No. 19-2222

In the United States Court of Appeals for the Fourth Circuit

CASA DE MARYLAND, *ET AL.*,
Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, *ET AL.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maryland

OPPOSED MOTION TO RECONSIDER, OR IN THE ALTERNATIVE TO REHEAR, THE MOTION TO DISMISS

The States of Texas, Alabama, Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Ohio, Oklahoma, Mississippi, Montana, South Carolina, and West Virginia respectfully ask this Court to reconsider its order dismissing this appeal so that they may intervene as Defendant-Appellants to challenge the district court's nationwide injunction. The district court preliminarily enjoined a final rule interpreting the Immigration and Nationality Act's prohibition against immigration by those would become a public charge—the public charge rule. Until two days ago, the federal defendants, agents or agencies of the United States (collectively "United States"), defended this rule in multiple courts, including the United States Supreme Court.

Two days ago, the United States changed tack. Abandoning its typical practice of asking courts to abey appeals of actions it no longer supports while it formally reverses those actions, the United States filed stipulated motions to dismiss numerous appeals defending the Rule across the country, including in this case. This Court granted that motion and immediately issued its mandate.

Under these circumstances, this Court should have rejected that stipulation. The nationwide injunction implicates the interests of countless parties who, until the stipulation was filed, had no notice that they needed to intervene in order to protect those interests. Indeed, the federal defendants here did not notify the States that they intended to withdraw support of the Rule prior to these stipulations becoming common knowledge. Allowing Federal Rule of Appellate Procedure 42(a) to be used in this fashion permits the federal government effectively to rescind rules by litigation rather than through the Administrative Procedure Act's requirements, vitiating numerous procedural protections for adversely impacted parties.

This novel practice will not end here. If permitted to stand, the federal government's repeal-by-stipulation tactic will simultaneously stifle public participation in major policy initiatives at the federal level, encourage ever-more-complex procedural gamesmanship, and will encourage even potentially affected parties to intervene aggressively into cases to prevent this tactic's future use. The Court should not countenance these results and should reconsider its dismissal.

BACKGROUND

The background of this case is explored in the accompanying motions to withdraw the mandate and to intervene. To avoid burdening the Court, State Intervenors supply only a truncated background here.

Since the late Nineteenth Century, Congress has prohibited immigration by individuals who are likely to become a "public charge." Immigrant Fund Act, 47th Cong. ch. 376, §§ 1-2, 22 Stat. 214 (1882). Congress has never attempted to define that term, providing only a list of factors that the Executive is to consider. 8 U.S.C. § 1182(a)(4)(B).

In 2019, following an extensive notice-and-comment period, the Trump Administration finalized the first formal rule defining a "public charge." This rule required federal officials assess an alien's likely reliance on non-cash public assistance as well as cash public assistance when determining whether an alien is likely to be a public charge, and therefore inadmissible. Inadmissibility of Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019). Various states, municipalities, and private interest groups immediately filed suit to challenge this rule in courts across the country. These cases led to sometimes overlapping and sometimes conflicting orders and injunctions, which are fully described in the United States's petition for certiorari arising from a companion case regarding the Rule in the Second Circuit. Petition for a Writ of Certiorari, *Department of Homeland Security v. New York*, No. 20-449 (U.S. Oct. 7, 2020).

The plaintiffs, CASA de Maryland, Inc. and two individuals, filed this action in the United States District Court for the District of Maryland against the President,

the Secretary of Homeland Security, and other federal defendants in their official capacities. The plaintiffs alleged that the Rule violates both the APA and the Fifth Amendment. *Id.* at 236. They moved for a preliminary injunction to block the rule from taking effect. *Id.* The district court granted the motion and entered a nationwide injunction preventing the United States from enforcing the rule anywhere. *Id.*

A panel of this Court reversed. It held that that the Rule "rests on an interpretation of 'public charge' that comports with a straightforward reading of the [statute]." *Id.* at 242. The panel further ruled that the district court "erred in its choice of remedy" by issuing a "plainly overbroad" nationwide injunction. *Id.* at 255-56.

The plaintiffs moved for rehearing en banc, which the Court granted. *Casa de Maryland, Inc. v. Trump*, 981 F.3d 311, 314 (4th Cir. 2020). The Court called for supplemental briefing "to address relevant developments concerning the Public Charge Rule." Order of Dec. 12, 2020 at 2, *Casa De Maryland, Inc v. Joseph Biden, Jr.*, No. 19-2222 (ECF 158). The United States responded that on February 2, 2021, President Biden issued an Executive Order directing a review of the DHS rule, and suggested that the Court postpone en banc oral argument until that review is complete. ECF 188 at 3. The Court agreed and removed the case from the oral argument calendar. ECF 208 at 2-3.

On March 9, 2021, the United States revealed that it no longer intended to defend the Rule, filing nearly simultaneous motions to dismiss litigation pending in the Supreme Court, this Court, and the Seventh Circuit. This morning, the Court granted that motion under Federal Rule of Appellate Procedure 42, without offering

the opportunity for other parties whose interests would be affected by the nationwide injunction to intervene to defend those interests.

ARGUMENT

The Court should reconsider its ruling on the Motion to Dismiss under Federal Rule of Appellate Procedure 42(b).[1] Motions for reconsideration are appropriate where, through no fault of the movant, a court has committed an error of fact or law in deciding on a motion. *Cf. Lightspeed Media Corp. v. Smith*, 830 F.3d 500, 505-506 (7th Cir. 2016) (collecting cases); *Keene Corp. v. Int'l Fidelity Insurance Co.*, 561 F. Supp. 656, 656 (N.D. Ill. 1982), *aff'd*, 736 F.2d 388 (7th Cir.1984) ("Motions for reconsideration serve a limited function; to correct manifest errors of law or fact or to present newly discovered evidence."). State Intervenors respectfully suggest that the Court made such an error here by allowing the parties—who are now aligned—to voluntarily dismiss an appeal of a ruling vacating a final rule without allowing non-parties whose interests are affected by the Rule the opportunity to intervene to protect those interests.

Federal Rule of Appellate Procedure 42 is an inappropriate mechanism to seek dismissal of an appeal of a nationwide injunction affecting numerous non-parties—particularly when accompanied by the immediate issuance of the court's mandate. Rule 42(b) allows the "circuit clerk [to] dismiss a docketed appeal if the parties file

[1] To the extent that the Court determines that this motion should have been brought as a petition for rehearing, State Intervenor request the Court to construe it as such. The standards for relief are similar, and such rehearing would be appropriate for the same reasons. *See* Fed. R. App. P. 40(a)(2).

a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due." This rule typically serves a salutary purpose in that it allows appeals where there is no longer a controversy to dismiss the case rather than incur additional costs. "Normally such stipulations are accepted and the appeal dismissed." *Alvarado v. Corp. Cleaning Servs., Inc.*, 782 F.3d 365, 372 (7th Cir. 2015). This Court has, however, stated that it will "decline to do so if necessary to avoid an injustice, and especially to 'protect the rights of anyone who did not consent to the dismissal.'" *Id.* (quoting *Safeco Ins. Co. of Am. v. Am. Int'l Grp., Inc.,* 710 F.3d 754, 755 (7th Cir.2013)).

Though the nominal parties to this appeal approved the dismissal, the injunction in this case affects numerous parties who have not had the opportunity either to consent or deny their consent to the dismissal. Indeed, many States whose interests are directly implicated were not so much as notified about the United States's intentions before it acted to dismiss these cases. This Rule was promulgated following a notice-and-comment period that lasted nearly a year. 84 Fed. Reg. at 41,501 (Aug. 2019); Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (Oct. 10, 2018). The final Rule balanced a multitude of concerns and addressed numerous comments, and the federal government, as it typically does, was charged with defending that rule against the litigation that inevitably followed. The federal government fulfilled those duties until it filed the motions of March 9, 2021.

The Court should not allow parties to voluntarily dismiss an appeal under these circumstances. Ordinarily, a rule adopted through notice-and-comment rulemaking can only be rescinded through notice-and-comment rulemaking. *Cf. Motor Vehicle*

Mfrs. Ass'n of U.S., Inc.v. State Farm Mutual Auto. Ins. Co., 463 U.S 29, 36-37, 41 (1983). As part of that process, parties whose interests would be negatively impacted by the rescission of the rule would have had the right to submit input, 5 U.S.C. § 503, and ultimately to challenge the final outcome in court, *Dep't of Com. v. New York,* 139 S. Ct. 2551, 2569 (2019). But this Administration has effectively rescinded the public-charge rule by agreeing to dismiss the case with an adversary in name only under Rule 42(b). That is not what voluntary dismissal under Rule 42(b) was designed to do.

To permit Rule 42(b) to be used as a route around the Administrative Procedure Act would lead to severe adverse consequences. Because rulemaking rarely satisfies everyone, APA challenges are both commonplace and often complex, potentially involving numerous issues and parties. In the early stages of this case, it was not clear that parties who were aligned with the United States could have become involved. Like all Americans, State Intervenors have an interest in uniform application of our immigration laws. It initially appeared, however, that the federal government planned to defend those interests. Now, the United States's dismissal of various appeals would impose direct costs on the States in the form of increased benefit payments to otherwise ineligible immigrants, *see generally* Mot. to Intervene, the States cannot vindicate their interests absent this Court's action because the United States have agreed to dismiss the appeal and allow the district court's order to become final.

If the Court permits Rule 42 to be used to dismiss a case in circumstances like this, nonparties like State Intervenors will be forced to intervene at the first sign of

litigation that may affect their interests. Indeed, it would paradoxically require States to more hastily intervene when the federal government already *supports* their interests precisely to avoid the sudden switch-and-dismissal performed here. That is precisely the opposite of what the federal rules are intended to work—namely "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

[Remainder of page intentionally left blank.]

Conclusion

The Court reconsider the motion to dismiss to allow State Intervenors to intervene and prosecute this appeal as Defendant-Appellants.

Respectfully submitted.

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CERTIFICATE OF CONFERENCE

On March 11, 2021, counsel for the State of Texas conferred with counsel for plaintiffs and for the United States, who advised that they are opposed to this motion.

/s/ Judd E. Stone II
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CERTIFICATE OF SERVICE

On March 11, 2021, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 1,809 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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