Nos. 18-1521 (L); 18-1522

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CASA DE MARYLAND, Inc., et al.,

Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Maryland, Case No. 8:17-cv-02942 (Hon. Roger W. Titus)

REPLY BRIEF FOR APPELLEES

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INTRODUCTION AND SUMMARY

The government's cross appeal in this case challenges the district court's nationwide injunction barring the government from changing its policy regarding the sharing of information obtained in the course of processing requests for Deferred Action for Childhood Arrivals (DACA). At the time the DACA policy was implemented in 2012, the Department of Homeland Security (DHS) published a "frequently asked questions (FAQ)" webpage that included guidance stating that information would be "protected from disclosure to" U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection "for the purpose of immigration enforcement proceedings," except that information could be disclosed where the criteria for issuance of a Notice to Appear are satisfied (for example, where national security, public safety, or significant criminal activity interests are implicated). U.S. Citizenship & Immigration Servs. (USCIS), *Deferred Action for Childhood Arrivals Frequently Asked Questions*, No. 19 (DHS DACA FAQ 19), https://go.usa.gov/xngCd (last visited Sept. 12, 2018); *see also id.* (explaining that information may be used for certain purposes other than removal). Notably, this policy was subject to the significant caveat that the policy "may be modified, superseded, or rescinded at any time." DHS DACA FAQ 19.

In our cross-appeal opening brief, the government demonstrated that the district court erroneously employed a free-floating "equitable estoppel" theory to enjoin preemptively any potential modification of this information-sharing policy.

Plaintiffs' cross-appeal response brief fails to overcome the myriad flaws in the district court's holding. *First,* there is no affirmative cause of action for equitable estoppel against the government, and plaintiffs identify no legal basis for inferring one. *Second,* even if such a claim did exist, plaintiffs concede it would require a showing of affirmative misconduct, but any potential change in the policy would not be misconduct given that DHS expressly reserved the right to modify or even rescind the policy *at any time*, a reservation of rights that must be given effect. *Third*, even if it would be affirmative misconduct to change the policy, the policy has not in fact changed, plaintiffs have failed to show otherwise, and DHS's mere refusal to commit that it will not change the policy in the future does not, contrary to plaintiffs' suggestion, even support their standing to sue now, let alone constitute affirmative misconduct. No other court has accepted plaintiffs' freestanding equitable estoppel theory, and this Court should not either. The district court's injunction should be vacated.

At a minimum, the scope of the nationwide relief issued by the district court reaches far too broadly. Plaintiffs' cross-appeal response brief fails to refute the government's showing that bedrock principles of standing and equitable discretion require, at the very least, limiting the scope of any injunction to plaintiffs and their DACA-recipient members.

ARGUMENT

The District Court's Nationwide Injunction Should Be Vacated, or, at a Minimum, Limited to the Parties Before the Court.

A. The district court erred in relying on an equitable estoppel theory to enjoin the government from changing its information-sharing policy.

1. As explained in the government's cross-appeal opening brief (at 68-69), and recognized by the Supreme Court, there is a "substantial" question as to whether equitable estoppel could ever apply against the federal government. *Heckler v. Community Health Servs.*, 467 U.S. 51, 60 (1984); *see also OPM v. Richmond*, 496 U.S. 414, 423 (1990). And plaintiffs make no attempt to explain how a freestanding equitable estoppel claim can exist, given that only Congress can create a "private right[] of action to enforce federal law." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Plaintiffs simply note (as we acknowledged) that the Supreme Court has reserved the question whether estoppel might ever apply against the government. Resp. Br. 59-60. But plaintiffs cannot dispute that the Supreme Court has never applied principles of equitable estoppel against the government, let alone allowed such a theory to provide a freestanding cause of action.

Plaintiffs' reliance (Resp. Br. 60) on *Community Health Services* fails to advance their claim. In that case, the Supreme Court *declined* to apply principles of equitable estoppel. 467 U.S. at 60-61. And although the Court there left open the possibility that an equitable estoppel claim might be available if necessary to maintain "minimum

standard[s] of decency, honor, and reliability in [individuals'] dealing with the[] government," *id.*, that was in the context of equitable estoppel as a *defense* against government action. Contrary to plaintiffs' suggestion, the Court nowhere suggested in *Community Health Services* that a plaintiff might bring a freestanding claim to enjoin a government policy on the ground that the policy decision was not "decent" enough, and *Alexander v. Sandoval* squarely forecloses implying such a cause of action. The government's policies may be subject to statutory or constitutional constraints; but the district court did not find a constitutional or statutory problem with respect to the information-sharing policy. JA.1514-15. The district court instead imposed a free-floating additional constraint on the government's policy decisions. This was error: "the government should not be unduly hindered from changing its position if that shift is the result of a change in public policy." *United States v. Owens*, 54 F.3d 271, 275 (6th Cir. 1995).

Plaintiffs' reliance on *United States v. Cox*, 964 F.2d 1431, 1434-35 (4th Cir. 1992), is also misplaced. *See* Resp. Br. 58. That case involved the question of which part of the federal government (the federal defender's office or the Department of Justice) would pay for a psychiatric examination, and this Court simply followed the guidelines promulgated by the Administrative Office of the United States Courts. *Cox*, 964 F.2d at 1433.

2. Even assuming there were a freestanding cause of action for equitable estoppel against the government, "it is well settled that the Government may not be

estopped on the same terms as any other litigant." *Community Health Servs.*, 467 U.S. at 60. As plaintiffs acknowledge, Resp. Br. 55-56, an estoppel claim against the government requires a showing of "affirmative misconduct." *Dawkins v. Witt*, 318 F.3d 606, 611 (4th Cir. 2003) (collecting cases). And, as the Tenth Circuit has explained, assuming equitable estoppel may lie against the government, there is "an extremely high bar to claims of equitable estoppel against the government, particularly in the immigration context." *Kowalczyk v. INS*, 245 F.3d 1143, 1150 (10th Cir. 2001).

Plaintiffs' contention that the district court "correctly found" that the government's behavior "constituted 'affirmative misconduct'" is without basis in the record. Resp. Br. 56. Any potential change in the information policy could not constitute affirmative misconduct. From the outset of the DACA policy, the government expressly stated that the information-sharing policy "may be modified, superseded, or rescinded at any time." DHS DACA FAQ 19. It cannot be affirmative misconduct to change a policy that was expressly subject to change from its inception (as explained below, the policy has not, in fact, been changed, *infra* p. 7-9). To hold otherwise would render the reservation of rights without effect and could deter the government from publicly announcing internal policies in the first place.[1]

[1] Without elaboration or citation, plaintiffs appear to suggest (Resp. Br. 58) that the government failed to argue below that the information-sharing policy was always subject to modification, but that suggestion is belied by the record. *See* JA.1280.

Plaintiffs are also wrong to assert that the government's 2012 statement that the information-sharing policy could be modified at any time applied only to future DACA requestors, not to those who requested DACA under the original policy. Resp. Br. 59. The policy's reservation of rights that it could be modified or rescinded "*at any time*" and "*without notice*" unambiguously applies to those who had already requested and received deferred action under DACA, as there would be no meaningful reason to include those caveats for those who had not yet requested DACA in the first place. Plaintiffs assert that it would "make[] no sense for the Government" to have encouraged individuals to request deferred action under DACA while simultaneously telling them the policy regarding the sharing of their information could be rescinded at any time. Resp. Br. 58-59. But it makes perfect sense both that the Government would not wish to bind itself to a particular policy even as to existing DACA recipients and that individuals without lawful status were willing to request deferred action under DACA even on those terms.

Indeed, the district court implicitly acknowledged that the policy's reservation of rights applied to plaintiffs. In its order, the court ordered the government to comply with its information-sharing policy *except* that "the language in the Policy specifying that it 'may be modified, superseded, or rescinded at any time without notice' is hereby **ENJOINED** pending further order of this Court or relief on appeal." JA.1532-33. If that language did not apply to plaintiffs, there would be no point in enjoining its application.

3. Even assuming plaintiffs are correct that changing the information-sharing policy would amount to affirmative misconduct sufficient to subject the government to an equitable estoppel claim, the information-sharing policy has not in fact changed, and the government's mere refusal to commit to never changing the policy cannot constitute affirmative misconduct. Nor have plaintiffs demonstrated standing to sue under this theory.

The government's information-sharing policy has not changed. As explained, at the time of DACA's implementation, recipients were informed that information would be "protected from disclosure . . . for the purpose of immigration enforcement proceedings," subject to exceptions where the criteria for issuance of a Notice to Appear are satisfied (for example, where national security, public safety, or significant criminal activity interests are implicated). DHS DACA FAQ 19; USCIS, *Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs)* (Nov. 7, 2011), https://go.usa.gov/xncPK (last visited Sept. 12, 2018); USCIS, *Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs)* (June 28, 2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0161-DACA-Notice-to-Appear.pdf (last visited Sept. 12, 2018). Nothing in the Acting Secretary's memorandum rescinding the DACA policy changes that approach—in fact, the memorandum makes no reference to information sharing at all, a point the district court recognized, JA.1505 n.24. And DHS had made clear in additional guidance issued after the rescission that "[t]his information-sharing policy

has not changed in any way since it was first announced, including as a result of the Sept. 5, 2017 memo starting a wind-down of the DACA policy." USCIS, *Guidance on Rejected DACA Requests* Q5 (Dec. 27, 2017) (emphasis added), www.uscis.gov/daca2017/guidance-rejected-daca2017 (last visited Sept. 12, 2018). In fact, even the district court appeared to recognize that the policy had not changed; rather it faulted the government for being "unable to provide any assurance that the Government would not make changes" in the future. JA.1516; *see also* JA.1528 (enjoining the provision in the information-sharing policy permitting modification of that policy).

In response, plaintiffs point to several record items that they contend demonstrate that the information-sharing policy has changed. Although plaintiffs provide numerous record citations, Resp. Br. 54, the referenced documents fail to support plaintiffs' contentions. For example, JA.475 references increased deportations and makes a cross-citation to the fact that the rescission memorandum did not itself reiterate the information-sharing policy. But neither of these facts indicate that any change in policy has occurred, especially in light of DHS's later public affirmation that the policy has not changed. USCIS, *Guidance on Rejected DACA Requests* Q5 (Dec. 27, 2017), www.uscis.gov/daca2017/guidance-rejected-daca2017. Plaintiffs also point out that one description of the information-sharing policy was slightly reworded in DHS's 2017 FAQs concerning the rescission of the DACA policy. JA.75-76. But the addition of the word "generally" to the FAQ does not have the meaning plaintiffs ascribe—it was always the case that information received from DACA requestors could be used

by DHS in certain circumstances connected with enforcement proceedings, and nothing in the revised FAQ suggests that "special" or "non-proactive" releases will henceforth be allowed when they would not previously have been permitted. *See* DHS DACA FAQ 19.

Instead of finding existing affirmative misconduct by the government, allegedly in the form of a change in policy, the district court relied on its conjecture that "[l]ogic would dictate that it is *possible* that the government . . . could now use . . . information to track and remove [DACA recipients]. This *potentially* would be 'affirmative misconduct' by the government." JA.1516 (emphases added). Plaintiffs have pointed to no case, and the government is aware of none, in which speculation about "potential" affirmative misconduct in the future would suffice to establish an equitable estoppel claim now. And plaintiffs have not presented any basis upon which to conclude that the government has any imminent plans to change its policy.

More fundamentally, as pointed out in the government's cross-appeal opening brief (at 67), given the lack of a district court finding concerning any *current* or *imminent* change of policy, plaintiffs' equitable estoppel claim fails to satisfy the requirements of both standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992), and irreparable harm, *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). Indeed, the mere fact that the government declined to commit not to change the policy does not even demonstrate a "substantial risk" that it will change the policy. Resp. Br. 57 (quoting *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014)). Plaintiffs confuse

matters in relying on this Court's precedent concerning a "credible threat of prosecution" under immigration laws generally. *See id.* (quoting *Kenny v. Wilson*, 885 F.3d 280, 288 (4th Cir. 2018)). In determining whether relief with respect to the information-sharing policy is appropriate, the question is whether plaintiffs have put forth any plausible contention that their information is likely to be shared in a way that conflicts with the information-sharing policy. Whether plaintiffs face a "credible threat of being subject to an immigration enforcement action," as plaintiffs contend (Resp. Br. 57), is not relevant to the question whether plaintiffs have an imminent injury stemming from the government's information-sharing policy.

And plaintiffs cannot evade their failure to show an actual change in policy by suggesting that the affirmative misconduct here is the mere refusal to commit not to change the policy. Plaintiffs assert (Resp. Br. 56) that in obtaining information from DACA requestors (the information necessary to determine whether the requestors met DACA's guidelines) and "refus[ing] to commit to not us[e] that information for enforcement purposes," the government engaged in affirmative misconduct. But, the government's unwillingness to commit to never changing that policy is not misconduct: it is simply a recognition that government policies may change—a fact about which potential DACA recipients were expressly made aware. *See supra* p. 5-6.

B. The district court erred in granting nationwide relief.

For the reasons explained above, the district court's injunction is erroneous and should be vacated. But at a minimum, as explained in the government's cross-appeal

opening brief (at 69-72), the court's injunction should be limited to the parties before it. In granting nationwide relief broader than necessary to redress any cognizable injuries of the plaintiffs, the district court violated the requirements of Article III and principles of equity.

1. As an initial matter, plaintiffs completely ignore the government's showing (Br. 72) that granting a nationwide injunction in these circumstances creates an inequitable result that the law should not and does not permit. Plaintiffs in other suits challenging the rescission of the DACA policy have attempted to obtain relief barring the government from changing its information-sharing policy on an equitable estoppel theory. No other plaintiffs have succeeded. Yet all of those unsuccessful plaintiffs will benefit from the district court's injunction here. At the same time, plaintiffs here are *not* bound by the dismissal of the equitable estoppel claims in the other lawsuits challenging the rescission of the DACA policy. Under plaintiffs' theory, litigants may bring suit in multiple district courts, secure in the knowledge that all will benefit if even one suit succeeds, and none will be bound by suits that fail.

This result is untenable, as voices throughout the federal judiciary have recognized. As Justice Thomas recently explained, nationwide injunctions "take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch." *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (Thomas, J., concurring); *see also City of Chicago v. Sessions*, 888 F.3d 272, 298

(7th Cir. 2018) (Manion, J., dissenting in part) (criticizing the "one-way-ratchet" created by nationwide injunctions), *reh'g en banc granted*, 2018 WL 4268817 (7th Cir. June 4, 2018) (vacating panel judgment "insofar as it sustained the district court's decision to extend preliminary relief nationwide"), *reh'g en banc vacated as moot,* 2018 WL 4268814 (7th Cir. Aug. 10, 2018).

2. Ignoring the fundamental inequity of their approach, plaintiffs argue that the district court correctly exercised its discretion to grant nationwide relief "in light of the facts of this case." Resp. Br. 61. Plaintiffs erroneously contend that because they reside, and provide services to residents, in various parts of the United States, a nationwide injunction is required. *Id.*

As the government explained in its cross-appeal opening brief (at 70-71), a "plaintiff's remedy must be 'limited to the inadequacy that produced [his] injury in fact.'" *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) (alteration in original) (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)); *see also Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001) (explaining that that an injunction covering the plaintiff alone would "adequately protec[t] it," and that preventing enforcement of the regulation "against other parties in other circuits does not provide any additional relief" to the plaintiff). Although plaintiffs assert that "a broader remedy is required" here "to ensure adequate protection," Br. 62, the mere fact that they purport to

represent DACA recipients throughout the United States does not explain how their injuries are remedied by further extending relief to *other, unrelated* DACA recipients.[2]

In attempting to paint nationwide relief as the default, plaintiffs rely to a great extent on the Seventh Circuit's decision in *City of Chicago*, overlooking the fact that, as noted above, *see supra* p. 12, the panel's decision in that case was subsequently vacated when the court granted rehearing en banc on whether the nationwide scope of the injunction in that case was proper. Although the Seventh Circuit subsequently vacated its order granting rehearing en banc on mootness grounds, that order does not resurrect the panel decision or eliminate the significant problems with nationwide injunctions that caused the Seventh Circuit to decide to hear the case en banc in the first place.

Plaintiffs' reliance on *Richmond Tenants Organization, Inc. v. Kemp,* 956 F.2d 1300, 1308 (4th Cir. 1992), fares no better. *See* Resp. Br. 61. To the extent that decision extended relief to numerous individuals not before the court and entirely unrelated to the parties before it, it is inconsistent with subsequent Supreme Court precedent

[2] In a footnote, plaintiffs suggest that "DHS has not demonstrated that it has the capacity" to ascertain whether a given DACA recipient would be covered by an injunction limited to those purportedly represented by plaintiffs. Resp. Br. 62 n.21. But this argument improperly shifts the burden, as it is *plaintiffs* who must demonstrate why relief going beyond their own injuries *is necessary*. Moreover, although the record is thus undeveloped on the issue, there does not appear to be any logical or operational reason that DHS would be unable to comply with a plaintiff-specific injunction, and even if there were, DHS could always choose to extend the same treatment to non-plaintiffs to whatever extent was necessary to ensure its compliance with a properly tailored, plaintiff-specific injunction.

making clear that a remedy must be limited to the injury of the *plaintiffs*. *See Gill*, 138 S. Ct. at 1930. Indeed, although plaintiffs also invoke *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), that case reaffirmed that an injunction should be no broader than necessary to provide complete relief to the plaintiffs, and it nowhere suggested that this entailed a universal injunction merely because plaintiffs are geographically dispersed. *Id.* at 765.

Finally, plaintiffs argue that a nationwide injunction is appropriate here to maintain uniform enforcement of the immigration laws. Resp. Br. 62. But the requirements of Article III and equity that limit overbroad injunctions apply equally in the immigration context, and nothing in federal immigration law even arguably requires that the same exact information-sharing policy that applies to the DACA recipients purportedly represented by plaintiffs must also be applied to all other DACA recipients in the country.

CONCLUSION

The district court's permanent injunction should be vacated, or, at a minimum, restricted to the parties before this Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,436 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Mark B. Stern
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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Mark B. Stern
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