No._____

In the Supreme Court of the United States

STATE OF TEXAS, ET AL., PETITIONERS

v.

COOK COUNTY, ILLINOIS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For more than a century, "[a]ny alien who . . . is likely at any time to become a public charge" has been "inadmissible" to this country. 8 U.S.C. § 1182(a)(4)(A). In 2019, after notice and comment, the Executive issued a final rule defining the term "public charge." Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (formerly codified at 8 C.F.R. pts. 103, 212-14, 245, 248) (the Rule). The previous administration then spent the next two years defending the Rule, including in this Court. *E.g.*, *DHS v. New York*, 141 S. Ct. 1370 (2021) (*New York II*).

The new administration spent almost two months defending—or at least requesting additional time to consider—the Rule. On March 9, 2021, without prior notice, the Executive acquiesced in a single district court's nationwide vacatur. *See* Pet. App. 5a-6a. The new administration relied on this vacatur to rescind the Rule without notice and comment. *Id.* at 6a. Two days after the federal government's acquiescence, a group of States sought to intervene to defend the Rule. *Id.* at 6a-7a. This Court directed petitioners to seek first to intervene in the district court, which petitioners did. Both plaintiffs and the Government opposed petitioners' attempts to intervene, which the lower courts rejected as untimely.

The questions presented are:

1. Whether petitioners were entitled to intervene in defense of the Rule when they sought to do so within days of the federal government's unprecedented litigation maneuvering.

2. Whether petitioners are entitled to either relief from the district court's judgment under Rule 60(b)(6) or equitable vacatur of that judgment.

PARTIES TO THE PROCEEDING

Petitioners the State of Texas, State of Alabama, State of Arizona, State of Arkansas, State of Indiana, State of Kansas, State of Kentucky, State of Louisiana, State of Mississippi, State of Montana, State of Ohio, State of Oklahoma, State of South Carolina, and State of West Virginia were intervenors-appellants in the court of appeals.

Respondents Cook County, Illinois, and the Illinois Coalition for Immigrant and Refugee Rights were plaintiffs-appellees in the court of appeals.

Respondents Alejandro Mayorkas, in his official capacity as Secretary of the U.S. Department of Homeland Security, the U.S. Department of Homeland Security, Ur M. Jaddou, in her official capacity as Director of the U.S. Citizenship and Immigration Services, and the U.S. Citizenship and Immigration Services were defendants-appellees in the court of appeals.[1]

Tracey Renaud, in her official capacity as Senior Official Performing the Duties of the Director of the U.S. Citizenship and Immigration Services, was a defendant in district court.

RELATED PROCEEDINGS

Cook County v. Wolf, No. 19-3169, U.S. Court of Appeals for the Seventh Circuit. Judgment entered June 11, 2020.

Wolf v. Cook County, No. 19A905, U.S. Supreme Court. Application granted February 21, 2020.

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[1] In the court of appeals, Secretary Mayorkas was automatically substituted for his predecessor under Federal Rule of Appellate Procedure 43(c)(2). In the courts below, defendants-appellees included David P. Pekoske, in his official capacity as Acting Secretary of the U.S. Department of Homeland Security.

Cook County v. Wolf, No. 1:19-cv-06334, U.S. District Court for the Northern District of Illinois. Judgment entered November 2, 2020.

Mayorkas v. Cook County, No. 20-450, U.S. Supreme Court. Petition dismissed March 9, 2021.

Cook County v. Wolf, No. 20-3150, U.S. Court of Appeals for the Seventh Circuit. Appeal dismissed March 9, 2021.

Texas v. Cook County, No. 20A150, U.S. Supreme Court. Application denied April 26, 2021.

Cook County v. State of Texas, No. 21-2561, U.S. Court of Appeals for the Seventh Circuit. Judgment entered June 27, 2022.

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OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-19a) is reported at 37 F.4th 1335. The district court's opinions (Pet. App. 20a-68a, 71a-89a) are reported at 340 F.R.D. 35 and 498 F. Supp. 3d 999.

JURISDICTION

The Seventh Circuit rendered judgment on June 27, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced in the appendix hereto. Pet. App. 90a-96a.

STATEMENT

I. Legal Background

A. The Immigration and Nationality Act

Congress has long prohibited immigration by any alien likely to become a "public charge." Immigrant Fund Act, Pub. L. No. 47-376, §§ 1-2, 22 Stat. 214, 214 (1882). The law currently declares inadmissible "[a]ny alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the [Secretary of Homeland Security] at the time of application for admission or adjustment of status, is likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A).[2]

Congress has never defined "public charge," but the Executive must, "at a minimum," consider "the alien's—

[2] The statute refers to the Attorney General, but in 2002, Congress transferred this authority to the Secretary of Homeland Security. 8 U.S.C. § 1103; 6 U.S.C. §§ 211(c)(8), 557. For clarity, petitioners refer to relevant executive officials collectively as the "Executive."

(I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; and (V) education and skills." *Id.* § 1182(a)(4)(B).

B. The Public Charge Rule

In 1999, the Executive recognized that the term "public charge" is ambiguous and proposed a rule defining it to include any alien "who is likely to become primarily dependent on the Government for subsistence as demonstrated by either: (i) [t]he receipt of public cash assistance for income maintenance purposes, or (ii) [i]nstitutionalization for long-term care at Government expense." Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676, 28,681 (proposed May 26, 1999). The Executive simultaneously adopted this definition through informal guidance pending adoption of a final rule. Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999). That final adoption never came—leaving the 1999 informal guidance in place for nearly two decades. *See* Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114, 51,133 (October 10, 2018).

In 2018, recognizing that modern public assistance comes in forms other than cash, the Executive proposed to include a greater range of government benefits in the definition of "public charge," *e.g.*, Medicaid, food stamps, and housing assistance. 8 C.F.R. § 212.21 (2020). After notice-and-comment proceedings, DHS promulgated the Rule including this broader definition in August 2019. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019). The Rule specifically required officials to consider the totality of the circumstances to determine whether an alien is likely to "receive[] one or more" of specified public benefits "for more than 12

months in the aggregate within any 36-month period." 8 C.F.R. § 212.21(a) (2020); *see id.* § 212.22 (2020). Per Congress's instructions, these circumstances included an alien's age, financial resources, family size, education, and health. *Id.*

II. Procedural History

A. Plaintiffs' efforts to enjoin the Rule

1. The Rule immediately led to at least nine different challenges in five different courts across the country. *See Make the Road N.Y. v. Cuccinelli*, 419 F. Supp. 3d 647, 667 & n.3 (S.D.N.Y. 2019). Respondents Cook County and the Illinois Coalition for Immigrant and Refugee Rights (ICIRR), challenged the Rule in the Northern District of Illinois, Pet. App. 1a-2a, as invalid under the APA and the Fifth Amendment, *id.* at 21a. Plaintiffs sought a preliminary injunction against the Rule's enforcement, which the district court granted as to Illinois—but not nationwide. *Id.* at 22a, 72a.

The Executive unsuccessfully sought a stay of the preliminary injunction in the Seventh Circuit. Order, *Cook County v. Wolf*, No. 19-3169 (7th Cir. Dec. 23, 2019), ECF 41. This Court, however, stayed both the Illinois injunction, *Wolf v. Cook County*, 140 S. Ct. 681 (2020), and another issued in *DHS v. New York*, 140 S. Ct. 599 (2020) (*New York I*). After the Seventh Circuit affirmed the preliminary injunction, the Executive filed a petition for a writ of certiorari, *Wolf v. Cook County*, No. 20-450 (Oct. 7, 2020); this Court held that petition pending resolution of *New York II*, 141 S. Ct. at 1370.

2. Meanwhile, plaintiffs moved for partial summary judgment on their APA claims. Pet. App. 73a. The district court granted the motion, vacated the Rule, and entered a partial final judgment. *Id.* at 73a, 88a-89a. Unlike

the preliminary injunction, this vacatur applied nationwide. *Id.* at 80a.

On November 3, 2020, the Executive again appealed and sought a stay. Motion for Stay Pending Appeal and Request for Immediate Administrative Stay, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Nov. 3, 2020), ECF 2. This time, the stay was granted pending this Court's disposition of the still-pending petition concerning the preliminary injunction. Order, *Cook* County, No. 20-3150, ECF 21.

3. District court litigation continued regarding the still-pending Fifth Amendment claim. Pet. App. 4a. On January 22, 2021, two days after the change in administrations, the district court requested a status report addressing whether the Executive would continue to defend the Rule. *Id.* The Executive did *not* announce any intention to discontinue its defense; instead, the parties filed a joint status report quoting an executive order that directed agency heads to review agency actions. Pet. App. 24a.

On February 19, the parties filed another joint status report. Again, the Executive expressed no intent to abandon its defense of the Rule. Joint Status Report 3-4, *Cook County*, No. 1:19-cv-06334, ECF 245. On the contrary, it represented that it had not yet decided what to do with the Rule, which "remain[ed] in effect while DHS and DOJ undertake the review required by President Biden's Executive Order." *Id.* at 4. ICIRR, in turn, objected to any lengthy stay of the proceedings because rather than "commit DHS to any policy change or set any timeline" for such change, *id.* at 2, the Executive was "still requesting that the U.S. Supreme Court and the U.S. Court of Appeals for the Seventh Circuit overturn

th[e] [district court's] prior rulings and uphold the Rule," *id.* at 1.

On March 5, the parties filed yet another joint status report in which the Executive represented that it was "assessing how to proceed in the relevant litigations concerning the [Rule]." Joint Status Report at 1, *Cook County*, 1:19-cv-06334, ECF 247. ICIRR bemoaned that—as it "feared would happen"—the Executive continued to ask for "multiple extensions with no movement" while it prosecuted its appeals. *Id.* at 2. The Executive promised to notify the district court "promptly after a determination is made" which "would have a material effect on this litigation." *Id.* at 1.

B. Respondents' efforts to bury the Rule

On March 9, 2021—just four days after representing that it was continuing to review the Rule and just two weeks after this Court granted certiorari in *New York II*—the Executive acquiesced in the vacatur in this case and simultaneously terminated all appeals relating to the Rule. It thereby "implemented a plan to instantly terminate the [R]ule with extreme prejudice—ensuring not only that the [R]ule was gone . . . but that it could effectively never, ever be resurrected, even by a future administration." *City & County of San Francisco v. USCIS*, 992 F.3d 742, 743 (9th Cir. 2021) (VanDyke, J., dissenting) (*San Francisco*).

As the Executive acknowledged to this Court, its conduct was unprecedented. Transcript of Oral Argument 73:23, *Arizona v. City & County of San Francisco*, 142 S. Ct. 1926 (2022) (No. 20-1775) (Tr.). Indeed, it inverted typical practice, where the Executive asks lower courts to abey litigation regarding administrative actions it no longer supports until it can rescind or otherwise terminate those actions. *See San Francisco*, 992 F.3d at 751

(VanDyke, J., dissenting).[3] Even this administration used this approach in most cases regarding disfavored administrative actions.[4] Only here did the Executive decide to capitulate rather than provide notice and an opportunity to intervene to potentially interested parties. *Id.* at 750.

The Executive's actions produced almost instantaneous results. "With a reaction time the envy of every appellate court, the Seventh Circuit only a few hours after DHS's statement granted the motion to dismiss," "immediately issued the mandate," and thereby ended the stay of the district court's vacatur. *Id.* at 747. Later that day, the administration announced that because of "the Seventh Circuit dismissal this afternoon," "the final judgment from the Northern District of Illinois . . . went into effect"—as did "the policy that was in place before the 2019 public charge rule." Status Report, Exhibit B at 1, *Cook County*, No. 1:19-cv-06334, ECF 252-2 (Exhibit B).

Within a week, DHS and USCIS formalized the Secretary's statement with a notice that "simply implement[ed] the district court's vacatur." Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. 14,221, 14,221 (Mar. 15, 2021). Asserting an

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[3] *E.g.*, Motion to Hold Case in Abeyance at 4-5, *NFIB v. Acosta*, No. 17-10054 (5th Cir. June 2, 2017); Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 27-28 & nn. 127-30 (2019) (collecting examples).

[4] *E.g.*, Motion to Hold Cases in Abeyance Pending Implementation of Executive Order and Conclusion of Potential Reconsideration, *Competitive Enter. Inst. v. NHTSA*, No. 20-1145 (D.C. Cir. Feb. 19, 2021); Appellants' Supplemental Brief, *O.A. v. Biden*, No. 19-5272 (D.C. Cir. Feb. 18, 2021); Joint Motion to Hold Case in Abeyance, *Pennsylvania v. Rosenfelt*, No. 1:20-cv-01468-CJN (D.D.C. Feb. 3, 2021), ECF 143.

"immediate need to implement the now-effective final judgment," the Executive claimed that the notice-and-comment process generally required by the APA to rescind a rule such as this one was "unnecessary, impracticable, and contrary to the public interest." *Id.*

C. Petitioners' efforts to defend the Rule

1. On March 11, just two days after the Executive abandoned its defense of the Rule, petitioners filed three related motions in the Seventh Circuit to protect their interests: motions for the court to recall its mandate, reconsider its dismissal, and permit petitioners to intervene to defend the Rule. The Seventh Circuit summarily denied all three motions on March 15. Pet. App. 27a.

On March 19, petitioners sought this Court's intercession through a stay pending the filing of a petition for certiorari. *Id.* at 27a. On April 26, this Court denied that application "without prejudice to [petitioners'] raising" their "arguments before the District Court, whether in a motion for intervention or otherwise." *Texas v. Cook County*, 141 S. Ct. 2562, 2562 (2021). But the Court clarified that "[a]fter the District Court considers any such motion," petitioners "may seek review, if necessary, in the Court of Appeals, and in a renewed application in this Court." *Id.*

2. Following this Court's direction, petitioners promptly began to navigate the "mare's nest" of procedural issues raised by the Executive's "tactic of 'rule-making-by-collective-acquiescence.'" *Arizona v. City & County of San Francisco*, 142 S. Ct. 1926, 1928 (2022) (Roberts, C.J., concurring) (*Arizona*).

On May 12, 2021, petitioners filed two motions in the district court. They sought to intervene to protect the important state interests the Rule serves. Memorandum in Support of Opposed Motion to Intervene, *Cook County*,

No. 1:19-cv-06334 (N.D. Ill. May 12, 2021), ECF 257 (seeking as-of-right or permissive intervention). And they sought relief from the judgment under Rule 60(b)(6) to defend the now-abandoned Rule. Memorandum in Support of Opposed Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b), *Cook County*, No. 1:19-cv-06334 (N.D. Ill. May 12, 2021), ECF 260.

The district court denied both motions. Pet. App. 68a. The district court concluded that petitioners had standing to intervene as defendants. *Id.* at 32a. But the court rejected petitioners' intervention as untimely: in its view, petitioners should have intervened at some unspecified point between the November election and March 9 based on campaign promises by then-candidate Biden—notwithstanding the Executive's repeated, post-inauguration representations that it was still assessing the Rule. *Id.* at 36a. The court similarly rejected petitioners' Rule 60(b)(6) motion as untimely because "there are no extraordinary circumstances to justify upsetting this court's judgment," and because granting relief "would improperly allow" petitioners "to use Rule 60(b) as a substitute for a timely appeal." *Id.* at 65a.

Petitioners promptly appealed to the Seventh Circuit. *Cf.* Pet. App. 2a.

3. In February 2022, while this appeal was pending, two significant events happened. *First*, the Executive published a notice of proposed rulemaking for a new public charge rule, which used as its baseline the 1999 guidance rather than the 2019 Rule. Public Charge Ground of Inadmissibility, 87 Fed. Reg. 10,570 (Feb. 24, 2022).[5]

[5] The final rule was posted for public inspection yesterday, but it does not become effective until late December. *DHS Publishes Fair and Humane Public Charge Rule*, DEP'T OF HOMELAND SECURITY (Sept. 8, 2022), https://tinyurl.com/bdekuscn.

Second, this Court heard argument regarding the Ninth Circuit's denial of a parallel motion by States to intervene to defend the Rule. In *Arizona*, the United States argued that interested States had no avenue to defend the Rule, Tr. 55:14-17, because the Northern District of Illinois's "vacatur of the [R]ule" deprived the injunction then under review of "any practical effect," *Id.* at 65:7-10. Counsel "[c]andidly" admitted that petitioners likely had no APA claim against the Rule's rescission without notice and comment, *id.* at 74:18, because (in his view) "the rescission of the [R]ule was justified" when the district court's "vacatur had become final," *id.* at 75:6-8. When asked by the Chief Justice if "there's nothing that an affected State could do in [the Executive's] view" to challenge its regulation-by-capitulation strategy, counsel answered that he "didn't think so." *Id.* at 66:12-13, 21.

In June, this Court dismissed the writ of certiorari in *Arizona* as improvidently granted. Concurring in that dismissal, Chief Justice Roberts, joined by Justices Thomas, Alito, and Gorsuch, described *Arizona* as a "mare's nest" of "a great many issues," which prevented the Court from reviewing the "fundamental" "important question" of "whether the Government's actions" regarding the Rule "comport with the principles of administrative law." 142 S. Ct. at 1928. But, the concurrence cautioned, that dismissal "should not be taken" to reflect "the appropriate resolution of other litigation" regarding the Rule, specifically including this case. *Id.* at 1929.

4. Twelve days after *Arizona*'s dismissal, the Seventh Circuit affirmed the denial of petitioners' motions. After concluding the case was not moot, Pet. App. 10a, the court declined to adopt the district court's view that litigants should make major strategic decisions based on

"campaign speech," *id.* at 12a, which this Court has described as "by long democratic tradition—the least binding form of human commitment," *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002). Nevertheless, the court found petitioners' request untimely because, in that court's view, petitioners should have known that "the federal government was at least *seriously considering* dismissal of its appeal" "[b]y the end of February 2021." Pet. App. 13a. The court deemed petitioners' swift motions in the Seventh Circuit and in this Court irrelevant because of differences in "issues" and "standards" between district court and appellate intervention. *Id.* at 14a. The court further concluded that some amount of delay prejudiced the parties without "unusual or extraordinary circumstances" to justify that delay. *Id.* at 14a-16a.

The court also affirmed the denial of Rule 60(b)(6) relief because, having been denied intervention, petitioners were not parties who could seek relief from the district court's judgment. *Id.* at 18a-19a.

REASONS FOR GRANTING THE PETITION

I. Whether Interested States May Intervene in These Extraordinary Circumstances Is an Exceptionally Important Question.

As four members of this Court acknowledged, the Executive's "tactic[s]" in this case "raise a host of important questions" regarding the rule of law during presidential transitions. *Arizona*, 142 S. Ct. at 1928 (Roberts, C.J., concurring). No doubt the federal government may choose not to defend a disfavored policy following a change in administrations. It may abandon the objections to the lawfulness and propriety of nationwide relief

that it otherwise routinely asserts in APA cases.[6] It may oppose intervention by interested third parties for a host of reasons. And perhaps it may even skip the APA's notice-and-comment procedures to implement an adverse final judgment between adverse parties. But if the Executive may do all of these simultaneously, no future administration will suffer the APA's process for rescinding unwanted rules subject to litigation. That possibility warrants this Court's intercession.

A. The Executive used unprecedented tactics to evade notice-and-comment rulemaking.

No one disputes that new administrations may make new rules or rescind old ones. There is a "traditional route" to do so when faced with litigation: the new administration asks the relevant court to hold that old litigation in abeyance while it follows the APA to change those rules. *San Francisco*, 992 F.3d at 751 (VanDyke, J., dissenting). The Biden Administration knows this: it took this well-trod route in numerous cases challenging other rules promulgated under the prior administration, *e.g.*, Defendants' Motion to Continue Stay at 5 n.5, *California v. Wheeler*, No. 3:20-cv-03005 (N.D. Cal. April 9, 2021) (collecting cases), including before this Court, *e.g.*, Motion to Hold Further Briefing in Abeyance, *Mayorkas v. Innovation Law Lab*, No. 19-1212 (U.S. Feb. 1, 2021).

As the United States conceded to this Court, it instead relied on unprecedented tactics here. Tr. 73:23. Acting "in concert with the various plaintiffs"

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[6] *E.g.*, Application for a Stay of the Judgment at 4, *United States v. Texas*, 2022 WL 2841804 (U.S. 2022) (No. 22A17); Application for a Stay of the Injunction at 4, *Biden v. Texas*, 142 S. Ct. 926 (2021) (No. 21A21); Emergency Motion for Stay Pending Appeal at 26-27, *Louisiana v. Becerra*, 20 F.4th 260 (5th Cir. 2021) (No. 21-30734).

challenging the Rule, the Executive "acquiesced in a single judge's nationwide vacatur of the [R]ule, leveraged that now-unopposed vacatur to immediately remove the [R]ule from the Federal Register, and quickly engaged in a cursory rulemaking stating that the federal government was reverting back to the Clinton-era guidance." *San Francisco*, 992 F.3d at 743 (VanDyke, J., dissenting). "[T]he formerly adversarial parties" then "walk[ed] off the field together, hand-in-hand." *Id.* at 749.

These actions not only broke with past practice: they "allowed the Government to circumvent" the APA's "usual and important requirement . . . that a regulation originally promulgated using notice and comment (as the Public Charge Rule was) may only be repealed through notice and comment." *Arizona*, 142 S. Ct. at 1928 (Roberts, C.J., concurring). Given the "start-up costs" of a presidential transition, an incoming administration may prefer informal or "unilateral devices . . . instead of using the rulemaking process" under notice-and-comment procedures, Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 930, 944 (2008), which, on average, can take over three years to complete, STEPHEN G. BREYER, ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 566 (6th ed. 2006). But when an agency "depart[s] from a prior policy *sub silentio* or simply disregard[s] rules that are still on the books," the results lack the force of law. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Under the Seventh Circuit's view, however, prior administrations foolishly abided by the rules that for decades both ensured presidential and administrative accountability and promoted efficiency during transitions of power. *E.g.*, William S. Morrow, Jr., *Midnight*

Regulations: Natural Order or Disorderly Governance, 26 ADMIN. & REG. L. NEWS 3, 18 (2001). They could have had the convenience of proceeding without notice and comment, done away with rules carrying the force of law, and ended lingering disputes over the outgoing administration's rules—all by colluding with nominally opposing parties. *See* Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015, 1039-43 (2001).

The Executive's acquiescence to nationwide vacatur here stands in stark contrast to its otherwise strident opposition to such relief. Just three months ago, the Executive sought the extraordinary remedy of certiorari before judgment to review a nationwide vacatur, because it was "inconsistent with bedrock Article III and equitable principles," exceeded the jurisdiction of individual district courts, and "enmesh[ed] the Judiciary in policy disputes . . . that should be—and, until recently, were—resolved through the democratic process." Application, 2022 WL 2841804, at *4-5. Indeed, even in this case, the Executive has stated that the district court should have limited its vacatur to Illinois. Pet. App. 80a; Tr. 50:22-51:1. Nevertheless, the Executive acquiesced in relief that it insists is unlawful as a means to achieve its desired end—instantaneous rescission of a disfavored rule.

B. The Executive's unprecedented tactics harm the judicial process.

The Executive's litigation conduct undermines the judicial process—underscoring the need for this Court's review. When the Executive announced that the Rule "was not in keeping with our nation's values," Exhibit B at 1, this Court had already granted certiorari to review the legality of the Rule, *New York II*, 141 S. Ct. at 1370, and stayed two injunctions against its enforcement,

Wolf, 140 S. Ct. at 681; *New York I*, 140 S. Ct. at 599. These actions necessarily suggested "a fair prospect that a majority of the Court will conclude that the decision[s] below w[ere] erroneous." *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers).

Due to this Court's unique role in announcing rules of nationwide application, it has repeatedly cautioned that "postcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye." *Knox v. SEIU, Loc. 1000*, 567 U.S. 298, 307 (2012).

This Court should be particularly suspicious here. Rather than provide interested parties with notice and an opportunity to be heard, the Executive deliberately sought to insulate the judgment below from review—even though a majority of this Court had already determined that judgment was likely wrong, and even though its own lawyer asserted that the trial court erred when it vacated the Rule nationwide. Tr. 50:22-51:1. It abandoned the "traditional route" through transitions of power—namely to hold "cases in abeyance, rescind[] the [R]ule per the APA, and then promulgat[e] a new rule through notice and comment rulemaking." *San Francisco*, 992 F.3d at 751 (VanDyke, J., dissenting). And it colluded with its nominal adversaries—eliminating any actual controversy between the parties in favor of a "tactic of rulemaking-by-collective-acquiescence." *Arizona*, 142 S. Ct. at 1928 (Roberts, C.J., concurring) (quotation marks omitted).

When asked about "the historical practice" for such conduct, the United States was unable to give a "lot of examples" because "it just hasn't come up." Tr. at 84:2-15; *see also id.* at 42:21-43:11 (Thomas, J.). Indeed, the United States could not identify *any* examples because

an administration has never before been so insistent on subordinating judicial and administrative procedures to its political desire to dispatch an unwanted rule. Such a substantial and consequential departure from established practice warrants this Court's review.

C. If allowed to stand, this issue will recur.

Review is critical because if the Executive's tactics here succeed, future administrations will realize that enduring the APA's notice-and-comment requirements is for "chumps! D[o]n't they realize that all they ha[ve] to do" is acquiesce in an adverse judgment against any rule they wish to rescind? *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 825 (2015) (Roberts, C.J., dissenting).

Transitions between Presidents of different political parties are not infrequent. Five have occurred in the last 30 years, and the next could arrive in only two. Any new administration steps into multiple cases challenging politically sensitive rules—any one of which will require judgments on the "nation's values," "the public interest," and the "efficient use of limited government resources." Exhibit B at 2. The political realities of such judgments and the practical realities of notice-and-comment rulemaking indicate that if "[l]eft unchecked, it seems quite likely this will become the mechanism of choice for future administrations to replace disfavored rules with prior favored ones." *San Francisco*, 992 F.3d at 750 (VanDyke, J., dissenting). This Court's review is the only realistic way to prevent future administrations from adopting such a scheme.

II. This Is a Good Vehicle to Assess the Executive's Evasion of the APA's Notice-and-Comment Requirements.

This case is an appropriate vehicle to address the problems presented by the Executive's collusive efforts to avoid the APA. The Seventh Circuit's timeliness decision turned on factors arising from the unprecedented nature of respondents' actions. By contrast, this case is free from many of the obstacles to review that four Justices identified in *Arizona*, and will also be unaffected by ongoing efforts to promulgate yet another Public Charge Rule.

1. The Seventh Circuit's reasons for holding that petitioners failed to satisfy the standard for intervention depended on factors related to the Executive's unprecedented actions. *First*, that court's analysis of any potential delay turned on whether petitioners had notice of the Executive's intent before seeking to intervene, which is directly informed by the Executive's repeated proclamations of uncertainty followed immediately by a collusive settlement of all related litigation. Pet. App. 12a-13a. *Second*, the Seventh Circuit's view that the parties in this case would be prejudiced by petitioners' intervention was directly tied to the Executive's choice to collusively settle rather than seek abeyance pending administrative review. *Id.* at 14a-15a. *Third*, the court's view that petitioners were *not* prejudiced turns on whether petitioners were deprived of significant fiscal and procedural rights based on the Executive's unprecedented attempt to circumvent both APA notice and comment *and* judicial review. *Id.* at 15a-17a. Petitioners were.

2. This case provides the same opportunity to review the question presented in *Arizona*, but without several of the vehicle problems identified in the Chief Justice's

concurrence: "standing; mootness;" and "the scope of . . . relief in an APA action." *Arizona*, 142 S. Ct. at 1928.

Standing. In *Arizona*, there was a disconnect between the scope of the preliminary injunction under review and the injury that supported the intervening States' request to intervene because the Ninth Circuit had already narrowed that injunction not to apply in non-party States. *City & County of San Francisco v. USCIS*, 981 F.3d 742, 763 (9th Cir. 2020).

But the district court's nationwide vacatur order here obviously affects petitioners, giving petitioners a "much . . . better argument" to intervene. Tr. at 29:6-8 (Breyer, J.). After all, the Rule estimates that it would save States cumulatively $1.01 billion annually. 84 Fed. Reg. at 41,301. Petitioners stand to share in those savings: for example, in 2019, the cost of the average Medicaid beneficiary in Texas was $9,084 per capita; in Ohio, $8,534; in West Virginia, $7,428. *Medicaid Per Capita Expenditures*, Medicaid.gov, https://tinyurl.com/heayt2 (last visited September 7, 2022). These figures are excluded from determining whether an immigrant is a public charge as a direct result of the district court's ruling because this relief is not provided as a direct cash payment to the immigrant, 87 Fed. Reg. at 10,669—even though that fact does not lessen state costs.

Moreover, the nationwide vacatur also deprived petitioners of the opportunity to participate in notice-and-comment proceedings regarding the Rule's rescission. Because the Rule was adopted through notice-and-comment procedures, it could only be rescinded through the same process. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015). Both the Secretary of Homeland Security and his subsequent rule cited the district court's judgment as the sole reason to skip that process. Exhibit B at

2; 86 Fed. Reg. at 14,221. If that judgment is reopened, DHS's failure to comply with the APA will lack a legal basis. *See SEC v. Chenery Corp.*, 332 U.S. 194, 201 (1947).

For both reasons, the rescission of the Rule imposes traceable, redressable harms on petitioners, supporting their standing in a way absent in *Arizona*.

Mootness. In *Arizona*, respondents argued that the preliminary injunction at issue was moot "because of . . . the Northern District of Illinois vacatur of the [R]ule." Tr. 65:7-10. But they admitted that argument "doesn't exist in Illinois." *Id.* at 91:11-12. That is, because the allegedly "mooting event was the government's decision not to seek further review" in this case, *id.* at 63:16-19, the alleged mootness issue does not preclude intervenors' efforts to seek review of this case.

Nor does DHS's publication of a notice of proposed rulemaking for a new public charge rule moot this case. 87 Fed. Reg. at 10,587 & n.131. As an initial matter, the notice of proposed rulemaking was just that—a proposed rulemaking. The Executive had previously proposed a rule related to the public charge statute and failed to issue a final rule. *E.g.*, 64 Fed. Reg. at 28,689. Even now that a final rule has been posted for inspection, it remains subject to various challenges, including challenges under the APA. The baseline for those challenges depends on whether the district court properly vacated the Rule here. *See Fox*, 556 U.S. at 513-15; *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983).[7] And if such a challenge were successful, the

[7] For this reason, petitioners' subsequent participation in notice-and-comment process for the new proposed rule demonstrates, rather than undermines, the injury they suffered from the absence of notice-and-comment rulemaking before the Rule was unceremoniously jettisoned. *E.g.*, Letter from Ken Paxton, Attorney General

version of the rule that would take effect would depend on whether the district court properly vacated the Rule here—not whether the preliminary injunction was proper in *Arizona*.

Scope of relief. This appeal also does not implicate scope-of-relief issues presented in *Arizona* (or elsewhere). The district court vacated the Rule nationwide but entered no injunction. Pet. App. 88a-89a. Although the U.S. Solicitor General's Office contends that nationwide vacatur was improper, Tr. 50:22-51:1, the Executive acquiesced in that judgment and cannot credibly advance this argument in this Court.

3. Although it remains unclear precisely "how the APA's procedural requirements apply in this unusual circumstance," *Arizona*, 142 S. Ct. at 1928 (Roberts, C.J., concurring), that is a reason to *grant* rather than deny review. Ordinarily this Court is reluctant to grant review where a favorable result would not necessarily result in a favorable outcome for the petitioner. STEPHEN M. SHAPIRO, ET AL., SUPREME COURT PRACTICE 282-86 (10th ed. 2013). But this is not an ordinary case: the *point* of the Executive's unprecedented tactics here was to preclude judicial review under the APA in either existing litigation or future litigation. *Cf.* Tr. 66:19-21. Those tactics plainly contravene well-settled practices and may well fall within the APA's strictures themselves. After all, the Executive's novel litigation tactics here effectively amount to an "agency process for formulating, amending, or repealing a rule," which would itself require notice and comment. *See* 5 U.S.C. § 551(5). To conclude that the potential need for further litigation on the merits

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of Texas, to Andrew Parker, Branch Chief, U.S. Citizen & Immigration Servs. (Apr. 25, 2022), https://www.regulations.gov/comment/USCIS-2021-0013-0426.

counsels against this Court's review would be to bless the Executive's efforts to evade the APA's notice-and-comment requirements for rescinding the Rule.

III. Petitioners Were Entitled to Intervene.

A. Petitioners timely sought to intervene.

Both the Seventh Circuit and district court erroneously rejected petitioners' attempt to intervene exclusively on timeliness grounds. Pet. App. 13a-16a, 32a, 48a-49a. Whether a putative intervenor has filed a timely motion under Rule 24(a) "is to be determined from all the circumstances." *NAACP v. New York*, 413 U.S. 345, 366 (1973).

Petitioners' motion to intervene meets each of the elements by which courts typically assess timeliness. *First*, petitioners had no notice that the Executive would abandon its defense of the Rule to pretermit review of the district court's order. *Second*, petitioners swiftly sought to defend the Rule once they learned that their interests would no longer be protected. *Third*, the parties were not prejudiced by the minimal time it took petitioners to seek intervention. *Finally*, petitioners are prejudiced by not being permitted to intervene three ways: procedurally in this litigation, administratively in future rulemakings, and fiscally through the costs the States must bear if the Rule is rescinded.

1. Petitioners lacked notice that the Executive would abandon the Rule.

Until the Executive voluntarily and simultaneously dismissed all its appeals regarding the Rule, petitioners did not know—and could not reasonably expect—that the Executive would not only stop defending the Rule, but strategically leverage this litigation to circumvent the APA's requirements to rescind the Rule. The

timeliness of petitioners' actions should therefore be measured from when the Executive announced its abandonment of the litigation. *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 390, 394 (1977). By that benchmark, petitioners' motion was timely. *Id.*; *e.g.*, *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1012 (2022).

The Seventh Circuit concluded petitioners' request was untimely because they should have known that "the federal government was at least *seriously considering* dismissal of its appeal" "[b]y the end of February 2021." Pet. App. 13a. But this logic suffers two fatal flaws.

First, the Executive continued to represent in signed filings that it was either uncertain of its next steps or actively defending the Rule until March—including asking for a stay or abeyance at least twice. *Supra* pp. 4-5. Plaintiffs responded to these requests as though they were genuinely adversarial, expressing concern that this case would be stayed indefinitely, and stressing that the administration continued to defend and enforce the Rule. *Id.* In similar situations, federal entities routinely oppose intervention on the grounds that the intervenors' interests were adequately represented by the federal defense. *E.g.*, Defendants' Brief in Opposition to Texas Motion to Intervene, *Pennsylvania*, No. 1:20-cv-1468, ECF 141; *Entergy Gulf States La. L.L.C. v. EPA*, 817 F.3d 198, 202 (5th Cir. 2016); *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 315 (D.C. Cir. 2015).

Second, even if petitioners should have known that the new administration intended to rescind the Rule, they still had no notice of a need to intervene because they had no way to know the Executive intended to abandon that traditional route of addressing disfavored rules in favor of the "tactic of 'rulemaking-by-collective-

acquiescence'" it employed here. *Arizona*, 142 S. Ct. at 1928 (Roberts, C.J., concurring). After all, this "traditional route" of abeying litigation, promulgating a new regulation, and then dismissing litigation against prior regulations was developed, *San Francisco*, 992 F.3d at 751 (VanDyke, J., dissenting), precisely because a "new administration is ... as a general matter entitled" to change its policy positions—or even its views on the legality of a prior agency action, *Arizona*, 142 S. Ct. at 1928 (Roberts, C.J., concurring). And, if followed, that route would have afforded petitioners an opportunity to participate in notice and comment and to challenge the Rule's rescission under the APA if the Executive "failed to consider ... important aspect[s] of the problem," such as the cost the rescission would impose on States. *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1910 (2020). Even the Executive has acknowledged it could find no precedent for its behavior here. Tr. 84:2-15. Petitioners hardly slept on their rights for failing to presage the unprecedented.

2. Petitioners promptly sought intervention.

Instead, petitioners "sought to intervene 'as soon as it became clear' that [their] interests 'would no longer be protected' by the parties in the case," and thus satisfied the "most important circumstance relating to timeliness." *Cameron*, 142 S. Ct. at 1012. Only two days after the parties effected their scheme, petitioners filed motions to withdraw the mandate, intervene, and reconsider the courts' dismissal in the Seventh Circuit (and elsewhere). *See* Pet. App. 27a. Petitioners sought this Court's review only four days after those motions were denied. And petitioners moved to intervene in district court just two weeks after this Court instructed them to

do so. *See Texas*, 141 S. Ct. at 2562. Petitioners' conduct easily satisfies the standard for timeliness.

Notably, petitioners moved to intervene in the Seventh Circuit the day after the motion at issue in *Arizona* was filed. Motion to Intervene by the States of Arizona, Alabama, Arkansas, Indiana, Kansas, Louisiana, Mississippi, Montana, Oklahoma, Texas, and West Virginia, *San Francisco*, Nos. 19-17213, et al. (9th Cir. Mar. 10, 2021), ECF 143.[8] Neither the parties nor the court questioned the timeliness of those States' attempted intervention.

Instead of measuring petitioners' timeliness from their March 11 motion in the Seventh Circuit, that court instead measured timeliness from petitioners' May 12 motion in district court. The Seventh Circuit discounted petitioners' March and April efforts to intervene both before that court and in this Court because "[t]he issues . . . and the standards" for district court and appellate intervention "are different." Pet. App. 14a.[9] This fails for three reasons.

First, the court of appeals never explained the materiality of those differences. And this Court has considered similar policies and factors to those at issue in district court intervention when assessing appellate intervention. *E.g.*, *Cameron*, 142 S. Ct. at 1010.

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[8] Petitioner South Carolina moved to intervene in the *Arizona* litigation on March 11.

[9] The Seventh Circuit also criticized petitioners for asserting that these earlier motions "stopped the clock." Pet. App. 14a. Petitioners do not recall and cannot locate any such assertion. But the criticism is unfounded in any event: it is "generally understood that a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam).

Second, the court of appeals failed to reconcile its conclusion with this Court's "hint," Pet. App. 7a, in late April that petitioners should seek intervention in district court. This Court would hardly instruct petitioners to reraise their "arguments before the District Court" in "a motion for intervention" on April 26, 2021, if a motion doing so two weeks later would be untimely. *Texas*, 141 S. Ct. at 2562.

Third, because petitioners were justified in seeking intervention in the Seventh Circuit before doing so in district court, any delay from doing so cannot be charged to petitioners. The Seventh Circuit's mandate lifted that court's November 2020 stay, which had protected the status quo for four months. Lifting the stay prejudiced petitioners because it precipitated the formal rescission of the Rule. 86 Fed. Reg. at 14,221 (citing the Seventh Circuit's dismissal). Only that court could recall its mandate and reconsider its grant of the Executive's collusive motion to dismiss. And only that court or this Court could reinstate that stay as the district court had already denied such relief. *See* Minute Entry, *Cook County*, No. 1:19-cv-06334, ECF 221. Petitioners thus reasonably sought to protect their interests in the court that most recently had jurisdiction over the matter as soon as it became clear that the Executive no longer represented those interests adequately. Petitioners thus satisfied the most important question for timeliness purposes. *Cameron*, 142 S. Ct. at 1012.

3. The parties were not prejudiced by any delay.

Petitioners' May 2021 motion to intervene prejudiced neither the federal government nor the plaintiffs. Each was served with petitioners' requests for relief in the Seventh Circuit and here in March. Thus, unlike

petitioners, the parties had notice of petitioners' litigation position in time to take protective action before the Executive purported to rescind the Rule in reliance upon the finality of this litigation,[10] and well before petitioners sought to intervene in district court. Thus, neither party can claim to have been surprised that the litigation was not over.

Nevertheless, the Seventh Circuit held that the parties would suffer prejudice because "this was the tail end of a lawsuit," and the "proposed intervention would have exposed the original parties to an entirely new set of issues." Pet. App. 14a. Leaving aside that Rule 24 does not require an identity of issues between intervenors and current litigants, *Berger v. N.C. State Conf. of NAACP*, 142 S. Ct. 2191, 2195-96 (2022), it is unclear what those new issues would have been, given that petitioners sought merely to take up the Executive's defense of the Rule. Consequently, the parties' expectations were effectively unchanged. At the time, they both represented to the district court that they were facing the possibility of protracted litigation over the same issues. *Supra* pp. 4-5.

More fundamentally, the Seventh Circuit's conclusion got matters backwards: by the time the Executive's acquiescence scheme was consummated, this Court had already granted review in *New York II*, 141 S. Ct. at 1370, which would have been resolved last June—even if this Court had to appoint an amicus to defend the Rule. It was the parties' efforts to evade both judicial review

[10] Opposed Motion to Intervene as Defendants-Appellants, *Cook County*, No. 20-3150 (7th Cir. Mar. 11, 2021), ECF 25-3; Opposed Motion for Leave to Intervene as Defendants-Appellants, *Casa de Md., Inc. v. Biden*, No. 19-2222 (4th Cir. Mar. 11, 2021), ECF 215; Motion to Intervene, *San Francisco*, *supra*, ECF 143.

and the APA that has delayed resolution of this lawsuit, so they cannot now claim prejudice from that delay.[11]

4. Petitioners are prejudiced by the denial of intervention.

The denial of intervention prejudiced petitioners in at least three interrelated ways: procedurally in this litigation, administratively in future efforts to modernize the 1990s definition of "public charge," and financially in forcing States to provide public benefits to otherwise inadmissible aliens.

Procedurally. Petitioners were most immediately prejudiced because the Seventh Circuit denied their request for Rule 60(b)(6) relief based entirely on their status as non-parties. Pet. App. 18a-19a. The denial of intervention thus served to "cut off" the "State[s'] opportunity to defend" their interest "in federal court," and should never be done "lightly." *Cameron*, 142 S. Ct. at 1011.

Administratively. Denying intervention also cut off petitioners' opportunity to challenge the Rule's rescission under the APA. To rescind a rule promulgated through notice-and-comment rulemaking, DHS would normally have "issue[d] a '[g]eneral notice of proposed rulemaking,'" "give[n] interested persons an opportunity" to submit "data, views, or arguments," and then "consider[ed] and respond[ed] to significant comments received." *Perez*, 575 U.S. at 96. This would have required the Executive to address the significant factual findings included in the Rule. *See* 84 Fed. Reg. at 41,300-

[11] For similar reasons, the Executive cannot claim prejudice because it might need to shift enforcement guidance again if they are not permitted to "dodge the pesky requirements of the APA." *San Francisco*, 992 F.3d at 749 (VanDyke, J., dissenting).

03. Instead, the parties agreed to manipulate the process by locking in a final judgment that DHS could cite to justify eliminating the Rule without notice and comment. *See* Pet. App. 5a-6a.

These tactics significantly impaired petitioners' notice-and-comment rights—not just here but elsewhere. Although deemed an inconvenience by these parties, "when Congress enacted the APA," it created these procedural rights to "settle[] long-continued and hard-fought contentions" by creating a "formula upon which opposing social and political forces have come to rest." *Perez*, 575 U.S. at 102. This formula has particular significance where a "fundamental sovereign attribute," like the power to control immigration, is implicated. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). Yet these parties apparently thought nothing of circumventing these important procedural rights so that no future administration could propound a similar rule, even through notice-and-comment rulemaking. *San Francisco*, 992 F.3d at 743 (VanDyke, J., dissenting). In doing so, they have created a roadmap for how to evade both notice-and-comment procedures, *id.*, and judicial review, *see Arizona*, 142 S. Ct. at 1929 (Roberts, C.J., concurring). The court of appeals' denial of intervention therefore not only prejudices petitioners, but undermines the basic principles to which administrative agencies are expected to adhere.

Fiscally. Finally, as even "DHS admit[ted]," the Rule has "caused some status adjustment applications to be denied." Pet. App. 30a. By definition, such applicants depend on public benefits, thus it is far from "speculative" that the rescission of the Rule will financially harm petitioners because such aliens, once admitted, "will use public benefits" that petitioners must fund. *Id.* Because petitioners have no way to recoup such funds, their inability

to intervene and defend the Rule inevitably causes them financial harm.

B. Petitioners are otherwise entitled to intervene.

The Seventh Circuit rejected petitioners' attempt to intervene exclusively on timeliness grounds. That error aside, petitioners are otherwise entitled to intervene both as of right and permissively.

1. Intervention as of right

Petitioners were entitled to intervene as of right under Rule 24(a), which "provides that a 'court must permit anyone to intervene' who, (1) '[o]n timely motion,' (2) 'claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest,' (3) 'unless existing parties adequately represent that interest.'" *Berger*, 142 S. Ct. at 2200-01.

Petitioners' motion to intervene was timely for the reasons explained previously. And the remaining two factors favor intervention, which "enables the States to serve as a 'balance' to federal authority." *Id.* at 2201 (quoting *Bond v. United States*, 564 U.S. 211, 221 (2011)). Moreover, due to the Executive's refusal to defend the Rule, petitioners' interests by definition are not "adequately represented"—they are not represented at all. Petitioners' procedural, administrative, and fiscal interests in defending the Rule will not only be "practically impaired [and] impeded," *id.* at 2203, if petitioners are not allowed to intervene; those interests will be extinguished.

2. Permissive intervention

Alternatively, permissive intervention was appropriate under Rule 24(b). Petitioners have "a claim or defense that shares with the main action a common question of law or fact" about the Rule. Fed. R. Civ. P. 24(b)(1)(B). For the reasons discussed in Part III.A.3, *supra*, intervention cannot "unduly delay or prejudice the adjudication of the original parties' rights." *Id.* R. 24(b)(3).

* * *

In sum, the totality of the circumstances showed that petitioners timely sought intervention. Petitioners moved to intervene as soon as they had notice of the need to do so. The parties were not prejudiced by petitioners' two-day delay in seeking relief initially in the Seventh Circuit. But petitioners are severely prejudiced by the denial of intervention. Because petitioners also met the other intervention requirements, the Seventh Circuit erred by affirming the denial of intervention.

IV. Petitioners Are Entitled to Rule 60(b)(6) Relief or Equitable Vacatur.

The court of appeals likewise erred by denying petitioners' request for relief from the judgment under Rule 60(b)(6). This catchall provision applies in "extraordinary circumstances" to "provide[] courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863-64 (1988); *cf. Kemp v. United States*, 142 S. Ct. 1856, 1861-62 (2022) (reaffirming the *Liljeberg* standard).

The district court denied petitioners' Rule 60(b)(6) motion as an attempt to circumvent the time limits to file

an appeal of what the district court considered to be its legally correct vacatur of the Rule. Pet. App. 65a. The Seventh Circuit affirmed the denial of relief because that court likewise denied intervention. *Id.* at 18a-19a. Both courts erred: this is an extraordinary case, and the Rule is lawful. But, at minimum, the Court should vacate the district court's order to prevent the Executive from using its own collusive conduct to insulate the judgment.

A. Extraordinary circumstances justify relief from the district court's judgment.

1. The district court was wrong to conclude that this case lacks extraordinary circumstances justifying Rule 60(b)(6) relief, *Buck v. Davis*, 137 S. Ct. 759, 777-78 (2017). For the reasons discussed above in Part I, *supra*, this case is "extraordinary."

The district court erred by dismissing petitioners' Rule 60(b)(6) motion as merely an untimely notice of appeal. Pet. App. 42a. Assuming "[n]on-parties who are bound by a judgment can obtain appellate review" by filing a timely notice of appeal, they cannot seek untimely intervention to evade that time limit. *See Cameron*, 142 S. Ct. at 1009; *Perez v. Stephens*, 745 F.3d 174, 178 (5th Cir. 2014) (applying *Bowles v. Russell*, 551 U.S. 205, 214 (2007)). But States' motion to intervene was *not* untimely for the reasons discussed above in Part III.A, *supra*.

Instead, "[w]hat respondents ask," and what the district court adopted, was "essentially a mandatory claims-processing rule," *Cameron*, 142 S. Ct. at 1010, that makes the window for intervention coterminous with that for a notice of appeal. But this Court is leery of adopting such rules. *Id.* And the district court identified no reason to do so here. Its denial of Rule 60(b)(6) relief was therefore legal error.

2. The Seventh Circuit also erred when it affirmed the denial of petitioners' intervention. Pet. App. 18a-19a. That ruling incorporates the legal flaws discussed in Part III, *supra*. It also represents a separate reason to grant review because it splits from the view of other circuits that have permitted a nonparty to seek Rule 60(b)(6) relief "where its interests were directly or strongly affected by the judgment." *Bridgeport Music, Inc. v. Smith*, 714 F.3d 932, 940 (6th Cir. 2013) (citing, *e.g.*, *Grace v. Bank Leumi Tr. Co. of N.Y.*, 443 F.3d 180, 188-89 (2d Cir. 2006); *Binker v. Pennsylvania*, 977 F.2d 738, 745 (3d Cir. 1992); *Dunlop v. Pan Am. World Airways, Inc.*, 672 F.2d 1044, 1051-52 (2d Cir. 1982); *Eyak Native Vill. v. Exxon Corp.*, 25 F.3d 773, 777 (9th Cir. 1994)).

B. The Rule is lawful.

To the extent the district court denied relief because it thought its vacatur was correct, that was also error. This Court previously stayed a similar order and granted certiorari on the lawfulness of the Rule—indicating both that the Rule was of extraordinary national importance, and that it is likely valid. *Supra* pp. 3, 14.

First, the Rule is valid because it tracks how the term "public charge" is typically used. "The ordinary meaning of 'public charge'" is "'one who produces a money charge upon, or an expense to, the public for support and care.'" *Casa de Md., Inc. v. Trump*, 971 F.3d 220, 242 (4th Cir. 2020). The Rule gives the term that natural meaning in the light of the factors listed by Congress, 8 U.S.C. § 1182(a)(4)(B)(I), by including non-cash benefits that provide an alien with food, housing, and medical care. 84 Fed. Reg. at 41,301. After all, whether benefits are paid in cash or in kind is immaterial to whether those benefits produce an expense to the State or a benefit to

the alien. *Cook County v. Wolf*, 962 F.3d 208, 241 (7th Cir. 2020) (Barrett, J., dissenting).

Second, the Rule comports with the rest of the INA. Regardless of what the Executive currently considers to be the Nation's "values," Exhibit B at 2, Congress has stated the official "immigration policy of the United States": the "availability of public benefits [must] not constitute an incentive for immigration to the United States," 8 U.S.C. § 1601(2)(B); *see also id.* § 1601(1) (reiterating "[s]elf-sufficiency" as "a basic principle of United States immigration law"). Congress has also required that an alien seeking admission or adjustment of status to submit "affidavit[s] of support" from sponsors, *id.* § 1182(a)(4)(C)-(D), who must agree "to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line," *id.* § 1183a(a)(1)(A). If a sponsor fails to do so, the government may seek reimbursement from the sponsor for "any means-tested public benefit" provided to the alien—including non-cash benefits. *Id.* § 1183a(a)(1)(B).

Third, the Rule follows the historic usage of the term "public charge." Some version of the public charge statute has existed for over a century. *City & County of San Francisco v. USCIS*, 944 F.3d 773, 779 (9th Cir. 2019). The term's usage has "changed over time to adapt to the way in which" public assistance is provided. *Id.* at 792. But it has always considered "different factors" beyond cash payouts, which "weighted more or less heavily at different times, reflecting changes in the way in which we provide assistance to the needy." *Id.* at 796.

Taken together, the Rule "easily" qualifies as a "permissible construction of the INA." *Id.* at 799. The district court erred in denying Rule 60(b)(6) relief based on its contrary understanding.

C. At minimum, the district court's judgment should be equitably vacated.

Even if this Court determines that plenary review is unwarranted, it should summarily vacate the district court's judgment based on the principles underlying *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). Those equitable principles prevent a federal court from "decid[ing] the merits of a legal question not posed in an Article III case or controversy. For that purpose, a case must exist at all the stages of appellate review." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 21 (1994). Where it does not, this Court will vacate earlier decisions both to serve the "public interest," *id.* at 26-27, and to "clear[] the path for future relitigation of the issues" between parties who meet the standards of Article III, *Munsingwear*, 340 U.S. at 40.

Here, by the time the district court's judgment became final, the case between the parties lacked the most fundamental component of an Article III case or controversy: a "real, earnest, and vital controversy." *Ashwander v. TVA*, 297 U.S. 288, 346 (1936). Absent—*at minimum*—a dispute over remedy, there is insufficient adversity to support a federal-court judgment. *See United States v. Windsor*, 570 U.S. 744, 760 (2013). And the "equitable balance" favors vacating that judgment, rather than blessing a blueprint for the Executive to evade the APA. Ari Cuenin, Note, *Mooting the Night Away: Postinauguration Midnight-Rule Changes and Vacatur for Mootness*, 60 DUKE L.J. 453, 492-94 (2010). Petitioners "seek[] review of the merits of an adverse ruling," and "ought not in fairness be forced to acquiesce in the judgment" of a single district court striking down the Rule. *Bancorp*, 513 U.S. at 24-25.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2022

APPENDIX

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 21-2561
COOK COUNTY, ILLINOIS, *et al.*,
Plaintiffs-Appellees,
v.
STATE OF TEXAS, *et al.*,
Intervenors-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 19-cv-06334 — Gary Feinerman, *Judge.*

ARGUED APRIL 13, 2022 – DECIDED JUNE 27, 2022

Before ROVNER, WOOD, and ST. EVE, *Circuit Judges.*

WOOD, *Circuit Judge.* In August 2019, the Department of Homeland Security (DHS) introduced the "Inadmissibility on Public Charge Grounds Rule" (the 2019 Rule). The new rule expanded the meaning of "public charge" to disqualify a broader set of noncitizens from benefits than earlier policies had done; it immediately generated extensive litigation across the country. In September 2019, Plaintiffs-Appellees Cook County, Illinois, and the Illinois Coalition for Immigrant

Refugee Rights (ICIRR) brought an action against the Department of Homeland Security and its U.S. Citizenship and Immigration Service. In November 2020, the district court vacated the 2019 Rule under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, and in March 2021, the federal government dismissed appeals defending the 2019 Rule in courts around the country. In May 2021, the States now before us sought to intervene in the proceedings in the Northern District of Illinois, hoping to defend the 2019 Rule; they also moved for relief from judgment under Rule 60(b). The district court denied these motions, finding each untimely.

We conclude that the district court did not abuse its discretion in that respect. That is enough to resolve the remainder of the issues that are properly before us. If the States wish to challenge the repeal of the 2019 Rule under the APA, we can confirm that nothing we say here will prevent them from trying to do so in a fresh legal proceeding.

I

A

The Immigration and Nationality Act (INA) permits the federal government to deny admission or adjustment of status to a noncitizen "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). For decades, "public charge" was understood to refer to noncitizens "primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government

expense." Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999). DHS departed from this understanding in August 2019, when it introduced the 2019 Rule. See 84 Fed. Reg. 41,292 (Aug. 14, 2019). That rule categorized as a "public charge" "an alien who receives one or more designated public benefits for more than 12 months in the aggregate within any 36-month period," thereby sweeping in noncitizens who received even minimal benefits for the requisite duration. *Id.* at 41,295. It also expanded the definition of "public benefit" to encompass non-cash benefits such as SNAP (commonly known as "food stamps"), most forms of Medicaid, and various forms of housing assistance. *Id.*

Challenges to the 2019 Rule quickly followed in district courts across the country. In the case before us, Plaintiffs Cook County and ICIRR brought suit in September 2019, alleging that the 2019 Rule's expanded definition of "public charge" was inconsistent with the INA and arbitrary and capricious in violation of the APA. ICIRR also asserted that the 2019 Rule violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. In October 2019, the district court granted both plaintiffs' motion for a preliminary injunction and enjoined the 2019 Rule's application within the State of Illinois. After DHS appealed, we denied the government's motion to stay the preliminary injunction pending appeal; the Supreme Court later granted that temporary relief. See *Wolf v. Cook County*, 140 S. Ct. 681 (2020) (mem.). Not long after, we affirmed the district court's preliminary injunction against the 2019 Rule's operation in Illinois on the basis that the 2019

Rule likely violated the APA. See *Cook County v. Wolf*, 962 F.3d 208, 221, 234 (7th Cir. 2020) ("*Cook County I*"), *cert. dismissed sub nom. Mayorkas v. Cook County*, 141 S. Ct. 1292 (2021). The Supreme Court's stay of the preliminary injunction remained in effect.

Back in the district court, the case continued. That court granted Cook County's motion for summary judgment on the APA claims in November 2020, entering a partial final judgment vacating the 2019 Rule on those claims pursuant to Federal Rules of Civil Procedure 54(b). This time, the district court explicitly indicated that its vacatur order was to operate nationwide. DHS soon appealed that judgment, but we stayed action on the appeal in light of the fact that DHS's petition for a writ of certiorari seeking review of our prior affirmance of the preliminary injunction was still pending before the Supreme Court. Because the district court's November 2020 order did not dispose of ICIRR's equal-protection theory, discovery related to that issue began.

On January 22, 2021, the district court ordered the federal government to file a status report addressing whether it planned to continue defending the 2019 Rule in light of the November 2020 election and the resulting change in administration. On February 2, President Biden issued an Executive Order directing DHS to "consider and evaluate the current effects of [the 2019 Rule] and the implications of [its] continued implementation." See Exec. Order No. 14,012, *Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans*, 86 Fed. Reg. 8,277, 8,278 (Feb. 2, 2021). The Order further stated that "it is essential to ensure

… that immigration processes and other benefits are delivered effectively and efficiently; and that the Federal Government eliminates sources of fear and other barriers that prevent immigrants from accessing government services available to them." *Id.* at 8,277. That same day, the government notified the district court of the Executive Order.

On February 19, 2021, ICIRR and DHS provided the district court with a joint status report agreeing to a two-week stay to provide the government with additional time to assess how it wished to proceed. In the report, DHS explained that a time-limited stay would "spare the parties and the Court from the burdens associated with briefing and resolving the merits of the equal protection claim" that "may ultimately prove unnecessary." ICIRR and DHS filed another joint status report on March 5, in which ICIRR objected to a further stay of the proceedings because the 2019 Rule remained in effect and continued to generate uncertainty for immigrant communities.

On March 9, DHS announced that the government was no longer going to defend the 2019 Rule, because it had determined that continued defense was not in the public interest nor an efficient use of government resources. It took actions around the country consistent with that decision, including a motion to dismiss the case of *DHS v. New York*, which the Supreme Court had agreed to hear. See No. 20-449 (U.S. Feb. 22, 2021). The Court obliged, in an order entered that same day, dismissing the petition pursuant to Supreme Court Rule 46.1. See 141 S. Ct. 1292 (2021). The government also moved to dismiss several appeals around the country,

including its appeal of the district court's Rule 54(b) judgment, which was the basis for the district court's nationwide order of vacatur. Like the Supreme Court, we granted the motion on March 9 and immediately issued the mandate, as required under Seventh Circuit Local Rule 41. Our mandate had the effect of leaving the district court's order in place, but unreviewed (as though no appeal had ever been taken). On March 11, 2021, DHS and ICIRR filed a final joint stipulation with the district court. ICIRR explained that it was voluntarily dismissing its equal-protection claim with prejudice on the theory that the November 2020 order, which was no longer subject to any stays, effectively wiped out the 2019 Rule.

On March 15, DHS promulgated a final rule, effective immediately, that removed the 2019 Rule from the Code of Federal Regulations, assertedly in compliance with the district court's nationwide vacatur. See *Inadmissibility on Public Charge Grounds; Implementation of Vacatur*, 86 Fed. Reg. 14,221, 14,227–29 (Mar. 15, 2021). DHS did not precede this action with formal notice and comment, instead choosing to invoke the APA's "good cause" exception. See 5 U.S.C. § 553(b)(B) (excusing notice and comment when "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

On March 11, two days after our mandate issued and the same day that ICIRR voluntarily dismissed its equal-

protection claim, Texas and thirteen other States[1] sought for the first time to obtain party status in this case, moribund though it was. They began with a motion in this court asking that we grant them intervenor status so that they could defend the 2019 Rule. They also moved to recall the mandate we had issued on March 9. We denied the motion to intervene on March 15. See Order, *Cook County v. Wolf*, No. 20-3150 (7th Cir. 2021). The Supreme Court later denied the States' application seeking a stay of the district court's vacatur order or, in the alternative, summary reversal of this court's denial of their motions. *Texas v. Cook County*, 141 S. Ct. 2562, 2562 (Apr. 26, 2021) (mem.). That killed the States' case for the time being, even though the Court did say that its ruling was "without prejudice to the States raising this and other arguments before the District Court, whether in a motion for intervention or otherwise." But without intervention, they did not have party status, and without that status, they could not pursue either recall of the mandate or relief under Rule 60(b).

B

This brings us to the latest chapter. On May 12, the States appeared before the district court for the first time. Following the Supreme Court's hint, they moved to intervene under Federal Rule of Civil Procedure 24(a) (of right) and 24(b) (permissive). In addition, assuming their success in intervening, they asked the district court to set aside its judgment pursuant to Rule 60(b)(6). The

[1] The other States are Alabama, Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, and West Virginia.

district court was satisfied that the States had Article III standing to proceed in this way, but it denied both the motions to intervene and the requested substantive relief.

With respect to the motions to intervene, the district court found that the States had waited too long to act. They had been aware that the 2019 Rule was on shaky ground for months. Two days after President Biden's inauguration the district court solicited comment on the 2019 Rule from the new administration; by March 9 the DHS had abandoned the Cook County case; and by March 15 it had repealed the 2019 Rule. The district court also found that intervention would prejudice the original parties. It noted that the States had alternative routes available under the Administrative Procedure Act to object either to the process by which the 2019 Rule was rescinded or to the policy that action reflected. To the extent the new administration was contemplating a replacement rule, the States had every opportunity to participate in that effort. Finally, the district court found that no unusual circumstances justified relief. As for Rule 60(b)(6), the court found that such relief first requires that intervention be granted. It wrapped up by indicating that even if the States should have been permitted to intervene, it nonetheless would have denied the Rule 60(b)(6) motion because it was untimely and no extraordinary circumstances were present.

We conclude our procedural tale with two important later-breaking developments. First, having erased the 2019 Rule from the books, DHS is now pursuing a replacement "public charge" policy through formal notice-and-comment rulemaking. See *Public Charge*

Ground of Inadmissibility, 87 Fed. Reg. 10,570, 10,571 (Feb. 24, 2022).

Second, until recently there was a case much like ours pending before the Supreme Court. See *Arizona v. City and County of San Francisco*, No. 20-1775. There, a coalition of States moved to intervene in the Ninth Circuit after the federal government dismissed its petition for a writ of certiorari seeking review of the Ninth Circuit's affirmance of multiple preliminary injunctions of the 2019 Rule. Those injunctions had been issued by district courts in the Northern District of California and the Eastern District of Washington. After the Ninth Circuit had refused to allow the States to intervene either of right or permissively, the Supreme Court granted review and held oral argument on February 23, 2022. On June 15, 2022, however, the Court dismissed the writ of certiorari as improvidently granted. See No. 20-1775, 2022 WL 2135493 (U.S. June 15, 2022). In a concurring opinion joined by three of the Justices, the Chief Justice noted that the Arizona case was plagued by a number of confounding issues:

- Did the government's actions comport with the principles of administrative law?
- Do States from areas that may not be covered by the district court's order have standing to sue?
- Have challenges to the Trump administration's rule become moot?
- If they are moot, is vacatur pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), required or possible?

- What is the scope of injunctive relief under the APA, and is a nationwide injunction permissible here?
- How do the APA's procedural requirements apply in this unusual setting?

2022 WL 2135493 at *1. We take the point: there is a cornucopia of issues that may be relevant. Only some of them must be resolved in order to dispose of the present appeal, however, as we now explain.

II

A

Before turning to the central issue on appeal—the right of the States to intervene—we comment briefly on why we do not regard the entire case as moot. It may seem that the States are beating a dead horse, but that isn't entirely true. In fact, they are seeking an opportunity to breathe life back into this case, and ultimately to resuscitate the 2019 Rule. In their view, if they can get in the door, they might succeed either in recalling the mandate and hence undoing the district court's work that way, or in persuading a court to grant Rule 60 relief. The question will remain whether the repeal of the 2019 Rule and the launch of notice and comment on the replacement rule, will doom their case on the merits should they get that far. But that is not the same thing as mootness.

We begin with the district court's denials of the States' motions to intervene; we review these for abuse

of discretion.[2] *Illinois v. City of Chicago*, 912 F.3d 979, 984 (7th Cir. 2019). As we noted, the States pursued both intervention of right and permissive intervention. There are meaningful differences between the two forms, but for present purposes they do not matter. The common thread is the timeliness of the motion to intervene. See *NAACP v. New York*, 413 U.S. 345, 365 (1973) ("Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rule 24(a) and Rule 24(b), that the application must be timely."). In evaluating timeliness, we look to four considerations: (1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenor if the motion is denied; and (4) any other unusual circumstances. See *City of Chicago*, 912 F.3d at

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[2] The centrality of timeliness in our case, plus the fact that the parties seeking intervention are not part of the same polity as the original parties, both distinguish our case from *Berger v. North Carolina State Conf. of the NAACP*, No. 21-248, 2022 WL 2251306 (U.S. June 23, 2022). The *Berger* Court confirmed that "[e]veryone before us agrees that the legislative leaders' motion to intervene was timely." *Id.* at *6. It also stressed that its decision rested on the prerogative of States to structure themselves "as they wish," subject only to "wide constitutional bounds." *Id.* at *3. The case before us is all about timeliness and has nothing to do with internal State organization, and so falls outside the scope of *Berger*. We do note, however, that *Berger* reserved the question whether the standard of review in the case before it was *de novo* or abuse-of-discretion. See *id.* at *11 n.*. It had no need to choose there, because it found an error of law, which is automatically an abuse of discretion. Here, the assessment of timeliness is a fact-bound question, which remains in our view subject to ordinary abuse-of-discretion review.

984 (applying these factors to a 24(a) analysis); *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 945 (7th Cir. 2000) (applying these factors to a 24(b) analysis). We agree with the district court that each of these considerations counsels against intervention.

With respect to the passage of time, a would-be intervenor is required to "move promptly to intervene as soon as it knows or has reason to know that its interests might be adversely affected by the outcome of the litigation." *Heartwood, Inc. v. U.S. Forest Serv.*, 316 F.3d 694, 701 (7th Cir. 2003); see also *City of Chicago*, 912 F.3d at 985 (noting that we "measure from when the applicant has reason to know its interests *might* be adversely affected, not from when it knows for certain that they will be"). Though then-candidate Biden indicated over the course of his 2020 presidential campaign that his administration would seek to repeal the 2019 Rule, we need not address the status of "campaign speech." We may assume for present purposes that the States were justified in relying on DHS's continued defense of the 2019 Rule at least through the November 2020 election, and perhaps even into the new year after President Biden took office. What matters is that by the end of February 2021 the States were, without doubt, aware of the possibility that the federal government was going to abandon its defense of the 2019 Rule and seek to promulgate a new one.

After the February 2, 2021, Executive Order directed DHS to review the 2019 Rule within 60 days, the federal government submitted a status report to the district court explaining that the government continued to assess its "next steps." Then in the joint status report filed on

February 19, the federal government sought a "time-limited stay" to "spare the parties and the Court from the burdens associated with briefing and resolving the merits of the equal protection claim," which "further developments" could "moot." In that same report, ICIRR hedged its bets by asking the district court to allow discovery on the equal-protection claim to continue. But contrary to the States' suggestions, a reasonable onlooker would not have inferred from ICIRR's attempts to keep pressure on the federal government that the government was committed to the 2019 Rule. As anyone who has ever sat at a negotiation table would recognize, ICIRR had an interest in continuing to press its case until abandonment was official. By the end of February 2021, there was no doubt that the federal government was at least *seriously considering* dismissal of its appeal. That is enough to render the States' May 12 motions untimely.

The problems for the States with respect to the first timeliness consideration do not end here. Recall that the original plaintiffs' APA claims were before us in an interlocutory posture when DHS dismissed its appeal and our mandate issued on March 9. *Cook County I*, 962 F.3d at 217 (appeal concerned only with APA issues). Litigation related to ICIRR's equal-protection claim continued to proceed at the district court along a separate track for another few days—ICIRR did not dismiss the constitutional claim until March 11. Moreover, as we have noted, on March 11 the States moved to intervene only in the court of appeals—*not* in the district court. They waited another two months, until May 12, to bring their motions to intervene to the district

court. The only justification the States offer is that they assumed that the March 11 motions to intervene in the APA *appeal* somehow "stopped the clock" with respect to the proceedings before the district court. But the March 11 intervention motions and May 12 intervention motions are not the same thing. The issues were different, and the standards for district court intervention under Rule 24 and appellate intervention are different. *Cf. Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1010 (2022) (treating appellate intervention, which is referenced only in "passing" in Rule 15(d) of the Federal Rules of Appellate Procedure, as distinct from intervention in the district courts, even though the rule for district court intervention can provide "guidance" for developing a rule governing appellate intervention); *Arizona* Transcript at 46 (Alito, J.) (observing that appellate intervention and Rule 24 intervention may be subject to different legal standards). And even if we were to give the States the benefit of the doubt and use the March 11 date as the point of reference, by that time the district court reasonably could have concluded that it was too late to create an entirely new lawsuit through the intervention of fourteen States.

The other three timeliness considerations also support the denial of the States' motions to intervene. We begin with prejudice. Because this was the tail end of a lawsuit that had begun in September of 2019, the States' proposed intervention would have exposed the original parties to an entirely new set of issues—a conclusion drawn by the district court which the States offer no reason to question. DHS may well have taken a

different approach to its repeal of the 2019 Rule and its design of a replacement had the States intervened sooner. Recall that as late as 2020, when we issued *Cook County I*, the district court's injunction was limited to Illinois. Had the States intervened earlier and challenged the nationwide vacatur, the result may have been to trim it back again to an order relating only to Illinois. Who knows? Without any additional parties, DHS rationally chose to accept the vacatur for reasons it deemed sufficient. In addition, if the States were to intervene now, ICIRR would in all likelihood move to revive its equal-protection claim and reinitiate a burdensome discovery process against the federal government. This is more than enough to demonstrate the risk of prejudice to the original parties if this late intervention were to be approved.

Next, we turn things around and ask whether the States would be prejudiced by the denial of their motions to intervene. The States insist that their stake in the 2019 Rule stems from their interests in fiscal responsibility and social-welfare budgeting, and that intervention is the only realistic means available to them to vindicate those interests. We do not doubt that these States, like their sister States, have an important interest in fiscal responsibility and all that goes with it. But it hardly follows that intervention is the only way to achieve that interest. For present purposes, we put to one side the empirical question whether the 2019 Rule would in fact save the States substantial amounts of money.[3] It is plain

[3] The answer to this question is far from self-evident. In its brief before this court, DHS represents that the 2019 Rule has had "an exceedingly modest impact" during the approximately one-year

that the States had (and still have) other, arguably better, legal routes available to them to influence the evolving "public charge" policy. As a number of Justices observed during the oral arguments in the *Arizona* case, the States could have brought a separate case under the APA to challenge the process by which DHS repealed the 2019 Rule. As previously noted, DHS did not use notice and comment when on March 15, 2021, it removed the 2019 Rule from the Code of Federal Regulations. And now that a new round of notice-and-comment rulemaking is underway, the States also are free to participate in the process of developing a new "public charge" rule. (As we noted, DHS issued its Notice of Proposed Rulemaking on February 24, 2022, and set April 25, 2022, as the submission deadline for written comments; the record before us does not reveal whether the States participated.) In sum, the district court did not abuse its discretion by finding that the States had failed to show prejudice from the denial of their intervention effort. The fourth and final question with respect to timeliness is whether any other unusual or extraordinary circumstances justify the States' delay. For the reasons outlined with respect to the first three considerations, we find nothing on this record indicating as much. The

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period in which it has been in effect. DHS reports that it "issued only 3 denials and two Notices of Intent to Deny based solely on the basis of the INA § 212(a)(4) public charge ground of inadmissibility evaluated under the Rule's totality of the circumstances framework." Dkt. No. 269-1, ¶ 8. To put this in perspective, DHS notes that this amounted to five people out of the 47,555 applications for adjustment of status to which the 2019 Rule was applied. Br. for Defendants-Appellees at 12.

propriety of nationwide injunctions has been debated for years. See, *e.g.*, *City of Chicago v. Barr*, 961 F.3d 882, 912–13 (7th Cir. 2020) (discussing the "serious concerns" with injunctive relief that extends beyond the parties before the court and citing relevant literature); Attorney General William P. Barr Delivers Remarks to the American Law Institute on Nationwide Injunctions, May 21, 2019, at https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-american-law-institute-nationwide. It is equally commonplace for a new administration to take different policy positions from its predecessor, and in the course of doing so to withdraw an appeal or rule. In the present case, the new administration wasted no time in signaling that it might take advantage of that prerogative. Even if there were unusual aspects about this litigation—particularly the way in which the decision not to appeal the nationwide vacatur interacted with the decision to withdraw the 2019 rule—this litigation is not the place in which to raise those concerns. We add that this is not the first time we have rejected the notion that the government's dismissal of its appeals was "extraordinary." We did so when we denied the States' March 11 motions. See Order Denying Motions, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 15, 2021), ECF No. 26. Nothing since that time has changed our assessment, especially given the deferential standard of review that governs this Rule 24 matter.

Put simply, the writing had long been on the wall that the federal government was likely to abandon its defense of the 2019 Rule. We therefore find that the district court did not abuse its discretion in finding that the May 2021 motions to intervene were untimely.

We conclude our analysis by noting that Rule 24(a) and Rule 24(b) contain additional requirements that the States must meet. Most notably, a timely motion for intervention of right under Rule 24(a) must involve either "an unconditional right to intervene by a federal statute" or, as the States claim here, an interest "relating to the property or transaction that is the subject of the action." See *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 315 (1985) (referring to the latter as a "legally protectible" interest). Drawing on the Supreme Court's precedents, Cook County and ICIRR argued in the district court and now before us that the States' purported financial interest in this litigation does not, without more, qualify as a "legally protectible" status. Because the untimeliness of the States' motions is dispositive, we need not pursue this point any further.

B

We next turn to the States' motion under Rule 60(b), which provides relief from a final judgment or order in a narrow set of circumstances. In reviewing the district court's denial of the motion, we apply "an extremely deferential abuse of discretion standard" that is met "only when no reasonable person could agree with the decision to deny relief." *Eskridge v. Cook County*, 577 F.3d 806, 808–09 (7th Cir. 2009).

A number of hurdles stand in the States' way of overcoming such a standard. Rule 60(b) motions must be made within a reasonable time, see FED. R. CIV. P. 60(c)(1), and so many of the considerations informing our analysis of the untimeliness of the motions to intervene apply with equal force here. But we need not reach these aspects of Rule 60(b), as the States face a threshold

problem: relief under Rule 60(b) is available only to "a party or its legal representatives." FED. R. CIV. P. 60(b).

The limitation to parties or legal representatives appears in the text of Rule 60(b). Indeed, we have noted that "[i]t is well-settled that, with an exception not relevant here, one who was not a party lacks standing to make a 60(b) motion." *Nat'l Acceptance Co. of Am. v. Frigidmeats, Inc.*, 627 F.2d 764, 766 (7th Cir. 1980). That exception, for which we cited the respected Wright and Miller treatise, refers only to those in privity with the original parties to the case. See Wright & Miller, 11 FED. PRAC. & PROC. CIV. § 2865 (3d ed. 2012) (noting that the Rule allows "one who is in privity with a party to move under the rule" but that "[w]ith this exception, one who was not a party lacks standing to make the motion"). This makes sense: if Rule 60(b) rights were extended beyond parties and their privies to anyone who disliked the outcome of a case, finality would be exceedingly hard to achieve.

With intervention denied, the States remain nonparties for this case, and they are not in privity with the federal government, Cook County, or ICIRR. They are therefore not entitled to pursue Rule 60(b) relief.

III

We AFFIRM the district court's orders rejecting the States' motions to intervene and their request for post-judgment relief.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COOK COUNTY, ILLINOIS, an Illinois governmental entity, and ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS, INC. Plaintiffs, vs. ALEJANDRO MAYORKAS, in his official capacity as Secretary of U.S. Department of Homeland Security, U.S. DEPARTMENT OF HOMELAND SECURITY, a federal agency, UR M. JADDOU, in her official capacity as Director of U.S. Citizenship and Immigration Services, and U.S. CITIZENSHIP AND IMMIGRATION SERVICES, a federal agency, Defendants.	19 C 6334 Judge Gary Feinerman

MEMORANDUM OPINION AND ORDER

Cook County and Illinois Coalition for Immigrant and Refugee Rights, Inc. ("ICIRR") alleged in this suit that the Department of Homeland Security's ("DHS") final rule, *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019) ("Final Rule" or "Rule"), was unlawful under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, and the equal protection component of the Fifth Amendment's Due Process Clause. Doc. 1. In November 2020, after over a year of proceedings (detailed below) at all three levels of the judiciary, this court entered a partial final judgment under Civil Rule 54(b) vacating the Rule under the APA while allowing ICIRR's equal protection claim to proceed. Docs. 221-223 (reported at 498 F. Supp. 3d 999 (N.D. Ill. 2020)). DHS appealed the judgment, Doc. 224, but then dismissed its appeal, Docs. 249-250, and on March 11, 2021, the parties stipulated to the dismissal of the equal protection claim, Doc. 253, ending the case, Doc. 254.

Two months later, after stops at the Seventh Circuit and the Supreme Court, the States of Texas, Alabama, Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, and West Virginia (collectively, "States") appeared in this court and moved to intervene under Rule 24 and for relief from the judgment under Rule 60(b)(6). Docs. 255-256, 259. Their motions are denied.

Background

Cook County and ICIRR claimed that the Final Rule violated the APA, and ICIRR alone brought an equal

protection claim. Doc. 1 at ¶¶ 140-188. On October 14, 2019, this court issued a preliminary injunction, limited to the State of Illinois, enjoining DHS from enforcing the Rule on the ground that it likely violated the APA by interpreting the term "public charge" in the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(4)(A), in a manner incompatible with its statutory meaning. Docs. 85, 87, 106 (reported at 417 F. Supp. 3d 1008 (N.D. Ill. 2019)).

DHS appealed. Doc. 96. The Seventh Circuit denied DHS's motion to stay the preliminary injunction pending appeal, No. 19-3169 (7th Cir.), ECF No. 41 (Dec. 23, 2019), but the Supreme Court issued a stay, 140 S. Ct. 681 (2020) (mem.). This court then denied DHS's motion to dismiss Plaintiffs' claims and granted ICIRR's request for extra-record discovery on its equal protection claim, which alleged that racial animus toward nonwhite immigrants motivated the Rule's promulgation. Docs. 149-150 (reported at 461 F. Supp. 3d 779 (N.D. Ill. 2020)). Shortly thereafter, the Seventh Circuit affirmed the preliminary injunction, reasoning that the Rule likely violated the APA, though on grounds different from those articulated by this court. 962 F.3d 208 (7th Cir. 2020). DHS filed a petition for a writ of certiorari at the Supreme Court. No. 20-450 (U.S. filed Oct. 7, 2020).

Meanwhile, Plaintiffs moved for summary judgment on their APA claims. Doc. 200. In its opposition brief, DHS conceded that the Seventh Circuit's opinion in the preliminary injunction appeal effectively required this court to grant Plaintiffs' motion. Doc. 209 at 7 ("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."); Doc. 219 at 1 ("Plaintiffs have argued, and Defendants do not dispute, that the Court may grant Plaintiffs' pending [summary judgment motion] in light of the Seventh Circuit's decision affirming the Court's preliminary injunction order."). On November 2, 2020, this court granted Plaintiffs' motion, entering a partial final judgment under Rule 54(b) that vacated the Rule under the APA and allowing ICIRR's equal protection claim to proceed. 498 F. Supp. 3d at 1007-10.

DHS appealed the judgment that day. Doc. 224. The Seventh Circuit stayed the judgment pending appeal, and it stayed briefing on the appeal pending the Supreme Court's resolution of DHS's petition for certiorari challenging its affirmance of the preliminary injunction. No. 20-3150 (7th Cir.), ECF No. 21 (Nov. 19, 2020).

Discovery continued in this court on ICIRR's equal protection claim. Docs. 232, 236, 238. DHS asserted the deliberative process privilege as to certain documents, and ICIRR countered that the privilege did not apply. Doc. 214 at 2-13; Doc. 232 at 3. In December 2020, the court held that *in camera* review was necessary to resolve the privilege dispute. Docs. 234-235 (reported at 2020 WL 7353408 (N.D. Ill. Dec. 15, 2020)). On January 22, 2021, days after the change in presidential administration, the court sought DHS's views as to whether a live dispute remained concerning the documents. Doc. 240. In particular, the court asked DHS to file a status report by February 4 addressing whether it planned to pursue its appeal before the Seventh Circuit and its certiorari petition before the Supreme Court, and

whether it would continue to assert the deliberative process privilege. *Ibid.*

On February 2, President Biden issued an Executive Order that, among other things, directed DHS to review the Final Rule. *See* Exec. Order No. 14,012, *Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans*, 86 Fed. Reg. 8277 (Feb. 5, 2021). Section 1 of the Order declared:

> Consistent with our character as a Nation of opportunity and of welcome, it is essential to ensure that our laws and policies encourage full participation by immigrants, including refugees, in our civic life; that immigration processes and other benefits are delivered effectively and efficiently; and that the Federal Government eliminates sources of fear and other barriers that prevent immigrants from accessing government services available to them.

Id. at 8277. Section 4, titled "Immediate Review of Agency Actions on Public Charge Inadmissibility," directed the Secretary of DHS and other officials to "consider and evaluate the current effects of [the Final Rule] and the implications of [its] continued implementation in light of the policy set forth in [S]ection 1 of this order." *Id.* at 8278.

The next day, DHS notified the court that, in light of the Executive Order, it "intend[ed] to confer with [ICIRR] over next steps in this litigation," and that it "continue[d] to assert the deliberative process privilege over the documents submitted to the Court for in camera review." Doc. 241 at 2 & n.1. DHS sought an extension of

time to file its status report, *id.* at 2, which the court granted, Doc. 244. On February 19, in a joint status report, ICIRR objected to a stay of proceedings on its equal protection claim, arguing that it should be allowed to continue probing through discovery the motivations behind the Final Rule. Doc. 245 at 3. ICIRR and DHS agreed, however, to a two-week stay to "provide DHS and DOJ with additional time to assess how they wish to proceed." *Id.* at 3-4. DHS stated that "further developments during that time period may … moot [ICIRR's] equal protection claim." *Id.* at 4. In a March 5 joint status report, ICIRR objected to any further stay because DHS at that point was continuing to seek reversal of the judgment vacating the Rule under the APA. Doc. 247 at 2.

Four days later, on March 9, 2021, DHS moved to voluntarily dismiss its appeal of this court's judgment, and the Seventh Circuit promptly granted the motion and issued its mandate, thereby dissolving the stay it had imposed on this court's vacatur of the Rule. No. 20-3150 (7th Cir.), ECF Nos. 23-24 (Mar. 9, 2021). Also that day, the parties filed a joint stipulation dismissing DHS's petition for certiorari before the Supreme Court, and the petition was dismissed. Joint Stipulation to Dismiss, No. 20-450 (U.S. Mar. 9, 2021). In a public statement, DHS explained that during its review of the Rule pursuant to the Executive Order, it concluded that continuing to defend the Rule was "neither in the public interest nor an efficient use of government resources." Press Release, Dep't of Homeland Sec., DHS Statement on Litigation Related to the Public Charge Ground of Inadmissibility (Mar. 9, 2021) (reproduced at Doc. 252-

1). DHS also announced that, in compliance with this court's judgment, it would no longer enforce the Rule. Press Release, Dep't of Homeland Sec., DHS Secretary Statement on the 2019 Public Charge Rule (Mar. 9, 2021) (reproduced at Doc. 252-2).

DHS notified this court of those developments the next day. Doc. 252. On March 11, the parties filed a joint stipulation dismissing ICIRR's equal protection claim with prejudice under Rule 41(a)(1)(A)(ii). Doc. 253. Because "a Rule 41(a)(1)(A) notice of dismissal is self-executing and effective without further action from the court," *Kuznar v. Kuznar*, 775 F.3d 892, 896 (7th Cir. 2015), the court simply noted the stipulation and closed the case, Doc. 254.

On March 15, DHS promulgated a direct final rule, without notice and comment, striking the Final Rule's text from the Code of Federal Regulations. *See Inadmissibility on Public Charge Grounds; Implementation of Vacatur*, 86 Fed. Reg. 14,221, 14,227-29 (Mar. 15, 2021) ("Vacatur Rule"). The Vacatur Rule's preamble stated that "[b]ecause [the Vacatur Rule] simply implements the district court's vacatur of the [Final Rule] … DHS is not required to provide notice and comment or delay the effective date of [the Vacatur Rule]." *Id.* at 14,221. In support, DHS cited its authority under the APA to forgo notice and comment "when the agency for good cause finds … that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B).

Meanwhile, on March 11, two days after the Seventh Circuit dismissed DHS's appeal and issued the mandate and hours after the parties stipulated to the dismissal

with prejudice of ICIRR's equal protection claim, the States filed motions in the Seventh Circuit to recall the mandate, to reconsider its order dismissing the appeal, and for leave to intervene as defendants to support the lawfulness of the Final Rule. No. 20-3150 (7th Cir.), ECF No. 25. On March 15, the Seventh Circuit denied the motions in a one-sentence order. *Id.*, ECF No. 26.

On March 19, the States applied to the Supreme Court for a stay of this court's judgment pending their filing of a certiorari petition or, in the alternative, for summary reversal of the Seventh Circuit's denial of their motions. Application for Leave to Intervene and for a Stay of the Judgment Issued by the United States District Court for the Northern District of Illinois, *Texas v. Cook Cnty.*, No. 20A150 (U.S. filed Mar. 19, 2021). In support, the States argued that DHS had violated the APA by dismissing its appeal of this court's judgment and issuing the Vacatur Rule without engaging in notice-and-comment rulemaking, reasoning that "[b]ecause the Rule was made through formal notice-and-comment procedures, it can only be unmade the same way." *Id.* at 21. The Supreme Court denied the States' application without prejudice. *Texas v. Cook Cnty.*, __ S. Ct. __, 2021 WL 1602614 (U.S. Apr. 26, 2021) (mem.). The Court's order expressly noted the States' argument that DHS's actions violated the APA:

> In 2019, the Department of Homeland Security promulgated through notice and comment a rule defining the term "public charge." The District Court in this case vacated the rule nationwide, but that judgment was stayed pending DHS's appeal to the United States Court of Appeals for the

> Seventh Circuit. On March 9, 2021, following the change in presidential administration, DHS voluntarily dismissed that appeal, thereby dissolving the stay of the District Court's judgment. And on March 15, DHS relied on the District Court's now-effective judgment to remove the challenged rule from the Code of Federal Regulations without going through notice and comment rulemaking. Shortly after DHS had voluntarily dismissed its appeal, a group of States sought leave to intervene in the Court of Appeals. When that request was denied, the States filed an application for leave to intervene in this Court and for a stay of the District Court's judgment. The States argue that DHS has prevented enforcement of the rule while insulating the District Court's judgment from review. The States also contend that DHS has rescinded the rule without following the requirements of the Administrative Procedure Act. We deny the application, without prejudice to the States raising this and other arguments before the District Court, whether in a motion for intervention or otherwise. After the District Court considers any such motion, the States may seek review, if necessary, in the Court of Appeals, and in a renewed application in this Court.…

Id. at *1.

On May 12, the States appeared in this court, represented by the Attorney General of Texas. Doc. 255. They move to intervene under Rule 24 and for relief from judgment under Rule 60(b)(6). Docs. 256, 259. Plaintiffs

and DHS oppose the motions. Docs. 267, 269. In the course of litigating the motions, the States abandoned their argument that DHS violated the APA by dismissing its appeal and rescinding the Final Rule without undertaking notice-and-comment rulemaking. Doc. 282 at 33:3-6 ("THE COURT: … So, are you saying that the federal government violated the APA by doing what it did in this case? [STATES]: No, your Honor, but we do not think we have to prove … that.").

Discussion

I. Standing

Plaintiffs and DHS argue that the States lack Article III standing and therefore cannot intervene. Doc. 267 at 9-11; Doc. 269 at 8-9, 22-25; Doc. 279 at 1-4. The court addresses that argument first. S*ee Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016) (holding that, where the original defendant does not appeal but intervenors seek to appeal, a court "cannot decide the merits of this case unless the intervenor[s] … have standing"); *Bond v. Utreras*, 585 F.3d 1061, 1071 (7th Cir. 2009) ("[I]ntervenors must show standing if there is otherwise no live case or controversy in existence."). The States acknowledge that, although they seek to intervene as defendants, they "need to show … that at least one of them has standing" to pursue their motions. Doc. 278 at 3.

"[T]he 'irreducible constitutional minimum' of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial

decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citation omitted) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560). The States argue that the Final Rule's vacatur will increase the fiscal burden imposed on their budgets by Medicaid and other public benefits programs because more noncitizens will be allowed to remain in the United States, either as noncitizens or new citizens, and use public benefits while here. Doc. 257 at 8-9; Doc. 260 at 15; Doc. 278 at 4-5. Plaintiffs respond that the States' claimed injury is "an attenuated, speculative, non-obvious harm, which is insufficient to support standing." Doc. 267 at 10. DHS contends that the conjectural nature of the States' claimed injuries is demonstrated by evidence showing that the United States Citizenship and Immigration Services ("USCIS") denied only three status adjustment applications based solely on the Rule. Doc. 269 at 22-23 (citing Doc. 269-1 at ¶ 8).

DHS's evidence supports rather than negates the States' standing. A measurable financial cost, even a minor one, qualifies as an injury in fact under Article III. *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) ("For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'"). DHS admits that the Final Rule caused some status adjustment applications to be denied, and it is not speculative that at least one such applicant (now granted status because of the Rule's vacatur) will use public benefits in one of the

States. Indeed, the Rule's fiscal *costs* were precisely the injuries that conferred standing on Cook County to challenge it. Cook County argued that noncitizens would forgo Medicaid coverage out of fear of being deemed a public charge, ultimately requiring its public hospital to pay for uncompensated health care costs. Doc. 27 at 34-35. This court held that the County showed standing on that basis, 417 F. Supp. 3d at 1017, and the Seventh Circuit affirmed, 962 F.3d at 218-19. Cook County and the States point to different financial costs and benefits of the Rule, respectively, but both qualify as injuries in fact.

As for traceability and redressability, the Rule's vacatur causes the States' injuries, and restoring the Rule would redress them. DHS admits that, without the Rule, some number of additional noncitizens will become eligible for public benefits by achieving lawful permanent resident status. Doc. 269 at 22-23. A predictable consequence of that eligibility is that those noncitizens will obtain public benefits. *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019) (holding that there is traceability where "third parties will likely react in predictable ways" to a legal change). Indeed, the States' asserted causal link between denials of status under the Rule, on the one hand, and benefits to their treasuries, on the other, may be as direct as the County's asserted causal link between the Rule's chilling effect on noncitizens' willingness to seek public health benefits, on the one hand, and fiscal costs to the County, on the other.

The clear link between denials of status under the Rule and fiscal benefits to the States distinguishes this case from *California v. Texas*, 141 S. Ct. 2104 (2021).

There, the Supreme Court held that certain States challenging the constitutionality of the minimum essential coverage provision, 26 U.S.C. § 5000A(a), of the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), failed to show an injury traceable to that provision. As the Court explained, Congress had eliminated the penalty for non-compliance with the provision, 141 S. Ct at 2112, and "the States [had] not demonstrated that an unenforceable mandate will cause their residents to enroll in valuable benefits programs that they would otherwise forgo," *id.* at 2119. The Court thus concluded that the States lacked standing because the causal link between the challenged provision and any injury to them "rest[ed] on a 'highly attenuated chain of possibilities.'" *Ibid.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)). The link here is far more direct, warranting a different result.

II. Motion to Intervene

With standing secure, the court may consider the States' motion to intervene. The States seek intervention as a matter of right under Rule 24(a)(2) and by permission under Rule 24(b)(1)(B). Doc. 257 at 5. A motion under either subsection must be "timely." Fed. R. Civ. P. 24(a), (b)(1); *see NAACP v. New York*, 413 U.S. 345, 365 (1973) ("Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rule 24(a) and Rule 24(b), that the application must be 'timely.'"). Timeliness is "determined from all the circumstances," *NAACP*, 413 U.S. at 366, and that determination is "committed to the sound discretion of the district judge," *South v. Rowe*, 759 F.2d 610, 612 (7th Cir. 1985).

Four factors govern whether an intervention motion is timely: "(1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenor if the motion is denied; (4) any other unusual circumstances." *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 945, 949 (7th Cir. 2000); *see also Illinois v. City of Chicago*, 912 F.3d 979, 984 (7th Cir. 2019) (same). That four-part standard, first articulated by the Fifth Circuit in *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-66 (5th Cir. 1977), was adopted by the Seventh Circuit in *United States v. Kemper Money Market Fund, Inc.*, 704 F.2d 389, 391 (7th Cir. 1983). Many other circuits have adopted the *Stallworth* standard. *See Culbreath v. Dukakis*, 630 F.2d 15, 20 (1st Cir. 1980); *United States v. New York*, 820 F.2d 554, 557 (2d Cir. 1987); *Mich. Ass'n for Retarded Citizens v. Smith*, 657 F.2d 102, 105 (6th Cir. 1981); *Sanguine, Ltd. v. Dep't of Interior*, 736 F.2d 1416, 1418 (10th Cir. 1984); *United States v. Jefferson Cnty.*, 720 F.2d 1511, 1516 (11th Cir. 1983). The standards articulated by other circuits employ slightly different language, but like *Stallworth*, they focus attention on the length of the proposed intervenor's delay in seeking intervention, the prejudice to existing parties of the delay, and any mitigating reasons for the delay. *See Wallach v. Eaton Corp.*, 837 F.3d 356, 371 (3d Cir. 2016); *Alt v. EPA*, 758 F.3d 588, 591 (4th Cir. 2014); *In re Wholesale Grocery Prods. Antitrust Litig.*, 849 F.3d 761, 767 (8th Cir. 2017); *Smith v. L.A. Unified Sch. Dist.*, 830 F.3d 843, 854 (9th Cir. 2016); *Amador Cnty. v. Dep't of Interior*, 772 F.3d 901, 903 (D.C. Cir. 2014). The result

here, denial of intervention on timeliness grounds, would be the same regardless of which circuit's standard is used.

A. Length of the Delay

The first factor directs attention to the delay between the time the States should have known of their interest in this case and the time they moved to intervene. *See Sokaogon Chippewa*, 214 F.3d at 949. This factor requires a would-be intervenor to "move promptly to intervene as soon as it *knows or has reason to know* that its interests *might be adversely affected* by the outcome of the litigation." *Heartwood, Inc. v. U.S. Forest Serv.*, 316 F.3d 694, 701 (7th Cir. 2003) (emphases added).

The emphasized language conveys two important points. First, the phrase "knows or has reason to know" imposes an objective "reasonableness standard," asking whether potential intervenors were "reasonably diligent in learning of a suit." *Nissei Sangyo Am., Ltd. v. United States*, 31 F.3d 435, 438 (7th Cir. 1994). This means that potential intervenors cannot claim subjective ignorance of a case's effect on their interests if ordinary diligence would have alerted them of the need to intervene. *See Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 798 (7th Cir. 2013) (denying intervention where the potential intervenor "could have missed the implications for his [interests] only if he was willfully blind to them"). Second, the phrase "might be adversely affected"—and, in particular, the word "might"—requires prompt intervention when the reasonable possibility, not just a certainty, of an adverse effect on the proposed intervenor's interests arises. The Seventh Circuit has emphasized that point time and again. *See*

Illinois v. Chicago, 912 F.3d at 985 ("[W]e measure from when the applicant has reason to know its interests *might* be adversely affected, not from when it knows for certain that they will be.") (emphasis in original); *Heartwood*, 316 F.3d at 701 ("A prospective intervenor must move promptly to intervene as soon as it knows or has reason to know that its interests might be adversely affected by the outcome of the litigation."); *Sokaogon Chippewa*, 214 F.3d at 949 ("As soon as a prospective intervenor knows or has reason to know that his interests might be adversely affected by the outcome of the litigation he must move promptly to intervene.") (citation omitted); *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995) ("[W]e determine timeliness from the time the potential intervenors learn that their interest might be impaired."); *City of Bloomington v. Westinghouse Elec. Corp.*, 824 F.2d 531, 535 (7th Cir. 1987) (holding that a motion to intervene was untimely because the movant "had knowledge that its interests could be affected more than 11 months prior to the time it sought intervention").

As noted, the States' claimed interest in this litigation is that the Final Rule reduced their spending on public benefits programs and that the Rule's demise will increase that spending. Doc. 257 at 8-9. The States thus had reason to know that their interests "might be adversely affected by the outcome of the litigation," *Heartwood*, 316 F.3d at 701, from the moment this suit was filed in September 2019. That said, the outset of this suit almost certainly would have been an *in*appropriate time for the States to seek intervention, as there was no prospect at that point, or for the first ten-plus months of

2020, that DHS would cease defending the Rule. *See Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019) ("Where the prospective intervenor and the named party have the same goal … there is a rebuttable presumption of adequate representation that requires a showing of some conflict to warrant intervention.") (internal quotation marks omitted). The pertinent question, then, concerns when the States had reason to know that DHS might abandon its defense of the Rule and thus no longer adequately represent their interests. *See Illinois v. Chicago*, 912 F.3d at 985 ("[I]ntervention may be timely where the movant promptly seeks intervention upon learning that a party is not representing its interests.").

In December 2019, during the presidential campaign, then-candidate Joe Biden publicly committed that his administration, "[i]n the first 100 days," would "[r]everse [the] public charge rule, which runs counter to our values as Americans and the history of our nation." The Biden Plan for Securing Our Values as a Nation of Immigrants (Dec. 12, 2019), https://web.archive.org/web/20191212040308/https://joebiden.com/immigration. That promise remained on candidate Biden's website throughout the campaign. *See* The Biden Plan for Securing Our Values as a Nation of Immigrants (Nov. 3, 2020), https://web.archive.org/web/20201103023048/https://joebiden.com/immigration. Plaintiffs argue that candidate Biden's promise put the States on clear notice that, should he be elected, they could no longer rely on DHS to defend the Rule. Doc. 267 at 12-13.

Plaintiffs garner support for their position from an unlikely ally: the State of Texas. In June 2020, a coalition

of States led by Pennsylvania filed suit to challenge a certain Department of Education ("DOE") regulation. *Pennsylvania v. DeVos*, No. 20-cv-1468 (D.D.C. filed June 4, 2020). On January 19, 2021, the day before Inauguration Day, Texas moved to intervene to defend the DOE regulation. *Id.*, ECF No. 130 (reproduced at Doc. 267-2). In support, Texas cited President-elect Biden's condemnation of the DOE regulation on his campaign website—the same website that condemned the Final Rule—and another campaign statement expressing opposition to the regulation. Doc. 267-2 at 10, 12, 21 & n.8. Texas argued that, given the President-elect's views, it could "no longer rely on [DOE] to adequately represent its interests in defending [the DOE regulation]," and it predicted that DOE's position would shift "when the President-elect is inaugurated into office." *Id.* at 10-11. Texas pointed to candidate Biden's statements as "evidence of an unavoidable, fundamental divide between Texas and [DOE] under the President-elect's incoming administration." *Id.* at 21. Texas added that its motion was "timely because it was filed close in time to the change in circumstances requiring intervention: President-elect Biden's inauguration on January 20." *Id.* at 13. As Texas ably summed up the situation it faced and the reasons its motion was timely:

> During the [current administration], Texas had no reason to intervene. Like Texas, the [current] administration defended the [challenged DOE regulation] … . The President-elect, however, has expressed open and adamant hostility to the [regulation], necessitating Texas' intervention if it is to protect its interests. [DOE] will cease

> adequately representing Texas' interests only after January 20, 2021 when the new administration takes over and begins implementing its own policies. This is not an occasion where a non-party sat on its rights. Texas has actively monitored the present action from the beginning and exhibited proper diligence in bringing its motion.

Id. at 14 (citations omitted).

That reasoning was perfectly sensible: Under the administration that soon would leave office, Texas could count on DOE to defend the challenged regulation; candidate Biden expressed strong opposition to the regulation during the campaign; so, because candidate Biden had won the election and soon would become President, Texas must be allowed to intervene to ensure the regulation's continued defense. Texas faced the same situation here: From the inception of this suit through much of 2020, Texas could count on DHS to continue to defend the Rule; candidate Biden expressed strong opposition to the Rule during the campaign, promising to "[r]everse" it "[i]n the first 100 days" of his administration; so, because candidate Biden had won the election and soon would become President, Texas needed to take action to ensure the Rule's continued defense, both in this court (as to ICIRR's equal protection claim) and in the Seventh Circuit (as to the appeal of this court's judgment).

But Texas did not follow here the course it took in *Pennsylvania v. DeVos*, and the excuses it offers for not doing so are diametrically opposed to its submissions in that case. Here, Texas argues that it would be "absurd"

to "look back to … statements made by then-candidate Biden" to evaluate its interest in intervening and the timeliness of its intervention motion. Doc. 278 at 8. And here, Texas argues that the States could not possibly have known of the need to intervene until March 9, when DHS dismissed its appeal of this court's judgment. Doc. 257 at 7; Doc. 278 at 8-9. Those arguments cannot be reconciled, on any level, with the position it took in *Pennsylvania v. DeVos*.

At the motion hearing, this court engaged with Texas about the conflict between its position in *Pennsylvania v. DeVos* and its position here. Doc. 282 at 46:4-52:9. In an effort to justify not pursuing here the course it took in *Pennsylvania v. DeVos*, Texas stated that it had been "denied relief in that case." *Id.* at 47:5-6. In fact, the court in that case granted Texas's motion to intervene. *See Pennsylvania v. DeVos*, No. 20-cv-1468 (D.D.C. Feb. 4, 2021). After this court reminded Texas of that fact, Texas observed that it had been denied intervention in a different case challenging the same DOE regulation, *Victim Rights Law Center v. DeVos*, No. 20-cv-11104 (D. Mass filed June 10, 2020). Doc. 282 at 50:1-5. But that ruling is unsurprising, for Texas moved to intervene in *Victim Rights* on April 30, 2021, months after it had moved in *Pennsylvania v. DeVos*. *See* Texas' Motion to Intervene as Defendant, *Victim Rights*, ECF No. 164. And, indeed, Texas's motion in *Victim Rights* was denied as untimely. *Id.*, ECF No. 170 (May 12, 2021). Finally, when this court asked Texas whether it would "stand by all the arguments that it made in its intervention motion in" *Pennsylvania v. DeVos*, Texas responded that it was

"not prepared to say whether we stand behind them or not." Doc. 282 at 51:19-52:2.

Granted, Texas does attempt in a footnote to distinguish the situation it faced in *Pennsylvania v. DeVos* from the situation it (and the other States) faced here, observing that this case had proceeded to final judgment when they sought intervention while *Pennsylvania v. DeVos* was at an earlier stage when Texas sought intervention. Doc. 278 at 9 n.2. But that distinction cuts against Texas, not in its favor, as the judgment vacating the Final Rule made prompt action to intervene even more crucial here than it was in *Pennsylvania v. DeVos*. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-96 (1977) (holding that the "critical inquiry" on a motion for "post-judgment intervention for the purpose of appeal" is "whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment"); *Bond*, 585 F.3d at 1071 ("[I]ntervention postjudgment—which necessarily disturbs the final adjudication of the parties' rights—should generally be disfavored.").

Accordingly, as it pertains to timeliness of intervention, Texas was right in *Pennsylvania v. DeVos* and is wrong here. Under settled precedent, Texas and the other States were required to intervene when a reasonable possibility arose of an adverse effect on their interests. *See Illinois v. Chicago*, 912 F.3d at 985; *Heartwood*, 316 F.3d at 701. It became not just a reasonable possibility, but likely, that the States' and DHS's respective interests in the Final Rule would diverge—and that DHS would cease its defense of the Rule—when it became likely that candidate Biden would

become President Biden. That puts front and center the question of when after the election it became reasonably possible, if not likely, that there would be a change in presidential administration.

The best answer to that question is November 7, 2020, a few days after the election, when all creditable news organizations declared candidate Biden the winner. *See, e.g.*, Jonathan Lemire *et al.*, *Biden defeats Trump for White House*, Associated Press (Nov. 7, 2020), https://apnews.com/article/joe-biden-wins-white-house-ap-fd58df73aa677acb74fce2a69adb71f9; Paul Steinhauser *et al.*, *Biden wins presidency*, Fox News (Nov. 7, 2020), https://www.foxnews.com/politics/biden-wins-presidency-trump-fox-news-projects. At the motion hearing, Texas resisted that proposition, stating that "there was significant amounts of litigation" to come after November 7. Doc. 282 at 49:19-24.

True enough, several dozen lawsuits concerning the presidential election were brought in state and federal courts across the country, among the more prominent being Texas's effort to pursue an original action in the Supreme Court against Georgia, Michigan, Pennsylvania, and Wisconsin. *See* Motion for Leave to File Bill of Complaint, *Texas v. Pennsylvania*, No. 22O155 (U.S. filed Dec. 7, 2020). Regardless of whether Texas knew or should have known with certainty the fate that would befall its suit and the others, Texas surely knew or should have known from the exceptionally able lawyers on its Attorney General's staff, most particularly its then-Solicitor General and his staff, that it was reasonably possible, if not likely, that the suits would fail and that candidate Biden would become President Biden.

See, e.g., *Trump v. Wis. Elections Comm'n*, 506 F. Supp. 3d 620 (E.D. Wis. 2020), *aff'd*, 983 F.3d 919 (7th Cir. 2020); *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899 (M.D. Pa. 2020), *aff'd sub nom. Donald J. Trump for President, Inc. v. Sec'y of Penn.*, 830 F. App'x 377 (3d Cir. 2020). At the very latest, Texas knew or should have known that fact by December 11, 2020, when the Supreme Court rejected its suit in a one-paragraph order. *See Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (mem.). Texas acknowledged as much at the motion hearing. Doc. 282 at 49:23-50:1 ("Your Honor, there was significant amounts of litigation, but yes, I will generally agree that by December, there was certainty about that candidate Biden would be elected.").

By November 7, 2020, the States thus knew or should have known of the need to intervene in this case, based on the impending inauguration of a presidential candidate who was widely acknowledged to have won the election and who had promised to reverse the Final Rule in the first 100 days of his administration. At the very latest, the States knew or should have known by December 11, 2020, of their need to intervene. And had the States intervened at any point during the several weeks preceding January 4, 2021, they could have joined this suit in time to file a timely notice of appeal of the judgment vacating the Rule, without having to seek intervention directly in the Seventh Circuit. *See* Fed. R. App. P. 4(a)(1)(B) ("The notice of appeal may be filed by any party within 60 days after the entry of the judgment or order appealed from if one of the parties is … a United States agency [or] a United States officer or employee sued in an official capacity ….")**;** Fed. R. App. P. 26(a)

(rules for computing time); *Anderson v. Dep't of Agric.*, 604 F. App'x 513, 516-17 (7th Cir. 2015) (holding that a private litigant "had 60 days to file his notice [of appeal after the district court entered judgment] because a United States agency is a party") (citing Fed. R. App. P. 4(a)(1)(B)); *Satkar Hosp., Inc. v. Fox Television Holdings*, 767 F.3d 701, 706 (7th Cir. 2014) (holding that the deadlines set by Appellate Rule 4(a)(1) apply to Civil Rule 54(b) judgments).

The discussion could stop there, but it bears mention that the Executive Order issued by President Biden on February 2, 2021 confirmed (or should have confirmed) for the States their need to quickly intervene. As noted, the Executive Order directed DHS to review the Final Rule and condemned its basic premises in clear terms. 86 Fed. Reg. at 8277 (declaring that immigrants should be encouraged to "access[] government services available to them"); *id.* at 8278 (directing DHS to review the Rule in light of that policy). On February 3, DHS notified this court of the Executive Order and that it might influence the "next steps in this litigation." Doc. 241 at 2. Any reasonable observer would have known at that point that intervention had become extremely urgent for anyone who wished to ensure the Rule's continued defense here and in the Seventh Circuit. Had the States intervened in this court in February, they would have been unable to file a timely notice of appeal of the judgment vacating the Rule, but they would have had a much stronger claim to intervene in the Seventh Circuit, well before DHS dismissed the appeal and the Seventh Circuit issued the mandate. *See Sierra Club, Inc. v. EPA*, 358 F.3d 516,

517-18 (7th Cir. 2004) (applying Civil Rule 24 in deciding whether to allow a non-party to intervene on appeal).

Yet the States did not move to intervene until March 11, 2021—in the Seventh Circuit, not here. No. 20-3150 (7th Cir.), ECF No. 25. That was over four months past November 7, exactly three months past December 11, and over five weeks past February 2, in a case where judgment had already been entered.

There is no simple formula for determining how long a delay is too long. In *NAACP v. New York*, the Supreme Court held that a 17-day delay—from March 21, 1972, when the proposed intervenors learned of the suit, to April 7, when they moved to intervene—rendered untimely their intervention motion. 413 U.S. at 360-61, 367. The Court reasoned that the plaintiff's summary judgment motion had been pending on March 21, and that the defendant had consented to the entry of judgment before April 7. *Id.* at 360, 367-68. In such circumstances, the Court explained, the potential intervenors needed "to take immediate affirmative steps to protect their interests," *id.* at 367, but failed to do so. That said, the Seventh Circuit has held that a three-month delay did not render a motion untimely where the intervenor was from Hong Kong and had to retain a United States lawyer before it could move to intervene. *See Nissei*, 31 F.3d at 439. That seventeen days could be too long in some circumstances, and three months timely in others, reflects that "intervention cases are highly fact specific and tend to resist comparison to prior cases," with the ultimate determination "essentially one of reasonableness." *ABC/York-Estes Corp.*, 64 F.3d at 321.

The States' delay in seeking intervention was plainly unreasonable under the circumstances of this case. This suit concerned a major immigration regulation and was subject to significant media and other attention; indeed, the States do not dispute that they were aware of their interests in the Final Rule during "the previous Administration." Doc. 257 at 7; *see NAACP v. New York*, 413 U.S. at 366 (observing that the potential intervenors "knew or should have known of the pendency" of the suit in light of news coverage and "public comment by community leaders"). Likewise, the events that imperiled the States' interests were common knowledge: then-candidate Biden's criticism of and promise to jettison the Rule, the wide recognition of his success in the election and the failure of Texas's suit in the Supreme Court, and (placing a cherry atop an already iced cake) President Biden's issuance of the Executive Order. The States were perfectly capable of seeking intervention in reaction to those events, as demonstrated by the fact that Texas did so in *Pennsylvania v. DeVos*. Given all this, and with a judgment vacating the Rule already having been entered, four months, three months, or even five weeks was too long for the States to wait to seek intervention.

Opposing this conclusion, the States rely heavily on *Flying J, Inc. v. Van Hollen*, 578 F.3d 569 (7th Cir. 2009), which held that a motion to intervene filed less than thirty days after the entry of judgment, during the window to file a notice of appeal, was timely. *Id.* at 570-72; *see* Doc. 257 at 6-7; Doc. 278 at 9-10. *Flying J* has some surface similarities to this case: The district court invalidated a Wisconsin statute, the Attorney General of

Wisconsin declined to appeal, and a trade association sought to intervene so that it could pursue an appeal in the Attorney General's stead. 578 F.3d at 570-71. *Flying J* illustrates the principle, disputed by no party here, that an intervention motion can be timely even after entry of judgment. *See United Airlines*, 432 U.S. at 395-96 (holding that prompt intervention after judgment can be timely).

Flying J is easily distinguished from this case, however, because the trade association there had no prior notice that the Attorney General of Wisconsin planned to forgo an appeal; as the Seventh Circuit observed, "there was *nothing* to indicate that the attorney general was planning to throw the case—until he did so by failing to appeal." 578 F.3d at 572 (emphasis added). The trade association in *Flying J* thus took prompt action at the earliest possible moment. Here, by contrast, there was ample basis for months before March 9, when DHS dismissed its appeal, to expect that DHS might and likely would cease its defense of the Final Rule. The States failed to act on that knowledge with the promptness required by Rule 24.

Finally, the States argue that they reasonably believed that DHS would seek to reverse the Final Rule through notice-and-comment rulemaking, not by dismissing its appeal, and therefore that they understandably did not realize until March 9 that intervention was necessary. Doc. 278 at 8-9. This argument sounds in a different register, as it concedes that President-elect Biden, upon taking office, would fulfill his promise to jettison the Rule, and focuses solely on the mechanism by which he would do so. To support

their point, the States rely exclusively on a dissent from the Ninth Circuit's denial of a motion to intervene that they (except for Kentucky and Ohio) filed in consolidated appeals challenging preliminary injunctions entered by district courts in California and Washington against enforcing the Rule. *City & Cnty. of San Francisco v. USCIS*, 992 F.3d 742, 743-55 (9th Cir. 2021) (VanDyke, J., dissenting). Specifically, the dissent asserted that DHS's dismissal of its appeal of this court's judgment was "quite extraordinary," allowing DHS "to dodge the pesky requirements of the APA" and "deliberately evad[e] the administrative process," when it should have pursued the "traditional route" of "asking the courts to hold the public charge cases in abeyance … and then promulgating a new rule through notice and comment." *Id.* at 743, 749, 751. The dissent further asserted that "every administration before" "the current administration" would have followed that abeyance and notice-and-comment approach. *Id.* at 754.

The dissent did not favor those assertions with citation to any legal authority. In fact, although the States argued in March to the Supreme Court that "[b]ecause the Rule was made through formal notice-and-comment procedures, it can only be unmade the same way," Application for Leave to Intervene and for a Stay, at 21, *Texas v. Cook Cnty.*, No. 20A150 (U.S.), the States now admit that the APA does *not* prohibit an agency from taking the course that DHS took here, Doc. 282 at 33:3-6 ("THE COURT: … So, are you saying that the federal government violated the APA by doing what it did in this case? [STATES]: No, your Honor, but we do not think we have to prove … that."). Moreover, as DHS

observes, Doc. 269 at 19; Doc. 282 at 58:22-59:8, federal agencies regularly choose to forego appeal, or to dismiss their appeals, of district court judgments that invalidate regulations. *See*, *e.g.*, *Ctr. for Sci. in the Pub. Int. v. Perdue*, 438 F. Supp. 3d 546, 572 (D. Md. 2020) ("*CSPI*") (invalidating a Department of Agriculture rule) (no appeal taken); *Burt Lake Band of Ottawa & Chippewa Indians v. Bernhardt*, __ F. Supp. 3d __, 2020 WL 1451566, at *12 (D.D.C. Mar. 25, 2020) (remanding a Department of Interior rulemaking to the agency), *appeal dismissed*, 2020 WL 3635122 (D.C. Cir. June 29, 2020); *Nat'l Educ. Ass'n v. DeVos*, 379 F. Supp. 3d 1001, 1033 (N.D. Cal. 2019) (vacating a DOE rule), *appeal dismissed*, 2019 WL 4656199 (9th Cir. Aug. 13, 2019); *Council of Parent Att'ys & Advocs., Inc. v. DeVos*, 365 F. Supp. 3d 28, 56 (D.D.C. 2019) (vacating a DOE rule), *appeal dismissed*, 2019 WL 4565514 (D.C. Cir. Sept. 18, 2019); *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 10 (D.D.C. 2020) (setting aside two USCIS directives), *judgment entered*, 2020 WL 1905063 (D.D.C. Apr. 16, 2020), *appeal dismissed*, 2020 WL 5358686 (D.C. Cir. Aug. 25, 2020). This should not be news to the States, as five of them (including Texas) were *amici curiae* in one of those cases. *See CSPI v. Perdue*, No. 19-cv-1004 (D. Md.), ECF Nos. 40 (Sept. 6, 2019), 58 (Apr. 13, 2020).

Thus, it was far from unprecedented, and in fact was entirely foreseeable, particularly given candidate Biden's promise to reverse the Final Rule during the first 100 days of his administration, that DHS would dismiss its appeal of the judgment vacating the Rule. The States were required to react promptly to that reasonable possibility, even if they could not predict with

certainty that DHS would take that course or precisely when. *See Illinois v. Chicago*, 912 F.3d at 985; *Heartwood*, 316 F.3d at 701. It follows that the first factor of the timeliness analysis, length of the delay, weighs heavily against the States.

B. Prejudice to Plaintiffs and DHS of the States' Delay

The second timeliness factor is the prejudice caused to the original parties by the potential intervenor's delay in seeking intervention. *See Sokaogon Chippewa*, 214 F.3d at 949. As the Seventh Circuit has observed, "'the mere lapse of time by itself does not make an application untimely,' [but] instead the [district court] 'must weigh the lapse of time in the light of all the circumstances of the case.'" *Crowe ex rel. Crowe v. Zeigler Coal Co.*, 646 F.3d 435, 444 (7th Cir. 2011) (quoting 7C Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 1916 (3d ed. 2010)).

One type of prejudice that Plaintiffs identify concerns the harms the Final Rule itself inflicted on them and the risk of confusion among the immigrants that ICIRR serves should the Rule be reinstated. Doc. 267 at 16-18. Those are not relevant considerations under Rule 24. As the Fifth Circuit explained in *Stallworth*, "the prejudice to the original parties to the litigation that is relevant to the question of timeliness is only that prejudice which would result from the would-be intervenor's failure to request intervention as soon as he knew or reasonably should have known about his interest in the action." 558 F.2d at 265; *see also Lopez-Aguilar v. Marion Cnty. Sheriff's Dep't*, 924 F.3d 375, 390 (7th Cir. 2019) (holding that no prejudice arose from a delay in filing the motion

to intervene where "the burden to the parties of reopening the litigation … would have been the same" no matter the motion's timing). The effects of the Rule, should it be reinstated, would flow not from the States' delay in seeking intervention, but from the mere fact of intervention, which does not factor in the timeliness inquiry.

That said, Plaintiffs and DHS did incur reliance costs due to the States' delay that would not have accrued had the States timely sought intervention. First, DHS expended resources reformulating national policy to reflect the new administration's views long after the States had notice of the need to intervene. The States had such notice by November 7, 2020, when the presidential candidate who had promised to jettison the Final Rule was widely recognized as the winner—and surely by December 11, 2020, when the Supreme Court rejected Texas's suit—well before the time to appeal the judgment ran on January 4, 2021. And then, shortly after he took office, President Biden directed DHS in the Executive Order to re-examine the Rule. 86 Fed. Reg. at 8278. As described by the parties' February 2021 status reports, DHS had undertaken by that time a process to evaluate its next steps regarding the Rule and this litigation—a process clearly premised on all the circumstances, including that no other party had appealed or taken any steps to intervene to defend the Rule. Doc. 241 at 2 (Feb. 3, 2021) (explaining that DHS had been ordered "to review agency actions related to implementation of the public charge ground of inadmissibility" and that it would "confer with [ICIRR] over next steps in this litigation"); Doc. 245 at 3 (Feb. 19,

2021) ("DHS is currently reviewing the … Rule, and the Department of Justice ('DOJ') is likewise assessing how to proceed with its appeals in relevant litigations in light of the aforementioned Executive Order."). DHS's process culminated in a considered decision in March 2021 that continued defense of the Rule was "neither in the public interest nor an efficient use of government resources." Doc. 252-1 at 2.

Federal agencies like DHS have a vital interest in conserving government resources, including by conducting litigation efficiently. *See Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009) ("Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government."); *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (noting "the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources"). Allowing the States to intervene at this point would squander the resources that DHS invested, during the critical period when the States knew of their need to seek intervention yet did not do so, in deciding how to proceed with the Final Rule and this case. If the States had sought intervention before the time to appeal elapsed, or at least immediately after the Executive Order issued, DHS could have taken the States' involvement into account in its deliberations as to the best and most efficient course.

The States' delay also impacted DHS's decision to cease enforcing the Final Rule on March 9, when it dismissed its appeal, and all the reliance costs thereby

accrued. When this court's judgment went into effect that day with the lifting of the Seventh Circuit's stay, DHS announced that it was no longer enforcing the Rule in accordance with the judgment, Doc. 252-2, and days later the Vacatur Rule formalized that change, 86 Fed. Reg. 14,221. Had the States moved to intervene in time to appeal this court's judgment—or had they done so after January 4, either here, in the Seventh Circuit, or both—DHS would have known of the possible need to preserve the Rule pending further review and might have taken a different approach. Allowing intervention now could "require DHS to again shift [the] public charge guidance" it issued in light of the Rule's vacatur, Doc. 269 at 28, a back-and-forth that could have been avoided if the States had acted promptly. Agencies and the public have an interest in the consistent and predictable implementation of federal policy. *See Wis. Elec. Power Co. v. Costle*, 715 F.2d 323, 327 (7th Cir. 1983) (holding that "the benefits of a stable, consistent administrative policy" counseled against considering post-decision information on judicial review of agency action); *Reyes-Arias v. INS*, 866 F.2d 500, 503 (D.C. Cir. 1989) (observing that "agencies in the modern administrative state" have "a keen interest in securing the orderly disposition of the numerous claims" under their purview).

A third type of reliance cost arises from the *de facto* settlement that Plaintiffs and DHS reached during the period of the States' delay. From July 2020 through the stipulated dismissal in March 2021, the parties were engaged in discovery disputes concerning ICIRR's equal protection claim. In July 2020, DHS opposed including

any White House officials as document custodians, Doc. 181 at 6, 8-9, and the court resolved that dispute in part in ICIRR's favor, Doc. 190 at 2-3. The court then ordered the parties to meet and confer about deponents and the timing of depositions. Doc. 192. The parties also disputed whether DHS could withhold certain documents from production under the deliberative process privilege, a disagreement that persisted even after the Executive Order issued in February 2021. Docs. 214, 232, 236, 238, 245, 247; *see* Doc. 241 at 2 n.1 (confirming that DHS "will currently continue to assert the deliberative process privilege"). After DHS dismissed its appeal, ICIRR agreed to dismiss its equal protection claim, Doc. 253, thereby eliminating the risks to DHS that it would lose the privilege battle and that former high-ranking officials would be deposed. Doc. 269 at 14 (DHS observing that discovery was "likely [to] include depositions of former, high ranking Government officials").

Although not a formal settlement, that series of events plainly reflected a negotiated compromise to end the litigation. If the States were allowed to intervene, ICIRR would move to revive its equal protection claim, Doc. 282 at 17:20-18:3, a motion that likely would be granted, subjecting DHS once again to the risk of losing the privilege battles and having to present former administration officials for deposition. Unraveling the parties' compromise by allowing the States to intervene would thus greatly prejudice the parties, particularly DHS, providing further reason to deny intervention. *See Sokaogon Chippewa*, 214 F.3d at 950 ("To allow a tardy intervenor to block the settlement agreement after all

that effort would result in the parties' combined efforts being wasted completely"); *Ragsdale v. Turnock*, 941 F.2d 501, 504 (7th Cir. 1991) ("Once parties have invested time and effort into settling a case it would be prejudicial to allow intervention."); *Bloomington*, 824 F.2d at 535 ("[I]ntervention at this time would render worthless all of the parties' painstaking negotiations because negotiations would have to begin again and [the potential intervenor] would have to agree to any proposed consent decree.").

C. Prejudice to the States of Denying Intervention

The States argue that denying intervention would prejudice them for the very reasons they support the Final Rule: They spend "billions of dollars on Medicaid services and other public benefits," and "the Rule would have helped to reduce such expenditures." Doc. 257 at 7-8. This argument is unpersuasive because the States have a readily available path to demand that DHS re-promulgate the Rule: a petition for rulemaking. *See* 5 U.S.C. § 553(e) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."). The States may submit a petition at any time, and if DHS denies it, the denial would be reviewable in court. *See Auer v. Robbins*, 519 U.S. 452, 459 (1997) ("The proper procedure … is set forth explicitly in the APA: a petition to the agency for rulemaking, § 553(e), denial of which must be justified by a statement of reasons, § 555(e), and can be appealed to the courts, §§ 702, 706.").

It follows that the marginal prejudice to the States of denying intervention here is not the loss of the Final

Rule itself, but rather the shift in the procedural posture of their effort to obtain the Rule's reinstatement. If allowed to intervene as defendants in this court and appellants in the Seventh Circuit, the States would enjoy the benefit of defending an already-promulgated regulation, which under current precedent receives deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In contrast, a potential future decision by DHS to deny a petition by the States to re-promulgate the Rule would be reviewed "under the deferential arbitrary-and-capricious standard." *Hadson Gas Sys., Inc. v. FERC*, 75 F.3d 680, 684 (D.C. Cir. 1996).

The States therefore must be understood as claiming an interest in preserving for themselves a favorable legal standard, and thus in improving their chances of achieving the Rule's reinstatement. Different legal standards of course can affect litigation. But it would be odd for a court to apply the label of "prejudice" to the petition right that Congress conferred in 5 U.S.C. § 553(e), or to recognize a cognizable interest in application of the *Chevron* doctrine. Litigants have no right to the best possible forum in which to present their claims. *Cf. Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 821 (7th Cir. 2015) (rejecting a plaintiff's asserted "right to forum shop").

The D.C. Circuit's decision in *Hadson Gas* illustrates the point. A gas company argued that FERC had to undertake notice-and-comment procedures before vacating a certain regulation. 75 F.3d at 681. There was no question that FERC had the legal authority to forgo notice and comment, as Congress had repealed the

regulation's enabling statute. *Id.* at 683. But the company argued that certain collateral consequences of the regulation's vacatur made notice-and-comment procedures necessary. *Id.* at 684. The D.C. Circuit held that the company's remedy lay instead in a petition under § 553(e), even though judicial review of any FERC denial of such a petition would be deferential. *Ibid.*

The situation here is analogous, although no statutory amendment is involved. The States no longer argue that the APA prohibited DHS from dismissing its appeal and implementing the Vacatur Rule without undertaking notice-and-comment procedures, but they protest the effects of DHS's actions on them. Doc. 282 at 33:10-15 ("I don't think it would be technically correct to say that [DHS is] violating the APA. What I would say, however, is that their actions have impinged upon the procedural rights that we would have under the APA ….''). But the APA already provides a route to vindicate the States' rights—a petition for rulemaking under § 553(e)—and it does not prejudice the States to require them to follow that route.

The States suggested at one point that they had a procedural right under the APA for DHS to proceed via notice-and-comment rulemaking before vacating the Final Rule. Doc. 257 at 9; Doc. 278 at 5-6, 11-12; Doc. 260 at 16. That argument is now waived because, as noted, when asked whether DHS violated the APA by dismissing its appeal, the States conceded that it had not. Doc. 282 at 33:3-15. In any event, the Vacatur Rule was itself premised on DHS's view that it was excused from notice-and-comment procedures by this court's judgment. *See* 86 Fed. Reg. at 14,221 (citing 5 U.S.C.

§ 553(b)(B)). The States easily could have presented their APA argument through a court challenge to the Vacatur Rule. *See* 5 U.S.C. § 702 (providing for judicial review of all "agency action"); *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 92-95 (D.C. Cir. 2012) (vacating an interim rule promulgated without notice-and-comment procedures, reasoning that § 553(b)(B) did not apply). With that avenue having been available, no prejudice can be said to result from denying the States the ability to intervene and make the same argument here.

Finally, the States argue that this court's judgment vacating the Final Rule will cast a "shadow" over future rulemakings concerning the INA's public charge provision and, in fact, will "preclude the next Administration from re-adopting the Rule *even with* notice-and-comment rulemaking." Doc. 260 at 16. To support their argument, the States rely on assertions in the above-referenced Ninth Circuit dissent that DHS's dismissal of its appeal of the judgment would "ensur[e] not only that the [R]ule was gone faster than toilet paper in a pandemic, but [also] that it could effectively never, ever be resurrected, even by a future administration." *San Francisco*, 992 F.3d at 743 (VanDyke, J., dissenting); *see also id.* at 749 (asserting that DHS's dismissal of its appeal "ensure[s] that it will be very difficult for any future administration to promulgate another rule like the 2019 rule"); *id.* at 753 ("They really have smashed Humpty Dumpty into pieces spread across the nation, and there isn't a single court (or future administration) that can do much about it."). As with its assertion that APA notice-and-comment rulemaking is required when an agency decides not to pursue an appeal

of a judgment vacating a regulation, the dissent did not favor its assertions with any citation to legal authority—unless overwrought metaphors invoking nursery rhymes and global pandemics can now be said to qualify as legal authority.

In an effort to fill the gap left by the dissent, the States cite *National Cable and Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 982-83 (2005). Doc. 260 at 16. The States do not explain how *Brand X* justifies their fears about the supposed shadow cast by this court's judgment on future rulemakings, but the portion of the opinion they cite reads:

> The better rule is to hold judicial interpretations [of the statute underlying the challenged regulation] contained in precedents to the same demanding *Chevron* step one standard that applies if the court is reviewing the agency's construction on a blank slate: Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gaps for the agency to fill, displaces a conflicting agency construction.

545 U.S. at 982-83. *Brand X* does not apply here for two independent reasons. First, a district court decision does not qualify as precedent. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case."); *Matheny v. United States*, 469 F.3d 1093, 1097 (7th Cir. 2006) ("[D]istrict court opinions do not have precedential authority."); *see*

also Am. Tunaboat Ass'n v. Ross, 391 F. Supp. 3d 98, 115 (D.D.C. 2019) (holding that an agency was free to continue applying its preferred interpretation of a regulation despite an adverse district court ruling). Second, this court's holding that the Rule violated the APA rests exclusively on the Seventh Circuit's opinion affirming the preliminary injunction, 498 F. Supp. 3d at 1004-05, and the Seventh Circuit grounded its analysis in *Chevron* step two, not step one, 962 F.3d at 226-29. *See Rush Univ. Med. Ctr. v. Burwell*, 763 F.3d 754, 759 (7th Cir. 2014) ("*Brand X* thus directs us to return to our [earlier] decision to determine whether it was, in essence, a *Chevron* step-one decision.").

Accordingly, this court's vacatur of the Final Rule does not preclude DHS in the future from promulgating a public charge regulation identical to the Rule, nor does it preclude the States from petitioning DHS to do so. The States will suffer no prejudice for Rule 24 purposes if their motion to intervene is denied.

D. Other Unusual Circumstances

Finally, the court must consider any other unusual circumstances relevant to the timeliness inquiry. *See Sokaogon Chippewa*, 214 F.3d at 949. For example, "a convincing justification for [the potential intervenor's] tardiness" might permit intervention where it would otherwise be untimely. *Stallworth*, 558 F.2d at 266. As to this factor, the States reiterate their view that it was unprecedented and improper for DHS to cease defending the Final Rule, and therefore that it was reasonable for them to rely on DHS's continued defense until the moment it dismissed its appeal. Doc. 257 at 7. That argument fails for the reasons set forth above. And

it again bears mention that the States themselves knew from *CSPI v. Perdue* that agencies can decide not to pursue appeals of district court decisions that vacate regulations, and they knew from *Pennsylvania v. DeVos* that they could seek intervention before a successful presidential candidate who expressed deep hostility to a regulation assumes office.

* * *

Considering all the pertinent circumstances, the States' motion to intervene is untimely. The States inexplicably delayed filing their motion for months after it had become not just reasonably possible, by highly likely, that candidate Biden, who had promised to reverse the Final Rule within the first 100 days of his administration, would become President Biden—and, at an absolute minimum, for five weeks after President Biden issued the Executive Order. The States' unreasonable delay in seeking intervention would cause substantial prejudice to the original parties, particularly DHS, and denying intervention causes no cognizable prejudice to the States because they have alternative forums in which to assert their interests. Because the States' motion to intervene is untimely, there is no need to consider Rule 24's other requirements. *See Illinois v. Chicago*, 912 F.3d at 989 (affirming denial of a motion to intervene solely on the ground that it was untimely).

III. Motion for Relief from the Judgment

The States also move for relief from judgment under Rule 60(b)(6). Doc. 260 at 8, 11. The States are correct that only a successful Rule 60(b) motion could resuscitate this case. The deadline for appealing the judgment vacating the Final Rule—January 4, 2021—had long

since passed when they filed their motion. Nor is a Rule 59(e) motion to alter the judgment an option, as such a motion had to be filed even sooner, "no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e).

But because the States are not parties, they cannot seek Rule 60(b)(6) relief. Rule 60(b) permits a court to "relieve *a party or its legal representative* from a final judgment." Fed. R. Civ. P. 60(b) (emphasis added). The natural reading of the Rule's text, and the one adopted by the Seventh Circuit, is that only parties or their privies can file Rule 60(b) motions. *See Pearson v. Target Corp.*, 893 F.3d 980, 984 (7th Cir. 2018) (holding that an absent class member "must count as a 'party' to bring the [Rule 60(b)] motion"); *United States v. 8136 S. Dobson St., Chi., Ill.*, 125 F.3d 1076, 1082 (7th Cir. 1997) ("The person seeking relief [under Rule 60(b)] must have been a party."); *Nat'l Acceptance Co. of Am., Inc. v. Frigidmeats, Inc.*, 627 F.2d 764,766 (7th Cir. 1980) ("It is well-settled that … 'one who was not a party lacks standing to make (a 60(b)) motion.'") (quoting 11 Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 2865 (1973)). The States note that some circuits have been more permissive, allowing Rule 60(b) motions by non-parties whose "interests were directly or strongly affected by the judgment." Doc. 260 at 8 (quoting *Bridgeport Music, Inc. v. Smith*, 714 F.3d 932, 940 (6th Cir. 2013)); Doc. 278 at 14. But this court must follow Seventh Circuit precedent. So, the States cannot seek Rule 60(b) relief, as "intervention is the requisite method for a nonparty to become a party to a lawsuit," *United States ex rel. Eisenstein v. City of New York*, 556 U.S.

928, 933 (2009), and their intervention motion has been denied.

To evaluate the States' Rule 60(b)(6) motion on the merits, then, the court will assume for the sake of argument that they are entitled to intervene. *See Bunge Agribusiness Sing. Pte. Ltd. v. Dalian Hualiang Enter. Grp. Co.*, 581 F. App'x 548, 551 (7th Cir. 2014) ("[T]he question whether one may intervene logically precedes whether one may do so to reopen a judgment."). And granting the States that assumption, their Rule 60(b)(6) motion is denied.

Rule 60(b) enumerates five specific reasons for relief from a judgment, *see* Fed. R. Civ. P. 60(b)(1)-(5), none of which applies here. So the States are left to invoke the catch-all category in Rule 60(b)(6): "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). "[R]elief under Rule 60(b)(6) requires the movant to establish that 'extraordinary circumstances' justify upsetting a final decision." *Choice Hotels Int'l, Inc. v. Grover*, 792 F.3d 753, 754 (7th Cir. 2015) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005)). "In determining whether extraordinary circumstances are present, a court may consider a wide range of factors. These may include, in an appropriate case, 'the risk of injustice to the parties' and 'the risk of undermining the public's confidence in the judicial process.'" *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988)).

The States' Rule 60(b)(6) motion faces insurmountable obstacles analogous to those that defeated their motion to intervene. As for timing, "[a] motion under Rule 60(b) must be made within a

reasonable time." Fed. R. Civ. P. 60(c)(1). Much like the Rule 24 timeliness inquiry, "what constitutes 'reasonable time' for a filing under Rule 60(b) depends on the facts of each case." *Ingram v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 371 F.3d 950, 952 (7th Cir. 2004). The pertinent timeliness factors for a Rule 60(b) motion include "the interest in finality, the reasons for the delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and the consideration of prejudice, if any, to other parties." *Ibid.* (quoting *Kagan v. Caterpillar Tractor Co.*, 795 F.2d 601, 610 (7th Cir. 1986)).

Those factors weigh heavily against the States. There were no good reasons for the States' delay, and they knew of their interests in this suit and the reasonably possible, in fact likely, consequences for the Final Rule of the impending presidential transition. Reopening the judgment at this juncture would prejudice Plaintiffs and, in particular, DHS because of the costs they incurred in reliance on their resolution of this suit. The States' Rule 60(b)(6) motion accordingly is untimely. *See Diaz v. Tr. Territory of the Pac. Islands*, 876 F.2d 1401, 1405 n.1 (9th Cir. 1989) (noting the parallel between the timeliness inquiries under Rules 24 and 60(b)(6)); *Bunge Agribusiness Sing. Pte. Ltd. v. Dalian Hualiang Enter. Grp. Co.*, 2013 WL 3274218, at *2 (N.D. Ill. June 27, 2013) (finding that a filing was untimely if construed as a Rule 24 motion and not made within a reasonable time if construed as a Rule 60(b) motion), *aff'd in part, appeal dismissed in part*, 581 F. App'x 548 (7th Cir. 2014). Denial of the States' Rule 60(b) motion is warranted on this ground alone. *See Kagan*, 795 F.2d at 610-11

(holding that a Rule 60(b) motion filed "nearly six months after the court's dismissal of the case" and "more than three months after the plaintiff … learned of the dismissal" was not filed within a reasonable time and thus was correctly denied).

In addition, the "extraordinary circumstances" for Rule 60(b)(6) relief asserted by the States strongly resemble their failed arguments for intervention. The States contend that they had "no notice" that DHS might dismiss its appeal, that the dismissal improperly evaded the APA's notice-and-comment procedures, and that this supposedly unexpected turn "warrants relief under Rule 60(b)(6)." Doc. 260 at 10-11. As explained above, the States had ample notice that what came to pass in DHS's handling of this suit and the Final Rule might come to pass. They admit that "by December [2020], there was certainty … that candidate Biden would be elected," Doc. 282 at 49:24-50:1, after he had promised to jettison the Rule. The States also now admit that DHS did not violate the APA by dismissing its appeal of this court's judgment without first engaging notice-and-comment procedures. *Id.* at 33:3-12. As noted, federal agencies regularly decide—presumably for a variety of reasons—to dismiss appeals of judgments invalidating regulations or to not appeal in the first place. It is not this court's role to scrutinize those reasons and label some "extraordinary" for purposes of Rule 60(b)(6), unless there is some hint of illegality or impropriety. *See United States v. Carpenter*, 526 F.3d 1237, 1241-42 (9th Cir. 2008) (holding that "the Attorney General has plenary discretion … to settle litigation to which the federal government is a party" unless "he settled the lawsuit in

a manner that he was not legally authorized to do"); Auth. of the U.S. to Enter Settlements Limiting the Future Exercise of Exec. Branch Discretion, 23 Op. O.L.C. 126, 135 (1999) ("The [Attorney General's] settlement power is sweeping, but the Attorney General must still exercise her discretion in conformity with her obligation to enforce the Acts of Congress.") (quotation marks omitted). And the States can live to fight another day by pressing for reinstatement of the Rule, or a regulation like it, using the mechanisms described above.

The States' Rule 60(b)(6) motion is therefore denied on two independent grounds: it is untimely, and there are no extraordinary circumstances to justify upsetting this court's judgment.

It bears mention that yet another reason for denial is that granting Rule 60(b)(6) relief would improperly allow the States to use Rule 60(b) as a substitute for a timely appeal. *See Browder v. Dir., Dep't of Corr. of Ill.*, 434 U.S. 257, 263 n.7 (1978) ("[A]n appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review."); *Mendez v. Republic Bank*, 725 F.3d 651, 659 (7th Cir. 2013) ("Rule 60(b) relief is appropriately denied when a party fails to file a timely appeal and the relief sought could have been attained on appeal."); *Stoller v. Pure Fishing Inc.*, 528 F.3d 478, 480 (7th Cir. 2008) ("A Rule 60(b) motion is not a substitute for appeal … ."); *Instrumentalist Co. v. Marine Corps League*, 694 F.2d 145, 154 (7th Cir. 1982) ("Rule 60(b) is clearly *not* a substitute for appeal and must be considered with the obvious need for the finality of judgments.") (quotation marks omitted). Arguments that could and should have been made against a judgment through a timely appeal

are not fodder for a Rule 60(b) motion. *See Banks v. Chi. Bd. of Educ.*, 750 F.3d 663, 668 (7th Cir. 2014) ("Far from presenting any 'extraordinary circumstances' that might warrant relief under Rule 60(b)(6), [the plaintiff] presented only arguments suitable for a direct appeal for which we do not have jurisdiction …."); *Gleash v. Yuswak*, 308 F.3d 758, 761 (7th Cir. 2002) ("A contention that the judge erred with respect to the materials in the record is not within Rule 60(b)'s scope, else it would be impossible to enforce time limits for appeal."). A successful movant under Rule 60(b) must instead point to something unknown or unnoticed at the time of final judgment that undermines the judgment's integrity. *See Bell v. McAdory*, 820 F.3d 880, 883 (7th Cir. 2016) ("Instead of trying to relitigate the merits through Rule 60(b), a litigant has to come up with something *different*—perhaps something overlooked before, perhaps something new."); *Gleash*, 308 F.3d at 761 ("[Rule 60(b)] is designed to allow modification in light of factual information that comes to light only after the judgment, and could not have been learned earlier.").

The States point to nothing unknown or unnoticed at the time judgment was entered that undermines the judgment's integrity. The APA claims were decided based on a closed administrative record and turned largely on the application of legal principles to that record. 498 F. Supp. 3d at 1004. As DHS acknowledged even before the change of presidential administration, this court had no choice but to rule in Plaintiffs' favor under the APA because of the Seventh Circuit's ruling in the preliminary injunction appeal. *Id.* at 1005 ("Given [the Seventh Circuit's] holdings, DHS is right to

acknowledge that this court should grant summary judgment to Plaintiffs on their APA claims."). The States in fact "agree that the Seventh Circuit's holding likely establishes the law of the case for this Court." Doc. 260 at 9. (It is circuit precedent as well.) As no one disputes, this court cannot hold, whether on a Rule 60(b) motion or otherwise, that the Final Rule complies with the APA.

So what exactly are the States seeking through their Rule 60(b) motion? They "ask this Court to vacate its judgment to allow the State Intervenors to defend the Rule, as the United States previously did on appeal." Doc. 260 at 9. But the States cannot be asking this court to vacate its judgment and then *uphold* the Rule, because nothing has changed and because the Seventh Circuit's decision prohibits upholding the Rule. Although they do not say it outright, the States must want the court to vacate the judgment and then simply re-enter it in identical form so that they can appeal. That use of Rule 60(b) would violate the tenet that "[a] collateral attack on a final judgment is not a permissible substitute for appealing the judgment within the [required] time." *Bell v. Eastman Kodak Co.*, 214 F.3d 798, 801 (7th Cir. 2000). In *Flying J*, by contrast, the trade association sought to intervene *before* the time for appeal had run, 578 F.3d at 570-71, so there was no need for a Potemkin relief from judgment meant solely to reset the appeal clock. The States do not identify a single case where a district court used Rule 60(b) in that artificial manner, and they offer no good reason why this court should be the first.

But, no matter, even putting that point aside, the States' Rule 60(b)(6) motion fails because it is untimely

and because there are no extraordinary circumstances warranting relief from this court's judgment.

Conclusion

The States' Rule 24 motion to intervene and Rule 60(b)(6) motion for relief from judgment are denied. This case remains closed.

August 17, 2021 /s/_____
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINIOS

Cook County, Illinois et al , Plaintiff(s), v. Wolf et al, Defendant(s).	Case No. 19 C 6334 Judge Gary Feinerman

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre-judgment interest.
☐ does not include pre-judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☐ in favor of defendant(s)
and against plaintiff(s)

Defendant(s) shall recover costs from plaintiff(s).

☒ other: Judgment is entered in favor of Plaintiffs Cook County, Illinois, and Illinois Coalition for Immigrant and Refugee Rights, Inc., and against Defendants Chad F. Wolf, et al., on Plaintiff's claims under the Administrative Procedure Act, 5 U.SC. § 701 et seq. The Department of Homeland Security's final rule, Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) ("Final Rule"), is vacated, effective immediately. There is no just reason for delay of the entry or appeal of this judgment.

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge Gary Feinerman on a motion.

Date: 11/2/2020 Thomas G. Bruton, Clerk of the Court

/s/ Jackie Deanes, Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COOK COUNTY, ILLINOIS, an Illinois governmental entity, and ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS, INC. Plaintiffs, vs. 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, 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, Defendants.	19 C 6334 Judge Gary Feinerman

MEMORANDUM OPINION AND ORDER

Cook County and Illinois Coalition for Immigrant and Refugee Rights, Inc. ("ICIRR") allege in this suit that the Department of Homeland Security's ("DHS") final rule, *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019) ("Final Rule" or "Rule"), is unlawful. Doc. 1. Plaintiffs claim that the Rule violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*., because (1) it exceeds DHS's authority under the public charge provision of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(4)(A); (2) is not in accordance with law; and (3) is arbitrary and capricious. Doc. 1 at ¶¶ 140-169. ICIRR also claims that the Rule violates the equal protection component of the Fifth Amendment's Due Process Clause. *Id*. At ¶¶ 170-188.

On October 14, 2019, this court preliminarily enjoined DHS from enforcing the Final Rule in the State of Illinois, reasoning that the Rule likely violates the APA because it interprets the term "public charge" in a manner incompatible with its statutory meaning. Docs. 85, 87, 106 (reported at 417 F. Supp. 3d 1008 (N.D. Ill. 2019)). DHS appealed. The Seventh Circuit denied DHS's motion to stay the preliminary injunction pending appeal, No. 19-3169 (7th Cir. Dec. 23, 2019), but the Supreme Court issued a stay, 140 S. Ct. 681 (2020) (mem.). Meanwhile, DHS moved to dismiss the suit under Civil Rules 12(b)(1) and 12(b)(6). Doc. 124. This court denied DHS's motion and granted ICIRR's request for extra-record discovery on its equal protection claim. Docs. 149-150 (reported at 461 F. Supp. 3d 779 (N.D. Ill. 2020)). And this court denied DHS's

motion to certify under 28 U.S.C. § 1292(b) an interlocutory appeal of the denial of its motion to dismiss the equal protection claim. Docs. 183-184 (reported at 2020 WL 3975466 (N.D. Ill. July 14, 2020)).

Shortly after this court denied DHS's motion to dismiss, the Seventh Circuit affirmed the preliminary injunction, reasoning that the Final Rule likely violates the APA. 962 F.3d 208 (7th Cir. 2020). Armed with the Seventh Circuit's decision, Plaintiffs move for summary judgment on their APA claims. Doc. 200. They seek a partial judgment under Civil Rule 54(b)—one that would vacate the Rule pursuant to the APA and allow continued litigation on ICIRR's equal protection claim. Docs. 217-218. Plaintiffs' motion is granted. A Rule 54(b) judgment is entered, the Final Rule is vacated, DHS's request to stay the judgment is denied, and ICIRR's equal protection claim may proceed in this court.

Discussion

The pertinent background is set forth in this court's opinions and the Seventh Circuit's opinion, familiarity with which is assumed.

(a) *Plaintiffs' Summary Judgment Motion*

DHS forthrightly concedes that the Seventh Circuit's opinion affirming the preliminary injunction effectively resolves the APA claims on the merits in Plaintiffs' favor. Doc. 209 at 7 ("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."); Doc. 219 at 1 ("Plaintiffs have argued, and Defendants do not dispute, that the Court

may grant Plaintiffs' pending [summary judgment motion] in light of the Seventh Circuit's decision affirming the Court's preliminary injunction order."). That concession is appropriate given the Seventh Circuit's conclusion that the Final Rule is both substantively and procedurally defective under the APA. 962 F.3d at 222-33.

As for substance, the Seventh Circuit held in pertinent part as follows:

> … Even assuming that the term "public charge" is ambiguous and thus might encompass more than institutionalization or primary, long-term dependence on cash benefits, it does violence to the English language and the statutory context to say that it covers a person who receives only *de minimis* benefits for a *de minimis* period of time. There is a floor inherent in the words "public charge," backed up by the weight of history. The term requires a degree of dependence that goes beyond temporary receipt of supplemental in-kind benefits from any type of public agency.
>
> * * *
>
> The ambiguity in the public-charge provision does not provide DHS unfettered discretion to redefine "public charge." We find that the interpretation reflected in the Rule falls outside the boundaries set by the statute.

Id. At 229.[*] As for procedure, and in the alternative, the Seventh Circuit held that the Rule was "likely to fail the 'arbitrary and capricious' standard" due to "numerous unexplained serious flaws: DHS did not adequately consider the reliance interests of state and local governments; did not acknowledge or address the

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[*] Although the Seventh Circuit reached its conclusion under step two of *Chevron* and this court stopped at step one, there is less dissonance between the two opinions than meets the eye. Adopting the methodological approach urged by DHS—which it has since abandoned—that "'the late 19th century [is] the key time to consider' for determining the meaning of the term 'public charge,'" 417 F. Supp. 3d at 1023 (quoting DHS's brief in opposition to Plaintiffs' motion for preliminary injunction), this court concluded from an examination of contemporaneous court decisions, dictionaries, and commentary that "an alien [cannot] be deemed a public charge based on the receipt, or anticipated receipt, of a modest quantum of public benefits for short periods of time," *id*. at 1026. *See id*. at 1022-29 (analyzing the cases, dictionaries, and commentary). And as just noted, the Seventh Circuit held that "[t]here is a floor inherent in the words 'public charge,'" and that "[t]he term requires a degree of dependence that goes beyond temporary receipt of supplemental in-kind benefits from any type of public agency." 962 F.3d at 229. Both opinions rest on a common premise: whatever play in the joints the statutory term "public charge" might enjoy, it cannot be stretched to cover the full measure of noncitizens deemed by the Final Rule to be public charges. *See generally* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 Va. L. Rev. 597, 599 (2009) ("[*Chevron*] artificially divides one inquiry into two steps. The single question is whether the agency's construction is permissible as a matter of statutory interpretation; the two *Chevron* steps both ask this question, just in different ways. As a result, the two steps are mutually convertible."); *id*. at 602 ("Congress' intention may be ambiguous within a range, but not at all ambiguous as to interpretations outside that range, which are clearly forbidden.").

significant, predictable collateral consequences of the Rule; incorporated into the term 'public charge' an understanding of self-sufficiency that has no basis in the statute it supposedly interprets; and failed to address critical issues such as the relevance of the five-year waiting period for immigrant eligibility for most federal benefits." *Id.* At 233. Given these holdings, DHS is right to acknowledge that this court should grant summary judgment to Plaintiffs on their APA claims.

The parties disagree, however, about the appropriate remedy. Plaintiffs ask this court to vacate the Final Rule. Doc. 201 at 35-37. DHS contends that this court should vacate the Rule only insofar as it affects Plaintiffs, meaning that the vacatur should be limited to the State of Illinois. Doc. 209 at 27-29. Plaintiffs are correct.

The APA provides in pertinent part that "[t]he 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). "[A]gency action" includes "the whole or a part of an agency rule." *Id.* § 551(13). By the APA's plain terms, then, an agency rule found unlawful in whole is not "set aside" just for certain plaintiffs or geographic areas; rather, the rule "shall" be "set aside," period. *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.") (quoting 42 U.S.C. § 1997e(d)(2)); *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.") (quoting 28 U.S.C. § 1407(a)).

Precedent confirms that the APA's text means what it says. For example, in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), the Supreme Court affirmed the D.C. Circuit's decision to set aside an agency rule concerning Medicaid reimbursement costs. Rather than limit relief to the "group of seven hospitals" that had filed suit, the Court declared the Rule "invalid." *Id.* At 207, 216. There is nothing unusual about this result, for that is simply what courts do when they determine that an agency action violates the APA. *See, e.g.*, *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1901 (2020) (holding that DHS's rescission of the Deferred Action for Childhood Arrivals program "must be vacated" due to the agency's violation of the APA); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("Courts enforce [arbitrary and capricious review] with regularity when they set aside agency regulations which … are not supported by the reasons that the agencies adduce."); *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.") (internal quotation marks omitted); *Empire Health Found. Ex rel. Valley Hosp. Med. Ctr. 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.") (internal quotation marks omitted); *Nat'l*

Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (same).

DHS cites *Johnson v. United States Office of Personnel Management*, 783 F.3d 655 (7th Cir. 2015), for the proposition that the APA authorizes courts to limit the vacatur of agency action to a defined geographic area. Doc. 209 at 27. True enough, *Johnson* held that "partial vacatur is sometimes an appropriate remedy" for an APA violation. 783 F.3d at 663. But by "partial vacatur," the Seventh Circuit meant a circumstance where a court invalidates the unlawful parts of an agency action and leaves the valid parts in place. *See ibid.* (citing *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77 (D.D.C. 2010), where the district court invalidated only part of a Clean Water Act permit). The Seventh Circuit did not mean that an agency rule can be vacated only as to certain plaintiffs or certain States. Nor could the court possibly have meant that. As Judge Moss has aptly observed: "As a practical matter, … how could [a] [c]ourt vacate [a challenged] Rule with respect to the … plaintiffs in [a] 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).

DHS retorts that an order vacating the Final Rule without any geographic limitation would be akin to entering the kind of nationwide injunction that the Fourth Circuit and two Justices have criticized in other cases involving APA challenges to the Rule. Doc. 209 at 27-30; *see DHS v. New York*, 140 S. Ct. 599, 599-601 (2020) (Gorsuch, J., joined by Thomas, J., concurring in

the grant of stay); *CASA de Md., Inc. v. Trump*, 971 F.3d 220, 255-63 (4th Cir. 2020). DHS's analogy is inapt. As an initial matter, the two cases cited by DHS arose in the preliminary injunction posture—the district courts there could not have vacated the Rule at that early juncture, so the only question concerned the appropriate scope of preliminary relief. Here, by contrast, Plaintiffs ask this court to vacate the Rule after a judgment on the merits. Although vacatur will prevent DHS from enforcing the Rule against nonparties, that is a consequence not of the court's *choice* to grant relief that is broader than necessary, but of the APA's *mandate* that flawed agency action must be "h[e]ld unlawful and set aside." 5 U.S.C. § 706(2).

Moreover, DHS's analogy fails to recognize that the two remedies—vacatur of a rule, and a nationwide injunction against its implementation—have significant differences. A nationwide injunction is a "drastic and extraordinary remedy" residing at the outer bounds of the judicial power. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010) ("An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course. If a less drastic remedy (such as partial or complete vacatur of [the agency's] deregulation decision) was sufficient to redress [the challengers'] injury, no recourse to the additional and extraordinary relief of an injunction was warranted."). Vacatur, by contrast, is the ordinary remedy—again, precisely the remedy demanded by the APA's text when a rule is held to violate the APA. *See* 5 U.S.C. § 706(2) (providing that the court "shall" "set aside" the challenged "agency action" if it is adopted "in excess of

statutory … authority" or is "arbitrary [and] capricious"); *see also Humane Soc'y of U.S. v. Zinke*, 865 F.3d 585, 614 (D.C. Cir. 2017) ("A common remedy when we find a rule invalid is to vacate."). As Judge Randolph has explained:

> Once a reviewing court determines that the agency has not adequately explained its decision, the [APA] requires the court—in the absence of any contrary statute—to vacate the agency's action. The [APA] states this in the clearest possible terms. Section 706(2)(A) provides that a "reviewing court" faced with an arbitrary and capricious agency decision "shall"—**not may**—"hold unlawful and set aside" the agency action. Setting aside means vacating; no other meaning is apparent. Often we do this simply as a matter of course.

Checkosky v. SEC, 23 F.3d 452, 491 (D.C. Cir. 1994) (opinion of Randolph, J.) (citation omitted).

In sum, the Final Rule is vacated, and the vacatur is not limited to the State of Illinois.

II. Rule 54(b) Judgment

With the APA claims resolved in Plaintiffs' favor, the question becomes whether the court should enter judgment under Rule 54(b) or, rather, under Rule 58—and, relatedly, what should happen to ICIRR's equal protection claim. Plaintiffs urge this court to enter a Rule 54(b) judgment on their APA claims and allow ICIRR to continue litigating its equal protection claim. Docs. 217-218. DHS does not expressly address whether a Rule 54(b) or Rule 58 judgment should be entered, but argues

in its brief—and reiterated last week at oral argument, Doc. 220—that the court should stay further proceedings on the equal protection claim if judgment is entered on the APA claims. Doc. 219 at 1, 4-5. The court will enter a Rule 54(b) judgment and, given the particular facts and circumstances of this suit and parallel suits pending elsewhere, will not stay litigation on the equal protection claim.

"When a case involves more than one claim, Rule 54(b) allows a federal court to direct entry of a final judgment on 'one or more, but fewer than all, claims,' provided there is no just reason for delay." *Peerless Network, Inc. v. MCI Commc'ns Servs., Inc.*, 917 F.3d 538, 543 (7th Cir. 2019) (quoting Fed. R. Civ. P. 54(b)). "A proper Rule 54(b) order requires the district court to make two determinations: (1) that the order in question was truly a 'final judgment,' and (2) that there is no just reason to delay the appeal of the claim that was 'finally' decided." *Gen. Ins. Co. of Am. v. Clark Mall Corp.*, 644 F.3d 375, 379 (7th Cir. 2011) (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 434-37 (1956)). Plaintiffs satisfy both requirements.

As to the "final judgment" requirement, "a judgment must be final in the sense that it is an ultimate disposition of an individual claim entered in the course of a multiple claims action." *Ibid.* (internal quotation marks omitted). A judgment is not "truly final" if "there is too much factual overlap with claims remaining in the district court." *Peerless Network*, 917 F.3d at 543. When "multiple claims arise from the same set of facts," the court must "consider whether they are based on entirely different legal entitlements yielding separate recoveries

or different legal theories aimed at the same recovery—the latter of which makes Rule 54(b) partial final judgment improper." *Ibid.* (internal quotation marks omitted).

The final judgment requirement is satisfied here. The APA claims concern whether the Final Rule properly implements the INA's public charge provision and whether DHS's rulemaking was arbitrary and capricious, Doc. 1 at ¶¶ 140-169; 962 F.3d at 222-33, while the equal protection claim concerns whether the Rule is motivated by the impermissible discriminatory purpose of favoring white immigrants over nonwhite immigrants, Doc. 1 at ¶¶ 170-188; 461 F. Supp. 3d at 784-92. Other than their common attack on the Rule itself, there is minimal factual (or legal) overlap between those claims. *See Marseilles Hydro Power, LLC v. Marseilles Land & Water Co.*, 518 F.3d 459, 465 (7th Cir. 2008) (holding that tort and property law claims arising from the collapse of a water canal had "some overlapping historical facts" but nonetheless were "sufficiently distinct" for purposes of Rule 54(b)); *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 515-16 (7th Cir. 2002) (upholding the entry of a Rule 54(b) judgment on a copyright claim because "the only facts before [the court] on … appeal" were "unlikely to be at issue" in the trademark claim that remained in the district court). Granted, a portion of one of Plaintiffs' APA claims alleges that the economic justifications articulated by DHS for the Rule are a pretext for racial discrimination, Doc. 1 at ¶ 166; 2020 WL 3975466, at *2, but the Seventh Circuit's opinion did not rely on pretext, and this court's grant of summary judgment on the APA claims likewise does not rely on pretext given that it

rests exclusively on the Seventh Circuit's opinion. *See Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 118 F.3d 1157, 1163 (7th Cir. 1997) ("[S]ome overlap between the facts in the retained and the appealed claims is not fatal.").

Moreover, the APA and equal protection claims are not "different legal theories aimed at the same recovery." *Peerless Network*, 917 F.3d at 543 (internal quotation marks omitted). The only remedy Plaintiffs seek under the APA is vacatur of the Final Rule. Doc. 201 at 35-37; Doc. 213 at 2-6; Doc. 217 at 3; Doc. 218 at 1. For its equal protection claim, ICIRR seeks a declaration that the Rule violates the Fifth Amendment and, more importantly, a permanent injunction enjoining DHS and its officials from implementing and enforcing the Rule, Doc. 1 at pp. 58-59, which could entail a requirement that, until a new rule is promulgated, DHS resume applying its 1999 field guidance, *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28,689 (May 26, 1999). As noted, the Supreme Court in *Monsanto Co.* made clear that "complete vacatur of [an agency's] … decision" is a "less drastic remedy" than the "additional and extraordinary relief of an injunction." 561 U.S. at 165-66. It follows that victory for ICIRR on its equal protection claim may yield relief in addition to the relief the court is granting on Plaintiff's APA claims. *See Nat'l Ski Areas Ass'n v. U.S. Forest Serv.*, 910 F. Supp. 2d 1269, 1288 (D. Colo. 2012) (in addition to vacating a Forest Service administrative directive, granting injunctive relief against the agency's enforcement thereof "to ensure good faith between the parties while the [directive] runs through APA

procedural process on remand"). Whether ICIRR will prevail on its equal protection claim, whether injunctive relief would be appropriate to remedy an equal protection violation, and what that relief might entail remain to be seen and cannot be answered at this juncture, when the parties have only recently commenced discovery and have not sought judgment on that claim. *See Marie v. Mosier*, 196 F. Supp. 3d 1202, 1216 (D. Kan. 2016) (collecting cases in which district courts in the wake of *Obergefell v. Hodges*, 576 U.S. 644 (2015), enjoined state laws banning same sex marriage, and rejecting the argument that the unlikelihood that those laws might be enforced made a permanent injunction unnecessary).

As to the "no just reason to delay the appeal" requirement, "a district court must take into account judicial administrative interests as well as the equities involved." *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980). Regarding the judicial system's interests, the "goal … is to prevent 'piece-meal appeals' involving the same facts." *Peerless Network*, 917 F.3d at 543 (quoting *Curtiss-Wright Corp.*, 446 U.S. at 10). Entry of a Rule 54(b) judgment is fully consistent with that aim because, as noted, the APA claims on which the court grants summary judgment have little overlap with ICIRR's equal protection claim. And regarding the equities, the Seventh Circuit has held that continued operation of the Final Rule will inflict ongoing harms on Cook County and on immigrants, 962 F.3d at 233, and this court has held that the same is true of ICIRR, 417 F. Supp. 3d at 1029-30. Because a Rule 54(b) judgment would give immediate effect to this court's vacatur of the

Rule—which DHS resumed implementing in September, *see Public Charge Fact Sheet*, U.S. Citizenship & Immigr. Servs., https://www.uscis.gov/news/public-charge-fact-sheet (last updated Sept. 22, 2020)—there is no just reason for delaying the entry of judgment or DHS's appeal thereof.

In sum, the entry of a Rule 54(b) final judgment on the APA claims is proper. The question remains whether this court should allow litigation to proceed on ICIRR's equal protection claim. In urging a stay of litigation on that claim, DHS invokes the constitutional avoidance doctrine, arguing that "courts 'will not decide a constitutional question if there is some other ground upon which to dispose of the case,' especially if the other ground 'afford[s] [a plaintiff] all the relief it seeks.'" Doc. 219 at 3 (quoting *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 205 (2009)) (alterations by DHS). DHS's argument fails because, as noted, ICIRR's equal protection claim provides a basis for injunctive relief, which Plaintiffs do not seek—and would have faced an uphill battle obtaining—on their APA claims. *See Monsanto Co.*, 561 U.S. at 165-66; *O.A.*, 404 F. Supp. 3d at 153-54.

DHS argues in the alternative that this court should stay litigation on ICIRR's equal protection claim because discovery on that claim "could consume significant resources of both the Court and the parties." Doc. 219 at 5. If this case were the only challenge to the Final Rule pending in federal court, DHS's argument would have significant weight. But as DHS confirmed at argument, Doc. 220, discovery is proceeding on equal protection claims brought in two parallel public charge

cases. *See Washington v. U.S. DHS*, No. 19 C 5210 (E.D. Wash.); *New York v. U.S. DHS*, No. 19 C 7777 (S.D.N.Y.). Proceeding with discovery on ICIRR's equal protection claim here therefore is unlikely to impose on DHS much work in addition to the work it is already doing in those other cases.

III. Stay of Judgment Pending Appeal

While acknowledging that, given the Seventh Circuit's ruling, summary judgment should be granted to Plaintiffs on the APA claims, DHS asks this court to stay its judgment pending appeal. Doc. 209 at 29-30. "The standard for granting a stay pending appeal mirrors that for granting a preliminary injunction.… To determine whether to grant a stay, [the court] consider[s] the moving party's likelihood of success on the merits, the irreparable harm that will result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other." *In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014); *see also Venckiene v. United States*, 929 F.3d 843, 853 (7th Cir. 2019) (same).

The hierarchical structure of the judiciary makes this a straightforward decision for a district court. The Seventh Circuit held in the cases just cited that the standard for granting a stay pending appeal mirrors that for granting a preliminary injunction, and held in this case that the criteria for a preliminary injunction have been met. 962 F.3d at 221-34. Accordingly, because (as the Seventh Circuit held) Plaintiffs are entitled to a preliminary injunction, DHS is not entitled to a stay pending appeal.

DHS counters with the argument that the Supreme Court, in staying this court's preliminary injunction order, "'necessarily conclud[ed]' that Plaintiffs were unlikely to succeed on the merits" and "necessarily … determine[ed] that the balance of the harms and the public interest support a stay." Doc. 209 at 29 (quoting *CASA de Md.*, 971 F.3d at 230) (first alteration in original). But the Seventh Circuit effectively rejected that line of reasoning in affirming the preliminary injunction:

> With respect to the balance of harms, we must take account of the Supreme Court's decision to stay the preliminary injunction entered by the district court. The Court's stay decision was not a merits ruling.… We do not know why the Court granted this stay, because it did so by summary order, but we assume that it abided by the normal standards. Consequently, the stay provides an indication that the Court thinks that there is at least a fair prospect that DHS should prevail and faces a greater threat of irreparable harm than the plaintiffs.
>
> The stay thus preserves the status quo while this case and others percolate up from courts around the country. 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. With the benefit of more time for consideration and the complete preliminary injunction record, we believe that it is our duty to evaluate each of the preliminary injunction factors, including the balance of equities. In so

> doing, we apply a 'sliding scale' approach in which "the more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor." *Valencia v. City of Springfield*, 883 F.3d [959,] 966 [(7th Cir. 2018)]. We also consider effects that granting or denying the preliminary injunction would have on the public. *Ibid.*
>
> In our view, Cook County has shown that it is likely to suffer (and has already begun to suffer) irreparable harm caused by the Rule. Given the dramatic shift in policy the Rule reflects and the potentially dire public health consequences of the Rule, we agree with the district court that the public interest is better served for the time being by preliminarily enjoining the Rule.

962 F.3d at 233-34. In reaching that decision, the Seventh Circuit also had the benefit of a Ninth Circuit opinion holding that the Final Rule likely complied with the APA, *see City and Cnty. Of San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019), and necessarily rejected the Ninth Circuit's approach. Given the Seventh Circuit's holding that, despite the Supreme Court's stay, the Final Rule was substantively and procedurally invalid under the APA and preliminary injunctive relief was appropriate, this court will not stay its vacatur of the Rule.

Conclusion

Plaintiffs' summary judgment motion is granted. The court enters a Rule 54(b) judgment vacating the Final

Rule, to take effect immediately. Litigation may proceed in this court on ICIRR's equal protection claim.

/s/
November 2, 2020 United States District Judge

APPENDIX E

8 U.S.C.A. § 1182(a)(4)

§ 1182. Inadmissible aliens

Effective: March 7, 2013

(a) ***Classes of aliens ineligible for visas or admission***

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

****

(4) Public charge

(A) In general

Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.

(B) Factors to be taken into account

(i) In determining whether an alien is inadmissible under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's--

(I) age;
(II) health;
(III) family status;

(IV) assets, resources, and financial status; and

(V) education and skills.

(ii) In addition to the factors under clause (i), the consular officer or the Attorney General may also consider any affidavit of support under section 1183a of this title for purposes of exclusion under this paragraph.

(C) Family-sponsored immigrants

Any alien who seeks admission or adjustment of status under a visa number issued under section 1151(b)(2) or 1153(a) of this title is inadmissible under this paragraph unless--

(i) the alien has obtained--

(I) status as a spouse or a child of a United States citizen pursuant to clause (ii), (iii), or (iv) of section 1154(a)(1)(A) of this title;

(II) classification pursuant to clause (ii) or (iii) of section 1154(a)(1)(B) of this title; or

(III) classification or status as a VAWA self-petitioner; or

(ii) the person petitioning for the alien's admission (and any additional sponsor required under section 1183a(f) of this title or any alternative sponsor permitted under paragraph (5)(B) of such section) has executed an affidavit of support described in section 1183a of this title with respect to such alien.

(D) Certain employment-based immigrants

Any alien who seeks admission or adjustment of status under a visa number issued under section 1153(b) of this title by virtue of a classification petition filed by a

relative of the alien (or by an entity in which such relative has a significant ownership interest) is inadmissible under this paragraph unless such relative has executed an affidavit of support described in section 1183a of this title with respect to such alien.

(E) Special rule for qualified alien victims

Subparagraphs (A), (B), and (C) shall not apply to an alien who--

(i) is a VAWA self-petitioner;

(ii) is an applicant for, or is granted, nonimmigrant status under section 1101(a)(15)(U) of this title; or

(iii) is a qualified alien described in section 1641(c) of this title.

APPENDIX F

Federal Rules of Civil Procedure Rule 24

Rule 24. Intervention

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

(1) ***In General.*** On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) ***By a Government Officer or Agency.*** On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) ***Delay or Prejudice.*** In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

APPENDIX G

Federal Rules of Civil Procedure Rule 60

Rule 60. Relief From a Judgment or Order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has

been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) ***Timing.*** A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) ***Effect on Finality.*** The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.