ORAL ARGUMENT PREVIOUSLY SCHEDULED MARCH 31, 2017

No. 16-5287

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Save Jobs USA,
Plaintiff-Appellant,

v.

United States Department of
Homeland Security,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA No. 15-cv-615
The Hon. Tanya S. Chutkan

DEFENDANT-APPELLEE'S OPPOSOTION TO PLAINTIFFS' MOTION TO RESCHEDULE BRIEFING AND ORAL ARGUMENT

JOSEPH H. HUNT
Assistant Attorney General
Civil Division
United States Department of Justice

WILLIAM C. PEACHEY
Director, Office of Immigration Litigation, District Court Section

EREZ REUVENI
Assistant Director
P.O. Box 878, Ben Franklin Station
Washington, DC 20044-0878
Telephone: (202) 307-4293

Counsel for Defendant-Appellee

Plaintiff-Appellant Save Jobs USA has moved this Court to take this case out of abeyance, arguing that Defendant-Appellant the Department of Homeland Security (DHS) has taken too long to issue a Notice of Proposed Rulemaking (NPRM) to rescind the rule at issue in this appeal. The Court should deny the motion. As DHS recently informed the Court, "[f]inal DHS clearance review of the proposed rule is ongoing, and senior levels of the Department's leadership are actively considering the terms of the NPRM for approval." Status Report (Aug. 20, 2018). Taking this case out of abeyance would thus not serve judicial economy or the interests of the parties and the Court, given the likelihood this appeal will be moot before it is resolved.

1. This case involves an Administrative Procedure Act challenge to the Executive's legal authority to issue, through notice-and-comment rulemaking, a rule, Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284-10,312 (Feb. 25, 2015) (H-4 EAD Rule), permitting certain aliens maintaining H-4 nonimmigrant status,[1] *see* 8 U.S.C. § 1101(a)(15)(H), to apply for, and if deemed eligible, to receive employment authorization from DHS.

2. On February 21, 2018, this Court granted DHS's motion to hold the case in abeyance, and denied Save Jobs USA's motion to reschedule briefing and

[1] H-4 nonimmigrants are spouses and children under 21 years of age of, *inter alia*, H-1B nonimmigrants. *See* 8 U.S.C. § 1101(a)(15)(H); *see also* 8 CFR 214.1(a)(2), 214.2(h)(9)(iv).

oral argument. Order at 1 (Feb. 21. 2018). The order instructed DHS to "file a status report within 90 days of the date of this order, and every 90 days thereafter," and directed the parties to "file motions to govern further proceedings within 30 days of appellee's completion of the proposed rulemaking. *Id*.

3. DHS has since filed three status reports, on February 28, May 22, and August 20, 2018. The next status report is due on November 19, 2018.

4. The most recent report reported that "Final DHS clearance review of the proposed rule is ongoing, and senior levels of the Department's leadership are actively considering the terms of the NPRM for approval." As previously noted, after DHS clearance, Office of Management and Budget (OMB) review will occur under Executive Order 12,866, Regulatory and Planning Review.

5. DHS's intention to proceed with publication of an NPRM concerning the H-4 EAD Rule at issue in this case remains unchanged. *See, e.g.*, Status Report at 1 (Aug. 20, 2018). And DHS continues to proceed in line with that intention. DHS informs undersigned counsel that, since the filing of the most recent status report, DHS's senior leadership reviewed the proposed rule and returned it to USCIS this month for revisions. Senior leadership review and the request for revisions is standard practice within DHS. When the necessary revisions are incorporated, USCIS will return the proposed rule to DHS for final clearance and submission to OMB. DHS anticipates that the rule will be submitted to OMB

within three months. DHS is making solid and swift progress in proposing to remove from its regulations certain H-4 spouses of H-1B nonimmigrants as a class of aliens eligible for employment authorization.

6. Given this strong progress, the Court should continue to hold this case in abeyance. The present abeyance serves judicial economy and preserves the resources of the Court and the parties. DHS's expected actions will likely obviate the need for judicial review of the current rule, and will moot this appeal, as the new rulemaking will supersede the current rule. *See, e.g.*, *Wash. Alliance of Tech. Workers v. United States Dep't of Homeland Security*, 650 F. App'x 13, 14 (D.C. Cir. May 13, 2016) (dismissing appeal as moot and explaining that appeal challenging agency regulation is "moot" when the challenged regulation "is no longer in effect"). Although any new final rule issued as a result of the NPRM may be challenged in the future, that does not change the fact that *this case* would be moot, such that litigating this case does not serve the interests of judicial economy or constitute an efficient use of the Court's or the parties' resources. *See, e.g.*, *Wheaton Coll. v. Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012) ("if we do not decide the merits of appellants' challenge to the current rule now, we may never need to").

7. Save Jobs' contrary arguments are not persuasive. First, Save Jobs contends that the longer the case remains in abeyance, the greater the possible

harm to U.S. workers or the beneficiaries of the H-4 EAD Rule. Mot. 5-6. The above points overcome these speculative harms to non-parties. *See, e.g.*, *Wheaton Coll.*, 703 F.3d at 553 (rejecting similar speculative claims about possible harms, and holding that "we see nothing about [these] claims that alters our conclusion that the petitioners' lawsuits should be held in abeyance pending the new rule that the government has promised will be issued soon"). Second, Save Jobs contends that DHS might never promulgate a rule. Mot. 8. This too is speculative—and it is belied by the progress described above and this Court's prior orders granting abeyance. Third, Save Jobs maintains that the Court must decide this case now because otherwise DHS could in theory issue a rule in the future that will require further litigation of the same legal issue. Mot. 7-10. But that is true of any rulemaking modifying or rescinding a prior rule that is the subject of litigation that could in turn become moot. Yet it is "preferable as a general matter to review a set of claims in the context of an extant rather than a defunct rule." *Ass'n of Am. Physicians & Surgeons v. Sebelius*, 746 F.3d 468, 473 (D.C. Cir. 2014) (if final rule issued with notice and comment replaces interim final rule with substantively different rule, procedural and substantive challenges to the replaced rule are moot). Finally, Save Jobs argues that the abeyance should be lifted because this Court in *Wash. All. of Tech. Workers v. U.S. DHS*, 892 F.3d 332, 341 (D.C. Cir. 2018) held that a different plaintiff could challenge a different DHS regulation on the theory

that the regulation increased worker competition. Mot. 11. But the fact that a plaintiff in a different case challenging a different rule was found to sufficiently allege injury at the motion-to-dismiss stage says nothing about whether an appeal from summary judgment in a case involving a different rule and a different plaintiff should be taken out of abeyance.

8. DHS respectfully requests that the Court continue to hold this case in abeyance pending completion of the NPRM process at DHS and deny Save Jobs USA's motion to end the abeyance and issue a new briefing schedule.

Dated: September 20, 2017

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General
Civil Division

WILLIAM C. PEACHEY
Director
Office of Immigration Litigation
District Court Section

/s/ *Erez Reuveni*
EREZ REUVENI
Assistant Director
United States Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Phone: (202) 307-4293
Erez.r.reuveni@usdoj.gov

CERTIFICATE PURSUANT TO FED. R. APP. P. 27, 32(A)(7)(C) AND CIRCUIT RULE 27(d)(2), 32(e)

Pursuant to Fed. R. App. P. 27 and D.C. Circuit Rule 27(d)(2), the attached motion is proportionately spaced, has a typeface of 14 points or more, and contains 1112 words, not including those sections excluded from the word count under applicable rules.

s/ Erez Reuveni
EREZ REUVENI
Assistant Director

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia by using the appellate CM/ECF system on September 21, 2018.

s/ Erez Reuveni
EREZ REUVENI
Assistant Director