No. 20-450

In the Supreme Court of the United States

CHAD F. WOLF, ACTING SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

COOK COUNTY, ILLINOIS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Ill.):

Cook County v. *Wolf*, No. 19-cv-6334 (Nov. 2, 2020) (granting partial final judgment)

United States Court of Appeals (7th Cir.):

Cook County v. *Wolf*, No. 20-3150 (Nov. 19, 2020) (granting stay pending appeal of partial final judgment)

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As the government explained in its petition for a writ of certiorari (Pet. 23-26) and further explains in its contemporaneously filed reply in support of the petition for a writ of certiorari in *Department of Homeland Security* v. *New York*, No. 20-449, this case concerns an important question of immigration law that warrants resolution by the Court this Term. Because the government's petition in *New York* provides a superior vehicle for addressing that question, however, the appropriate course is to hold the petition in this case pending a decision in *New York* and then dispose of the petition here accordingly.

Respondents argue that the Court instead should simply deny the petition in this case outright. They rely on various intervening developments since the petition was filed, but none of them provides a persuasive reason to deny rather than hold the petition.

First, respondents argue that the appeal of the district court's preliminary injunction at issue here has been rendered moot by the district court's subsequent entry of a partial final judgment declaring the rule invalid. But respondents fail to account for the fact that the court of appeals has stayed that partial final judgment pending appeal, leaving uncertain the effect of that judgment on the status of the preliminary injunction. Especially since respondents do not contend that holding the petition would prejudice them in any way, the better course is to defer the resolution of any mootness considerations until the Court has disposed of the government's petition in *New York*. Alternatively, if the Court concludes that the preliminary-injunction appeal is moot, it should "vacate the judgment below." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

Second, respondents rely heavily on speculation that the Department of Homeland Security (DHS) may soon choose to rescind the public-charge rule. But such predictions about future agency action—grounded solely in campaign statements rather than indications from the agency itself—are not a suitable basis for judicial determinations. And in any event, this Court's clarification of the boundaries of the public-charge provision would be warranted even if DHS were to choose in the future to alter the interpretation in the rule.

Finally, respondents contend that there is no longer any square circuit conflict over whether the rule should be preliminarily enjoined in light of recent rulings in the Fourth and Ninth Circuits. But those rulings do not eliminate the express disagreement between the Second and Seventh Circuits about what the statute unambiguously requires, and the superseded opinions by Judges Wilkinson and Bybee—and the dissent in this

case by then-Judge Barrett—continue to show the existence of an important question of federal law that this Court should settle. The Court thus should hold the petition for a writ of certiorari pending resolution of *New York*, and then dispose of it accordingly.

A. The District Court's Entry Of A Partial Final Judgment Provides No Basis For Declining To Hold The Petition

Respondents contend (Br. in Opp. 4) that "[t]he petition must be denied" because of the district court's intervening decision granting partial final judgment in the case and declaring the rule invalid. See *id.* at 6-11; see also D. Ct. Doc. 222 (Nov. 2, 2020) (Partial Final Judgment Order). But it is not clear that the district court's decision has rendered the present appeal moot, and this Court has no need to decide the issue given the procedural posture; regardless, the proper disposition if the Court were to deem the appeal moot would be to vacate the judgment below under *Munsingwear*, *supra*.

1. On November 2, 2020, the district court granted respondents' motion for summary judgment on their claims that the rule is invalid under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.* See Partial Final Judgment Order 1-8. The court did not resolve the separate equal-protection claim asserted in the case, however, and determined that it was appropriate to enter a partial final judgment under Federal Rule of Civil Procedure 54(b) rather than an ordinary final judgment under Rule 58. See Partial Final Judgment Order 8-12. In doing so, the court concluded that the injunctive relief potentially available in connection with the equal-protection claim would be broader than its vacatur of the rule, and that the vacatur accordingly did not moot its continued consideration of the arguments for such injunctive relief. *Id.* at 10-11.

The government immediately appealed the district court's partial final judgment, and on November 19, 2020, the court of appeals entered a stay of the district court's judgment "pending resolution of th[e] appeal." 20-3150 Order (Nov. 19, 2020). The court of appeals further ordered that briefing in that appeal would be suspended pending this Court's resolution of the petition for a writ of certiorari in this case. *Ibid.*

2. Respondents argue (Br. in Opp. 6-11) that the district court's entry of partial final judgment renders the appeal of the preliminary injunction moot, and therefore deprives this Court of jurisdiction. It is far from clear that the appeal is moot, however, given the unusual circumstances present here.

As respondents observe, preliminary injunctions "preserve the status quo pending final determination" of a plaintiff's claims. Br. in Opp. 7 (quoting *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 325 (1999)). Ordinarily, once a district court enters a permanent injunction at the close of a case, the preliminary injunction no longer has any real-world effect because the permanent injunction will instead dictate the parties' relations going forward. See *Grupo Mexicano*, 527 U.S. at 314 ("Generally, an appeal from the grant of a preliminary injunction becomes moot when the trial court enters a permanent injunction, because the former merges into the latter."). Two features of this case make application of that rule uncertain here.

First, the court of appeals has stayed the effect of the district court's partial final judgment pending the completion of the government's appeal of that judgment. See 20-3150 Order. Unlike an ordinary case, therefore, the final judgment entered by the district

court does not currently dictate the parties' relations (or control DHS's enforcement of the public-charge rule). Accordingly, it is far from clear whether the preliminary injunction can be deemed to have "merge[d]" into a partial final judgment that has been stayed. Cf. *Grupo Mexicano*, 527 U.S. at 314. Respondents simply ignore that issue, and with it the possibility that this Court's stay of the preliminary injunction continues to be necessary.

Second, the district court has not entered a final judgment ending the case, but rather a *partial* final judgment vacating the rule, while leaving open the possibility of further injunctive relief. See Partial Final Judgment Order 10. And the court did so based on a representation from respondent Illinois Coalition for Immigrant and Refugee Rights, Inc., that a permanent injunction would provide "meaningful[ly] additional relief" beyond the vacatur. D. Ct. Doc. 218, at 4 (Oct. 16, 2020); see Partial Final Judgment Order 10. In that posture, it is again far from clear whether the preliminary injunction can be deemed to have "merge[d]" into the vacatur order given that it is unsettled whether and when a final "permanent injunction" may be entered. Cf. *Grupo Mexicano*, 527 U.S. at 314.

3. There is no need for this Court to resolve at this stage those potentially complicated, and relatively unbriefed, jurisdictional questions. The government is not urging the Court to grant plenary review in this case, but merely to hold the petition pending a merits decision in *New York*. And respondents identify no prejudice that they would suffer from such a limited disposition, while disregarding the prejudice to the government if a denial of the petition were to cause the lower courts to conclude that the preliminary injunction is no

longer stayed yet still in effect. See Br. in Opp. 15. In this posture, the most prudent course is for the Court to hold the petition pending a disposition in *New York*. If the Court grants the petition in *New York* and reverses, the Court could at that point vacate the decision here and remand to the court of appeals for a determination of whether to dismiss the appeal on mootness grounds or instead reverse the district court's entry of the preliminary injunction on the merits. And if this Court denies the petition in *New York*, or grants the petition and affirms, the Court could deny the petition here without needing to address the mootness issue.

4. Alternatively, if this Court determines that the government's appeal is moot, the appropriate course would not be to deny the petition, but instead to "vacate the judgment below." *Munsingwear*, 340 U.S. at 39. That is consistent with this Court's decision in *Harper ex rel. Harper* v. *Poway Unified School District*, 549 U.S. 1262 (2007) (mem.), in which (as respondents note) the Court "remand[ed] to the lower court with instructions to dismiss [an] appeal of [a] preliminary injunction order as moot because the district court had entered final judgment." Br. in Opp. 8. Respondents identify no reason that such an order would be inappropriate here.

B. Respondents' Speculation About The Rule's Future Is No Reason For Denying Review Now

Relying on past statements by the Biden campaign, respondents also urge this Court to deny review on the theory that the rule will be rescinded before this Court can address its validity. Br. in Opp. 13-15. But this Court recently granted a writ of certiorari to consider agency approval of Medicaid work requirements, notwithstanding the similar possibility of a future policy

change. See *Azar* v. *Gresham*, No. 20-37 (Dec. 4, 2020). It should do the same here.

Any decision whether to rescind the rule ultimately must be made by DHS, which would have to comply with any applicable requirements of the APA. Substantively, the APA requires agency action rescinding or modifying a rule to engage in "reasoned decisionmaking." *Department of Homeland Security* v. *Regents of the University of California*, 140 S. Ct. 1891, 1905 (2020) (*Regents*) (citation omitted). And because that requirement demands that DHS consider, among other things, "the 'alternatives' that are 'within the ambit of the existing policy'" and the costs of abandoning the current rule, *id.* at 1913 (brackets and citation omitted), respondents' confident assertion that the agency will scuttle the rule in light of campaign statements rests on either unfounded speculation about the rulemaking process or an assumption of improper pre-commitment. Procedurally, the APA requires notice-and-comment rulemaking to rescind rules, subject to certain exceptions. 5 U.S.C. 553(a) and (b). And that further calls into question whether any rescission of the rule would be in effect before this Court otherwise decided the validity of the current rule by the end of this Term.

Relatedly, it is quite likely any such rescission would be met with litigation, including requests for preliminary injunctive relief. Cf. *Regents*, 140 S. Ct. at 1903-1906; *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2378-2379 (2020). Indeed, respondents can hardly contest the likelihood that jurisdictions concerned about public benefits usage by aliens would challenge any attempt to rescind the rule. Cf. *United States* v. *Texas*, 136 S. Ct. 2271 (2016) (per curiam). To be clear, the point is not

that any such challenge would necessarily or even likely prevail. Rather, it is that rescission of the rule would require not only proper administrative evaluation but also potentially prolonged and uncertain litigation, during which the validity of the current rule would remain important. Those considerations underscore why the decision whether to grant certiorari should not turn on speculation over the rule's future.

In contrast, granting further review in *New York* and resolving whether the current rule is lawful by June 2021 would benefit all stakeholders, *regardless* of the rule's ultimate fate. This Court's decision would at the very least resolve the acknowledged conflict between the Seventh Circuit's decision here, Pet. App. 27a, and the Second Circuit's decision in *New York* about whether Congress has silently ratified a specific, unambiguous definition of "public charge" that is limited to the persistently dependent. See *New York* v. *United States Department of Homeland Security*, 969 F.3d 42, 73-74 (2020), petition for cert. pending, No. 20-449 (filed Oct. 7, 2020). Regardless of how DHS chooses to exercise its discretion in the short term, it has a long-term institutional interest in preserving the flexibility Congress has traditionally afforded to the Executive Branch in making public-charge inadmissibility decisions. See Pet. App. 26a (holding that while "the meaning of 'public charge' has evolved over time as immigration priorities have changed[,] * * * [w]hat has been consistent is the delegation from Congress to the Executive Branch of discretion, within bounds, to make public-charge determinations"). And if this Court were instead to affirm the Second Circuit's decision in New York, that would likely obviate the need for any rescission and further litigation. Accordingly, even if DHS

were willing and able to rescind the rule as a legal and policy matter at some later date, that does not necessarily mean the agency in the interim would stop seeking review of the judgment below.

C. Intervening Judicial Decisions Do Not Undermine The Need For This Court's Review

Finally, respondents contend (Br. in Opp. 12-13) that review is unwarranted because intervening developments in the Fourth and Ninth Circuits have eliminated the square conflict over the rule's lawfulness. As just discussed, those developments do not affect the direct disagreement between the Seventh Circuit here and the Second Circuit in *New York* regarding whether 8 U.S.C. 1182(a)(4)(A) unambiguously adopts a "persistent * * * dependency" standard. *New York*, 969 F.3d at 74. And at a minimum, this remains an important question of federal law that this Court should settle, as is confirmed by the opinions of Judges Wilkinson and Bybee that have been superseded as well as by the dissent of then-Judge Barrett. See Pet. 23-26.

* * * * *

The petition for a writ of certiorari should be held pending a decision on the government's petition for a writ of certiorari in *United States Department of Homeland Security* v. *New York*, No. 20-449 (filed Oct. 7, 2020), and any further proceedings in that case, and then disposed of as appropriate in light of the Court's actions in that case.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

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