UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COOK COUNTY, ILLINOIS, et al., Plaintiffs, v. CHAD F. WOLF, in his official capacity as Acting Secretary of U.S. Department of Homeland Security; U.S. DEPARTMENT OF HOMELAND SECURITY, et al., Defendants.	Case No. 19-cv-6334 Judge Gary Feinerman

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON COUNTS I-III

DHS concedes that "the Seventh Circuit's recent decision concluding that the Rule is likely unlawful . . . may justify summary judgment for Plaintiffs on their APA claims here." Resp. Br. at 1. This resolves the substantive issue before this Court. Although DHS repeats its arguments "[f]or the sake of preservation for appeal," *id.*, both sides understand that the Seventh Circuit's analysis controls this case and compels the conclusion that the Final Rule violates the Administrative Procedure Act ("APA"). Accordingly, Plaintiffs will not burden the Court with additional argument on the merits.

Instead, given the Seventh Circuit's opinion and DHS's admission, this Court should enter summary judgment for Plaintiffs on Counts I-III. The Final Rule continues to affect the lives of thousands of immigrants. The Rule continues to chill immigrants' access to critical public benefits including health care. And, as the country remains in the grip of the COVID-19 pandemic, it remains imperative to set aside the Final Rule as quickly as possible.

Given DHS's concession here, only two questions remain. First, whether the APA permits a Court to enter judgment that a rule is unlawful but still allow that rule to remain in effect in certain geographies. Second, whether a stay of an interim injunction justifies staying a judgment. The answer to each question is no.

I. The Final Rule Should Be Vacated and Vacatur of an Invalid Rule Should Not be Limited to a Particular Geography.

Having acknowledged that the Seventh Circuit's analysis requires this Court to hold the Final Rule invalid, DHS nonetheless asks this Court to declare the Rule invalid only in Illinois. In particular, notwithstanding that the Seventh Circuit's ruling compels the vacatur of the Rule, DHS asserts that this Court somehow can (and should) limit the scope of that vacatur to the State of Illinois. Resp. Br. at 21–23. Importantly, DHS points to no case law supporting the idea that courts should enter geographically limited and party-specific vacatur of unlawful agency action at judgment.

To the contrary, as explained in Plaintiffs' Opening Brief, absent the limited circumstances (not present here) in which remand without vacatur is appropriate,[1] and because the APA mandates that a reviewing court "shall . . . set aside" unlawful agency actions, 5 U.S.C. § 706(2), courts routinely *vacate* unlawful agency regulations in full. *See* Opening Br. at 28–29 (collecting cases). Indeed, when "a reviewing court determines that agency regulations are unlawful, the *ordinary result* is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (emphasis added) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)); *see also Empire Health Found. For Valley Hosp. Med. Ctr. v. Azar*, 958 F.3d 873, 886 (9th Cir. 2020); *D.A.M. v. Barr*, No. 20-cv-1321, 2020 WL 5525056, at *7 (D.D.C. Sept. 15, 2020) ("[T]he law is clear that when a court vacates an agency rule, the vacatur applies to all regulated parties, not only those formally before the court."); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting) ("if the plaintiff prevails" in an APA challenge, "the result is that the rule is invalidated, not simply that the court

[1] Some courts allow for a remedy less than vacatur depending on "the seriousness of the order's deficiencies" and the "disruptive consequences" of vacatur. *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (citation omitted). Here, the Seventh Circuit held that the Final Rule suffers from "numerous unexplained serious flaws," *Cook County v. Wolf*, 962 F.3d 208, 233 (7th Cir. 2020), and vacatur would merely mean reversion to the guidance in place before the Final Rule. Indeed, since the Rule went into effect, DHS has periodically reverted to the guidance in place before the Final Rule as a result of courts' injunctions.

forbids its application to a particular individual"). Notably, DHS does not address or purport to distinguish a single one of these cases.

Indeed, numerous federal courts (including one cited in DHS's own brief) recently rejected the precise argument DHS presses here, because a vacatur that still allows an invalid agency's rule to exist anywhere is nonsensical. For example, in *O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019), while acknowledging that some courts have questioned "the propriety of nationwide injunctive relief," the court explained that it was not facing "such a case" because "the APA . . . dictate[d] the proper remedy." *Id.* at 152. The court found the government's argument that vacatur should be limited to the particular plaintiffs "both at odds with settled precedent and difficult to comprehend." *Id.* at 153. And the court was "at a loss to understand what it would mean to vacate a regulation, but only as applied to the parties before the Court." *Id.* ("As a practical matter, for example, how could this Court vacate the Rule with respect to the organizational plaintiffs in this case without vacating the Rule writ large? What would it mean to 'vacate' a rule as to some but not other members of the public? What would appear in the Code of Federal Regulations?"); *see also N.M. Health Connections v. U.S. Dep't of Health & Human Servs.*, 340 F. Supp. 3d 1112, 1183 (D.N.M. 2018) (cited in Resp Br. at 21) ("[T]he Court cannot, in an intellectually honest manner, limit vacatur of the rules to the state of New Mexico. The Court does not know how a court vacates a rule only as to one state, one district, or one party.").

DHS cites no case authorizing the "single-state" vacatur it now requests. Instead, DHS misleadingly cites a single Seventh Circuit opinion for the proposition that "partial vacatur is sometimes an appropriate remedy" for a violation of the APA. Resp. Br. at 21 (quoting *Johnson v. U.S. Office of Pers. Mgmt.*, 783 F.3d 655, 663 (7th Cir. 2015)). But *Johnson* did not suggest it would be proper to limit the effect of vacatur geographically, as DHS argues. To the contrary, *Johnson* stated (in dicta) that it is sometimes appropriate to vacate *only unlawful parts of a rule*. *See* 783 F.3d at 663 (noting that plaintiffs could not win "vacatur of the entire Rule" because they lacked "standing to challenge aspects of that Rule that have not caused them injury").[2] DHS also cites a single case where the Fourth Circuit limited the scope of a permanent injunction. *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393–94 (4th Cir. 2001), *overruled on other grounds by The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012). That case has no bearing here. It did not suggest that a vacatur may have a geographic limitation, but instead addressed the scope of a permanent injunction, which is a more "drastic and extraordinary" remedy than vacatur. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010).

[2] The case upon which *Johnson* relied, *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 79 (D.D.C. 2010), highlights the extraordinarily narrow circumstances where partial vacatur is appropriate. The court in *Sierra Club* identified a small, substantively lawful portion of the agency action at issue and allowed it to continue, while vacating the unlawful portion of the action in full. *Id.* at 79–80. *Sierra Club*, therefore, has no application to a situation like this one, where an agency's action is unlawful *in its entirety*, but the agency nevertheless asks the court to enter geographically limited relief.

DHS also asks the Court to depart from the standard relief of vacatur because nationwide preliminary injunctions related to the Rule issued by other courts have been stayed or reversed. Resp. Br. at 22–23. But beyond the evidentiary differences between this case and the others DHS cites is the difference in procedural posture. "An equitable, interlocutory form of relief, a preliminary injunction is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it." *Valencia v. City of Springfield*, 883 F.3d 959, 965 (7th Cir. 2018) (quotation omitted); *see also Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."). Here, in contrast, the parties agree that summary judgment is warranted because the Final Rule violates the APA.

II. This Court Should Not Stay Entry of the Judgment.

Separately, DHS suggests that this Court should stay pending appeal any relief it grants to Plaintiffs. DHS argues that the Supreme Court's decision to stay the preliminary injunction in this case "necessarily reflects a determination that the balance of the harms and the public interest support a stay, and that balance is identical here." Resp. Br. at 23. But DHS ignores that the very first stay factor is "whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits." *Nken v. Holder*, 556 U.S. 418, 434 (2009). DHS began its brief by conceding that the Seventh Circuit's legal conclusions necessarily imply not only that Plaintiffs are *likely* to succeed, but also that, under the law of the case, Plaintiffs *have* succeeded; the Final Rule is unlawful and summary judgment

should be entered against it. Far from making a "strong showing" of a likelihood of success on the merits, DHS has *admitted* that it has no chance of success at all. And DHS's argument that the balance of harms and public interests weigh in favor of a stay cannot overcome this Court's earlier conclusion, which remains true today, "that the balance of harms favors Cook County and ICIRR." Dkt. 106 at 29; *see also Cook County v. Wolf*, 962 F.3d 208, 233–34 (7th Cir. 2020).

Notably, the Supreme Court has not made any finding on the merits at this point, nor any finding at all. *Id.* at 233 ("The Court's stay decision was not a merits ruling."). To read into the Supreme Court's silent stay of a preliminary injunction a reason to stay a judgment would be to take away the normal sequence and authority of the federal courts. *See id.* at 234 ("There would be no point in the merits stage if an issuance of a stay must be understood as a *sub silentio* disposition of the underlying dispute."). If the Supreme Court had wanted to say that the case should be stayed in its entirety, it would have; instead, it made an affirmative and express invitation for Plaintiffs to continue to pursue relief in this Court. *Wolf v. Cook County*, No. 19A905, 2020 WL 1969275, at *1 (Apr. 24, 2020) ("This Order does not preclude a filing in the District Court as counsel considers appropriate.").

Perhaps as importantly, had DHS wanted the Supreme Court to weigh in on the merits of the Seventh Circuit's holding that the Rule violates the APA, it could have done so by filing a prompt petition for a writ of certiorari. Nearly four months have passed, and DHS has not sought Supreme Court review. At some point, the Supreme Court may have an opportunity to decide the merits of this case, but it has

not had that opportunity yet. The provision of prior interim relief, even from the Supreme Court, does not strip a district court's power to enter judgment.

The Final Rule is unlawful and should be vacated. Plaintiffs request that the Court grant summary judgment on Plaintiffs' APA claims (Counts I–III).

Dated: October 2, 2020

Respectfully submitted,

/s/ David A. Gordon
David A. Gordon
Tacy F. Flint
Marlow Svatek
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000 (Telephone)
(312) 853-7036 (Facsimile)
dgordon@sidley.com
tflint@sidley.com
msvatek@sidley.com

Yvette Ostolaza (*pro hac vice*)
Texas Bar No. 00784703
Robert S. Velevis (*pro hac vice*)
Texas Bar No. 24047032
SIDLEY AUSTIN LLP
2021 McKinney Ave, Suite 2000
Dallas, Texas 75201
(214) 981-3300 (Telephone)
(214) 981-3400 (Facsimile)
Yvette.ostolaza@sidley.com
rvelevis@sidley.com

/s/ Caroline Chapman
Caroline Chapman
Meghan P. Carter
LEGAL COUNCIL FOR HEALTH JUSTICE
17 N. State, Suite 900
Chicago, IL 60602
Phone: (312) 605-1958
Fax: (312) 427-8419
cchapman@legalcouncil.org
mcarter@legalcouncil.org

/s/ Militza M. Pagán
Andrea Kovach
Militza M. Pagán
Nolan Downey
SHRIVER CENTER ON POVERTY LAW
67 E. Madison, Suite 2000

Chicago, IL 60603
Phone: (312) 690-5907
Fax: (312) 263-3846
andreakovach@povertylaw.org
militzapagan@povertylaw.org
nolandowney@povertylaw.org

/s/Katherine E. Walz
Katherine E. Walz
NATIONAL HOUSING LAW PROJECT
1663 Mission Street, Suite 460
San Francisco, CA 94103
Phone: (415) 546-7000
Fax: (415) 432-5701
kwalz@nhlp.org

Counsel for Illinois Coalition For Immigrant and Refugee Rights, Inc.

/s/ Jessica M. Scheller
Jessica M. Scheller, Assistant State's Attorney Chief; Advice, Business & Complex Litigation Division
Lauren E. Miller, Special Assistant State's Attorney
Civil Actions Bureau
500 W. Richard J. Daley Center Place, Suite 500
Chicago, IL 60602
Phone : (312) 603-6934
Phone: (312) 603-4320
Jessica.Scheller@cookcountyil.gov
Lauren.Miller@cookcountyil.gov

/s/ David E. Morrison
David E. Morrison
Steven A. Levy
A. Colin Wexler
Takayuki Ono
Juan C. Arguello
Goldberg Kohn Ltd.
Special Assistant State's Attorneys
55 E. Monroe St., Suite 3300
Chicago, IL 60603
Phone: (312) 201-4000
Fax: (312) 332-2196

david.morrison@goldbergkohn.com
steven.levy@goldbergkohn.com
colin.wexler@goldbergkohn.com
takayuki.ono@goldbergkohn.com
juan.arguello@goldbergkohn.com

Counsel for Cook County, Illinois

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that on October 2, 2020, he caused the foregoing Plaintiffs' Reply Brief In Support of Motion for Summary Judgment on Counts I-III to be served via the Court's ECF system upon all counsel of record.

/s/ David A. Gordon