No. 20A150

IN THE SUPREME COURT OF THE UNITED STATES

TEXAS, ET AL., APPLICANTS

v.

COOK COUNTY, ILLINOIS, ET AL.

FEDERAL RESPONDENTS' RESPONSE IN OPPOSITION TO APPLICATION FOR LEAVE TO INTERVENE AND FOR A STAY OF THE JUDGMENT ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

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The Acting Solicitor General, on behalf of Secretary of Homeland Security Alejandro N. Mayorkas and the other federal parties, respectfully files this response in opposition to applicants' application for a stay of the November 2, 2020 partial final judgment issued by the United States District Court for the Northern District of Illinois.

The application should be denied. As an initial matter, applicants have no basis for seeking this Court's review -- let alone a stay or summary reversal -- of the actions by the district court and court of appeals that they challenge. Only a "party" to a "[c]ase[] in the courts of appeals" may file a petition for a writ of certiorari enabling review of a lower-court judgment, 28 U.S.C. 1254(1), but applicants concede (Stay Appl. 23) that they were "nonparties" in the court of appeals. Indeed, applicants never participated in the litigation even as an amicus while it

was in the court of appeals; their only filing came after the court had already issued its mandate and divested itself of jurisdiction. And while this Court has occasionally read the term "party" to include a real party in interest who did not formally appear in the court of appeals, see Stay Appl. 8, it has never suggested that the term is so devoid of meaning as to include complete strangers to the litigation like applicants.

Even if applicants' filing were procedurally permissible, moreover, it is misguided on the merits. The U.S. Department of Justice -- not any of the States that seek to intervene here -- has the authority and responsibility to make litigation decisions on behalf of the United States. See 28 U.S.C. 516. In doing so, the Department relies on the views of other entities within the government as well as its own "broad[] view of litigation in which the Government is involved throughout the state and federal court systems." FEC v. NRA Political Victory Fund, 513 U.S. 88, 96 (1994). And through that process, the government regularly decides not to seek further review of adverse decisions based on a host of legal and practical considerations. Applicants disagree with the result of that process here, but they identify no authority for the proposition that, where the federal government decides not to pursue litigation further, a court of appeals must recall its mandate in order to allow strangers to the litigation to override the federal government's litigation decision.

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., provides that an alien is "inadmissible" if, "in the opinion of the [Secretary of Homeland Security] at the time of application for admission or adjustment of status, [the alien] is likely at any time to become a public charge." 8 U.S.C. 1182(a)(4)(A). In August 2019, the Department of Homeland Security (DHS) adopted a rule under which DHS would treat certain applicants for admission or adjustment of status as likely to become "public charge[s]" for purposes of that provision if it determined that the applicants were likely to receive specified public benefits, including participation in Medicaid or the Supplemental Nutrition Assistance Program, for more than 12 months within any 36-month period. See 84 Fed. Reg. 41,292, 41,501 (Aug. 14, 2019) (2019 Rule or Rule). The 2019 Rule represented a significant departure from the definition and standards that the U.S. Citizenship and Immigration Services had used in applying the public-charge inadmissibility ground during the decades preceding the Rule's adoption.

2. The 2019 Rule generated extensive litigation across the United States at all levels of the federal judiciary. Plaintiffs who had opposed adoption of the Rule (including 21 States and numerous local governments and nongovernmental organizations)

filed suits in five different district courts in four different circuits alleging that the Rule was unlawful on numerous grounds.

a. All five district courts concluded that the 2019 Rule was likely unlawful, and entered preliminary injunctions in October 2019 barring the Rule from taking effect. See Stay Appl. App. D1-D33 (preliminary injunction entered by the District Court for the Northern District of Illinois); Casa de Maryland, Inc. v. Trump, 414 F. Supp. 3d 760 (D. Md. 2019); Washington v. United States DHS, 408 F. Supp. 3d 1191 (E.D. Wash. 2019); New York v. United States DHS, 408 F. Supp. 3d 334 (S.D.N.Y. 2019); Make the Road N.Y. v. Cuccinelli, 419 F. Supp. 3d 647 (S.D.N.Y. 2019); City & Cnty. of San Francisco v. U.S. Citizenship & Immigration Servs., 408 F. Supp. 3d 1057 (N.D. Cal. 2019).

b. The government sought stays pending appeal of those preliminary injunctions. The Fourth and Ninth Circuits granted stays of the preliminary injunctions entered by district courts in their jurisdictions, see City & Cnty. of San Francisco v. USCIS, 944 F.3d 773 (9th Cir. 2019); Order, Casa de Maryland, Inc. v. Trump, No. 19-2222 (4th Cir. Dec. 9, 2019), while the Second and Seventh Circuits declined to do so, see New York v. United States DHS, Nos. 19-3591 & 19-3595, 2020 WL 95815 (2d Cir. Jan. 8, 2020); Stay Appl. App. E1. This Court subsequently granted the government's motions for stays pending appeal of the preliminary

injunctions entered in New York and Illinois. See DHS v. New York, 140 S. Ct. 599 (2020); 140 S. Ct. 681.

c. Following this Court's entry of a stay pending appeal in the Northern District of Illinois case, DHS began implementation of the Rule for the first time in February 2020. See New York v. United States DHS, 969 F.3d 42, 58 (2d Cir. 2020). The appeals of the preliminary injunctions proceeded with the Rule in place, however, and the Second, Seventh, and Ninth Circuits thereafter affirmed the preliminary injunctions entered in their respective jurisdictions. See New York v. United States DHS, 969 F.3d 42; Stay Appl. App. H1-H82; City & Cnty. of San Francisco v. USCIS, 981 F.3d 742 (9th Cir. 2020). The government filed petitions for writs of certiorari seeking this Court's review of all three decisions. See DHS v. New York, No. 20-449 (Oct. 7, 2020); Wolf v. Cook Cnty., No. 20-450 (Oct. 7, 2020); USCIS v. City & Cnty. of San Francisco, No. 20-962 (Jan. 21, 2020).

Finally, a divided panel of the Fourth Circuit initially reversed the preliminary injunction entered by the District of Maryland, see Casa de Maryland, Inc. v. Trump, 971 F.3d 220 (2020), but the en banc Fourth Circuit subsequently vacated that decision and set the case for re-argument, see 981 F.3d 311 (2020).

d. Extensive litigation involving the challenges to the Rule continued in the district courts as well.

i. In July 2020, the District Court for the Southern District of New York entered a new preliminary injunction against enforcement of the 2019 Rule during the pendency of the COVID-19 public-health emergency. See New York v. United States DHS, 475 F. Supp. 3d 208, 223-231. The court concluded that the plaintiffs in that case had "provide[d] ample evidence that the Rule deters immigrants from seeking testing and treatment for COVID-19, which in turn impedes public efforts * * * to stem the spread of the disease." Id. at 226. In particular, the court pointed to declarations filed by "[d]octors and other medical personnel, state and local officials, and staff at nonprofit organizations" that described "immigrants refusing to enroll in Medicaid or other publicly funded health coverage, or forgoing testing and treatment for COVID-19, out of fear that accepting such insurance or care will increase their risk of being labeled a 'public charge.'" Ibid. That evidence about how the 2019 Rule was interfering with efforts to combat the COVID-19 pandemic, the district court concluded, altered the equitable balance and public-interest factors that this Court had considered in entering a stay of the district court's prior preliminary injunctions in January 2020, before the public-health emergency had been declared. See id. at 225. The district court therefore concluded that a new preliminary injunction was warranted. Id. at 231. The court noted that although this Court had denied a motion to lift its stay in light

of the COVID-19 pandemic, the Court's order specifically indicated that it "d[id] not preclude a filing in the District Court as counsel considers appropriate." Id. at 225 n.10 (quoting DHS v. New York, 140 S. Ct. 2709 (2020)).

The Second Circuit entered a stay pending appeal of that new preliminary injunction. See New York v. United States DHS, 974 F.3d 210 (2020) (per curiam). In doing so, the Second Circuit did not address the relationship between the 2019 Rule and the COVID-19 pandemic; instead, it held the district court had likely lacked jurisdiction to enter a new preliminary injunction while the appeal of the original preliminary injunctions remained pending, regardless of whether a new preliminary injunction might otherwise have been warranted. See id. at 214-216.

ii. Also in July 2020, the District Court for the Northern District of Illinois ruled that the government would be required to produce emails and other documentary evidence from certain high-level White House officials who had been involved in formulating the 2019 Rule, including former Senior Advisor to the President Stephen Miller and former Acting White House Chief of Staff Mick Mulvaney. D. Ct. Doc. 190, at 2 (July 24, 2020). The court also ordered the parties to attempt to reach agreement about possible depositions of senior officials, including Miller. Id. at 1. The court concluded that this discovery was necessary to allow the plaintiffs to develop their claim that adoption of the Rule had

been motivated by racial animus, in violation of the equal-protection component of the Fifth Amendment. See id. at 1-3; see also 461 F. Supp. 3d 779 (earlier order denying motion to dismiss equal-protection claim).

iii. In August 2020, the United States Government Accountability Office (GAO) released a report expressing its view that former Acting Secretary of Homeland Security McAleenan -- the signatory of the 2019 Rule -- and then-Acting Secretary of Homeland Security Wolf had both been installed in their Acting Secretary roles in violation of the Federal Vacancies Reform Act of 1998, Pub. L. No. 105-277, Div. C., Tit. I, § 151, 112 Stat. 2681-611, and the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (6 U.S.C. 1101 et seq.). See GAO, B-331650, Department of Homeland Security -- Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security (Aug. 14, 2020). Plaintiffs in the Southern District of New York thereafter added a claim asserting that those alleged violations provided an additional reason for declaring the 2019 Rule invalid. See First Am. Compl. ¶¶ 309-315, New York v. United States DHS, No. 19-cv-7777 (Oct. 2, 2020).

iv. Finally, in November 2020, the District Court for the Northern District of Illinois entered a judgment vacating the 2019 Rule on a nationwide basis under the Administrative Procedure Act

(APA), 5 U.S.C. 701 et seq. See Stay Appl. App. C1-C14. The court concluded that the 2019 Rule did not represent a reasonable interpretation of the INA and that DHS had acted arbitrarily and capriciously in adopting it. See id. at C2-C4. The court did not resolve the plaintiffs' separate equal-protection claim, however. Instead, it issued a partial final judgment under Federal Rule of Civil Procedure 54(b) on the plaintiffs' APA claims while retaining jurisdiction to consider the equal-protection claim after the plaintiffs had completed the previously authorized discovery. See Stay Appl. App. C8-C12.

The Seventh Circuit thereafter granted a stay pending appeal of the partial final judgment, and placed the appeal in abeyance pending the disposition of the government's petitions for writs of certiorari in DHS v. New York, No. 20-449, and Wolf v. Cook County, No. 20-450. See 20-3150 C.A. Doc. 21 (Nov. 19, 2020).

3. On February 2, 2021, shortly following the change in Administration, President Biden directed the Secretary of Homeland Security, along with the Attorney General, the Secretary of State, and other relevant agency heads, to "review all agency actions related to implementation of the public charge ground of inadmissibility * * * and the related ground of deportability." Exec. Order No. 14,012, § 4, 86 Fed. Reg. 8277, 8278 (Feb. 5, 2021). The President ordered the agencies to complete that review within 60 days. Ibid.

4. On February 22, 2021, this Court granted the government's petition for a writ of certiorari in DHS v. New York, No. 20-449, in order to review the preliminary injunctions issued in October 2019 by the District Court for the Southern District of New York. Approximately two weeks later, DHS announced that the government had determined that continuing to defend the 2019 Rule before this Court and in the lower courts would not be in the public interest or an efficient use of government resources. See Stay Appl. App. K4-K5. Consistent with that determination, on March 9, 2021 the government filed stipulations with the Clerk of this Court dismissing DHS v. New York, No. 20-449; Mayorkas v. Cook County, No. 20-450; and USCIS v. City & County of San Francisco, No. 20-962.

5. The government likewise filed motions to dismiss public-charge related appeals in the lower courts, including -- as most relevant here -- its appeal of the partial final judgment entered in the Northern District of Illinois vacating the 2019 Rule. See Stay Appl. App. P1. The Seventh Circuit granted the government's motion and dismissed the appeal. Stay Appl. App. B1-B3. In reliance on that dismissal, the plaintiffs subsequently dismissed their equal-protection claim in the district court, terminating the case. D. Ct. Doc. 253 (Mar. 11, 2021). Because the district court's judgment had become final, the government published a rule that removed the 2019 Rule from the Code of Federal Regulations.

DHS, Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. 14,221, 14,221 (Mar. 15, 2021).

6. On March 11, 2021, applicants -- a group of States that had not previously participated in any of the above-described litigation -- filed a motion in the Seventh Circuit to recall the mandate in the appeal of the district court's partial final judgment vacating the Rule. See Stay Appl. App. I1-I42. Applicants further sought leave to intervene in the appeal and defend the Rule. See ibid. The court of appeals denied applicants' motion to recall the mandate. Id. at A1.[1]

ARGUMENT

Applicants identify no case in which this Court has previously granted the truly extraordinary relief they seek, and supply no persuasive reason that the Court should grant such relief here. Applicants' primary request is that this Court grant a stay of a district court judgment to which they were not parties; their ostensibly more modest fallback request is that the Court summarily reverse the court of appeals' order denying their motion to recall its mandate. Both requests fail at the outset for the straightforward reason that Congress has authorized only a "party"

[1] Applicants also filed motions seeking leave to intervene in the preliminary injunction appeals in the Fourth and Ninth Circuits. Both courts of appeals denied the motions, with Judge VanDyke dissenting from the denial of the motion in the Ninth Circuit. See Order, Casa de Maryland, Inc. v. Biden, No. 19-2222 (4th Cir. Mar. 18, 2021); Order, City & Cnty. of San Francisco v. USCIS, Nos. 19-17213, 19-17214, 19-35914 (9th Cir. Apr. 8, 2021).

to a "[c]ase[] in the courts of appeals" to file a petition for a writ of certiorari seeking this Court's review of a lower-court decision. 28 U.S.C. 1254(1). That statutory text does not encompass applicants, who concede (Stay Appl. 23) that they are "nonparties" and who never filed anything while the case was pending in the court of appeals.

Even if applicants could overcome that jurisdictional obstacle, moreover, the extraordinary relief they seek would still be unwarranted. Consistent with Article II of the Constitution, Congress has vested the Executive Branch -- not the States or private parties -- with responsibility for making litigation decisions on behalf of the United States. Giving others the right to revive litigation that the Executive Branch has determined not to pursue would frustrate that constitutional and congressional choice. At the very least, applicants have not shown that the court of appeals abused its discretion in refusing to take the unprecedented action they requested.

I. APPLICANTS ARE NOT "PART[IES]" ENTITLED TO FILE A PETITION FOR A WRIT OF CERTIORARI AND CANNOT SHOW THAT A STAY PENDING SUCH A PETITION IS WARRANTED

In order to obtain a stay pending the filing and disposition of a petition for a writ of certiorari, applicants must demonstrate (1) a "reasonable probability" that the Court will grant the future petition; (2) "a fair prospect that a majority of the Court will conclude that the decision below was erroneous"; (3) that they

would suffer "irreparable harm * * * from the denial of a stay"; and (4) that, in close cases, the "balance [of] the equities" favors relief. Conkright v. Frommert, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (citation and internal quotation marks omitted). Applicants cannot satisfy those demanding requirements.

A. As a threshold matter, applicants cannot show a reasonable likelihood that this Court will grant their hypothetical future petition for a writ of certiorari, because they have no right to file such a petition in the first place.

1. In defining this Court's appellate jurisdiction, see U.S. Const. Art. III, § 2, Congress has authorized certiorari review under Section 1254(1) only at the request of a "party" to a "[c]ase[] in the courts of appeals." 28 U.S.C. 1254(1). This Court's Rules similarly provide for a stay of the enforcement of a lower court's judgment only at the request of "[a] party to [the] judgment." Sup. Ct. R. 23.2. Applicants acknowledge (Stay Appl. 23), however, that they were "nonparties" in the court of appeals. Indeed, applicants never filed anything in the case -- no notice of appearance, no amicus brief, no motion -- until after the court of appeals had already issued its mandate terminating the appeal. Under a straightforward reading of Section 1254(1), therefore, applicants cannot file a petition for a writ of certiorari to review the district court's judgment or the court of appeals'

decision not to recall its mandate -- and this Court's Rule 23.2 does not permit them to seek a stay, either.

2. Applicants offer no textual understanding of the word "party" that could apply to them. Instead, they assert in a single sentence that "[t]his Court has interpreted 'party' broadly to allow intervention by those with interests that are vitally affected by the judgment below," citing four examples. Stay Appl. 8 (citing Gonzales v. Oregon, 546 U.S. 807 (2005); Pyramid Lake Paiute Tribe of Indians v. Truckee-Carson Irrigation Dist., 464 U.S. 863 (1983); Hunter v. Ohio ex rel. Miller, 396 U.S. 879 (1969); and Banks v. Chicago Grain Trimmers Ass'n, 389 U.S. 813 (1967)). None of the cases they cite, however, supports their claim that "interested nonparties" like applicants, Stay Appl. 23, are free to file petitions for writs of certiorari seeking review of judgments in cases in which they did not participate.

One of the cases on which applicants rely is simply irrelevant to the question. In Gonzales, the Court allowed a group of nonparties to intervene at the merits stage only after granting a petition for a writ of certiorari filed by another litigant who had been a party to the case below. Compare Gonzales, supra (granting motion to intervene on October 3, 2005), with Gonzales v. Oregon, 543 U.S. 1145 (granting petition for a writ of certiorari on February 22, 2005); see Stephen M. Shapiro et al.,

Supreme Court Practice 6-63 (11th ed. 2019).[2] The Court's grant of the intervention motion accordingly did not depend on whether the movants were "part[ies]" to the case in the court of appeals for purposes of Section 1254(1). 28 U.S.C. 1254(1).

While the other three cases at least involved intervention at the petition stage, none of them helps applicants because the petitioners in those cases had a practical claim to party status that applicants wholly lack. In each, the petitioner was the real party in interest in the litigation -- a benefits claimant seeking to defend her administrative workers' compensation award challenged by the employer respondent in Banks, a candidate for election seeking to remain on the ballot in Hunter, and an Indian tribe seeking to defend its water rights in Pyramid Lake Paiute Tribe. See Banks v. Chicago Grain Trimmers Ass'n, 390 U.S. 459, 460-461 (1968); Pet. at 6-9, Hunter, supra (No. 654); U.S. Br. at 6-10, Pyramid Lake Paiute Tribe, supra (No. 82-1723) (describing background of tribe's intervention motion). The petitioners had not been formal parties in the lower courts, however, because in each case the government had been assigned special responsibility to represent their individualized interests. See Supreme Court Practice 2-22 & n.43 (discussing Banks and Hunter); U.S. Br. at

[2] The Court took a similar step in National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012). Compare 565 U.S. 1033 (granting a writ of certiorari on November 14, 2011), with 565 U.S. 1154 (granting motion to add additional parties on January 17, 2012).

13, Pyramid Lake Paiute Tribe, supra (No. 82-1723) (supporting intervention on the ground that "the Tribe will be bound by the holding on the contract limitation issue in this case by virtue of the United States' participation as a party") (citing Nevada v. United States, 463 U.S. 110 (1983)); see also Nevada, 463 U.S. at 135 (discussing the United States' participation in litigation as "a party * * * acting as a representative for the Reservation's interests").

As the United States explained in an invited submission in Banks, that unusual posture -- in which the party seeking to petition had been "[i]n a practical sense * * * the real party in interest in the judicial proceedings [below] even if not formally named" -- meant that "it would not appear unreasonable to deem [the] petitioner a party below for purposes of entitlement to file a petition for a writ of certiorari." Supreme Court Practice 2-22 n.43 (quoting U.S. filing). Cf. Black's Law Dictionary 1350-1351 (11th ed. 2019) ("For purposes of res judicata, a party to a lawsuit is a person who has been named as a party and has a right to control the lawsuit either personally, or, if not fully competent, through someone appointed to protect the person's interests.").[3]

[3] In Hunter, supra, this Court's jurisdiction was invoked under 28 U.S.C. 1257, which lacks the express "party" limitation in Section 1254(1). Supreme Court Practice 2-22 & n.44. Applicants' reliance on Hunter is misplaced for that reason, too.

Applicants cannot make any comparable claim here. They were not, and do not claim to have been, the real parties in interest in the court of appeals or district court. They have no role in administering the INA or making admissibility and adjustment-of-status determinations, and the district court's judgment will not benefit or burden them in any direct, particularized way. Nor will that judgment have res judicata effect against them in subsequent litigation. Instead, applicants assert (Stay Appl. 8) only that the judgment may "affect[]" their interests in an indirect way: DHS might in the future grant lawful permanent resident (LPR) status to an unknown number of noncitizens who would not have received it but for the district court's vacatur of the 2019 Rule, and some subset of that group might in turn become eligible for public benefits paid for by applicants. See Stay Appl. 8-10. Even assuming that such a speculative, indirect interest would be sufficient to give applicants Article III standing to litigate a suit of their own, it does not make applicants "part[ies]" to a case in which they had no involvement at all (actual or practical) until after the appellate mandate had already issued. 28 U.S.C. 1254(1). To accept applicants' contrary contention -- that anyone "affected" by a lower court's judgment may seek this Court's review by certiorari without having participated in the case in the lower courts -- would be to ignore

the "party" limitation Congress adopted in the text of Section 1254(1).

3. Applicants briefly assert that decisions allowing "'one who has been denied the right to intervene in a case in a court of appeals [to] petition for certiorari to review that ruling'" provide an "independent basis" for their future petition and current stay application. Stay Appl. 10-11 (brackets and citation omitted). That assertion is incorrect for at least two reasons.

a. In the cases on which applicants rely, the petitioners had participated in the cases while they were pending "in the courts of appeals." 28 U.S.C. 1254.[4] The same is true in Cameron v. EMW Women's Surgical Center, No. 20-601 (Mar. 29, 2021), in which this Court recently granted a writ of certiorari to review

[4] In International Union, UAW, Local 283 v. Scofield, 382 U.S. 205 (1965), the petitioner (a union) had been a defendant in administrative proceedings before the National Labor Relations Board, then sought to intervene in the court of appeals to defend the administrative decision in its favor alongside the Board. See id. at 207. The court of appeals authorized the union to file an amicus brief, but denied its motion to intervene. Ibid. Likewise, in Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27 (1993) (per curiam), the petitioner filed a motion to intervene while the court of appeals was considering a joint request, filed by the parties, to vacate the district court's judgment in the case. See id. at 29. The court of appeals denied the motion to intervene and proceeded to grant the parties' request to vacate. See ibid. Applicants also rely (Stay Appl. 10) on language from this Court's decision in Hohn v. United States, 524 U.S. 236, 247-248 (1998). That language described the Court's prior holding in Scofield, supra; Hohn itself did not involve intervention, but rather whether a habeas petitioner's application for a certificate of appealability qualifies as a "[c]ase[] in the court[] of appeals," 28 U.S.C. 1254. See Hohn, 524 U.S. at 241.

whether a state attorney general should have been granted leave to intervene in defense of a state law and file a timely petition for rehearing. See EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 831 Fed. Appx. 748, 749-750 (6th Cir. 2020) (describing timing of intervention request), cert. granted, No. 20-601 (Mar. 29, 2021).

Here, by contrast, applicants filed nothing at all in the public-charge-related litigation until the court of appeals had already dismissed the appeal and issued its mandate. See Stay Appl. App. I1-I42; 20-3150 C.A. Doc. 24-2 (Mar. 9, 2021). That timing is significant, because issuance of the mandate "br[ought] the proceedings in [the] case on appeal * * * to a close" and "remove[d] it from the jurisdiction of" the court of appeals. 16AA Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3987 n.1 (5th ed. Oct. 2020 update) (quoting Ostrer v. United States, 584 F.2d 594, 598 (2d Cir. 1978)). Accordingly, even if filing an unsuccessful intervention motion is enough to qualify as a "party" for purposes of Section 1254(1) -- an issue that this Court does not appear ever to have expressly addressed -- applicants still do not come within Section 1254(1)'s additional requirement that they have been parties while the case was "in the court[] of appeals." 28 U.S.C. 1254(1).

b. The intervention cases on which applicants rely also limit the scope of this Court's review in ways that are incompatible with the relief applicants request. Specifically,

while this Court has sometimes allowed a person whose motion to intervene has been denied to "seek Supreme Court review of the denial of the motion to intervene, * * * such a putative intervenor cannot petition for review of any other aspect of the judgment below." Supreme Court Practice 6-62 (collecting cases); see, e.g., Scofield, 382 U.S. at 209 (observing that while the Court could review "the orders denying intervention," the unsuccessful intervenor "would not have been entitled to file a petition to review a judgment on the merits"); cf. Cameron, supra, (granting certiorari as to the first question of whether intervention should have been allowed, but not as to the second question of whether the court of appeals' judgment on the merits should be vacated).

That limitation means that even if applicants could file a petition for a writ of certiorari, but see pp. 13-19, supra, their petition would be limited to whether the Seventh Circuit should have permitted them to intervene. But applicants make no effort to show that such a petition would satisfy this Court's ordinary certiorari criteria or that there is otherwise a "reasonable probability" this Court would grant it. Conkright, 556 U.S. at 1402 (Ginsburg, J., in chambers) (citation omitted); see Sup. Ct. R. 10. Nor do they attempt to explain why a stay of the district court's underlying merits judgment would be appropriate in connection with a petition limited to the question of appellate

intervention. Instead, they focus their argument for a stay on the prospect that this Court would grant a petition addressing the merits of the 2019 Rule -- a petition that they clearly cannot file. See Stay Appl. 12-19. Indeed, to the extent applicants address at all the separate suitability of the intervention question for this Court's review, they implicitly concede that it would not warrant plenary consideration. They ask instead for summary reversal -- a request that is without merit. See pp. 26-31, infra.

Accordingly, because it is exceedingly unlikely that the Court would grant a petition for a writ of certiorari filed by applicants, applicants have not established a basis for a stay of the district court's partial final judgment.

B. Applicants' stay request should also be denied for the additional reasons that they have not established that they will suffer irreparable harm and have not shown that the balance of equities and public interest favor a stay. See Conkright, 556 U.S. at 1402 (Ginsburg, J., in chambers).

1. When the government previously asked this Court to grant stays in connection with the 2019 Rule, it did so against the backdrop of Congress's vesting of authority in the Secretary of Homeland Security to administer the public-charge provision. See 8 U.S.C. 1182(a)(4)(A) (providing that an alien is "inadmissible" if, "in the opinion of the [Secretary of Homeland Security]," he

"is likely at any time to become a public charge"). That statutory vesting of authority meant that the Secretary, and DHS and the federal government more broadly, would suffer irreparable harm if required to admit an alien whom the Secretary had determined was likely to become a public charge. Cf. Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) ("Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (brackets and citation omitted).

Applicants, however, have no role in making public-charge determinations, nor are they charged with adjusting noncitizens' federal immigration status more generally. This Court's prior irreparable-harm findings accordingly have no bearing on whether applicants are entitled to seek a stay of a judgment that the federal government has decided no longer to challenge. Contra Stay Appl. 20. And the only claim of irreparable harm to applicants' own interests that they assert (Stay Appl. 20-22) is a speculative claim of monetary injury that cannot support a stay in these circumstances.[5]

[5] Applicants also contend (Stay Appl. 20) that they will lose a "procedural right" to object to rescission of the Rule. But applicants have no procedural right to be consulted in advance (or after the fact) about the federal government's litigation decisions. And even if such a procedural right did exist, it would not provide a basis for a stay where, as here, applicants cannot show that irreparable harm to their substantive interests will result. Applicants invoke (Stay Appl. 21) this Court's decision in Massachusetts v. EPA, 549 U.S. 497 (2007), but that case

Specifically, applicants contend (Stay Appl. 8-9) that they will suffer monetary harm through the following chain of events: (1) DHS might, as a result of the district court's judgment, admit or grant LPR status to some indeterminate number of noncitizens who would not have been admitted or received LPR status under the 2019 Rule; (2) some subset of those noncitizens might live in applicants' jurisdictions; (3) some subset of that subset might apply for Medicaid or other public-benefits programs paid for (at least in part) by applicants; and (4) applicants' expenditures on those public-benefits programs might be greater than any countervailing financial effects of the Rule's vacatur.

Applicants make no serious effort to estimate the size of this feared financial injury. Real-world experience with the 2019 Rule, moreover, suggests that this causal chain is likely to result in few, if any, additional noncitizens becoming eligible for and receiving benefits in applicants' jurisdictions. According to information provided to the Office of the Solicitor General by DHS, the Rule made a difference in only a minuscule number of immigration adjudications during the period it was in effect between February 2020 and March 2021: immigration officials applied the Rule in adjudicating approximately 47,500 applications for adjustment of status, of which just three were denied based on

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involved standing; it did not address irreparable harm, let alone hold that the bare loss of a procedural right, standing alone, is a sufficient basis for a stay.

the 2019 Rule (with Notices of Intent to Deny also issued in response to two other applications). Applicants' implicit speculation that the Rule would substantially reduce the number of noncitizens eligible for public benefits within their jurisdictions thus appears to be incorrect. Moreover, applicants ignore that noncitizens admitted to the country on non-immigrant visas are, with certain limited exceptions, "ineligible for benefits," and that even noncitizens with LPR status are "eligible to receive very few benefits until [they have] been here for five years." Stay Appl. App. H43-H45 (Barrett, J., dissenting); see 8 U.S.C. 1611, 1613, 1621. Those statutory restrictions further undercut applicants' ability to show that they will suffer irreparable harm of a sort that could support a stay.[6]

2. Applicants also fail to address the substantial equitable and public-interest considerations that weigh against a stay. Putting the 2019 Rule back into effect weeks after it was vacated could create substantial confusion in immigrant communities (including for citizens and noncitizens alike). Indeed, DHS recognized even in connection with the original

[6] As discussed next, evidence suggests that citizens, lawful permanent residents, and others who were not subject to the 2019 Rule refrained from using benefits for which they were eligible because of confusion about the 2019 Rule's effects. See pp. 24-26, infra. Applicants appropriately have not argued that they are entitled to a stay in order to perpetuate this confusion and any incidental cost-savings it may have generated. See Stay Appl. 9 (relying only on putative cost savings associated with "immigrants who would otherwise be inadmissible under the DHS Rule").

adoption of the 2019 Rule that "confusion regarding the rule's scope and effect" could lead to negative consequences, such as disenrollment from public-benefits programs by citizens and others who are not themselves subject to the Rule. 84 Fed. Reg. at 41,313. DHS further recognized that such disenrollment could in turn lead to "food insecurity, housing scarcity," adverse effects on "public health and vaccinations," and "increased costs to states and localities." Ibid. Those harmful, unintended effects would likely become more pronounced if the Rule is placed back into effect after the public has been advised that the Rule was finally vacated and no longer operational.

This would be a particularly poor time, moreover, to reintroduce what DHS identified even before the pandemic as the potentially harmful impact of the Rule on "public health and vaccinations." 84 Fed. Reg. at 41,313. Evidence suggests that confusion over the 2019 Rule has interfered with efforts to combat the COVID-19 public-health emergency, as the District Court for the Southern District of New York concluded in July. See New York v. United States DHS, 475 F. Supp. 3d 208, 223-231 (2020) (pointing to declarations provided by doctors and other public-health professionals); pp. 6-7, supra. Regardless of whether the district court in that case had jurisdiction to impose a new preliminary injunction on that basis, its findings illustrate that granting applicants' requested stay could frustrate current efforts to

vaccinate especially vulnerable communities. See New York, 475 F. Supp. 3d at 227 (observing that "[i]mmigrants make up a substantial portion of workers in essential industries who have continued to work throughout the national emergency" and as such face increased risk of infection). The speculative claims of future monetary harm on which applicants rely do not begin to justify a stay from this Court that could have such negative consequences for public health in the midst of a pandemic. For that independently sufficient reason, too, a stay is not warranted.

II. APPLICANTS IDENTIFY NO ERROR AT ALL -- AND CERTAINLY NO BASIS FOR SUMMARY REVERSAL -- IN THE COURT OF APPEALS' DENIAL OF THEIR MOTION TO RECALL THE MANDATE

Applicants alternatively request that this Court "summar[ily] revers[e] * * * the court of appeals' denial of their motions to recall the mandate" and allow applicants to revive the case. Stay Appl. 22 (capitalization and emphasis omitted); see Stay Appl. 22-26. For the reasons already discussed, applicants have no claim to such relief because they are not "part[ies]" entitled to seek this Court's review under 28 U.S.C. 1254(1). And even if they could overcome that jurisdictional problem, applicants identify no case in which a court of appeals has ever recalled its mandate to allow intervention of the sort applicants envision here, let alone a case in which this Court found that a court of appeals had abused its discretion in declining to do so. Their request that this

Court do so for the first time in a summary reversal here lacks merit and should be denied.

This Court has recognized that a court of appeals has inherent authority to recall its mandate, but that "the power can be exercised only in extraordinary circumstances," ordinarily as an option "of last resort, to be held in reserve against grave, unforeseen contingencies." Calderon v. Thompson, 523 U.S. 538, 550 (1998). The Court reviews a court of appeals' decision on whether to recall its mandate for abuse of discretion. See id. at 549.

This case presents no extraordinary circumstances that would have warranted recall of the mandate. The only assertedly "unusual circumstances" that applicants identify (Stay Appl. 22) are that "the United States defended the Rule for over a year" and then determined not to continue defending the Rule without first providing "notice to any of the States." It is hardly extraordinary (or even unusual), however, for the federal government to decide not to pursue further review of a lower-court decision vacating a federal rule. See, e.g., Natural Res. Def. Council v. Wheeler, 955 F.3d 68 (D.C. Cir. 2020) (April 7, 2020 decision striking down Environmental Protection Agency rule; no further review sought); Conservation Law Found. v. Ross, No. 19-5365, 2020 WL 2610894 (D.C. Cir. Apr. 27, 2020) (granting government's motion to voluntarily dismiss appeal in case where

district court held unlawful a final rule adopted by the National Marine Fisheries Service); Center for Sci. in the Public Interest v. Perdue, 438 F. Supp. 3d 546 (D. Md. 2020) (April 13, 2020 decision striking down Department of Agriculture rule; no further review sought). Nor does the federal government ordinarily provide nonparties, such as applicants, with advance notice of those litigating decisions.

Contrary to applicants' intimations (e.g., Stay Appl. 1-3, 7-8, 23-24), there is nothing inconsistent with the APA about deciding not to pursue further review of a final judgment entered by a district court or court of appeals. In any given case, there are likely to be those whose "parochial view of the interest of the Government" would lead them to appeal an adverse judgment. FEC v. NRA Political Victory Fund, 513 U.S. 88, 96 (1994). Rather than adopt an appeal-everything standard, however, Congress has (with certain exceptions not relevant here) given discretionary control over appeals to the Department of Justice, which can exercise that discretion using its "broader view of litigation in which the Government is involved throughout the state and federal court systems." Ibid.; see 28 U.S.C. 516; see also 5 U.S.C. 3106, 28 U.S.C 519. Congress's policy choice assumes that the government will not always pursue every available appeal, but will instead balance such considerations as the strength of the respective positions on the merits; the legal and practical consequences of

an adverse decision; the burdens associated with ongoing litigation (including discovery burdens that such litigation may impose on the government); and the public interest more broadly. Cf. NRA Political Victory Fund, 513 U.S. at 96 ("Whether review of a decision adverse to the Government in a court of appeals should be sought depends on a number of factors which do not lend themselves to easy categorization."). Applicants disagree with how the government balanced those considerations in this particular circumstance, but that hardly presents the sort of situation for which a recall of the mandate might be appropriate.

Indeed, it is applicants' requested relief that would be truly extraordinary. They identify no case in which a court of appeals has ever recalled its mandate in order to allow a nonparty to revive a challenge to a federal rule that the Department of Justice has determined no longer to defend through continued pursuit of an appeal. Yet applicants' position appears to be that such a recall of the mandate would be warranted whenever the federal government opts not to pursue a civil case all the way to a final decision in this Court, so long as one of the "numerous interested nonparties" can assert a financial stake in seeking further review. Stay Appl. 23.

That position would have far-reaching consequences. Interested nonparties have just the sort of "parochial" interests in litigation that Congress sought to counterbalance by

centralizing the federal government's litigating authority in the Department of Justice. NRA Political Victory Fund, 513 U.S. at 96. Here, for example, applicants focus (Stay Appl. 8-9) solely on the potential effects of the district court's judgment for future Medicaid budgets. By contrast, they appear to have given no consideration to the possible public-health consequences of reviving litigation over the Rule. See pp. 24-26, supra. Nor do they address the costs and distraction that renewed litigation over the 2019 Rule would present for DHS and the federal government more broadly. The Executive Branch, at the President's express direction, is actively reviewing the government's policies in this area. It would significantly complicate those efforts to be simultaneously engaged in extensive litigation regarding the 2019 Rule after DHS already determined that continuing to defend the 2019 Rule before this Court and in the lower courts would not be in the public interest or an efficient use of government resources. See Stay Appl. App. K4-K5.

In addition, any such litigation would encompass not just the claims addressed in the district court's partial final judgment, but also additional claims, such as the allegation that the 2019 Rule was adopted because of racial animus on the part of senior officials in the prior Administration. See pp. 7-8, supra. Resolving that equal-protection claim would, as the government recognized last year, involve "contentious discovery disputes

raising difficult issues of executive privilege" -- and would be even more challenging now that the officials no longer work in government. D. Ct. Doc. 163, at 5 (June 16, 2020). Yet nonparties like applicants have no reason to take such legal, practical, and financial effects for the federal government into account here, or in any other case.

Given the apparent lack of any precedent for the "extraordinary" relief applicants sought from the court of appeals, Calderon, 523 U.S. at 558, and the substantial disruption that granting such relief would have caused, applicants have fallen far short of showing that the court abused its discretion in declining to recall the mandate. Their request that this Court summarily reverse the court of appeals' decision should accordingly be denied.

CONCLUSION

The application for leave to intervene and for a stay should be denied.

Respectfully submitted.

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