A. 574.) The stay order did not mention the indicative ruling that the district court had issued simultaneously with its preliminary injunction.

E. Other Challenges to the Public Charge Rule

Three other courts of appeals have addressed the likely validity of the Rule. The Seventh and Ninth Circuits have agreed with this Court that the Rule is likely unlawful. A panel of the Fourth Circuit originally held otherwise, but the full court has now granted en banc review, thereby vacating the panel decision. No other court has addressed a request to halt the Rule during the national emergency concerning the COVID-19 pandemic.

Seventh Circuit: In *Cook County v. Wolf*, the Seventh Circuit affirmed a preliminary injunction against implementation of the Rule, concluding that the Rule is likely contrary to law and arbitrary and capricious. 962 F.3d 208 (7th Cir. 2020), *cert pet. filed*, No. 20-450 (S. Ct.

Oct. 7, 2020). That preliminary injunction remains stayed pending the Supreme Court's resolution of a pending petition for certiorari. *Wolf v. Cook County, Ill.*, 140 S. Ct. 681, 681 (2020) (Ginsburg, Breyer, Sotomayor, and Kagan, JJ., dissenting).

Since that decision, the U.S. District Court for the Northern District of Illinois has granted summary judgment to the *Cook County* plaintiffs and entered a final judgment under Federal Rule of Civil Procedure 54(b) vacating the Public Charge Rule. *Cook County, Ill. v. Wolf*, No. 19-6334, 2020 WL 6393005, at *7 (N.D. Ill. Nov. 2, 2020). DHS's appeal from that judgment is pending; in the meantime, the Seventh Circuit granted DHS's request to stay the judgment pending appeal. Order, *Cook County, Ill. v. Wolf*¸ No. 20-3150 (7th Cir. Nov. 19, 2020), ECF No. 21.

Ninth Circuit: In *City & County of San Francisco v. USCIS*, the Ninth Circuit also affirmed a preliminary injunction against implementation of the Rule. 981 F.3d 742 (9th Cir. 2020). Like this Court and the Seventh Circuit, the Ninth Circuit held that the Rule is likely contrary to law and arbitrary and capricious. *Id.* at 756-62.

Fourth Circuit: In *Casa de Maryland, Inc. v. Trump*, a panel of the Fourth Circuit initially reversed a preliminary injunction against

implementation of the Rule, holding that "the Rule is a permissible interpretation of the public charge provision" in the INA. 971 F.3d 220, 230 (4th Cir. 2020). Recently, however, the full court granted en banc review and vacated this panel decision. Order, *Casa de Maryland*, No. 19-2222 (4th Cir. Dec. 3, 2020), ECF No. 147; *see* 4th Cir. R. 35(c) ("Granting of rehearing en banc vacates the previous panel judgment and opinion . . . .").

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

This Court reviews the district court's issuance of preliminary relief for abuse of discretion. *Goldman Sachs & Co. v. Golden Empire Schs. Fin. Auth.*, 764 F.3d 210, 214 (2d Cir. 2014). The district court's legal conclusions are reviewed de novo, its factual findings for clear error, and its ultimate decision for abuse of discretion. *County of Nassau, N.Y. v. Leavitt*, 524 F.3d 408, 414 (2d Cir. 2008). Here, the district court properly exercised its discretion in issuing new, time-limited preliminary relief to halt the Public Charge Rule's implementation during the national emergency caused by COVID-19.

I. The district court had jurisdiction to issue a new preliminary injunction while the appeal from the first preliminary injunction was pending; and to the extent that it lacked jurisdiction, it appropriately issued an indicative ruling under Federal Rule of Civil Procedure 62.1 instead.

A. The district court properly issued additional preliminary relief based on new facts that did not exist and therefore could not have been presented to this Court or to the Supreme Court during the appeal and stay application addressing the first injunction. The second injunction is based on the new and unprecedented circumstances presented by the COVID-19 pandemic. These circumstances were not, and could not have been, considered by this Court during the prior appeal or by the Supreme Court when it stayed the first injunction. Accordingly, the second injunction did not interfere with the Court's adjudication of the first appeal.

B. Even if the district court lacked jurisdiction, it appropriately issued an alternative indicative ruling under Federal Rule of Civil Procedure 62.1. That rule was designed for precisely the situation where a district court may lack jurisdiction because of a pending appeal: under the rule, the district court is authorized to issue a statement that it would

grant relief if the appellate court remands for that purpose. Defendants do not dispute that the district court properly followed that procedure here. Accordingly, if the Court were to determine that the district court lacked jurisdiction, the Court should remand to the district court to reissue the injunction while retaining jurisdiction over the appeal.

II. The district court acted well within its discretion in granting preliminary relief to respond to the unique and pressing harms of the COVID-19 pandemic. Government plaintiffs are exceedingly likely to succeed on the merits of their challenge to the Rule, and the balance of harms and public interest tip decisively in favor of time-limited relief.

A. This Court's opinion affirming the district court's first injunction confirms that government plaintiffs are extremely likely to succeed on the merits of their challenge to the Rule. The Supreme Court's stay of the first injunction did not expressly determine otherwise, and was in any event based on the incomplete record and briefing that attends a stay application. This Court implicitly recognized as much when it issued its opinion affirming the first injunction after the Supreme Court stay had already issued.

B. The balance of harms and public interest amply support the second injunction, and rest on circumstances that were not previously before this Court or the Supreme Court. Unrebutted evidence below demonstrated that the Rule's implementation during the pandemic is causing substantial harm to public health by deterring immigrants and their families from using public healthcare benefits like Medicaid. Without such benefits, many immigrants are declining to obtain testing or treatment for COVID-19 or related conditions—raising the risk that they will inadvertently spread the virus to others. The Rule is also deterring immigrants and their families from using publicly funded nutrition benefits that are designed to temporarily assist employed or employable individuals who lose income or jobs during an emergency such as the current COVID-19 crisis. This deterrent effect harms government plaintiffs' residents and economies during a time of economic crisis.

Defendants' generic interest in continuing to implement the Rule pales in comparison to these extensive public health and economic harms. Indeed, this Court has already held that defendants' interest in enforcing its preferred policy does not warrant implementing the Rule during the pendency of this litigation.

The Supreme Court's previously issued stay does not alter this analysis for two independent reasons. First, as noted above, the Court did not explain the basis for its stay, and in any event any conclusions reached by that Court were based on the preliminary and incomplete record and briefing that attend a stay application. This Court implicitly recognized as much when it affirmed the first injunction and held, after the Supreme Court issued its stay, that the balance of the equities and the public interest warrant preliminarily halting the Rule. Second, no matter what import the Supreme Court's stay might have had when it originally issued, there is no question that the Court did not consider the overwhelming impact of the new and unprecedented harms caused by the Rule during the pandemic, or the effect of those harms on the balance of the equities and the public interest.

C. The nationwide scope of the second injunction is proper given the nature of the pandemic, in which the virus easily and rapidly spreads across jurisdictional lines. Moreover, the injunction does not conflict with any other extant decisions by the courts of appeals, which have all determined that the Rule is likely unlawful and that preliminary relief is warranted.

ARGUMENT

POINT I

THE DISTRICT COURT HAD JURISDICTION TO ISSUE A NEW PRELIMINARY INJUNCTION, AND IN ANY EVENT APPROPRIATELY ISSUED AN INDICATIVE RULING

Defendants challenge the district court's jurisdiction to issue the second preliminary injunction (Br. for Appellants (Br.) 19-24), but their arguments are incorrect. The district court had authority to issue a new injunction based on the new and substantially changed circumstances presented by the unprecedented COVID-19 pandemic. In any event, defendants' jurisdictional arguments ignore the district court's simultaneous issuance of an indicative ruling under Federal Rule of Civil Procedure 62.1, which authorizes such a ruling precisely when a district court may lack jurisdiction due to a pending appeal.

A. The District Court Had Jurisdiction to Issue A New Injunction Based on New Facts and Circumstances.

An interlocutory appeal "only divests the district court of jurisdiction respecting the questions raised and decided in the order" on appeal. *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1350 (2d Cir. 1989). Accordingly, when a court of appeals is considering

an interlocutory appeal from an order granting a preliminary injunction, the district court lacks jurisdiction to vacate or alter that injunction in ways that would undermine or interfere with the orderly disposition of the pending appeal. *See Ideal Toy Corp. v. Sayco Doll Corp.*, 302 F.2d 623, 625 (2d Cir. 1962); Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3949.1 (5th ed. Oct. 2020 update) (Westlaw). But the case otherwise proceeds in the district court, *see Terry*, 886 F.2d at 1350, and the district court thus retains jurisdiction to issue additional injunctive relief based on new circumstances not addressed in the pending appeal. *See International Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Eastern Air Lines, Inc.*, 847 F.2d 1014, 1019 (2d Cir. 1988) (affirming issuance of injunction in district court based on new development while district court's previous denial of injunctive relief and dismissal of the plaintiff's complaint was pending appeal); *Adams v. City of Chicago*, 135 F.3d 1150, 1153 (7th Cir 1998) (plaintiffs may seek new preliminary injunction based on "new evidence" pending appeal from earlier denial of preliminary injunction); Wright & Miller, *supra*, § 3949.1 (interlocutory appeal "does not oust district-court jurisdiction to continue

with proceedings that do not threaten either the appeal's orderly disposition or its raison d'etre").[6]

Here, the district court properly found that it had jurisdiction to issue a new, time-limited preliminary injunction based on newly arising facts and procedural circumstances, notwithstanding the pending appeal from the first preliminary injunction. The second preliminary injunction is by no means "virtually identical" to the first injunction (Br. at 20 (quotation marks omitted)). Nor did the second injunction reconsider the first injunction and provide additional reasons to justify that preexisting relief. (*See* J.A. 575.) To the contrary, the second injunction was premised

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[6] Defendants contend (Br. at 22-23), and this Court's order staying the second injunction stated (J.A. 575-576), that *International Ass'n of Machinists* provides only that a district court may issue injunctive relief to preserve the status quo during the pendency of an appeal. But the opinion in *International Ass'n of Machinists* is not so limited. Indeed, the Court specified that the preliminary injunction issued in that case did more than preserve the status quo while the Court considered a preexisting appeal from the denial of preliminary relief. 847 F.2d at 1016, 1018. The Court nonetheless addressed and affirmed the preliminary injunction based on the parties' agreement to treat the injunction as a new action. *Id.* at 1018-19. Although the parties did not reach such an agreement here, *International Ass'n of Machinists* demonstrates that there are circumstances when a district court may issue preliminary relief based on new facts despite the pendency of an appeal concerning a prior motion for a preliminary injunction.

on new facts and circumstances that were not, and could not have been, at issue in the first injunction that was under review by this Court during the prior appeal.

In particular, the second injunction was based on the unique harms posed by the COVID-19 crisis—harms that were not and could not have been addressed by the initial preliminary injunction or the appeal from that injunction. The COVID-19 pandemic began after the district court issued its first injunction and after the Supreme Court allowed the Rule to take effect by staying the first injunction. The unprecedented and drastically changed circumstances caused by both the pandemic and the Rule's implementation during the pandemic thus were not—and could not have been—considered by the district court, and were not part of the record before this Court in the first appeal.

New procedural developments also supported the second injunction. When the COVID-19 pandemic arose soon after the Supreme Court stayed the first injunction, government plaintiffs requested that the Supreme Court lift or modify its stay. Although the Court declined to do so, its order specifically recognized that government plaintiffs could ask the district court to consider issuing additional relief to address the new

circumstances presented by the Rule's implementation during the pandemic. (*See* J.A. 332.) Faced with this new and unusual development, the district court properly concluded that it was the proper forum to address in the first instance the novel question of whether the Rule should be temporarily halted during the COVID-19 national emergency.

Defendants are simply incorrect in asserting that the second injunction was based "entirely on the merits arguments that were already at issue in the previous appeal" (Br. at 2). Since the legal merits of the substantive challenge to the Rule were still the subject of appellate proceedings, the district court appropriately did not issue any new ruling on those arguments, and adhered to its prior ruling on plaintiffs' legal objections to the Rule. Instead, the second preliminary injunction was based on an entirely new set of circumstances affecting the balance of equities and the public interest—circumstances that were not and could not have been presented to this Court or to the Supreme Court during the prior appeal. As a result, the second injunction in no way undermined or interfered with the then-pending prior appeal from the first injunction. Indeed, this Court's subsequent adjudication of the first appeal confirms

that the second injunction did not upset the "orderly disposition" of that appeal.[7] *See* Wright & Miller, *supra*, § 3949.1.

B. In Any Event, the District Court Had the Authority to Issue An Indicative Ruling.

Alternatively, if the district court lacked jurisdiction to issue the second injunction, it nonetheless had authority to issue an indicative ruling as an alternative. *See* Fed. R. Civ. P. 62.1. Defendants' jurisdictional arguments entirely ignore this indicative ruling, and the Court's order staying the second injunction did not address it either. But the district court plainly had authority to issue an indicative ruling here. The Federal Rules of Civil Procedure provide a specific procedure to address precisely the situation where a district court might lack jurisdiction to address a party's motion because of a pending appeal. *See* Fed. R. Civ. P. 62.1 Advisory Committee's Notes to 2009 Adoption (Westlaw) (Rule 62.1 applies when district court does not have "authority to grant relief without

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[7] To be sure, in its order staying the second injunction pending appeal, this Court stated that its affirmance of the first preliminary injunction did not "retroactively cure" any jurisdictional defect in the second injunction. (J.A. 576.) But the orderly adjudication of the first appeal provides further evidence that the second injunction did not interfere with the prior appeal at all.

appellate permission"). In those circumstances, Rule 62.1 gives the district court clear authority to issue an indicative ruling stating that it "would grant" the relief requested if the court of appeals remands for that purpose. *See, e.g.*, *In re Puda Coal Sec. Inc., Litig.*, No. 11-cv-2598, 2014 WL 715127, at *2-3 (S.D.N.Y. Feb. 21, 2014) (issuing indicative ruling). And this procedure works in tandem with Federal Rule of Appellate Procedure 12.1, which authorizes the appellate court to remand the matter for the district court to issue the ruling it indicated it would make while retaining appellate jurisdiction over the case. *See* Fed. R. App. P. 12.1.

The district court followed these procedures here. In response to defendants' jurisdictional objection to the second preliminary injunction, the district court expressly stated that it was issuing an alternative indicative ruling with the factual findings and legal conclusions that it would issue if this Court were to remand for that purpose. (S.A. 31.) Accordingly, if this Court concludes that the district court lacked jurisdiction to issue the second injunction when it did, this Court should remand for the district court to issue the second injunction now, while retaining jurisdiction over this appeal so that the Court can quickly resolve the appeal as soon as the district court reissues its order. *See, e.g.*, *United*

States v. Maldonado-Rios, 790 F.3d 62 (1st Cir. 2015) (remanding for district court to issue order while retaining jurisdiction over appeal).

POINT II

THE DISTRICT COURT PROPERLY ISSUED PRELIMINARY RELIEF HALTING THE PUBLIC CHARGE RULE DURING THE NATIONAL EMERGENCY CONCERNING COVID-19

The party seeking preliminary relief must show that the balance of the harms and the public interest favor such relief, and that it is likely to succeed on the merits. *Kelly v. Honeywell Int'l, Inc.*, 933 F.3d 173, 183-84 (2d Cir. 2019). Here, the district court properly found that all four factors weigh in favor of a new, time-limited preliminary injunction to halt the Rule's implementation during the national emergency caused by COVID-19. This Court should thus affirm the second injunction.

A. Government Plaintiffs Are Exceedingly Likely to Succeed on the Merits of Their Challenge to the Rule.

Government plaintiffs are likely to succeed on the merits of their legal claims because this Court already has determined that the Rule is likely contrary to law and arbitrary and capricious. *New York*, 969 F.3d at 80-86. Moreover, this Court already held that the balance of the equities and public interest supported halting the Rule, based on a record

compiled before the COVID-19 crisis began. *Id.* at 86-87. This Court's binding decision thus easily satisfies the likelihood-of-success factor.

Defendants misplace their reliance (Br. at 24-26) on the Supreme Court's stay of the district court's first injunction. The Supreme Court's stay—issued after truncated briefing on an expedited schedule and without oral argument—cannot plausibly be interpreted as a definitive adjudication on the merits; indeed, the stay says nothing about the merits. And a stay is "often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). Here, there is no question that the Supreme Court's stay was issued before the COVID-19 pandemic began. The stay thus could not possibly have reflected the Court's considered judgment about whether injunctive relief might be warranted in light of the unprecedented and unique harms imposed by implementation of the Rule during the COVID-19 national emergency.

More fundamentally, this Court has already necessarily rejected defendants' arguments about the import of the stay on the likelihood-of-success factor. This Court issued its decision finding the Rule unlawful *after* the Supreme Court issued its stay of the first preliminary injunction.

And both the Seventh and Ninth Circuits have subsequently issued similar rulings. These courts thus necessarily decided that the Supreme Court's stay does not prevent a court from determining, based on full briefing and consideration of the record before it, that preliminary relief from the Rule is appropriate.

Defendants also misplace their reliance on both the Ninth Circuit's stay decision and the decision by a Fourth Circuit panel stating that the Rule is likely lawful. (Br. at 32.) Both of these decisions have since been superseded: after full merits briefing and argument, the Ninth Circuit ultimately determined that the Rule is likely unlawful, and the Fourth Circuit has granted en banc review, thus vacating the panel decision. See *supra* at 24-26.

B. The Balance of Harms and the Public Interest Warrant Preliminarily Halting the Rule's Implementation During the COVID-19 Pandemic.

The second preliminary injunction should be affirmed, notwithstanding the Supreme Court's stay of the first injunction pending its determination of the petition for certiorari, because the new circumstances presented by the COVID-19 pandemic drastically tip the balance of the equities and the public interest in favor of time-limited

relief during the pandemic. As the district court found, implementation of the Rule during the ongoing COVID-19 crisis will cause harms to public health and economic welfare by interfering with government plaintiffs' attempts to respond effectively to the pandemic and by imposing additional, unnecessary burdens on top of the crushing costs from COVID-19.

1. The Public Charge Rule is irreparably harming government plaintiffs and the public during the pandemic.

a. The Rule is impeding efforts to mitigate the spread of the virus.

The district court correctly found that the Rule is irreparably harming public health in government plaintiffs' jurisdictions during the unprecedented public-health disaster caused by the pandemic. (*See* S.A. 22-23.) Government plaintiffs' unrebutted evidence demonstrated that the Rule is deterring immigrants and their family members from obtaining publicly funded health insurance and medical care, thereby undermining efforts to slow the spread of the virus—putting everyone at higher risk of infection.

As this Court has recognized and DHS has acknowledged, the Rule's expanded criteria for finding inadmissibility will deter immigrants and their family members from obtaining (or maintaining) Medicaid or other publicly funded health coverage, for fear that using such benefits will jeopardize their ability to obtain lawful permanent resident status. *See New York*, 969 F.3d, at 59-60; 84 Fed. Reg. at 41,422. Indeed, since the Rule took effect, "[d]octors and other medical personnel, state and local officials, and staff at nonprofit organizations have all witnessed immigrants refusing to enroll in Medicaid or other publicly funded healthcare coverage" because of concerns that receiving such coverage "will increase their risk of being labeled a 'public charge'" under the Rule. (S.A. 23; *see* J.A. 392-393, 399, 408, 522-523.)

As the record established, such avoidance of Medicaid and other publicly funded healthcare programs prevents immigrants from receiving testing or treatment for COVID-19, "which in turn impedes public efforts in [government plaintiffs'] jurisdictions to stem the spread of the disease." (S.A. 23.) Patients who lack health insurance are less likely to obtain necessary treatment for COVID-19 because of the prohibitive costs of such care. (J.A. 402-403, 406-409, 526.) *See* Dan Witters, *In U.S., 14%*

With Likely COVID-19 to Avoid Care Due to Cost, Gallup News (Apr. 28, 2020) (internet). See also *supra* at __. And as the district court emphasized, and as defendants did not dispute, doctors and others working on the front lines of the crisis have seen many immigrants avoid COVID-19 testing and treatment even if they might be able to obtain publicly funded care, due to fear generated by the Rule. (S.A. 23.) 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 Rule and fears that they could not afford to pay for treatment. (J.A. 351-352.)
- Telephone hotlines operated by Plaintiff Catholic Charities Community Services, Archdiocese of New York, in partnership with state or city agencies, have been receiving public-charge-related inquiries from callers who are fearful of seeking medical treatment for COVID-19. (J.A. 514-515.)
- The New York Legal Assistance Group has observed immigrants and their family members declining or delaying medical treatment they needed because of COVID-19, due to concerns about the Rule. (J.A. 502-503.)
- 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. (J.A. 484.)
- 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. (J.A. 467-468.)

The district court also properly found that the Rule's deterrent effect jeopardizes the health and safety of not only immigrants and their families but also the public. Without proper testing and treatment, immigrants who become infected are more likely to suffer severe illness and death from the virus, and are more likely to spread the virus to other people inadvertently. (J.A. 352, 397, 403-404, 409-411.)

As the district court further found, the Rule "is particularly dangerous during a pandemic" because "[i]mmigrants make up a substantial portion" of essential workers, such as home health aides, food delivery workers, and building cleaners, who "have continued to work throughout the national emergency and interact with large swaths of the population." (S.A. 24; *see* J.A. 374-375, 409.) By making immigrant workers "fearful of receiving medical care for a deadly, contagious disease," the Rule is jeopardizing "the health and security of communities" throughout government plaintiffs' jurisdictions. (S.A. 24-25.) These substantial public-health harms amply support the district court's preliminary injunction.

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

As the district court further found, the Rule is also irreparably injuring government plaintiffs and the public by deterring immigrants from using supplemental benefits to mitigate the vast economic consequences of the pandemic. (S.A. 25-26.) These irreparable harms further tilt the balance of the equities and the public interest in favor of preliminary halting the Rule's implementation during the COVID-19 national emergency.

The COVID-19 pandemic has triggered a severe and ongoing economic crisis, with millions of workers losing significant income or their employment. (J.A. 411-413.) In November 2020, approximately 10.74 million people were unemployed in the United States—nearly double the number of individuals who were unemployed in February. *See* Bureau of Labor Stats., *The Employment Situation—November 2020*, *supra*, at 2; Bureau of Labor Stats., U.S. Dep't of Labor, *Employment Situation News Release* (Mar. 6, 2020) (5.8 million unemployed individuals in United States in February 2020) (internet). And unemployment rates in government plaintiffs' jurisdictions have remained high because of the

pandemic. See *supra* at 13-14. For example, more than 13% of individuals were unemployed in New York City in October 2020. New York Dep't of Labor, *NYS Economy Added 45,600 Private Sector Jobs in October 2020, Marking 6th Straight Month of Gains* (Nov. 19, 2020) (internet). Despite some improvement in the unemployment figures since the height of the first wave COVID-19 infections, government plaintiffs and their residents thus continue to experience severe economic consequences from the pandemic. And the likelihood of further restrictions on businesses and further economic fallout as a result is steadily increasing as the number of infections continues to rise again. *See* Jennifer Millman, *Cuomo Warns Hospital Strain May Force Total Shutdown; NYC Indoor Dining on Brink*, NBCNews (Dec. 8, 2020) (internet); Laura Glesby, *Connecticut Cases Rising; Docs Warn Of 2nd Shutdown If Climb Continues*, New Haven Indep. (Oct 13, 2020) (internet).

The evidence before the district court established that supplemental benefits like Medicaid and SNAP are crucial to helping employed or employable individuals—who are not plausibly public charges, *New York*, 969 F.3d at 74-79—get through an emergency like receiving a pay cut, losing a job, or incurring medical bills for COVID-19 treatment. (*See* J.A.

412-413, 468, 486.) As this Court observed, Congress made supplemental benefits programs available "to a broad swath of low- and moderate-income Americans, including those who are productively employed," to assist them in maintaining or achieving higher standards of living. *New York*, 969 F.3d at 84. By providing such short-term assistance to individuals affected by the pandemic, supplemental benefits promote economic stability and recovery for all of government plaintiffs' residents.

But the Rule is deterring immigrants and their families from using supplemental benefits to maintain health and nutrition during the crisis. (J.A 351, 461, 482-483.) As the district court found, many hard-working immigrants, "who otherwise would not be classified as public charges under any reasonable definition, are experiencing substantial financial burdens" because of the pandemic. (S.A. 26.) Yet 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. (J.A. 399, 483.) *See also* Zolan Kanno-Youngs, *A Trump Immigration Policy Is Leaving Families Hungry*, N.Y. Times (Dec. 4, 2020) (internet) (explaining how Rule is causing

many immigrants and their families to disenroll from food stamps and other nutrition programs).

Immigrants' avoidance of supplemental benefits has already inflicted substantial harms on both immigrants and government 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 that are already "running out of food at alarming rates." (J.A. 486.) *See* Kanno-Youngs, *supra* (immigrants "are flocking to food pantries" because of the Rule, which, "in turn, is badly straining relief agencies"). Because the second injunction appropriately prevents these irreparable economic harms during the COVID-19 emergency, the Court should affirm the injunction.

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

Defendants' response to this unrebutted evidence of harm is to speculate that the Rule is not causing these harms given the "alert" that USCIS issued temporarily limiting the Rule's application. (Br. at 27-28.) The alert states that DHS officials conducting public-charge determinations 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. (J.A. 334.) The district court correctly found that the alert does not fully redress the harms caused by the Rule and that the balance of hardships thus supports the second injunction.

As a threshold matter, the alert is itself an admission by defendants that the Rule inherently has the *in terrorem* effect of deterring immigrants from accessing essential health care and other benefits during the COVID-19 pandemic, despite great cost to themselves, their communities, and the public. Contrary to defendants' unsubstantiated contentions, the Rule continues to have such effects even as modified by the alert. Indeed, after DHS posted the alert, physicians and other front-line workers have continued to see many immigrants and their families declining to obtain COVID-19 testing and treatment based on their persistent concerns about the Rule. (J.A. 356-357, 413-414, 460-461.) *See also* Kanno-Youngs, *supra*.

Defendants are also wrong to assert that the Court must ignore the continuing harms found by the district court because they purportedly result solely from immigrants' "mistaken beliefs about how the Rule will be applied in the COVID-19 context." (Br. at 28.) As an initial matter, this Court has already recognized that the Rule's "predictable effect[s]" irreparably harm government plaintiffs—including effects on individuals who are not directly subject to the Rule and whose reactions may be "illogical or unnecessary." *New York*, 969 F.3d at 59 (quotation marks omitted); *see id.* at 86. The Rule's predictable and continuing deterrent effects remain highly relevant to balancing the equities—particularly when those effects and their resulting harms are not just predictable but *actually happening*. (S.A. 21.)

In any event, immigrants' concerns about the Rule are hardly mistaken or unreasonable given the alert's limited application. 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." (S.A. 25 (emphasis in original) (quotation marks omitted).) But as defendants do not dispute, there is no mechanism for a Medicaid applicant to seek coverage solely for COVID-

19-related treatment. (S.A. 26.) There is thus a serious question about whether the alert's purported exception for COVID-19 has any real-world impact.

The alert would also appear to preserve the Rule's application if, for example, an individual receives medical treatment for COVID-19-like symptoms but is never confirmed to have contracted COVID-19, or ultimately receives a negative result from a COVID-19 test. And, as the district court correctly found, the Rule also continues to apply if immigrants enroll in Medicaid and use it for other treatment during the pandemic—including treatment for medical conditions like diabetes and heart disease "that place [them] at increased risk of suffering severe illness or death if they contract COVID-19." (S.A. 27; *see* J.A. 414.) The Rule also applies whenever federally funded Medicaid is used for other services important for protecting public health during the pandemic, such as, for example, testing and treatment for the flu. (S.A. 27.) Indeed, immigrants have been declining Medicaid coverage and delaying medical treatment for serious medical conditions because of concerns about the Rule—increasing the health risks to themselves and the likelihood that

they inadvertently spread the virus to others. (J.A. 403, 414, 485, 491, 502-503.)

Moreover, defendants acknowledge that, absent the new preliminary injunction, they would be entitled to fully restore 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. (S.A. 27-28.) Given that the alert "may be wiped out at a moment's notice," (S.A. 28), the Rule will continue to deter immigrants from accessing healthcare that is essential not only for their personal well-being but also for the well-being of the other members of the public in the communities where they live and work, and indeed for the broad public-health effort to control the spread of the disease during the pandemic.

Defendants also have no response to the Rule's continuing application to immigrants' receipt of supplemental benefits other than Medicaid. Despite the economic catastrophe caused by the COVID-19 pandemic, "the Rule offers no meaningful relief or incentive for immigrants" facing sudden financial burdens "to confidently access supplemental benefits, such as SNAP" (S.A. 26), that are essential to preserve individual well-being and to prevent the vicious economic

downturn that could cripple government plaintiffs' finances and public programs for years. The alert states that DHS officials *may* consider COVID-19-related factors that lead an immigrant to access supplemental benefits—such as enforced social distancing or an employer shutting down. (J.A. 334.) But this statement provides no meaningful assurance because defendants retain complete discretion to give such factors any weight they choose, including no weight at all.

Given the unrebutted evidence of the Rule's deterrent effects, there is no merit to defendants' unsupported assertion (Br. at 28-29) that the second injunction will not mitigate those effects. Common sense dictates that halting the Rule during the COVID-19 emergency will help alleviate the Rule's deterrent effects and the resulting harms to government plaintiffs and the public. The history of the public-charge provision further demonstrates the point. In 1996, the public-charge statute began to deter many immigrants and their families from using supplemental benefits for which they were eligible because of confusion about the application of the public-charge provision and separate statutory changes restricting some immigrants' eligibility for certain benefits. *See* Field Guidance on Deportability and Inadmissibility on Public Charge Grounds,

64 Fed. Reg. 28,689, 28,689 (Mar. 26, 1999); Michael E. Fix & Jeffrey S. Passel, *Trends in Noncitizens' and Citizens' Use of Public Benefits Following Welfare Reform: 1994-97* 1-2 (Urban Inst. Mar. 1, 1999) (internet). In part to alleviate those deterrent effects, the federal government issued guidelines clarifying that receipt of supplemental benefits like Medicaid and SNAP benefits did not make individuals public charges. 64 Fed. Reg. at 28,689, 28,692; *see New York*, 969 F.3d at 52-54. By assuring immigrants that they need not choose between forgoing essential aid for healthcare, food, or housing or risk their future chances of obtaining LPR status, the second injunction will likewise provide needed clarity and confidence about using the very healthcare and economic benefits that are critical to mitigating the pandemic and its harms. As the district court found, temporarily halting the Rule is "nothing short of critical" now. (S.A. 21.)

2. The harms caused by the Rule during the national pandemic vastly outweigh defendants' interests.

In response to the specific and substantial harms that the Rule is causing to government plaintiffs and the public during the pandemic, defendants assert only their general interest in enforcing the Rule (Br. at 29-30). But even without considering the considerable harms posed by the COVID-19 crisis, this Court previously found such generic claims of harm insufficient to defeat a preliminary injunction against the Rule. As this Court explained, "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" government plaintiffs from implementation of the Rule. *New York*, 969 F.3d at 87. The COVID-19 crisis has made the equities even more lop-sided now.

This Court's recent decision also forecloses defendants' argument (Br. at 31) that the Supreme Court's previously issued stay of the district court's first injunction compels an alteration in this Court's current evaluation of the balance of the harms or of the public interest. Notwithstanding that stay, this Court squarely held that the Rule irreparably harms government plaintiffs and the public, and that the balance of the equities tips in favor of preliminarily halting the Rule, presumably

recognizing that (a) the basis for the Court's stay was unclear, and (b) its decision was based on the abbreviated briefing and record attendant on stay proceedings.

In any event, whatever the import of the Supreme Court's stay when it originally issued, it simply did not address—and could not have addressed—the dramatic harms imposed by the Rule during the ongoing and unprecedented COVID-19 crisis. And the Supreme Court's more recent order, which expressly contemplated government plaintiffs returning to the district court to seek relief based on COVID-19, further undercuts defendants' assertion that the Supreme Court has preempted further relief in this proceeding.

3. The district court properly found that nationwide relief is warranted during the pandemic.

Contrary to defendants' assertion (Br. at 32-34), the district court properly exercised its broad discretion in preliminarily halting the Rule nationwide during the COVID-19 pandemic. As this Court recently reaffirmed, nationwide injunctions "may be an appropriate remedy in certain circumstances." *New York*, 969 F.3d at 88; *see id.* at 87 ("scope of injunctive relief is dictated by the extent of the violation established"

(quotation marks omitted)). Such nationwide relief is appropriate here given "the interconnected nature of the risks between and within states" from the Rule's implementation during the COVID-19 pandemic, "and the realities attendant to the spread of this disease." (S.A. 30 (quotation marks omitted).)

Moreover, the concerns that the Court raised about nationwide injunctions "overrid[ing] contrary decisions from co-equal and appellate courts," *New York*, 969 F.3d at 88, are no longer present here. Three circuit courts—this Court and the Seventh and Ninth Circuits—have now "spoken unanimously on the issue," *id.*, of the Rule's likely illegality and the appropriateness of preliminarily halting the Rule. And no appellate decision to the contrary remains given that the Fourth Circuit's has decided to hear an earlier panel ruling en banc and thus vacated it. Moreover, no other courts are currently considering whether the Rule's unique harms during the COVID-19 national emergency warrants a separate preliminary injunction halting the Rule's implementation. Accordingly, the second injunction's nationwide scope is appropriate. *See* Br. for Appellees Make the Road New York, et al. at 3-13.

CONCLUSION

The Court should affirm the preliminary injunction or, in the alternative, remand to the district court to issue the preliminary injunction while retaining jurisdiction over this appeal.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, William P. Ford, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 11,016 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7) and Local Rule 32.1.

/s/ *William P. Ford*