No. 19A905

IN THE SUPREME COURT OF THE UNITED STATES

CHAD WOLF, ACTING SECRETARY OF HOMELAND SECURITY, ET AL., APPLICANTS

v.

COOK COUNTY, ILLINOIS, ET AL.

REPLY IN SUPPORT OF APPLICATION FOR A STAY

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By granting a stay pending appeal in Department of Homeland Sec. v. New York, 140 S. Ct. 599 (2020) (No. 19A785), this Court necessarily determined that the government had a fair prospect of success in its defense of the Department of Homeland Security (DHS) rule defining the statutory term "public charge," see 84 Fed. Reg. 41,292 (Aug. 14, 2019) (Rule), and that the government would be irreparably harmed if its enforcement of that Rule were preliminarily enjoined.

Respondents attempt to distinguish New York on the ground that "the injunctions entered in New York are nationwide in scope -- whereas the injunction here is narrowly tailored to the harm alleged by the parties before the [district] court." Stay Opp. (Opp.) 2. But this Court did not stay only the nationwide aspect of the New York injunctions, as the government had requested in the alternative there. The Court stayed those injunctions in their entirety. It thus necessarily determined that the government had

a fair prospect of success on the independent ground that challenges to the Rule were unlikely to succeed on the merits, and that even an injunction tailored to the particular parties in that case would cause irreparable harm. See Conkright v. Frommert, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (listing the stay factors). That determination equally applies in this case, which involves the identical legal issues.[1]

Respondents' argument (Opp. 13-14) that this Court should decline to stay the injunction in order to "[a]llow[] the Seventh Circuit to complete its review of the injunction on the merits" is likewise unsound. A stay will not inhibit the Seventh Circuit's review of the injunction at all; it simply will stay the injunction during the pendency of those proceedings (and possible future proceedings in this Court) -- just as the stay in New York will not impede the Second Circuit's expedited review of the injunctions entered by the district court there.

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[1] To the extent respondents suggest (Opp. 12) that this Court did not find that the government had a fair prospect of success on the merits of its defense of the Rule, yet stayed the New York injunctions in their entirety anyway because the government's alternative request for relief "could [not] feasibly be crafted," that suggestion is not plausible. This Court obviously has discretion to fashion equitable relief, and easily could have limited the New York injunctions to "a specified region in which [those] plaintiffs operate[d]" if it believed the government had phrased its alternative request for relief incorrectly. Ibid. Indeed, that was how the New York respondents understood the government's request. See NY Opp. at 38, New York, supra (No. 19A785) (opposing the alternative request because it would allow the Rule "to take effect in some States but not others").

The same considerations that led to a stay in New York thus compel a stay here, too, and respondents' arguments on the stay factors (Opp. 15-39) are unavailing for the same reasons that the New York respondents' similar arguments were.

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

Respondents contend (Opp. 15) that there is no reasonable probability this Court would grant certiorari because "there is no opinion of the Seventh Circuit to review; no other appellate opinion to consider, much less a split among the circuits; and no petition for certiorari on file." That contention is meritless. The Seventh Circuit's failure to provide any explanation for its denial of a stay despite this Court's grant of a stay in New York is a reason to grant a stay here, not deny it. And the Ninth Circuit's lengthy published opinion granting a stay in City & County of San Francisco v. USCIS, 944 F.3d 773 (2019), certainly qualifies as "[an]other appellate opinion to consider," Opp. 15. Finally, this Court has never required a litigant to file a petition for a writ of certiorari before seeking a stay pending appeal; such a requirement would needlessly encourage petitions for writs of certiorari before judgment and short-circuit the appellate process. At all events, by granting the stay in New York, supra (No. 19A785), this Court determined it was reasonably likely to grant certiorari to review a potential future decision enjoining the Rule by the Second Circuit. Respondents do not

explain why that conclusion would be any different for a similar decision by the Seventh Circuit.

II. THERE IS A FAIR PROSPECT THE COURT WOULD VACATE THE INJUNCTION

There also is at least a "fair prospect" that if this Court granted a writ of certiorari, it would vacate the preliminary injunction here. Again, by granting the stay in New York, this Court already determined that the government has demonstrated at least a fair prospect of success in its defense of the Rule. That determination is dispositive here.

A. The government has explained why respondents lack constitutional and statutory standing to challenge the Rule here. Gov't Stay Appl. (Appl.) 17-19. The County asserts (Opp. 18-19) that it will receive lower Medicaid reimbursements and other federal payments as a result of the projected disenrollment of aliens from public benefits in response to the Rule. But as the term "reimbursements" indicates, those payments are for care that the County's health system provides; if it provides less care, it is entitled to less reimbursement. That is not an injury. And as for the County's assertion that it will have to provide "more costly, uncompensated emergency care," Opp. 19 n.4, the Rule exempts Medicaid coverage for emergency services, see Appl. 17-18, so that is not a viable injury either.[2]

[2] The affidavits the County cites (Opp. 20) to support its claim that the Rule will increase the risk of harm from the spread of communicable diseases simply underscore its reliance on an "attenuated chain of possibilities," Clapper v. Amnest Int'l USA,

As for the Coalition, it asserts (Opp. 20) that it will lose certain payments tied to how many clients it enrolls in public benefits. That may well place the Coalition within the zone of interests for statutes and regulations that grant such public benefits. But it places the Coalition squarely outside the zone of interests of the public-charge inadmissibility provision, which Congress enacted in furtherance of its national policy of "assur[ing] that aliens be self-reliant" and "remov[ing] the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. 1601(5)-(6).

B. Respondents' challenge to the Rule also lacks merit, for the same reasons that the largely similar arguments pressed by the New York respondents lacked merit. Presented as a "Chevron step one" argument, respondents' case depends on establishing that "public charge" refers unambiguously and only to "an individual who is primarily dependent on the state for subsistence." Opp. 23-24; see Appl. App. (App.) 19a. But as the government has explained (Appl. 19-29), the term has never possessed that narrow, fixed meaning -- not when it was adopted in 1882, and not when it was readopted in 1996. Instead, as the Ninth Circuit held, "public

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568 U.S. 398, 410 (2013). E.g., Opp. Addendum 10a, ¶ 33 ("Lower rates of vaccination can lead to an increase in vaccine preventable diseases, raising the concern of communicable disease outbreaks that can affect everyone.") (emphases added); id. at 34a, ¶ 32 ("The confusing language of the public charge rule * * * will cause some [people with HIV] to be fearful of enrolling in government benefits * * * and could lead to increased HIV transmissions.") (emphasis added).

charge" is "ambiguous," and the only "consistent" understanding "that has endured since 1882 * * * is the idea that a totality-of-the-circumstances test governs public-charge determinations," with "the Executive Branch * * * afforded the discretion to interpret it." City & County of San Francisco, 944 F.3d at 792, 796-797.[3]

Respondents attempt (Opp. 24-30) to prove otherwise by citing selective cases and dictionary definitions that they claim embraced interpretations of "public charge" that are different from the one adopted in the Rule. That attempt fails for multiple reasons. For one thing, at least some of the authorities on which respondents rely set forth interpretations that are fully consistent with the Rule. For example, respondents cite (Opp. 25) Cicero Township v. Falconberry, 42 N.E. 42 (Ind. App. 1895), which

[3] To the extent respondents imply (Opp. 4, 23-24) that the government did not make that argument in the district court, the implication is incorrect. The government argued below (as it does here) that "the definition of 'public charge' in the Rule is consistent with the plain meaning of the statutory text" in 1882. Opp. Addendum 64a; see id. at 64a-69a. The government likewise argued below (as it does here) that, within the broad bounds of that plain meaning, Congress has provided the Executive Branch with a "comprehensive delegation of interpretative authority * * * dating back to the early public charge statutes." Id. at 73a; see id. at 54a (observing that "predecessor statutes going back to at least 1882 * * * have, without exception, delegated to the Executive Branch the authority to determine who constitutes a public charge for purposes of that provision") (emphasis added). In any event, "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99 (1991).

stated "[t]he mere fact that a person may occasionally obtain assistance from the county does not necessarily make such a person a pauper or a public charge." Id. at 44. Respondents also rely (Opp. 24) on the Ninth Circuit's similar observation that "[t]he 1882 act did not consider an alien a 'public charge' if the alien received merely some form of public assistance." City & County of San Francisco, 944 F.3d at 793. But the Rule accords with both of those understandings: rather than make receipt of any public benefit sufficient, DHS set a reasonable threshold level (12 aggregate months in any 36-month period) of certain specified benefits (including noncash benefits related to food, housing, and medical care) that an alien would have to receive before potentially being considered inadmissible on the public-charge ground.

More fundamentally, those authorities do not establish that "public charge" had the single, narrow, and unambiguous meaning on which respondents' argument depends. To the contrary, they underscore what the government has argued (Appl. 26) and the 1950 Senate Judiciary Committee Report confirms: that there have been "varied definitions of the phrase 'likely to become a public charge,'" and that Congress has chosen not to "define the term in law" with the narrow precision respondents claim. S. Rep. No. 1515, 81st Cong., 2d Sess. 347, 349 (1950).

Respondents' contention (Opp. 24) that "public charge" has only ever referred to a person who is "primarily dependent on the state for subsistence" does not account for those varied definitions. For example, the 1933 and 1951 editions of Black's Law Dictionary defined "public charge" as simply "one who produces a money charge upon, or an expense to, the public for support and care." Black's Law Dictionary (3d ed. 1933); Black's Law Dictionary (4th ed. 1951). And a 1929 treatise indicated that a "public charge" was someone who required "any maintenance, or financial assistance, rendered from public funds." Arthur Cook et al., Immigration Laws of the United States § 285 (1929). Respondents cannot deny that those understandings differ sharply from their preferred interpretation. Instead, they argue that those authorities were "'wrong'" and that their own interpretation of the term is right. Opp. 31 (quoting App. 24a). But that is no answer to the critical point, which is that no single, narrow understanding of "public charge" has ever had the settled status that respondents' argument demands. Respondents cannot establish that everyone has always understood "public charge" in the way they prefer by saying that anyone who did not understand it in that way does not count.

Respondents' criticisms of those authorities also are misplaced. They contend (Opp. 31) that "neither the dictionary entries nor the treatise purport to define the statutory term

'public charge,' as they fail to address this Court's decision in Gegiow." But the 1933 version of Black's Law Dictionary specified that it was providing the meaning of "public charge" "[a]s used in Immigration Act Feb. 5, 1917, § 19 (8 USCA § 155)." Black's Law Dictionary (3d ed. 1933). It thus unquestionably "define[d] the statutory term." Opp. 31 (emphasis omitted). The difficulty for respondents is that the 1917 Immigration Act had been revised, as the government has explained (Appl. 28), for the specific purpose of "overcom[ing]" the dictum in Gegiow, S. Rep. No. 352, 64th Cong., 1st Sess. 5 (1916), by altering the placement of "public charge" in the statutory text. The Black's Law Dictionary entries thus provide further confirmation that Gegiow's dictum about the 1910 immigration statute did not -- as the district court erroneously believed -- establish an unambiguous meaning of "public charge" that persisted even when the surrounding text was deliberately modified. See Appl. 27-29.[4]

Respondents' attempts to address other authorities that are inconsistent with their view of the supposedly unambiguous meaning

[4] Respondents' reliance on Gegiow is misplaced for an additional reason. In arguing that the relevant portion of the decision was binding as to the meaning of the 1910 statute, they contend that the Court there "held, based on the statutory text, that a public charge finding requires a 'permanent' condition." Opp. 27 (citation omitted). But respondents' own interpretation of "public charge," which is based on the 1999 field guidance, requires not permanence, but "primar[y] dependence." Opp. 24. Respondents themselves therefore do not treat Gegiow as establishing an unambiguous and fixed interpretation of "public charge" that would apply today.

of "public charge" are similarly unsound. For example, respondents note that in In re B-, 3 I. & N. Dec. 323 (B.I.A. 1948; A.G. 1948), the Board of Immigration Appeals concluded that "mere 'acceptance by an alien of services provided' by the government 'does not in and of itself make the alien a public charge.'" Opp. 32 (citation and emphasis omitted). Rather, the Board also considered whether there had been a lawful demand for repayment that went unmet. See In re B-, 3 I. & N. at 327. But the difference between that approach and the one adopted in the Rule simply reflects the fact that a demand for repayment generally has been required in the deportation context (as in In re B-), but not the admissibility context (which is at issue here). That longstanding distinction underscores the Executive's flexibility in making public-charge determinations. The more significant aspect of In re B- is that it adopted an understanding of "public charge" decidedly different from respondents' narrow interpretation, thereby disproving their central claim that "public charge" has a single, well-established meaning that DHS must maintain in perpetuity. Indeed, respondents offer no way to reconcile the holding of In re B- -- that an alien could in some circumstances be deemed a public charge based merely on unreimbursed government payments for "clothing, transportation, and other incidental expenses," ibid. -- with their preferred interpretation of "public charge."

Nor can respondents square their position with the affidavit-of-support provisions that Congress has added to the Immigration and Nationality Act. 8 U.S.C. 1183; 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 submit a required affidavit of support is, as a matter of law, inadmissible on the public-charge ground, regardless of the amount or type of benefits the alien receives. See Appl. 21-22. Instead, they argue (Opp. 33) that not all aliens are required to provide such affidavits. That misses the point: in classifying aliens who fail to submit a required affidavit of support as being inadmissible on the public-charge ground, Congress necessarily rejected respondents' understanding of "public charge" as limited to aliens who are primarily dependent on governmental support. That was not a congressional "change" from an earlier statutory definition of "public charge" (Opp. 32), but rather an indication that Congress had never understood the term to have the fixed and narrow meaning respondents would assign to it.

Respondents mistakenly attempt (Opp. 35) to draw a contrary inference about congressional understandings from a pair of never-enacted legislative proposals in 1996 and 2013. Those proposals would have resulted in statutory definitions of "public charge" that, like the Rule, contained specific public-benefit thresholds -- though they would have covered a significantly larger number of

aliens.[5] Contrary to respondents' suggestion (ibid.), that does not mean Congress rejected the Rule's definition of public charge. Rather, the far better inference is that Congress simply wanted to preserve Executive Branch discretion by leaving the statutory term undefined -- not that it wanted to adopt a narrower definition that would then be fixed for all time. Indeed, the legislative history of the 1996 proposal indicates that it was dropped at the last minute in part because the President objected to the proposal's rigid definition of "public charge" and threatened to veto the bill. See H.R. Rep. No. 828, 104th Cong., 2d Sess, 241 (1996); 142 Cong. Rec. 26,666, 26,679-26,680 (Sept. 30, 1996).

Finally, respondents suggest (Opp. 36) that the Executive Branch's discretion to define "public charge" might violate the nondelegation doctrine. That suggestion, too, is incorrect. Under this Court's precedents, delegation requires an "intelligible principle." Whitman v. American Trucking Ass'ns, 531 U.S. 457, 472 (2001) (citation omitted). Here, everyone agrees that "public charge" must refer to an alien dependent on governmental assistance; the only questions are how dependent, and for how long. As to those questions, Congress itself has articulated a "national policy with respect to welfare and immigration" under which the

[5] The 1996 proposal would have included aliens who received benefits during twelve months over a seven-year, rather than three-year, period. See H.R. Rep. No. 828, 104th Cong., 2d Sess., 138, 240-241. The 2013 proposal would have included aliens who received any covered public benefits. S. Rep. No. 40, 113th Cong., 1st Sess., 42, 63.

government should seek to ensure "that aliens be self-reliant" and to "remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. 1601. The Rule reasonably defines the type and duration of public benefits that may lead to a public-charge inadmissibility determination in furtherance of that well-articulated policy.

III. THERE IS A LIKELIHOOD THAT IRREPARABLE HARM WILL RESULT FROM THE DENIAL OF A STAY

As the government has explained, "DHS 'currently has no practical means of revisiting public-charge determinations once made,' making that harm effectively irreparable." Appl. 30 (citation omitted). By staying the nationwide injunctions in New York, supra (No. 19A785), in their entirety, the Court necessarily found that the government would suffer irreparable harm absent a stay not just from having to forgo implementing the Rule in locations where no plaintiffs were located, but from having to forgo implementation anywhere, including in New York, Connecticut, Vermont -- and, of course, Illinois too.

In the face of that finding of irreparable harm, respondents answer: "So what?" Opp. 38. In respondents' view, no harm will result if "some unidentified number of individuals in Illinois might become lawful permanent residents even though they might" be likely to become public charges under the Rule. Ibid. But Congress has made the judgment that aliens are inadmissible if, "in the opinion of the" Secretary, they are likely at any time to

become public charges. 8 U.S.C. 1182(a)(4)(A). Allowing an alien whom the Secretary would deem inadmissible on that ground to become a lawful permanent resident would contravene an Act of Congress in an effectively irrevocable way. Contrary to respondents' assertion (Opp. 38), that is not a "trifling" matter.

Respondents contend that the government will not suffer irreparable harm because "if DHS truly faced an imminent threat of harm in delaying implementation in Illinois, it would have sought a stay immediately." Opp. 37-38; see Opp. 14. But seeking a stay of the Illinois-specific injunction would have been pointless while nationwide injunctions entered by other district courts remained in effect. Once the Second Circuit ruled on the last of those nationwide injunctions -- refusing to enter a stay pending appeal -- the government expeditiously sought a stay from this Court. As the government has explained (Appl. 30-31), that was a sensible and efficient course to avoid burdening this Court with multiple stay applications from multiple circuits on the exact same issue. Had this Court either denied the stay in New York or stayed only the nationwide aspect of those injunctions, the government would not have sought further relief in this case, for such a ruling would have indicated that the government had not satisfied all of the stay factors with respect to the merits of the Rule's lawfulness.

On the other hand, the government reasonably anticipated that if this Court stayed the New York injunctions in their entirety, the Seventh Circuit would follow the Court's lead and stay the injunction here. See Gov't Stay Appl. at 13 n.2, New York, supra (No. 19A785). It is only because the Seventh Circuit, without any explanation, declined to do so that the government now must return to this Court. That sequence of events in no way suggests that the government does not face harm from the district court's injunction and from the inability to enforce the Rule in Illinois.

CONCLUSION

This Court should stay the district court's preliminary injunction pending the completion of further proceedings in the court of appeals and, if necessary, this Court.

Respectfully submitted.

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