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September 16, 2019

Hon. Mark Langer
Clerk, U.S. Court of Appeals for the District of Columbia Circuit
E. Barrett Prettyman U.S. Courthouse &
William B. Bryant Annex
333 Constitution Ave., N.W.
Washington, D.C. 20001

Re: *Save Jobs USA v. Dep't of Homeland Sec.*, Case No. 16-5287 (D.C. Cir.) (oral argument scheduled for September 27, 2019)

Dear Mr. Langer:

I write on behalf of Immigration Voice, Sudarshana Sengupta, and Anuj Dhamija, the Intervenors in the above-referenced appeal, to respond to the Court's September 11, 2019 *per curiam* order that by 4 p.m. on September 16, 2019 "the parties show cause why the September 27, 2019 oral argument should not be removed from the oral argument calendar and indefinitely posted." The Intervenors believe, as explained below, based on prudential considerations and in the interest of judicial economy the oral argument should be removed from the argument calendar and indefinitely postponed.

In its September 10, 2019 letter to the Court, the U.S. Department of Homeland Security ("DHS") indicated that DHS is working on "notice of proposed rulemaking that would propose to remove H-4 dependent spouses from the class of aliens eligible for employment authorization, effectively rescinding the challenged H-4 Rule, Employment Authorization for Certain H-4 Dependent Spouses[.]" If DHS decides to rescind the current rule on policy grounds, the proposed rule might well eliminate the controversy at the heart of this appeal—whether DHS had legal authority to promulgate the current rule in the first place. Accordingly, there is a strong argument that the current controversy is not, as a prudential matter, ripe for review.

As this Court said in deciding that another APA rule challenge was not ripe for review because of a pending rule change, "[i]f we do not decide [the merits of

appellants' challenge to the current rule] now, we may never need to." *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 387 (D.C. Cir. 2012) (quoting *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1431 (D.C. Cir. 1996)); *see also Devia v. Nuclear Regulatory Comm'n*, 492 F.3d 421, 424 (D.C. Cir. 2007) (same).

In *Am. Petroleum Inst.*, 683 F.3d at 384, a case that is broadly on point, the Court determined as a prudential matter that a challenge to an existing rule was not ripe and held case in abeyance following post-briefing notice of proposed rulemaking that would have significantly amended rule at issue. Similarly, in *Wheaton Coll. v. Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012), this Court found a rule challenge was not ripe and held the case in abeyance following Advance Notice of Proposed Rulemaking and other assurances by the government that a new rule would be issued to address plaintiffs' challenge. These cases, and DHS's repeated assertions that it is going to propose a rule to rescind the current rule, weigh in favor of finding that this matter is not currently ripe for resolution.

In assessing the prudential ripeness of a case, one factor courts consider is the "the extent to which withholding a decision will cause hardship to the parties." *Am. Petroleum Inst.*, 683 F.3d at 387 (internal citation omitted). Here, that factor weighs in favor of deferring review. DHS sought to hold this case in abeyance, which is a strong indication the agency would not be prejudiced by withholding a decision. Because work authorization continues to be issued under the existing rule, the Intervenors would also not be prejudiced by delay. As to Save Jobs USA, the Intervenors believe that the district court properly found that Save Jobs USA failed to demonstrate injury to its members and so failed to demonstrate standing. Thus, Save Jobs USA will suffer no injury from delay—after all, it suffers no injury now. But even assuming for sake of argument that this Court were to find Save Jobs USA has standing, it is highly uncertain whether its members would obtain relief sooner through this challenge than they would through DHS's forthcoming rule. Whichever side loses this appeal will likely seek rehearing *en banc*, and either Save Jobs USA or the Intervenors, whoever comes out on the short end of that rehearing process, will likely file a petition for a writ of certiorari. Thus, any decision in this appeal is not likely to become final for a considerable period of time, and so there is no reason to think that Save Jobs USA's members

are likely to receive relief sooner through an appeal than they would through a new notice and comment rulemaking procedure.

Looking ahead in time to when the new rule is promulgated underscores why this Court might wish to delay weighing in on this matter now. Once DHS issues a new rule rescinding the current rule, the relevant legal battle will be over the validity of the new rule. Any challenge to the validity of the current rule, will become moot if, and when, the current rule is repealed. Should DHS not succeed in rescinding the current rule, any legal challenge to the current rule is going to have to consider how the legal landscape is altered by the effort to repeal the current rule. Thus, if this Court were to go ahead with the oral argument currently scheduled for September 27, 2019, not only would the Court be addressing a matter that arguably is not ripe, the time and effort that the Court spends on the legal challenge to the current rule will likely be of little or no import once the new rule is issued.

Moreover, even if this matter is not moot when the panel issues its decision, this case or controversy may well become moot before the appellate process has run its course as a result of the issuance of a new rule. In that circumstance, whether it is Save Jobs USA or the Intervenors that are seeking further review, this Court's decision would likely be vacated under the *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), making this Court's expenditure of time and energy on resolving this appeal a particularly inefficient use of its scarce, judicial resources.

Respectfully submitted,

By: *s/ Carl E. Goldfarb*

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CERTIFICATES OF SERVICE AND COMPLIANCE

I hereby certify that this filing is 952 words, and therefore complies with the word limitations of Federal Rule of Appellate Procedure 28(j) and this Circuit's local rules.

I hereby certify that on September 16, 2019, I electronically filed the foregoing letter brief with the Clerk of the Court by using the appellate CM/ECF system. Counsel of record are registered CM/ECF users.

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