No. 20-449

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

STATE OF NEW YORK, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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This Court has already granted a stay in this case, reflecting the Court's recognition that the case likely warrants further review, that the preliminary injunctions at issue are likely to be vacated, and that the government will suffer irreparable harm if those injunctions take effect. Respondents offer no persuasive reason to back away from any of those judgments.

Instead, 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. In any event, even if DHS were to choose in the future to alter its interpretation of "public charge," 8 U.S.C. 1182(a)(4)(A), the court of appeals' holding that the statute *unambiguously* requires a "persistent * * *

dependency" standard, Pet. App. 53a, would substantially constrain DHS's options. Given the acknowledged disagreement on that issue even among the courts of appeals that have found the existing rule unlawful, this Court's review is needed to clarify the scope of DHS's discretion. That need exists regardless of whether this specific rule may eventually be rescinded or modified.

Respondents' other arguments against review are likewise unpersuasive. They point to intervening developments in the Fourth and Ninth Circuits to argue that there is no longer any square conflict over whether the rule should be preliminarily enjoined. But those developments 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the express disagreement between the Second and Seventh Circuits about what the statute unambiguously requires, and the superseded opinions by Judges Wilkinson and Bybee—and the dissent by then-Judge Barrett—continue to show that this case presents an important question of federal law that this Court should settle. Nor is there any reason to withhold review until the district court has entered a final judgment: respondents offer no reason to think the final judgment on the merits would diverge in any material way from the precedential court of appeals decision already at issue here, and the additional procedural arguments respondents have raised belatedly in district court are no impediment to this Court's review. The Court thus should grant the petition for a writ of certiorari and reverse.

A. The Decision Below Warrants This Court's Review

1. Relying on past statements by the Biden campaign, respondents urge this Court to deny review on the theory that the rule will be rescinded before this Court can address its validity. States of New York et al. Br. in Opp. (NY Opp.) 1, 15-20; Make the Road New

York et al. Br. in Opp. (MTRNY Opp.) 2, 11-12. 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 Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.* 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)

(*Little Sisters*). 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 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 Second Circuit's decision here, Pet. App. 51a-52a, and the Seventh Circuit's decision in *Cook County* v. *Wolf*, 962 F.3d 208, 226 (7th Cir. 2020), petition for cert. pending, No. 20-450 (filed Oct. 7, 2020), about whether Congress has silently ratified a specific, unambiguous definition of "public charge" that is limited to the persistently dependent, see Pet. 25-26; Pet. App. 51a-53a. 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 *Cook County*, 962 F.3d at 226 (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 decision below, 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.*

2. Respondents further contend (NY Opp. 20-22; MTRNY Opp. 27-29) that the Court should deny review because the decision below concerns a preliminary injunction rather than a final judgment. But this Court regularly reviews decisions affirming preliminary injunctions of federal executive directives. See, *e.g.*, *Little Sisters*, 140 S. Ct. at 2379-2380; *Trump* v. *Hawaii*, 138 S. Ct. 2392 (2018). That course is particularly appropriate where, as here, the Court has already determined that the preliminary injunction is sufficiently suspect on the merits, and harmful to the government and the public, to warrant the grant of a stay pending further proceedings. See 140 S. Ct. 599, 599-600.

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* Respondents alternatively suggest that the Court defer consideration of the petition for a writ of certiorari. See NY Opp. 15; MTRNY Opp. 11. This Court effectively denied that request already when it denied respondents' requests for further extensions of time to respond to the petition. Declining to delay beyond the January 8, 2021 Conference continues to make sense because otherwise the Court would be unable to decide this case until next Term (absent significant expedition at the merits stage). If DHS were to change course in a relevant manner a few weeks after certiorari were granted, the Court would retain the option of reconsidering; but if the Court waits to see what, if anything, DHS does, it will have lost the opportunity to resolve the case this Term even if the agency continues to desire that result.

Respondents maintain (NY Opp. 20-21; MTRNY Opp. 27) that reviewing a final judgment would give the Court the benefit of a more complete record, and suggest that the partial final judgment recently entered by the Northern District of Illinois in a parallel challenge to the rule may soon provide an opportunity for such review. But respondents identify nothing in the administrative record that might affect this Court's consideration yet could not be considered in the case's current posture. Indeed, the partial final judgment that they offer as a preferable object of review states that it "rests exclusively on the Seventh Circuit's [preliminary-injunction] opinion," and contains no additional substantive analysis of the rule's lawfulness. *Cook County* v. *Wolf*, No. 19-C-6334, 2020 WL 6393005, at *5 (N.D. Ill. Nov. 2, 2020), appeal pending, No. 20-3150 (7th Cir. filed Nov. 3, 2020). Presumably for that reason, the Seventh Circuit has stayed further proceedings in the appeal of that partial final judgment pending this Court's consideration of the petition for a writ of certiorari in *Wolf* v. *Cook County*, *supra* (No. 20-450). Waiting to review such a final judgment would thus add nothing but harmful delay, given that this Court's stay of the preliminary injunctions here would no longer be in effect.

Respondents separately argue (NY Opp. 21-22; MTRNY Opp. 28-29) that this Court should defer review in light of their recently added claim that the rule was not signed by a properly appointed Acting Secretary of DHS. But the Court should not incentivize plaintiffs to add claims to a case piecemeal as a way of staving off appellate review of harmful preliminary injunctions. That is especially so here, given that the new claims have yet to be ruled upon, are meritless, and could be

mooted either by Senate action on Acting Secretary Wolf's pending nomination or through ratification by the proper Acting Secretary under respondents' theory.

3. Finally, respondents contend (NY Opp. 22; MTRNY Opp. 25-27) that review is unwarranted because intervening developments in the Fourth and Ninth Circuits have eliminated the square conflict over the rule's lawfulness. As discussed, see p. 4, *supra*, those developments do not affect the direct disagreement between the Second Circuit here and the Seventh Circuit in *Cook County* regarding whether Section 1182(a)(4)(A) unambiguously adopts a "persistent * * * dependency" standard. Pet. App. 53a. 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. 14-22.

B. The Decision Below Is Wrong

Respondents are similarly unpersuasive in their defense of the decision below on the merits.

1. Respondents argue (NY Opp. 23-28; MTRNY Opp. 14-18) that the phrase "public charge" has been uniformly understood to refer exclusively to those "primarily dependent" on government support, and that Congress has unambiguously ratified that understanding in Section 1182(a)(4)(A). That argument is incorrect in multiple respects.

As an initial matter, respondents' account is inconsistent with historical evidence that "public charge" has been given different meanings over time. Judge Wilkinson's panel-stage majority opinion in the Fourth Circuit thoroughly canvassed the history of executive and judicial public-charge determinations, concluding that

"executive and judicial practice from 1882 to the present rebuts any idea that 'public charge' has been uniformly understood * * * as pertaining only to those who are 'primarily dependent' on public aid." *CASA de Maryland, Inc.* v. *Trump*, 971 F.3d 220, 246 (2020), reh'g en banc granted, No. 19-2222, 2020 WL 7090722 (4th Cir. Dec. 3, 2020); see Pet. 18-19 (pointing to this history). For example, Judge Wilkinson noted a 1985 Senate Report that observed that "the State Department and INS have interpreted 'public charge' to exclude persons receiving assistance through such programs as 'food stamps' and 'rent subsidies.'" 971 F.3d at 247 (quoting S. Rep. No. 132, 99th Cong., 1st Sess. 47-48 (1985)). And while judicial interpretations of the phrase were less common, the recorded decisions that do exist "often adopted [the phrase's] ordinary meaning," *id.* at 248, rather than treating it—as respondents would (NY Opp. 2)—as a specialized "term of art."

Dictionary definitions from the period further refute respondents' supposedly uniform interpretation. As the petition explained (at 14), when Congress in 1952 adopted the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 163 (8 U.S.C. 1101 *et seq.*), Black's Law Dictionary defined "public charge" as "one who produces a money charge on, or an expense to, the public for support and care." *Black's Law Dictionary* 295 (4th ed. 1951) (capitalization and emphasis omitted). That definition did not limit the term to "individuals who are *primarily dependent* on the government for *long-term* subsistence," contrary to respondents' assertion of a "more-than-century-long consensus" that the term is so limited. NY Opp. 2 (emphasis added). Respondents seek to explain away that definition on the ground that *Black's* cited *Ex parte Kichmiriantz*, 283 F. 697 (N.D.

Cal. 1922), in which the recitation of the facts showed that the defendant was incapable of caring for himself because of mental illness. See NY Opp. 25-26; MTRNY Opp. 16. But neither *Black's* nor *Kichmiriantz* suggested that the term was limited to such facts; on the contrary, the district court in *Kichmiriantz* held that "the words 'public charge,' as used in the Immigration Act, mean just what they mean ordinarily; that is to say, a money charge upon, or an expense to, the public for support and care." 283 F. at 698 (citation omitted). A primary-dependence standard is nowhere to be found in either the case or the dictionary.

Respondents' narrow interpretation is also irreconcilable with the affidavit-of-support provisions Congress adopted in 1996, under which a covered alien must identify a sponsor who will provide reimbursement for any means-tested public benefits the alien receives during a specified period, regardless of whether those benefits provide the alien's primary support. See 8 U.S.C. 1182(a)(4)(C) and (D). Aliens who fail to provide a required affidavit are inadmissible on the public-charge ground. See 8 U.S.C. 1182(a)(4). Respondents claim that the affidavit-of-support provisions are not probative, because not all aliens are required to submit such affidavits and the affidavits serve other purposes. See NY Opp. 26-27; MTRNY Opp. 20-21. But that ignores the critical point: if respondents' understanding of "public charge" were correct, Congress would have limited the effect of the affidavit-of-support requirement to only those aliens who become primarily dependent on government support. That Congress instead made aliens inadmissible on the public-charge ground even in circumstances where they are *not* primarily dependent on government support shows that "public charge" does

not have the narrow and unambiguous meaning respondents advocate. See *Cook County*, 962 F.3d at 246 (Barrett, J., dissenting) ("[T]he affidavit provision reflects Congress's view that the term 'public charge' encompasses supplemental as well as primary dependence on public assistance."). Respondents never come to grips with that fundamental flaw in their approach.

2. Echoing the court of appeals (Pet. App. 72a), respondents also contend that DHS violated the APA by failing to explain adequately why it was expanding the public-charge definition to encompass aliens who use government benefits as a supplemental rather than primary means of support. See NY Opp. 28-30; MTRNY Opp. 22-23. But as even the court of appeals recognized (Pet. App. 69a), that argument is closely tied to respondents' narrow interpretation of "public charge" as excluding those who use public benefits as anything other than a primary means of support. DHS more than adequately explained the reasons for its broader interpretation, including the need to avoid "burden[ing] the public benefits system" or making "the availability of public benefits * * * an incentive for immigration to the United States." Pet. 20-21 (citation omitted); see 84 Fed. Reg. 41,292, 41,319 (Aug. 14, 2019). The deferential arbitrary-and-capricious standard does not demand more than that. See, *e.g.*, *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009).

3. Finally, the organizational respondents (MTRNY Opp. 22-24) argue that the rule is contrary to the Rehabilitation Act of 1973 (Rehabilitation Act), 29 U.S.C. 701 *et seq.*, and constitutional equal-protection principles. Neither argument has merit.

As to the Rehabilitation Act, an alien whose disability makes it more likely than not that he will become a

public charge at some point in the future is not "otherwise qualified," 29 U.S.C. 794(a), for admission under the public-charge inadmissibility provision; he is inadmissible because he is likely to impose a substantial charge on the public. The Rehabilitation Act by its terms accordingly does not require an exemption. And contrary to respondents' argument (MTRNY Opp. 23), it is the INA—which requires consideration of "health" in the specific context of assessing whether an alien is likely to become a public charge, see 8 U.S.C. 1182(a)(4)(B)(i)(II)—that would control if the two statutes were found to conflict.

As to equal-protection principles, respondents claim (MTRNY Opp. 24) that the rule "does not pass even rational basis review" because it is founded on "animus against a particular group." But the rule was supported by a thorough explanation of the agency's reasoning, which reflected not animus but rather national immigration policy established by Congress. See, *e.g.*, 84 Fed. Reg. at 41,319-41,320. This Court has recently rejected similar challenges, see *Regents*, 140 S. Ct. at 1916 (plurality opinion), and should do so here as well.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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