No. 19A785

In the
Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, et al.,

Applicants,

v.

NEW YORK, et al.,

Respondents.

REPLY OF GOVERNMENT PLAINTIFFS ON THEIR MOTION TO TEMPORARILY LIFT OR MODIFY THE COURT'S STAY OF THE ORDERS ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

LETITIA JAMES
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
STEVEN C. WU
Deputy Solicitor General
JUDITH N. VALE
Senior Assistant Solicitor General
28 Liberty Street
New York, New York 10005
(212) 416-8016
barbara.underwood@ag.ny.gov

MATTHEW COLANGELO
Chief Counsel
for Federal Initiatives
ELENA GOLDSTEIN
Deputy Bureau Chief
Civil Rights Bureau
MING-QI CHU
Section Chief, Labor Bureau

*Counsel of Record for Government Plaintiffs

Dated: April 22, 2020

(*Additional counsel appear on signature page.*)

TABLE OF CONTENTS

Page

ARGUMENT

The fundamental purpose of a stay is "to balance the equities as the litigation moves forward" rather than to "conclusively determine the rights of the parties. *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) ("*IRAP*"). Here, as plaintiffs' motion explained, the unprecedented COVID-19 crisis has so drastically altered the balance of the equities that this Court should revisit its previously issued stay and either lift it during the pendency of the national emergency declared by the president concerning COVID-19, or clarify that the lower court may consider these changed circumstances (including plaintiffs' new evidence) in the first instance. (Mot. by Gov't Pls. to Temporarily Lift or Modify the Court's Stay ("Mot.") 14-24.)

Defendants do not dispute that this Court has the power to issue such relief. Nor do they dispute that there is a direct connection between the COVID-19 crisis and the Public Charge Rule at issue here—indeed, they have already been forced to limit the Rule in light of the COVID-19 crisis, and they have announced further changes for the first time in their response to plaintiffs' motion here. Their arguments against the narrow relief that plaintiffs request are meritless.

First, defendants miss the mark in presuming that this Court has already deemed plaintiffs' claims unlikely to succeed and that any change to the balance of the equities would thus not "even be relevant to the propriety of the existing stay." (Response in Opp. to Resps.' Mot. to Temporarily Lift or Modify the Court's Stay ("Opp.") 11; *see also id.* at 5-6, 8-10.) A stay is "often dependent as much on the equities of a given case as the substance of the legal issues it presents." *IRAP*, 137 S. Ct. at 2087 (citations omitted). Indeed, the stay order does not mention the parties' merits arguments at all. (App. 1.)

At minimum, there are sufficiently serious questions about defendants' likelihood of success on the merits that this Court can and should evaluate whether the drastically changed

circumstances presented by the COVID-19 crisis warrant a temporary halt to the Rule. *See Wolf v. Cook County, Ill.*, 140 S. Ct. 681, 683 (2020) (Sotomayor, J., dissenting) (noting "weighty arguments on the merits" raised by plaintiffs in separate challenge to the Rule). And as plaintiffs' motion established and defendants do not contest, the Court plainly has authority to temporarily lift or modify its own stay, or to postpone the effective date of the Rule under 5 U.S.C. § 705, in order to properly "balance the equities as the litigation moves forward." *IRAP*, 137 S. Ct. at 2087. (*See* Mot. 14-16.)

Second, this Court's exercise of its undisputed authority here would not be unprecedented, as defendants contend. (*See* Opp. 7, 10, 18.) In prior cases, this Court, acting through a single Justice or the full Court, has lifted, modified, or clarified the meaning of its own stay orders when new circumstances not previously considered by the Court warranted such a response. *See, e.g.*, *King v. Smith*, 88 S. Ct. 842, 843 (1968) (Black, J., in chambers). For example, in *IRAP*, this Court effectively clarified that its earlier-issued stay order permitted the entry of "grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, brothers-in-law and sisters-in-law,"[1] notwithstanding the president's executive order halting immigration from certain countries, when it rejected the federal government's effort to limit that stay only to more immediate family members. *See Trump v. Hawaii*, 138 S. Ct. 34 (2017) (Mem.); *IRAP*, 137 S. Ct. at 2088. And lower courts routinely alter or lift their own equitable orders when new circumstances warrant such a change. *See, e.g.*, *New York v. Kraeger*, 972 F. Supp. 2d 291, 295 (N.D.N.Y. 2013) (granting in part motion to modify injunction given "significant change in circumstances"); *NML Capital, Ltd. v. Republic of Argentina*, No. 08-cv-6978, 2016 WL 836773, at *2 (S.D.N.Y. Mar. 2, 2016) (lifting

[1] *Hawai'i v. Trump*, 263 F. Supp. 3d 1049, 1054 (D. Haw. 2017).

previously issued injunctions where "circumstances have changed so significantly as to render the injunctions inequitable and detrimental to the public interest").

Moreover, this Court is likely the only court that can provide temporary relief from the harms imposed by the Public Charge Rule during the national emergency. Defendants themselves strenuously argue that the district court here "probably lacks the authority" to consider plaintiffs' concerns about the changed circumstances presented by the COVID-19 pandemic "now that the Court has stayed" the district court's orders of preliminary relief. (Opp. 16.) Thus—unless this Court clarifies that, contrary to defendants' assertion, the district court can consider the COVID-19 crisis and appropriately tailor temporary relief to those new circumstances—only this Court can decide whether the balance of the equities warrants the lifting or modification of its own stay.

In any event, the unprecedented crisis currently facing this nation calls for unprecedented relief. The COVID-19 pandemic is the largest public-health and economic disaster that the country has faced in at least a century. And the Public Charge Rule is impeding efforts to mitigate the virus's spread and to stabilize the economy. These exceptional circumstances have already led to extraordinary changes in this country—and indeed around the world. The temporary and targeted relief that plaintiffs request here is thus not disproportionate to the severe problems that we are facing.

Third, defendants dispute that the "equities have shifted in a way that would warrant revisiting" this Court's stay. (*See* Opp. 11.) In so arguing, defendants do not contest that the Public Charge Rule is deterring immigrants and their family members from obtaining publicly funded health insurance and medical care during the COVID-19 pandemic, thus undermining efforts to slow the spread of the virus. (*See* Mot. 18-22.) Nor do they dispute that the Rule is deterring immigrants and their family members from using public benefits, such as Medicaid and

Supplemental Nutrition Assistance Program benefits, that are critical to helping plaintiffs and the nation recover from the current economic crisis. (*Id.* at 22-24.) Indeed, defendants do not challenge as a factual matter any of the concrete evidence of harms presented by plaintiffs.

Instead, defendants assert that they have "taken aggressive actions to address the current public-health crisis" through the alert they issued regarding the application of the Public Charge Rule to COVID-19 medical treatment or preventive services. (Opp. 18.) But plaintiffs have already explained why defendants' alert is inadequate and thus no substitute for the relief requested here. (Mot. 24-26.) Tellingly, defendants' principal response to plaintiffs' objections is to *further* modify the Rule's application by stating for the first time that "if an alien enrolls in Medicaid to receive COVID-19-related care, that enrollment will not be a negative factor in a public-charge inadmissibility determination." (Opp. 13.) Although defendants purport to base this position on the text of the alert they issued, the alert actually appears to say the opposite by admonishing that defendants will continue "to consider the receipt of certain cash and non-cash public benefits, *including those that may be used to obtain testing or treatment for COVID-19* in a public charge inadmissibility determination." (App. 44 (emphasis added).) Defendants' attempt to further alter the Rule through their opposition to a motion in this Court not only highlights the defects in the original alert, but will also likely cause more confusion about the Rule's applicability during these tumultuous times—thus further demonstrating the need for this Court to issue a clear ruling that temporarily lifts or modifies its stay until the national emergency ends.

In any event, defendants' new modification of the Rule's application falls short for additional reasons. For example, under the alert, the Rule continues to penalize an LPR applicant for seeking or using Medicaid coverage to obtain treatment for medical conditions other than COVID-19 that place patients at high risk of suffering more severe symptoms or death if they

contract COVID-19. (*See* Mot. 25; App. 66 (explaining that because "much of the medical harm of COVID-19 is related to other medical problems, such as heart disease, asthma, or diabetes, effective treatment may involve care for other medical problems for which insurance is necessary").) And defendants' assertion that they *may* consider other COVID-19-related factors that lead an immigrant to access public benefits—"such as enforced social distancing or an employer's shutting down" (Opp. 13)—is no assurance at all because defendants purport to retain complete discretion to give such factors any weight they choose, including no weight at all. The ambiguous and incomplete nature of defendants' alert thus should not preclude this Court from determining whether the equities here warrant narrow relief from this Court to fully address the Public Charge Rule's impact on the COVID-19 crisis.

Defendants also contend (Opp. 14-15) that the Court should simply ignore the evidence of the Rule's new harms to public health and the economy because many immigrants are forgoing or disenrolling from critical public benefits out of "mistaken beliefs about the Rule's application and content." (Opp. 14 (quotation marks and alterations omitted).) But defendants do not dispute that the Public Charge Rule is in fact deterring many immigrants and their family members from using *any* publicly funded healthcare or nutritional benefits, even if those individuals or benefits are not directly subject to the Rule. In the standing context, this Court has recognized that cognizable injury can be based on the "predictable effect[s]" of a challenged government action—including the effects on individuals who are not directly subject to the government's action and who react based on purportedly "unfounded fears." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). Defendants have cited no case that would preclude this Court from similarly considering such predictable harms in balancing the equities here—particularly when the Rule's

deterrent effects, and their resulting harms to both the parties and the public interest, are not only predictable but are *actually happening* now.

Moreover, defendants cannot simply dismiss the confusion about the Public Charge Rule that is deterring many immigrants and their family members from using public benefits during the current crisis when that confusion is largely the product of defendants' own actions. It is entirely understandable that the many ambiguities and deficiencies in the alert and the Rule are driving many immigrants and their family members to avoid public benefits rather than risk losing the opportunity to obtain LPR status and, eventually, U.S. citizenship. (*See, e.g.*, App. 158 (alert has "only created more confusion" about Public Charge Rule); App. 192-193 (explaining difficulties in differentiating between use of federally funded Medicaid, which is a negative or heavily weighted negative factor under Rule depending on duration of use, and use of purely state-funded Medicaid or other healthcare benefits, which is not a negative factor under Rule).) And contrary to defendants' contention (Opp. 15), officials and agencies in plaintiffs' jurisdictions, as well as many other state and local officials and private organizations across the country, are expending significant resources to educate the public and clarify the scope of the Public Charge Rule. These efforts have continued during the pandemic despite the enormous strains that COVID-19 is placing on plaintiffs' resources. (*See, e.g.*, App. 36-37, 116-118.) But temporary and targeted relief from this Court is needed precisely because the Rule continues to drive many immigrants and their family members away from publicly funded healthcare and benefits despite plaintiffs' efforts to mitigate such harms.

Finally, defendants object to the Court temporarily lifting or modifying its stay on the ground that such relief will halt implementation of the Rule nationwide until the federal emergency ends. (*See* Opp. 16.) But such nationwide relief is perfectly appropriate to address the nationwide

harms that the Rule is inflicting during a public-health and economic crisis that is currently affecting every State in the country. And temporary, nationwide relief will provide needed clarity about the Rule's application during the pandemic. In any event, to the extent that the Court is concerned about this point, it "need not grant the total relief sought by the applicant but may mold its decree to meet the exigencies of the particular case." *IRAP*, 137 S. Ct. at 2087 (quoting 11A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2947, at 115 (3d ed. 2013)). The Court may thus temporarily lift or modify its stay as applied to plaintiffs' jurisdictions, which are some of the jurisdictions hardest hit by the pandemic. Or the Court may clarify that its stay does not preclude the district court from reconsidering the geographic scope of any further preliminary relief to respond to the new circumstances caused by the COVID-19 pandemic.

CONCLUSION

The Court should temporarily lift or modify its stay to halt implementation of the Public Charge Rule during the national emergency declared on March 13, 2020. In the alternative, the Court should clarify that its stay does not preclude the district court from considering whether changed circumstances from the COVID-19 outbreak warrant temporary relief from implementation of the Public Charge Rule.

Dated: New York, New York
April 22, 2020

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York

Barbara D. Underwood /ccm

BARBARA D. UNDERWOOD*
Solicitor General
STEVEN C. WU
Deputy Solicitor General
JUDITH N. VALE
Senior Assistant Solicitor General

(212) 416-8016
barbara.underwood@ag.ny.gov
* Counsel of Record

MATTHEW COLANGELO
Chief Counsel for Federal Initiatives
ELENA GOLDSTEIN
Deputy Bureau Chief, Civil Rights Bureau
MING-QI CHU
Section Chief, Labor Bureau

WILLIAM TONG
Attorney General
State of Connecticut
55 Elm St.
P.O. Box 120
Hartford, CT 06106

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont
109 State St.
Montpelier, VT 05609

JAMES E. JOHNSON
Corporation Counsel
City of New York
100 Church St.
New York, NY 10007