No. 21-40680

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS; STATE OF ALABAMA; STATE OF ARKANSAS; STATE OF LOUISIANA; STATE OF NEBRASKA; STATE OF SOUTH CAROLINA; STATE OF WEST VIRGINIA; STATE OF KANSAS; STATE OF MISSISSIPPI,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, Secretary, U.S. Department of Homeland Security; CHRIS MAGNUS, Commissioner, U.S. Customs and Border Protection; TAE D. JOHNSON, Acting Director of U.S. Immigration and Customs Enforcement; UR M. JADDOU, Director of U.S. Citizenship and Immigration Services,

Defendants-Appellants,

ELIZABETH DIAZ; JOSE MAGANA-SALGADO; KARINA RUIZ DE DIAZ; JIN PARK; DENISE ROMERO; ANGEL SILVA; MOSES KAMAU CHEGE; HYO-WON JEON; BLANCA GONZALEZ; MARIA ROCHA; MARIA DIAZ; ELLY MARISOL ESTRADA; DARWIN VELASQUEZ; OSCAR ALVAREZ; LUIS A. RAFAEL; NANCI J. PALACIOS GODINEZ; JUNG WOO KIM; CARLOS AGUILAR GONZALEZ; STATE OF NEW JERSEY,

Intervenor Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas

SUPPLEMENTAL BRIEF FOR FEDERAL APPELLANTS

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INTRODUCTION AND SUMMARY

The federal government submits this brief in response to the Court's supplemental-briefing order. That order directs the parties to address the government's position that the Court should treat the Department of Homeland Security's (DHS's) recently promulgated final rule as the operative agency action for purposes of plaintiffs' substantive claims. The order further directs the parties to provide the statutory authority that governs appeals from the rulemaking and the basis for this Court's jurisdiction to review the rule. The order permits the parties to address other issues as well.

This Court can and should consider the substantive validity of the final rule in reviewing the district court's injunction, which expressly bars DHS from "reimplementing" the Deferred Action for Childhood Arrivals (DACA) program, and so prohibits implementation of the final rule as well as the DACA memorandum that it replaces. It is well established that when a plaintiff challenges a statute or regulation that is amended while the case is on appeal, the court of appeals must consider the law as it currently stands, not as it stood at the time of the district court's judgment. Furthermore, where the changes to the law are not material to the plaintiff's claims, the court of appeals may and often should consider the validity of the revised law in the first instance—remand would cause unnecessary delay and waste judicial and party resources. This approach applies even if the court of appeals would not have original jurisdiction over a challenge to the revised law or regulation; because the court has

appellate jurisdiction, it may review the claims that are before it on appeal in the context of the current law.

Here, the DACA regulations promulgated by the final rule are materially indistinguishable for present purposes from the policy administered pursuant to the 2012 DACA memorandum, and the parties' substantive arguments (albeit not plaintiffs' notice-and-comment arguments) are equally applicable to both. Moreover, the district court's injunction bars the government not only from continuing to implement DACA under the 2012 memorandum, but also from reimplementing DACA under the final rule. The present appeal places the validity of the injunction squarely before this Court, and the Court's appellate jurisdiction gives it the authority to review the injunction in all respects, including its prospective application to the rule. Therefore, this Court should resolve the current dispute about the substantive validity of DACA with regard to the final rule. Because the district court's injunction will bar implementation of the rule, the Court should address the validity of the rule even if the Court issues its decision prior to the effective date of the rule.

Plaintiffs' procedural notice-and-comment claim, in contrast, will be moot once the new regulations take effect. Because DHS has now complied with the informal rulemaking procedures of the Administrative Procedure Act (APA), there will be no continuing controversy regarding whether DHS was required to undertake notice-and-comment procedures before promulgating the DACA policy. Plaintiffs' speculation that there might be a situation in which the final rule is invalidated and the

2012 memorandum springs back to life is highly unlikely. Because the final rule and 2012 memorandum are indistinguishable for purposes of plaintiffs' substantive lawfulness claims, this Court could not invalidate the final rule in such a manner that would leave the 2012 memorandum intact.

Finally, the final rule confirms that the various aspects of the DACA policy, and the provisions of the new regulations, are severable from each other. DHS has now further made clear that each part of the DACA policy is independently workable and that DHS would implement any of those provisions even if it lacked legal authority to implement the rest.

ARGUMENT

I. THE COURT SHOULD REVIEW PLAINTIFFS' SUBSTANTIVE CHALLENGES TO DACA IN LIGHT OF THE FINAL RULE

The Department of Homeland Security has promulgated a final rule, issued pursuant to notice-and-comment rulemaking, that rescinds the 2012 DACA memorandum and replaces it with DACA regulations. The regulations, which are substantively the same as the 2012 DACA memorandum for purposes of this lawsuit, are scheduled to take effect on October 31, 2022. However, the district court's injunction prohibits DHS from implementing the regulations. The validity of that injunction is now before this Court. Because the final rule rescinds the 2012 memorandum, because it replaces the memorandum with substantively identical regulations, and because the existing injunction will prohibit DHS from putting those

regulations into effect, it is appropriate for the Court to address the validity of the final rule in the course of reviewing the injunction under appeal.[1]

A. This appeal presents a familiar and recurring appellate scenario: a law or rule whose validity has been addressed by a district court is revised while the district court's judgment is under appeal. The Supreme Court has made clear that when a challenged statute is changed following the district court's judgment, the judgment must be reviewed on appeal in "light of presently existing … law, not the law in effect at the time that judgment was rendered." *Fusari v. Steinberg*, 419 U.S. 379, 387 (1975); *see also Diffenderfer v. Central Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 414 (1972) (per curiam) ("We must review the judgment of the District Court in light of Florida law as it now stands, not as it stood when the judgment below was entered."). And this Court's decision in *De la O v. Housing Authority of El Paso*, 417 F.3d 495, 497-498 (5th Cir. 2005), makes clear that the same rule is equally applicable to regulations.

In *De la O*, this Court reviewed a district court's dismissal of claims challenging the constitutionality of housing regulations that restricted the distribution of political material. After the appeal was filed, the defendant housing authority amended the

[1] DHS has explained that the injunction "prohibit[s] [DHS] from granting initial DACA requests and related employment authorization under the final rule." Press Release, DHS, *DHS Issues Regulation to Preserve and Fortify DACA* (Aug. 24, 2022), https://www.dhs.gov/news/2022/08/24/dhs-issues-regulation-preserve-and-fortify-daca. Because the injunction has been partially stayed, DHS presently—and for so long as the stay remains in place—"may grant DACA renewal requests under the final rule." *Id.*

regulations to make them less restrictive. 417 F.3d at 498. For purposes of the plaintiffs' *damages* claim, the Court explained that it must consider "the propriety of the regulations as they existed at the time of the district court's decision." *Id.* at 499, 506. But for purposes of the plaintiffs' prospective claim for *injunctive* relief, the Court considered the amended regulations. *Id.*; *see Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc) ("Our review must be in the light of the Florida rule as it now stands, not as it stood when the judgment below was entered."); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1548 (8th Cir. 1996) ("It is clear that we must review the judgment appealed [upholding the constitutionality of a state statute] from in the light of the Minnesota statute as it now stands, not as it stood when the judgment below was entered."); *James v. Ball*, 613 F.2d 180, 181 n.1 (9th Cir. 1979) (Kennedy, J.) (in case challenging the constitutionality of Arizona statutes, the court of appeals would review the decision of the district court looking "to the statute as it presently reads, not as it read at the time the district court rendered its decision"), *rev'd on other grounds*, 451 U.S. 355 (1981); *cf. Church of Scientology Flag Serv. Org. v. City of Clearwater*, 777 F.2d 598, 606 n.22 (11th Cir. 1985) ("There are numerous cases illustrating the principle that where a challenged ordinance is amended during litigation the appropriate course is to proceed to a consideration of the amended ordinance.").

Courts have explained that when a challenged statute or regulation is amended during the course of litigation, any dispute over the earlier version of the law is ordinarily "mooted by the enactment of the new" one. *MacDonald v. City of Chicago*,

243 F.3d 1021, 1025 (7th Cir. 2001); *see also Pugh*, 572 F.2d at 1058 ("As an attack on the Florida procedures which existed as of the time of trial, the case has lost its character as a present, live controversy and is therefore moot."). If the revised law or regulation continues to injure the plaintiffs, a court may consider the validity of the revised provision in place of the original. *See MacDonald*, 243 F.3d at 1025. That is because "where a new statute 'is sufficiently similar to the repealed [statute] that it is permissible to say that the challenged conduct continues' the controversy is not mooted by the change, and a federal court continues to have jurisdiction." *Rosenstiel*, 101 F.3d at 1548 (alteration in original) (quoting *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 n.3 (1993)); *see also id.* ("[I]f the new statute disadvantages the complainants in the same fundamental way the repealed statute did, the amendment does not divest the court of the power to decide the case."); *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1310 (11th Cir. 2000) ("[W]hen an ordinance is repealed by the enactment of a superseding statute, then the superseding statute or regulation moots a case only to the extent that it removes challenged features of the prior law. To the extent that those features remain in place, and changes in the law have not so fundamentally altered the statutory framework as to render the original controversy a mere abstraction, the case [is] not moot." (quotation marks omitted)).

The proper procedure for considering challenges to a law or rule that is revised during the pendency of an appeal depends on the nature of the amendment and its

relationship to the plaintiffs' claims. Where the amendment is immaterial for purposes of the claims, courts of appeals generally proceed with the appeal and consider the claims as they apply to the revised law. For example, in *Coalition for the Abolition of Marijuana Prohibition*, the plaintiff appealed a judgment holding that challenged portions of Atlanta's outdoor-festival ordinance were constitutional. 219 F.3d at 1305. While the case was on appeal, the city enacted a new outdoor-festival ordinance. *Id.* at 1309. With regard to provisions that had been "substantially altered" by the new enactment, the court of appeals left it to the district court to "review those provisions in the first instance" and to determine whether they "pass constitutional muster." *Id.* at 1316. But with regard to the provisions that "remain[ed] predominantly unchanged by the enactment," the court held that "the issues presented on appeal [we]re sufficiently defined and concrete to permit effective decision-making by the court." *Id.* (emphasis omitted). Accordingly, the court of appeals evaluated the constitutionality of those revised provisions without remand to the district court. *See id.* ("[W]e consider the appellants' arguments that the 1994 Festival Ordinance is unconstitutional by analyzing the 2000 festival ordinance.").

Likewise, in *Rosenstiel*, the district court had dismissed claims that Minnesota's public campaign-financing program violated candidates' First Amendment rights. 101 F.3d at 1546-1547. While the case was on appeal, the Minnesota legislature amended the challenged statute. *Id.* at 1547-1548. Although the amendment substantively changed the law, the court of appeals found that "the amended statute still impairs the

[plaintiffs] in the very same way that they claimed the prior section did" and "the fundamental nature of the challenged statute continues unchanged." *Id.* at 1548. Accordingly, the court held that the case was not moot and went on to determine the constitutionality of the revised provisions. *Id.* at 1548-1557.

Similarly, in *Sanjour v. EPA*, 56 F.3d 85, 87, 90 (D.C. Cir. 1995) (en banc), the D.C. Circuit considered an appeal from a district court's dismissal of a First Amendment challenge to Office of Government Ethics regulations and an Environmental Protection Agency advisory letter prohibiting EPA employees from receiving certain travel-expense reimbursements. While the case was on appeal, the Office of Government Ethics issued new regulations elaborating on its travel-reimbursement policy. *Id.* at 88. But because the new regulations "only elaborated the … policy enunciated in the earlier regulations," which also remained in effect, and were "not intended to effect substantive change," the court of appeals "consider[ed] the constitutionality of th[e] scheme as implemented by both" regulations, *id.* at 90, without remanding to the district court to consider the new regulation in the first instance.

Indeed, even where a statutory or regulatory amendment makes substantive changes that are relevant to the issues on appeal, courts of appeals often will consider the validity of the revised statute or regulation in the first instance as long as the factual record needs no further development. This Court followed that course in its en banc decision in *Pugh*, and did so again more recently in *De la O*. *See Pugh*, 572 F.2d

at 1058-1059 (declining to consider as-applied challenges to amended bail rule because the district-court record contained no evidence regarding application of the amended rule, but nevertheless addressing the amended rule's facial constitutionality); *De la O*, 417 F.3d at 500 (reviewing constitutionality of amended regulations rather than remanding to district court, even though the amended regulations were substantively different, because "the outcome in the district court [wa]s certain" and a remand therefore "would be inefficient."); *see also, e.g.*, *Hadix v. Johnson*, 144 F.3d 925, 935 (6th Cir. 1998) (court of appeals would consider constitutionality of amended provision in the first instance "in the interest[s] of judicial economy" and avoiding delay because the plaintiffs' "challenge raise[d] purely legal issues" and did "not necessitate any findings of fact"; "the district judges' expertise in evaluating factual matters" could not advance "appellate review of th[e] action"), *abrogated on other grounds by Miller v. French*, 530 U.S. 327 (2000).

As *Pugh* and *De la O* demonstrate, when a reviewing court remands for the district court to consider a revised statute or regulation in the first instance, it is typically because consideration of the revised law requires a new factual record or raises new legal issues. For example, in *Fusari*, the Supreme Court remanded to the district court to consider challenges to an amended statute because the Supreme Court was "unable meaningfully to assess the issues in th[e] appeal on the present record." 419 U.S. at 387. The Court explained that the statutory amendments "may alter significantly the character of the system considered by the District Court" and

"[t]he record[] … provide[d] no indication" of how the amended statute operated in practice. *Id.* at 386-387, 389.

B. This case fits squarely within the general rule that challenges to the validity of a federal law or regulation are determined on appeal in light of intervening revisions to the provision. When the final rule takes effect on October 31, 2022, the rule will provide the legal basis for the DACA policy challenged in this suit and will define the contours of that policy. Furthermore, because the final rule and regulations rescind the 2012 memorandum, 87 Fed. Reg. 53,152, 53,298 (Aug. 30, 2022), the memorandum will no longer exist as an operative agency action or a legal basis for the DACA policy going forward. Plaintiffs' challenges to the 2012 memorandum will be moot, *see MacDonald*, 243 F.3d at 1025; *Pugh*, 572 F.2d at 1058, and the Court must review their challenge to the DACA policy in light of the regulations that will then be in effect, *see Fusari*, 419 U.S. at 387.

The Court should proceed to consider plaintiffs' claims and the district court's judgment and injunction as they apply to the final rule, rather than remanding to the district court. As the United States explained in its Rule 28(j) letter, and as plaintiffs agree, the final rule promulgated by DHS does not materially change the DACA policy created by the 2012 memorandum for purposes of plaintiffs' substantive claims. *See* U.S. Rule 28(j) Letter 1-2, Aug. 24, 2022; Pls. Resp. to Rule 28(j) Letter 1, Aug. 25, 2022 ("The [plaintiff] States and the federal government agree that the 2012 Memorandum and the rule are substantially similar, including maintaining the existing

threshold criteria for DACA, retaining the existing process for DACA requestors to seek work authorization, and affirming that DACA recipients are considered lawfully present in the United States." (alterations and quotation marks omitted)). Plaintiffs contend that the regulations and memorandum "contain the same substantive defects," Pls. Resp. to Rule 28(j) Letter 2—that is, the arguments plaintiffs made in challenging the memorandum in district court and on appeal, and the holdings and reasoning of the district court, apply in the same manner to the final rule. Because the district court has already vacated the final rule on substantive as well as procedural grounds, "the outcome in the district court [regarding the validity of the final rule] is certain," and remand "would be inefficient," *De la O*, 417 F.3d at 500, and would provide no aid to this Court in resolving the claims presented. As in *Coalition for the Abolition of Marijuana Prohibition*, *Rosenstiel*, and *Sanjour*, there is no need for or use in remanding before the Court considers plaintiffs' claims as they apply to the final rule.[2]

C. In the event the Court issues a decision in this case before the final rule becomes effective on October 31, the Court should address the validity of *both* the 2012 memorandum and the final rule. It is appropriate for the Court to address the validity of the memorandum because it will remain in effect (to the extent that the

[2] Plaintiffs have not asserted that the final rule is invalid on any grounds other than those already raised in the context of the 2012 memorandum. If the plaintiffs were to raise new claims directed at the rulemaking, and it proved necessary to address such claims in order to resolve the litigation, it might be appropriate for the Court to remand for the district court to entertain and decide such claims in the first instance.

district court has stayed its injunction) until that date. And it is appropriate for the Court to address the validity of the final rule because, for the reasons addressed in Part II below, the district court's injunction prohibits the government from implementing the rule. *See infra* pp. 14-15. The injunction therefore cannot stand unless this Court determines that the rule is substantively invalid.

Because the injunction bars implementation of the final rule, it causes an actual and imminent injury in fact to the government, and the United States therefore has standing to appeal that aspect of the district court's judgment. *See DeOtte v. Nevada*, 20 F.4th 1055, 1070 (5th Cir. 2021) ("Standing to appeal requires injury from the judgment of the lower court."). Furthermore, just as a court can consider the claim of an individual who challenges the validity of a statute even before the law takes effect, provided that the law will certainly operate against the individual, this Court can consider the validity of the district court's injunction insofar as it will prohibit implementation of the regulations that are due to take effect shortly. *Cf. Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) ("Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect.").

This Court's decision in *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021), does not permit, much less require, a different result. In that case, the district court held that DHS's decision to terminate the Migrant Protection Protocols violated the APA. *Id.*

at 941. While an appeal was pending, the government took new action to terminate the policy with a more detailed explanation. *See Biden v. Texas*, 142 S. Ct. 2528, 2534-2535 (2022). This Court held that the new action was not separately reviewable final agency action and proceeded to consider the validity of only the initial agency action. *See Texas*, 20 F.4th at 957-965. But the Supreme Court rejected this Court's characterization of DHS's second agency action and reversed and remanded for the district court to consider the validity of that action. *See Biden*, 142 S. Ct. at 2544-2548. Nor is this Court's reasoning in *Texas* applicable here: In declining to review the separate action, this Court reasoned that the government could not "moot th[e] case by reaffirming and perpetuating the very same injury that brought the [plaintiffs] into court." 20 F.4th at 960. But here, the United States is not arguing that the case is moot (although certain claims may be), but rather that this Court should assess plaintiffs' substantive claims in light of the final rule. Finally, in *Texas*, remand to the district court to consider DHS's second termination decision was appropriate because that decision was materially distinguishable from the earlier termination decision for purposes of the plaintiffs' arbitrary-and-capricious claims because it contained different reasoning. In this case, however, the final rule is materially indistinguishable from the 2012 memorandum for purposes of plaintiffs' contrary-to-law claims, and this Court therefore can rule upon the legal validity of the final rule.

II. THE DISTRICT COURT'S INJUNCTION PROHIBITS THE GOVERNMENT FROM IMPLEMENTING THE FINAL RULE, AND THIS COURT'S APPELLATE JURISDICTION AUTHORIZES THE COURT TO DETERMINE WHETHER THAT PROHIBITION IS VALID

The Court has asked the parties to identify "the statutory authority or authorities that govern appeals from the rulemaking and the resulting final rule and regulations" and to discuss "the basis for this court's jurisdiction, or lack of jurisdiction, to review that final rule and related regulations."

If this case had not been filed, and the district court had not already issued the final judgment and injunction that are now before this Court, a private party that wished to challenge the legality of the final rule would do so by bringing a civil action in a district court under the APA, *see* 5 U.S.C. §§ 702-706. Jurisdiction over the action would be governed by 28 U.S.C. § 1331, which vests the district courts with original jurisdiction over civil actions arising under federal law.

No statute vests this Court with original jurisdiction to entertain such a suit in the first instance. And if a party had sought to initiate such a suit here, this Court would have to dismiss the suit for lack of jurisdiction. But the Court does not have such a suit before it, and the Court's authority to address the validity of the final rule in this litigation does not rest on its original jurisdiction. Instead, it rests on the Court's appellate jurisdiction under 28 U.S.C. § 1291.

The district court has entered a final judgment that is the subject of the present appeal. The final judgment includes an injunction against "the United States of

America, its departments, agencies, officers, agents, and employees." ROA.25242-43. The injunction not only prohibits the federal government from "administering the DACA program," but also prospectively bars the government from "*reimplementing* DACA without compliance with the APA," 5 U.S.C. §§ 551-559, 701-706. ROA.25243 (emphasis added). That prohibition bars DHS from implementing a new DACA rule that is, *inter alia*, "not in accordance with law" or "in excess of [the agency's] statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(A), (C). The district court has already determined that, in its view, the DACA policy established by the Secretary's 2012 memorandum exceeds DHS's statutory authority, and as explained in the government's Rule 28(j) letter (and as plaintiffs agree), the final rule is not materially different from the memorandum in the respects that the district court deemed dispositive. As a consequence, the district court's injunction prohibits DHS from "reimplementing DACA" by putting the final rule into effect (except to the extent that the district court has partially stayed its injunction).

The United States and the intervenors have invoked this Court's appellate jurisdiction under § 1291 to review the district court's injunction. The Court therefore has jurisdiction to address the validity of all parts of the injunction, including the injunction's prospective prohibition against "reimplementing DACA." ROA.25243. That prohibition will restrain DHS from implementing the final rule (outside the confines of the stay) on October 31 and will continue to do so thereafter. Indeed, restraining the operation of the final rule will be the *only* effect of that

prohibition because the 2012 memorandum will have been rescinded. Because the injunction itself is properly before this Court, and because the injunction bars the implementation of the final rule, the Court has the authority to determine whether the injunction is valid in that respect—and that, in turn, permits the Court to determine whether the rule itself is within DHS's statutory authority. And as explained above, it is proper for the Court to do so.

The Court's jurisdiction to review the final rule is made evident by the Court's decisions in *Pugh* and *De la O*. In *Pugh*, the Court did not have original jurisdiction to hear a constitutional challenge to Florida's rules of criminal procedure, yet the Court reviewed those rules in the first instance on appeal from the district court's denial of relief in a challenge to prior judicial practices. Likewise, in *De la O* this Court did not have original jurisdiction to consider the constitutionality of El Paso's housing regulations, yet the Court reviewed amended regulations on appeal from a district-court decision concluding that earlier regulations were constitutionally permissible. Just as in those cases, this Court has jurisdiction to consider the final rule on appeal from the judgment below. In fact, the Court's jurisdiction to do so in this case is even more clear than in *Pugh* and *De la O* because the district court's judgment in this case—unlike in the judgments in those cases—restrains the government from implementing the final rule.

III. PLAINTIFFS' NOTICE-AND-COMMENT CLAIM WILL BECOME MOOT ONCE THE FINAL RULE TAKES EFFECT

DHS promulgated the final rule after complying with the notice-and-comment requirements of 5 U.S.C. § 553. Accordingly, plaintiffs' argument that the DACA policy was promulgated in violation of those requirements is now moot.

The Court must evaluate plaintiffs' standing "for each claim; 'standing is not dispensed in gross.'" *Fontenot v. McCraw*, 777 F.3d 741, 746 (5th Cir. 2015). "Even when a plaintiff has standing at the outset, there must be a case or controversy through all stages of a case." *Id.* at 747 (alterations and quotation marks omitted). Circumstances that "eliminate[] actual controversy after the commencement of a lawsuit render[] that action moot." *Id.* (quotation marks omitted); *see also Flast v. Cohen*, 392 U.S. 83, 95 (1968) ("[N]o justiciable controversy is presented … when the question sought to be adjudicated has been mooted by subsequent developments[.]"). A claim becomes moot, therefore, when the plaintiff has already received everything to which it would be entitled in the event of a favorable judgment. *See Massachusetts v. U.S. Dep't of Health & Human Servs.*, 923 F.3d 209, 220-221 (1st Cir. 2019) (procedural challenge to rulemaking became moot when the court could no longer grant effectual relief to the plaintiffs on the claim, but substantive challenge remained live); *Amar v. Whitley*, 100 F.3d 22, 23 (5th Cir. 1996) (party's appeal of the denial of a writ of sequestration became moot when it received all money that it was owed). Continued

litigation in such a case could result only in an improper "advisory opinion." *Amar*, 100 F.3d at 23.

As of October 31, 2022, plaintiffs here will have received everything to which they would be entitled on their notice-and-comment claim: the promulgation of regulations following notice-and-comment procedures and the rescission of the challenged memorandum that was issued without those procedures. The D.C. Circuit confronted a similar situation in *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*, 680 F.2d 810, 811 (D.C. Cir. 1982), in which a petitioner argued that a rule was improperly issued without notice and comment. While the petition for review was pending, the government initiated informal rulemaking procedures and ultimately issued a final rule. *Id.* at 813. The D.C. Circuit held that the procedural challenge to the government's original rule was moot. *Id.* at 813-815. The court explained that "[c]orrective action by an agency … can moot a previously justiciable issue"; the court could "hardly order the [agency] … to do something that it has already done." *Id.* at 814. As in *Natural Resources Defense Council*, continued litigation of the notice-and-comment claim in this case could result only in "a declaration from this court that the initial promulgation of the rule was unlawful, an advisory opinion which federal courts cannot provide," *id.* at 814-815. *See also Massachusetts*, 923 F.3d at 221 (procedural challenge to interim final rules became moot when they were superseded by final rules following notice and comment).

Plaintiffs contend that their notice-and-comment claim will remain live even after the final rule takes effect "because only the rule will rescind the 2012 Memorandum," and if the Court "conclude[s] that the rule is unlawful and must be vacated, the 2012 Memorandum likely would once again control." Pls. Resp. to Rule 28(j) Letter 1-2. But that outcome is in fact quite *unlikely* to occur. As plaintiffs concede, "the rule and Memorandum are materially similar" and, in plaintiffs' view, "both contain the same substantive defects." *Id.* at 2. Thus, if the Court were to hold that the final rule is contrary to law, affirm the district court's judgment on plaintiffs' substantive claims, and vacate the final rule, that vacatur would *not* "likely resuscitate the 2012 Memorandum," *id.* Rather, such a judgment would affirm the reasoning underlying the district court's invalidation of the 2012 memorandum, and the affirmed injunction would prohibit the resuscitation of the memorandum. Resolution of the notice-and-comment claim would result in no additional relief for plaintiffs.

IV. THE FINAL RULE REINFORCES THE GOVERNMENT'S STATUTORY AND SEVERABILITY ARGUMENTS

A. When reviewing an agency's legal construction of the statute it administers, the Court applies the two-step analysis established by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). Under *Chevron*, an agency's interpretation of a statute is entitled to deference if that interpretation "'was promulgated in the exercise of [the agency's] authority' to make rules carrying the force of law." *Residents of Gordon Plaza, Inc. v. Cantrell*, 25 F.4th 288,

297 (5th Cir. 2022). "Generally, formalized pronouncements of broad application, such as official rulemaking or adjudication, are entitled to *Chevron* deference." *Midship Pipeline Co. v. FERC*, __ F.4th __, 2022 WL 3535983, at *4 (5th Cir. Aug. 18, 2022). Because the final rule is an "official rulemaking," DHS's construction of the statutes it administers, as set out in the rule, is entitled to *Chevron* deference. *See, e.g.*, 87 Fed. Reg. at 53,184-53,191 (addressing DHS's statutory authority to issue the rule). Thus, although the final rule reflects the best reading of the statutory provisions without deference, the Court should defer to DHS's interpretation so long as it is a reasonable one. *Chevron*, 467 U.S. at 844.

B. In the prior briefing in this appeal, the government explained that the forbearance element of the DACA policy established by the 2012 memorandum is severable from the provisions of other DHS regulations that permit DACA recipients to apply for work authorization and that govern eligibility for certain federal benefits. *See* U.S. Br. 53-54. As a result, the government explained that "[i]f this Court considers any part of DACA to be unlawful, it should invalidate only those parts and leave the rest intact." U.S. Reply Br. 23.

The final rule contains express severability provisions. *See* 87 Fed. Reg. at 53,299-53,300. New section 236.24 of title 8 of the Code of Federal Regulations, captioned "Severability," provides:

> (a) Any provision of this subpart held to be invalid or unenforceable as applied to any person or circumstance shall be construed so as to continue to give the maximum effect to the provision permitted by law,

> including as applied to persons not similarly situated or to dissimilar circumstances, unless such holding is that the provision of this subpart is invalid and unenforceable in all circumstances, in which event the provision shall be severable from the remainder of this subpart and shall not affect the remainder thereof.
>
> (b) The provisions in § 236.21(c)(2) through (4) [concerning employment authorization, eligibility for Social Security benefits, and inadmissibility under 8 U.S.C. § 1182(a)(9), respectively] and § 274a.12(c)(14) and 274a.12(c)(33) [concerning employment authorization] are intended to be severable from one another, from this subpart and any grant of forbearance from removal resulting from this subpart, and from any provision referenced in those paragraphs, including such referenced provision's application to persons with deferred action generally.

Id. The preamble to the final rule further explains that "[a]lthough the important goals and policies reflected [in the regulations] are best served if each of the portions of the rule remains intact, DHS recognizes that each portion of the rule will remain workable without the others." *Id.* at 53,248. And it explains that "although there are significant benefits to providing work authorization alongside forbearance, … DHS would have adopted the forbearance portion of the policy even if it did not believe that the work authorization portion of the rule were legally authorized." *Id.* at 53,248-53,249.

These provisions and the accompanying discussion reinforce the severability position previously set forth in the government's principal and reply briefs. As already explained, the substantive provisions of the final rule are not materially different from the policy created by the 2012 memorandum, and they are within the Secretary's statutory authority for the same reasons, addressed at length in the earlier

briefing, that that policy is within his authority. But if the Court were to conclude that any of the substantive provisions of the rule (and the memorandum, if the Court's decision issues before October 31) are invalid, the foregoing severability provisions confirm that the Court should affirm the judgment of the district court only insofar as it bears on those provisions and should permit the government to implement the rule in all other respects.

CONCLUSION

For the foregoing reasons, this Court has jurisdiction to review the district court's injunction as it applies to the final rule and should address plaintiffs' substantive claims in the context of the rule.

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September 2022

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

/s/ Joshua M. Koppel
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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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