No. 19A785

IN THE SUPREME COURT OF THE UNITED STATES

DEPARTMENT OF HOMELAND SECURITY, ET AL., APPLICANTS

v.

STATE OF NEW YORK, ET AL.

DEPARTMENT OF HOMELAND SECURITY, ET AL., APPLICANTS

v.

MAKE THE ROAD NEW YORK, ET AL.

REPLY IN SUPPORT OF APPLICATION FOR A STAY

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Congress has declared that under the United States' "national policy with respect to welfare and immigration," there is a "compelling governmental interest" in "assur[ing] that aliens be self-reliant" and in "remov[ing] the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. 1601. Consistent with that objective, Congress has long empowered specified Executive Branch officials, including the Secretary of the Department of Homeland Security (DHS), to declare "inadmissible" "[a]ny alien who, in the opinion of [the relevant Executive Branch official], is likely at any time to become a public charge," 8 U.S.C. 1182(a)(4)(A). See Appl. 5-6.

That statutory policy refutes respondents' arguments. First, on the merits, it undermines respondents' claim that "public charge" has a uniformly accepted meaning that applies only to narrowly drawn types of public support. Nothing in the statute's text, context, or history requires that narrow reading, or precludes DHS's natural and reasonable conclusion that aliens who rely on public support to feed or house themselves over a protracted or intense period are public charges. Second, on the equities, it forecloses respondents' argument that because aliens subject to the Rule may disenroll from public benefit programs, allowing the Rule to go into effect would harm the public interest.

Indeed, two courts of appeals faced with substantively identical nationwide preliminary injunctions already have

concluded that stays are warranted to allow the Rule to go into effect pending appeal. The nationwide injunctions of a single district judge should not be allowed to supersede those appellate determinations or dictate national immigration policy. Instead, historical limitations on the proper role of a district court, given force through Article III and principles of equity, require that any relief be appropriately tailored to the parties.

I. THERE IS A REASONABLE PROBABILITY THIS COURT WOULD GRANT CERTIORARI

Respondents do not seriously dispute that if the Second Circuit were to affirm the nationwide preliminary injunctions, that decision would warrant this Court's review. Indeed, the nationwide aspect of those injunctions by itself would warrant review. See Trump v. Pennsylvania, cert. granted, Jan. 17, 2020 (No. 19-454). Instead, respondents contend that "until the[] courts [of appeals] issue their decisions, there is no reasonable basis" to predict whether this Court would grant certiorari. NY Opp. 21; see Make the Road (MTR) Opp. 20. But this Court routinely makes such predictive judgments when it considers whether to grant a stay pending appeal of a preliminary injunction. See, e.g., Barr v. East Bay Sanctuary Covenant, 140 S. Ct. 3 (2019); Trump v. Sierra Club, 140 S. Ct. 1 (2019). And contrary to respondents' suggestion (MTR Opp. 17), making that prediction is especially easy here, where two courts of appeals already have entered stays of substantively identical nationwide injunctions -- one of them

in a published and precedential opinion holding that the Rule "easily" survives challenge. City & County of San Francisco v. USCIS, 944 F.3d 773, 799 (9th Cir. 2019).

II. THERE IS A FAIR PROSPECT THAT THIS COURT WOULD VACATE THE INJUNCTIONS IN WHOLE OR IN PART

A. Respondents Are Unlikely To Prevail On The Merits

1. Respondents have failed to identify a cognizable Article III injury that is within the zone of interests of the public-charge inadmissibility provision. Even if respondents could show that the prospect of aliens' disenrollment from public-benefits programs poses a "certainly impending" threat to their coffers fairly traceable to the Rule, Clapper v. Amnesty Int'l USA, 568 U.S. 398, 410 (2013), their interest in preventing such disenrollment is "inconsistent" with the public-charge provision's goal of ensuring that aliens be self-sufficient, Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 225 (2012). Respondents' contrary assertion (NY Opp. 35-36; MTR Opp. 22) that the public-charge provision was somehow intended to facilitate continued dependence on public benefits in service of other goals finds no support in the statutory text.

2. a. Respondents' challenges to the Rule also lack merit. As the Ninth Circuit recognized, Congress has over the course of more than a century intentionally preserved the Executive Branch's flexibility to interpret public-charge inadmissibility provisions in a way that takes account of changes in public welfare programs.

City & County of San Francisco, 944 F.3d at 791-798. The Rule exemplifies that adaptive approach, and fits well within the "considerable discretion" Congress has granted to DHS "to determine if an alien is likely to become a public charge." Id. at 799.

Despite that history, respondents repeatedly insist that when Congress adopted the current provision in 1996, "public charge" had a narrow, "well-established meaning" that Congress must have meant to incorporate. NY Opp. 6; see, e.g., id. at 7, 12, 22, 24, 27. In respondents' view, the settled meaning of "public charge" is "an individual who does not work and is consequently primarily dependent on the government for long-term subsistence." Id. at 4; see MTR Opp. 2. There is no such well-established or settled meaning. See Appl. 20-27. Even the 1999 agency discussions -- which respondents otherwise embrace -- acknowledged that "public charge" is "ambiguous" and had "never been defined in statute or regulation." 64 Fed. Reg. 28,676, 28,676-28,677 (May 26, 1999); see City & County of San Francisco, 944 F.3d at 796 ("[W]e are unable to discern one fixed understanding of 'public charge' that has endured since 1882. * * * [D]ifferent factors have been weighted more or less heavily at different times, reflecting changes in the way in which we provide assistance to the needy."). Three examples illustrate the point.

First, respondents' position is impossible to square with the affidavit-of-support provisions of the Immigration and Nationality

Act (INA). See 8 U.S.C. 1182(a)(4)(C) and (D). Respondents do not dispute that an alien subject to those provisions who fails to obtain a required affidavit of support is, as a matter of law, inadmissible on public-charge grounds, regardless of the amount or type of benefits the alien receives. See Appl. 20-22. Respondents' arguments (NY Opp. 29) that some public benefits are currently exempted by regulation from that treatment, and that the affidavit-of-support remains in effect for only a limited time, miss the point: in classifying aliens who fail to obtain a required affidavit-of-support as being inadmissible on public-charge grounds, Congress necessarily rejected respondents' narrow understanding of "public charge" as limited to aliens who are institutionalized or primarily dependent on cash payments.

Second, respondents' position is inconsistent with an immigration treatise and the Black's Law Dictionary definition of "public charge" from the time of the INA's passage. See Appl. 24-25. Respondents essentially argue (NY Opp. 25; MTR Opp. 7 n.2.) those definitions were incorrect, and that the correct definition is in a case that the dictionaries and treatise cited. But that case, Ex Parte Kichmiriantz, 283 F. 697 (N.D. Cal. 1922), does not support respondents either: it recognized that "the words 'public charge,' as used in the Immigration Act [of 1917], mean just what they mean ordinarily": "a money charge upon, or an expense to, the public for support and care." Id. at 698. To be sure, the

court found that definition inapplicable because the alien's relatives had paid the State for the alien's care, see ibid., but the court (like the dictionary and treatise) nevertheless understood that "public charge" naturally refers to aliens who impose a charge on the public, without qualifications about cash assistance, primary dependence, or the like.

Third, respondents' position is inconsistent with longstanding administrative interpretations, such as the one adopted in In re B-, 3 I. & N. Dec. 323 (B.I.A. 1948; A.G. 1948), that did not require a showing of cash support or primary dependence. See id. at 326. Respondents observe (NY Opp. 25-26; cf. MTR Opp. 7 n.1) that unlike the Rule, In re B- required a showing of actual failure to repay funds upon demand. But that difference simply underscores the Executive's longstanding flexibility in making public-charge determinations. Critically, In re B- adopted an understanding of "public charge" decidedly different from respondents' narrow definition, see Appl. 25 & n.4, thereby disproving their central claim that "public charge" has a single, well-established meaning that DHS is required to maintain in perpetuity.

b. Respondents misread Gegiow v. Uhl, 239 U.S. 3 (1915), as establishing that "the scope of 'public charge' remained limited to individuals likely to rely almost entirely on government support to survive." NY Opp. 6. Gegiow actually addressed only the "single question" of "whether an alien can be declared likely to

become a public charge on the ground that the labor market in the city of his immediate destination is overstocked." 239 U.S. at 9-10. The Court said no, requiring such determinations to be based on the characteristics of the alien, not his place of destination. Ibid. Although the Court suggested in dicta that "public charge" might be interpreted narrowly to accord with nearby terms (like "paupers" and "professional beggars," id. at 10), Congress subsequently revised the relevant language specifically to disapprove that inference, see Immigration Act of 1917, 64th Cong. ch. 29 § 3, 39 Stat. 875-876; S. Rep. No. 352, 64th Cong., 1st Sess. 5 (1916) ("The purpose of this change is to overcome recent decisions of the courts limiting the meaning of the description of the excluded class. * * * (See especially Gegiow v. Uhl, 239 U. S., 3.)."); see also United States ex rel. Iorio v. Day, 34 F.2d 920, 922 (2d Cir. 1929) (L. Hand, J.) (the public-charge statute "is certainly now intended to cover cases like Gegiow").

Nor do any of the lower-court decisions and administrative adjudications respondents cite (NY Opp. 4-6, 23-25; MTR Opp. 5-8) establish a uniform, settled understanding of "public charge." At most, those decisions -- when contrasted with the materials discussed above -- confirm the Senate Judiciary Committee's observation in 1950 that "[d]ecisions of the courts have given varied definitions of the phrase 'likely to become a public charge.'" S. Rep. No. 1515, 81st Cong., 2d Sess. 347, 349 (1950).

Congress's reaction to that variation was to preserve Executive Branch flexibility to adapt the public-charge inadmissibility provision as circumstances require -- not to incorporate a fixed definition of the term. See Appl. 25-26.

As the Ninth Circuit correctly recognized, it "easily" follows that the Rule's interpretation is "'rational and consistent with the statute.'" City & County of San Francisco, 944 F.3d at 799 (citation omitted). DHS adopted a reasonable interpretation of "public charge" that -- like the mid-twentieth century treatise and dictionaries -- asks whether an alien is likely to charge expenses to the public for support and care; the agency then moderated that interpretation by establishing an administrable threshold level of benefits below which an alien would not be considered a public charge. Especially given Congress's identification of the "compelling governmental interest" in "assur[ing] that aliens be self-reliant," 8 U.S.C. 1601(4), that is an eminently reasonable interpretation of the statute, promulgated after notice-and-comment rulemaking; it is certainly not, as respondents contend, "far 'beyond the meaning that the statute can bear.'" NY Opp. 26 (citation omitted).

c. Contrary to respondents' suggestion (NY Opp. 31-32; MTR Opp. 31), the Rule is not arbitrary and capricious in treating the receipt of public benefits as indicative of a lack of self-sufficiency. An alien who receives public "assistance to provide

for * * * basic necessities is," by definition, "not self-sufficient," 83 Fed. Reg. 51,154, 51,159 (Oct. 10, 2018), whether or not he could have been self-sufficient had he chosen not to accept public benefits. Nor is the Rule's "aggregate-counting system" arbitrary and capricious. NY Opp. 32; cf. MTR Op. 32. That system reflects DHS's sensible approach to considering both the intensity and duration of an alien's receipt of benefits in an administrable way, with periods of more intense usage weighed more heavily. DHS also acted reasonably in including, as part of its totality-of-the-circumstances assessment, factors such as low credit scores, lack of English proficiency, and family size. See NY Opp. 32. Such considerations bear on an alien's financial stability, earning power, and material needs, and DHS cited evidence showing that they thus affect the likelihood that a given alien will receive public benefits in the future. See 83 Fed. Reg. at 51,184-51,185 (family size and English proficiency); 84 Fed. Reg. 41,292, 41,425-41,426 (Aug. 14, 2019) (discussing causes and effects of credit scores).

d. The Rule also does not violate the Rehabilitation Act. See NY Opp. 34-35; MTR Opp. 29-31. Congress has directed that DHS "shall" consider "health" in determining whether an alien is likely to become a public charge. 8 U.S.C. 1182(a)(4)(B). On respondents' view, instead of treating health-related conditions as one consideration among many in the totality-of-the-circumstances

analysis, DHS would be required to treat minor ailments as a negative factor -- but disregard entirely more serious conditions that rise to the level of a disability. The Rehabilitation Act does not require such absurdities. See Appl. 30-31.

e. Finally, the Rule does not violate equal protection principles. See MTR Opp. 32-33. It pursues in a facially neutral manner the reasonable, congressionally declared "national immigration policy" of ensuring "that aliens be self-reliant," 8 U.S.C. 1601(5). Respondents offer no colorable basis for subjecting it to heightened scrutiny.

B. The Nationwide Injunctions Are Overbroad

1. As the government explained (Appl. 32-39), nationwide preliminary injunctions can be in serious tension with both Article III and traditional principles of equity. As to Article III, respondents assert that the nationwide injunctions here "protect[] against precisely the harm [respondents] ultimately seek to prevent -- implementation of an unlawful regulation." NY Opp. 38; see MTR Opp. 37. But "a plaintiff's remedy must be 'limited to the inadequacy that produced his injury in fact.'" Gill v. Whitford, 138 S. Ct. 1916, 1930 (2018) (emphasis added; brackets and citation omitted). An injunction limited to aliens receiving services from respondents in the jurisdictions where respondents

operate fully remediates respondents' alleged injuries.[1]

As to principles of equity, respondents contend that "[t]he 'scope of injunctive relief is dictated by the extent of the violation established, not by the geographical' location of plaintiffs." NY Opp. 38 (citation omitted). But respondents overlook that the case they quote for that proposition, Califano v. Yamasaki, 442 U.S. 682 (1979), involved a class action "brought in conformity with" Civil Rule 23. Id. at 702. A certified nationwide class may of course pursue nationwide relief; indeed, a principal problem with nationwide injunctions is that they elide the requirements and protections of class-action litigation. See Appl. 32. Yamasaki itself cautioned that before certifying a nationwide class, courts should "ensure that nationwide relief is indeed appropriate" and "would not improperly interfere with the litigation of similar issues in other judicial districts." 442 U.S. at 702. Respondents' position would turn Yamasaki on its head.

Respondents assert (MTR Opp. 37) that a court in equity historically could issue an injunction "that also protects the

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[1] Respondents' assertion (MTR Opp. 35) that one of them "supports affiliate programs that deliver direct services to immigrants in 49 states and the District of Columbia" is insufficient to create a nationwide injury. Respondents' claim to injury as mere service providers to the individuals actually affected by the Rule already is tenuous, see Appl. 17-18; voluntarily providing "support[]" to other service providers stretches the concept of Article III injury beyond all reasonable limits. See Clapper, 568 U.S. at 418.

interests of nonparties." But in support, respondents cite an article discussing a "bill of peace," which was more analogous to a class action (with similar requirements and protections), see Frost, In Defense of Nationwide Injunctions, 93 N.Y.U. L. Rev. 1065, 1081 n.77 (2018), as best illustrated by the fact that such bills bound the absent parties win or lose, cf. Smith v. Swormstedt, 57 U.S. (16 How.) 288, 302-303 (1853); Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 366-367 (1921). Respondents cite another article identifying a small handful of nationwide injunctions issued in the early 20th century, one as early as 1913. See Sohoni, The Lost History of the "Universal" Injunction, 133 Harv. L. Rev. 920, 924-925 (2020). But federal courts' equity jurisdiction is limited to the "system of judicial remedies" applied by "the High Court of Chancery in England" in 1789 -- not 1913. Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318 (1999) (citations omitted).[2]

2. Respondents' alternative reliance (NY Opp. 36-38; MTR Opp. 36-37) on 5 U.S.C. 705 is misplaced. That provision states that a court may "postpone the effective date of an agency action"

[2] The date of the earliest known nationwide injunction is contested. See Bray, A Response to The Lost History of the "Universal" Injunction, Yale J. Reg. Notice & Comment (Oct. 18, 2019); Sohoni, A Reply to Bray's Response, Yale J. Reg. Notice & Comment (Oct. 18, 2019). Regardless, that scholars debate whether the first nationwide injunction was in 1913 or 1939 or 1963 simply underscores that it was not a traditional part of equity in 1789.

only "to the extent necessary to prevent irreparable injury." Postponing agency action solely as to the plaintiffs properly before the court is all that is "necessary" to prevent their asserted injuries. Ibid. Respondents' reliance (NY Opp. 36; MTR Opp. 36) on the observation that Section 705 "authorizes courts to stay agency rules pending judicial review," Mexichem Specialty Resins, Inc. v. EPA, 787 F.3d 544, 562 (D.C. Cir. 2015) (Kavanaugh, J., dissenting in part) (emphasis omitted), likewise is inapposite because it does not address the scope of such a stay. And that agencies "routinely" "postpone the effective dates of their own rules * * * on a nationwide basis" (NY Opp. 37) says nothing about whether courts may order them to do so under Section 705.

Moreover, as even the district court correctly recognized (Appl. 24a n.5; id. at 50a n.4), the "standard for a stay" under Section 705 "is the same as the standard for a preliminary injunction." Indeed, as this Court reaffirmed shortly before the APA was enacted, statutory remedies should be construed consistent with "traditions of equity practice." Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944). The Court has even suggested that the All Writs Act, 28 U.S.C. 1651, confers remedial authority no broader than would exist under traditional "principles of equity applicable" in a case. Grupo Mexicano, 527 U.S. at 326 n.8 (citation omitted). Nothing in Section 705 suggests it is any broader than the capacious All Writs Act. At a minimum, because

traditional principles of equity place fundamental limits on the judicial power, id. at 318, respondents' expansive reading of Section 705 would raise serious constitutional doubts and so should be rejected on that basis too. See Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018).[3]

3. Finally, respondents assert (NY Opp. 38; MTR Opp. 38) that the interest in the uniformity of the immigration laws and the public interest support a nationwide injunction here. But Congress's desire that the immigration laws be "enforced vigorously and uniformly," Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 115, 100 Stat. 3384, is a policy directive to the Executive Branch -- not a license for courts to issue nationwide injunctions that impede development of the law.

And it is respondents' position that would undermine the public interest. Principles of efficient and effective governance support the vigorous enforcement of the immigration laws, including regulations (such as the Rule here) duly promulgated through notice-and-comment rulemaking. Two courts of appeals

[3] Respondents' reliance (NY Opp. 36; MTR Opp. 36) on National Mining Association v. U.S. Army Corps of Engineers, 145 F.3d 1399 (D.C. Cir. 1998), also is misplaced. The D.C. Circuit did not grapple with any of the historical limitations on equitable remedies, and instead relied on a unique practical point inapplicable here: that because venue for suits against federal agencies always lies in D.C., even a narrower injunction would as a practical matter apply nationwide because successive plaintiffs would benefit from the binding precedent. See id. at 1409-1410.

already have determined that the Rule likely is lawful; at a minimum, therefore, it is in the public interest to enforce the Rule in those jurisdictions. A nationwide injunction prevents that by precluding operation of a Rule everywhere if it is successfully challenged anywhere -- regardless of how many unsuccessful challenges there may be.

III. THE REMAINING STAY FACTORS WEIGH IN FAVOR OF A STAY

Respondents do not dispute that because of the nationwide preliminary injunctions, the government is presently awarding -- on an effectively irrevocable basis -- grants of lawful permanent resident status to aliens who, under the Rule, should instead be declared inadmissible. See MTR Opp. 8, 34-35; Appl. 39-40. Instead, they claim (NY Opp. 16) these effects do not qualify as irreparable harm because any inadmissibility determinations made under the Rule would be "of dubious legality." That argument thus collapses into respondents' arguments on the merits.

Respondents' arguments about the "public interest" also are inextricably tied to their arguments on the merits. Respondents contend that the nationwide injunctions should be allowed to remain in place, notwithstanding the decisions of the Ninth and Fourth Circuits, because otherwise large numbers of aliens will disenroll from public benefit programs, forgoing billions of dollars' worth of "benefits for which they are eligible." MTR Opp. 33-34; ibid. (describing these effects as "grave harms"). But Congress has

expressly specified that it is the official "immigration policy of the United States that * * * aliens within the Nation's borders not depend on public resources to meet their needs." 8 U.S.C. 1601 (emphasis added). To the extent that the Rule may "discourag[e] aliens from receiving public benefits" because pursuing such benefits would be inconsistent "with the immigration status they are seeking," that is not a valid objection because "self-sufficiency is the rule's ultimate aim," consistent with statutory purposes. 84 Fed. Reg. at 41,312-41,313. See United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 497 (2001) ("[A] court siting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation.'") (citation omitted). And to the extent that the Rule might cause disenrollment by aliens who are not subject to the Rule, such disenrollment is "unwarranted," 84 Fed. Reg. at 41,313, easily corrected, and temporary. It does not outweigh the long-term harms the government will experience while the Rule is enjoined.

Respectfully submitted.

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