No. 20-3150

**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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| **COOK COUNTY, ILLINOIS**, an Illinois governmental entity; and **ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS, INC.**,<br><br>***Plaintiffs-Appellees*,**<br><br>v.<br><br>**CHAD F. WOLF,** in his official capacity as Acting Secretary of U.S. Department of Homeland Security; **U.S. DEPARTMENT OF HOMELAND SECURITY,** a federal agency;<br><br>**KENNETH T. CUCCINELLI II,** in his official capacity as Acting Director of U.S. Citizenship and Immigration Services; and **U.S. CITIZENSHIP AND IMMIGRATION SERVICES,** a federal agency,<br><br>***Defendants-Appellants*.** | Appeal from the United States District Court, Northern District of Illinois, Eastern Division<br><br>No. 19 CV 6334<br><br>The Honorable Gary S. Feinerman, Judge Presiding |

**PLAINTIFFS-APPELLEES' RESPONSE TO DEFENDANTS-APPELLANTS' MOTION FOR STAY PENDING APPEAL**

## INTRODUCTION

Defendants seek to stay a merits judgment that they already have conceded is required by a prior ruling of this Court. Accordingly, they have made the *opposite* of a strong showing of likelihood of success, and they make no attempt to satisfy any of the other traditional factors for evaluating a stay. This should be the end of the matter.

Nonetheless, Defendants contend that, because the Supreme Court previously stayed a preliminary injunction in this case, this Court is now bound to stay the final judgment. That argument fails as a matter of precedent and on the specific facts of this case. First, Supreme Court stay rulings are not precedential "merits" rulings, even with respect to the order stayed. That is why Defendants previously argued that a Supreme Court stay would "not inhibit" this Court's review of the preliminary injunction, and why this Court *affirmed* that injunction notwithstanding the Supreme Court's stay order. Reply in Support of Application for a Stay, No 19A905 at 2 (Feb. 20, 2020); *Cook County v. Wolf*, 962 F.3d 208, 234 (7th Cir. 2020) ("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."). Second, the Supreme Court's stay of the *preliminary* injunction does not bar enforcement of the *final* judgment. Indeed, in this case, the Supreme Court itself explicitly stated that its stay would *not* preclude further, different relief in the lower courts.

Defendants' motion for stay should be denied, and the "public charge" rule should no longer be enforced because—as Defendants conceded—this Court already has held it to be unlawful.

## BACKGROUND

Plaintiffs Cook County and the Illinois Coalition for Immigrant and Refugee Rights ("ICIRR") challenge the Department of Homeland Security's ("DHS") October 2019 public charge rule, *see Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (the "Final Rule" or the "Rule"). On October 14, 2019, the District Court granted Plaintiffs' motion for a preliminary injunction and enjoined the Final Rule's application within Illinois. Dkt. 86[1]; *see also* Dkt. 106 (corrected memorandum opinion).

Defendants moved to stay the preliminary injunction pending appeal; both this Court and the District Court denied those motions. *Cook County v. Wolf*, Dkt. 41, No. 19-3169 (7th Cir. Dec. 23, 2019); Dkt. 109, Nov. 14, 2019 Hr'g Tr. at 25–35. Defendants did not at that time seek a stay in the Supreme Court. The Supreme Court subsequently stayed two nationwide preliminary injunctions of the Final Rule that had been issued by the Southern District of New York. *See Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020). Defendants again asked this Court to stay the Illinois preliminary injunction pending appeal, which this Court denied. *Cook County*, Dkt. 117, No. 19-3169 (7th Cir. Feb. 10, 2020). Defendants

[1] District court docket entries are cited Dkt. [docket number].

then moved for a stay of the preliminary injunction at the Supreme Court; the Court granted the stay without providing any explanation for its decision. *Wolf v. Cook County*, 140 S. Ct. 681 (2020). On April 17, 2020, in the midst of the COVID-19 pandemic, Plaintiffs moved to temporarily lift or modify the stay. The Supreme Court denied that request without opinion, but clarified that its "order does not preclude a filing in the District Court." *Wolf v. Cook County*, 140 S. Ct. 2709 (2020).

On June 10, 2020, this Court affirmed the District Court's preliminary injunction, holding that the Final Rule violated the Administrative Procedure Act ("APA") because it exceeded the agency's statutory authority and was arbitrary and capricious. *Cook County*, 962 F.3d at 221–33. This Court also held that the Rule was likely to cause irreparable harm and that the public interest favored a preliminary injunction. *Id.* at 233–34.

On August 31, 2020, Plaintiffs moved for summary judgment on their APA claims in the District Court. Dkt. 201. In their response to Plaintiffs' summary judgment motion, Defendants stated that they "do not dispute that the Seventh Circuit's legal conclusions concerning the Rule may justify summary judgment for Plaintiffs on their APA claims here." Dkt. 209 at 1. On November 2, 2020, the District Court granted Plaintiffs' motion for summary judgment on the APA claims and entered final judgment on those claims under Federal Rule of Civil Procedure 54(b). Dkts. 222–23.

## ARGUMENT

### I. The Judgment Should Not Be Stayed.

#### A. Defendants Cannot Satisfy Any of the Stay Factors.

A motion for stay pending appeal pursuant to Federal Rule of Appellate Procedure 8(a) "is a request for extraordinary relief." *Chan v. Wodnicki*, 67 F.3d 137, 139 (7th Cir. 1995). When evaluating a motion for stay, courts consider: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). As the District Court explained, "[t]he standard for granting a stay pending appeal mirrors that for granting a preliminary injunction." Dkt. 222 at 12 (quoting *In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014)). Here, this Court already has determined that Plaintiffs have satisfied the criteria for a preliminary injunction, *Cook County*, 962 F.3d at 221–34, and Defendants point to no change in circumstances since that ruling. The stay should therefore be denied.

Defendants cannot satisfy even one of the controlling factors. First, Defendants make no attempt to establish the "most important" stay factor—a strong showing that they are likely to succeed on the merits in an appeal to this Court. *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014). Nor can they: this Court already has heard Defendants' arguments and found them unavailing, and

Defendants *conceded* that Plaintiffs are entitled to summary judgment as a result of this Court's prior opinion. Dkt. 209 at 1 ("Defendants do not dispute that the Seventh Circuit's legal conclusions concerning the Rule may justify summary judgment for Plaintiffs on their APA claims here."). The District Court agreed, holding that this Court's preliminary injunction ruling necessitated judgment in Plaintiffs' favor. Dkt. 222 at 12–13. Although Defendants have had more than a year since Plaintiffs' Complaint was filed, and more than five months since this Court's ruling affirming the preliminary injunction, they were unable to identify any evidence or authority supporting a different outcome on final judgment than the outcome this Court affirmed at the preliminary injunction stage, and did not attempt to persuade the District Court otherwise. Defendants themselves thus have established that they have no likelihood of success in an appeal that asks this Court—based upon neither new evidence, nor new law, nor changed circumstances—to reverse its prior ruling.

Second, Defendants offer no evidence that the District Court's ruling would create an irreparable injury. In fact, Defendants have *never* offered any such evidence—not in opposition to a preliminary injunction, *see* Dkt. 106 at 29 (noting that Defendants did not offer "any explanation of the practical consequences of the delay [in enforcing the Rule] and whether those consequences are irreparable"), not in support of a stay of the preliminary injunction, *see* Dkt. 109, Nov. 14, 2019 Hr'g Tr. at 23:1-10; *id.* at 34:1-8, and not in support of their current stay request. Instead, Defendants speculate that the District Court's order vacating the Rule

"threatens to sow confusion about the current and future effects of the Rule and deprives aliens and the government of clarity regarding which scheme should apply." Mot. at 6.[2] But "[t]here is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). And the District Court's order could not be clearer that the Rule violates federal law and is thus without legal effect.

Indeed, if there is any risk of harm from confusion, it favors *denying* a stay—not granting one. This Court already has held that the Rule itself creates confusion, and—in light of Defendants' failure adequately to address that confusion—the Rule violates the APA's arbitrary and capricious provision. 962 F.3d at 229–231. In short, Defendants cannot create a Rule so confusing that it is unlawful, and then argue that setting aside the Rule would "sow confusion" as to its effects. Given the "substantial public interest 'in having governmental agencies abide by the federal laws that govern their existence and operations,'" Defendants' motion for stay should be denied. *League of Women Voters*, 838 F.3d at 12 (citation omitted).

In any event, Defendants' speculation about confusion cannot outweigh the concrete evidence of harm put forth by Plaintiffs. *See, e.g.*, *Citizens for*

[2] As Defendants acknowledge and the USCIS website makes clear, the Rule has been enforced continuously only for the past two months. Between July 29, 2020 and on or around September 22, 2020, the Rule was not enforced due to a separate preliminary injunction issued by the Southern District of New York. Mot. at 6 n.3; *see also* USCIS, Inadmissibility on Public Charge Grounds Final Rule: Litigation, https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge/inadmissibility-on-public-charge-grounds-final-rule-litigation (last accessed Nov. 16, 2020).

*Responsibility & Ethics v. FEC*, 904 F.3d 1014, 1019 (D.C. Cir. 2018) (per curiam) (explaining that irreparable injuries must "rise beyond the speculative level"). Indeed, this Court already held Plaintiffs' evidence of irreparable injury persuasive at the preliminary injunction stage, when it determined that the Rule's chilling effect: (1) would cause immigrants to disenroll or refrain from enrolling in medical benefits, forego routine treatment, and rely upon emergency care provided by Cook County; and (2) this disenrollment and lack of enrollment would result in significant cost increases for the County and a higher risk for communicable diseases. *Cook County*, 962 F.3d at 233. Defendants offer no countervailing evidence or explanation as to how any harm to them will outweigh these well-documented consequences. Defendants thus have failed to justify the "extraordinary" relief they request. *Chan*, 67 F.3d at 139. And all of this is particularly true during a time when access to health care is most important—in the midst of a global pandemic that appears to be worsening. *See Cook County*, 962 F.3d at 220 ("Ensuring that immigrants have access to affordable basic health care … protects the community at large from highly contagious diseases such as COVID-19."); *New York v. United States Dep't of Homeland Sec.*, 2020 WL 4347264, at *13 (S.D.N.Y. July 29, 2020) ("Defendants' interest in effectuating the Rule fails to measure up to the gravity of this global pandemic that continues to threaten the lives and economic well-being of America's residents. No person should hesitate to seek medical care, nor should they endure punishment or penalty if they seek temporary financial aid as a result of the pandemic's impact."); Brady Dennis, Jacqueline Dupree & Marisa Iati, *With*

*Coronavirus Cases Spiking Nationwide, All Signs Point to a Harrowing Autumn*, WASH. POST (Nov. 10, 2020), https://www.washingtonpost.com/health/with-coronavirus-cases-spiking-nationwide-all-signs-point-to-a-harrowing-autumn/2020/11/10/d61fa050-238b-11eb-a688-5298ad5d580a_story.html. Granting a stay and permitting an unlawful rule to remain in effect adds confusion to an already dangerous public health crisis.

### B. The Supreme Court's Order Staying The Preliminary Injunction Does Not Support A Stay Of The Final Judgment.

Unable to support its stay request under any of the applicable stay factors, Defendants urge this Court to stay the judgment because the Supreme Court granted a stay of the District Court's prior preliminary injunction enjoining the Rule. Mot. at 4–6. The Supreme Court's stay order has no application here.

First, the stay order—unaccompanied by any supporting opinion—"was not a merits ruling" and has no precedential effect. *Cook County*, 962 F.3d at 233; *see also Ind. State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 960 (2009) (per curiam) (emphasizing that decision to grant or deny stay is "not a decision on the merits of the underlying legal issues"); *Barefoot v. Estelle*, 463 U.S. 880, 907 n.5 (1983) (Marshall, J., dissenting) ("the denial of a stay can have no precedential value"); *compare also, e.g.*, *Doe v. Reed*, 130 S. Ct. 486 (2009) (granting stay against disclosure requirements), *with Doe v. Reed*, 130 S. Ct. 2811 (2010) (upholding disclosure requirements on the merits against facial challenge). Indeed, Defendants themselves argued that the Supreme Court's stay of the preliminary injunction

"simply will stay the injunction during the pendency of" appellate review of the preliminary injunction, and would "not inhibit" further lower court proceedings. Reply in Support of Application for a Stay, No. 19A905 at 2. What is more, the Supreme Court explicitly confirmed that its stay order did not "preclude a filing in the District Court" for further relief "as counsel considers appropriate." *Wolf v. Cook County*, No. 19A905, 2020 WL 1969275, at *1 (Apr. 24, 2020).

Nor is there merit to Defendants' contention that this Court should infer that the Supreme Court "necessarily concluded" that Defendants are likely to succeed on the merits in its appeal of the final judgment. Mot. at 4. This assertion rings hollow given Defendants' concession that Plaintiffs are entitled to judgment as a result of this Court's ruling, Dkt. 209 at 1—which was issued *after* the Supreme Court stayed the District Court's preliminary injunction and which, unlike the stay order, is a precedential opinion on the merits. Far from making the requisite "strong showing" of likelihood of success on the merits, *Nken*, 556 U.S. at 434, Defendants admitted that they had no chance of success at all before the District Court and, by extension, before this Court. Likewise, nothing in the Supreme Court's stay order can overcome this Court's conclusion, which Defendants have not challenged with any evidence, that "the public interest is better served" without the Rule in effect. *Cook County*, 962 F.3d at 234.

Additionally, Defendants' argument ignores the important differences between preliminary relief and a final judgment. *See 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."). The Supreme Court—without giving any indication as to why—stayed the District Court's grant of *preliminary* injunctive relief. But the District Court's *final* judgment vacating the Rule is what is currently before this Court. To read into the Supreme Court's unexplained, non-precedential stay of a preliminary injunction that this Court must now stay a final judgment would fundamentally undermine the authority of the lower federal courts and the appellate review process. As this Court succinctly put it, "[t]here 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." *Cook County*, 962 F.3d at 234.

## II. Defendants' Alternative Request For A Geographically Limited Stay Should Be Denied.

Lastly, Defendants ask this Court to "stay the district court's injunction insofar as it applies to parties outside Illinois." Mot. at 7. This request misstates the relief entered by the District Court and finds no support in the law.

First, Plaintiffs did not seek, and the District Court did not enter, an injunction. Instead, Plaintiffs sought and obtained *vacatur* of the Rule as required by the APA. The plain text of that statute mandates vacatur as the proper remedy for unlawful agency action: "The reviewing court *shall … hold unlawful and set aside* agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (emphasis added). The "set aside" language "is ordinarily read as an

instruction to vacate, wherever applicable, unlawful agency rules." *District of Columbia v. U.S. Dep't of Agric.*, No. CV 20-119 (BAH), 2020 WL 1236657, at *33–34 (D.D.C. Mar. 13, 2020). In addition, the word "shall" is mandatory and requires courts to "set aside" unlawful agency rules; it does not give courts discretion to prohibit the application of an unlawful rule only as to certain geographic areas. *See Murphy v. Smith*, 138 S. Ct. 784, 787 (2018) ("[T]he word 'shall' usually creates a mandate, not a liberty, so the verb phrase 'shall be applied' tells us that the district court has some nondiscretionary duty to perform.") (citation omitted); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' … normally creates an obligation impervious to judicial discretion.") (citation omitted).

As this language makes clear, vacatur is the proper relief mandated by the APA when, as here, a rule is found to violate the APA. *See*, *e.g.*, *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1901 (2020) (concluding that DACA rescission "must be vacated" because it violated the APA); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 207, 216 (1988) (declaring rule "invalid" under the APA instead of limiting relief to the "group of seven hospitals" that had filed suit); *H & H Tire Co. v. U.S. Dep't of Transp.*, 471 F.2d 350, 355–56 (7th Cir. 1972) ("When an administrative decision is made without consideration of relevant factors it must be set aside.") (citation omitted); *Empire Health Found. v. Azar*, 958 F.3d 873, 886 (9th Cir. 2020) ("[W]hen 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.") (citation omitted); *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (same).

In addition to being inconsistent with the text of the APA and the case law, Defendants' request for a geographically limited vacatur is nonsensical and would be impossible to implement. As one district court explained:

> As a practical matter … 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?

*O.A. v. Trump*, 404 F. Supp. 3d 109, 153 (D.D.C. 2019); *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) ("[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.").

Defendants identify no basis for departing from the APA's clear instruction that vacatur is the proper relief here. Instead, Defendants rely exclusively on cases addressing the geographic scope of *preliminary injunctive relief*, not vacatur after a final judgment on the merits. Mot. at 7. But the Supreme Court has repeatedly made clear that vacatur is a distinct remedy from an injunction. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010) (describing an "injunction" as "a drastic and extraordinary remedy" and "vacatur" of unlawful agency action as a "less drastic remedy"); *see also Regents*, 140 S. Ct. at 1916 n.7 (recognizing this

distinction by holding that affirmance of the "order vacating the [agency action] makes it unnecessary to examine the propriety of the nationwide scope of the injunctions"). Defendants do not—and cannot—point to a single case supporting the idea that a court can or should enter a geographically limited vacatur of an invalid agency rule at final judgment.

Defendants also assert that the court's equitable powers should override the plain text of the APA. Mot. at 7–8. In doing so, Defendants rely on the Supreme Court's decision in *The Hecht Co. v. Bowles*, 321 U.S. 321 (1944), but that case is inapt for several reasons. First, as Defendants acknowledge, in that case the Supreme Court interpreted a different statute altogether—the Emergency Price Control Act of 1942—which provided that, if the court found that certain conditions were met, "a permanent or temporary injunction, restraining order, *or other order* shall be granted without bond." *Id.* at 322 (emphasis added). Based on this statutory language ("or other order") and the ambiguous legislative history, the Court held that that statute left "some room for the exercise of discretion on the part of the court" in deciding whether to issue injunctive relief. *Id.* at 328. Defendants do not point to any similar discretion-conferring language in the APA.[3]

To the contrary, "the APA's text means what it says": an invalid agency rule

[3] Defendants also cite the Fourth Circuit's decision in *Virginia Society 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). Mot. at 7. The Fourth Circuit in that case limited the scope of an *injunction*, not a vacatur order, and the decision therefore has no application here.

must be "set aside." Dkt. 222 at 5. This Court should reject Defendants' request for a stay order that would grant novel, nonsensical, and textually unsupported relief in the form of a geographically-limited vacatur.

## CONCLUSION

The motion for a stay should be denied.

Dated: November 17, 2020

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 27**

I hereby certify that:

1. This response complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 3,543 words, as reported by the word count function of Microsoft Word, excluding the parts of the response exempted by Federal Rule of Appellate Procedure 32(f); and

2. This response complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 27(d)(1)(E) (incorporating by reference the requirements of Federal Rule of Appellate Procedure 32(a)(5), as modified by Circuit Rule 32(b), and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6)), because it has been prepared in a proportionally spaced typeface using Microsoft Word in 12-point Century Schoolbook with footnotes in 11-point Century Schoolbook.

November 17, 2020

*/s/* David A. Gordon
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**CERTIFICATE OF SERVICE**

I hereby certify that on November 17, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

November 17, 2020

*/s/* David A. Gordon
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