No. 20A150

IN THE

Supreme Court of the United States

TEXAS, ET AL.,

Applicants,

v.

COOK COUNTY, ET AL.

Respondents.

On Application for Leave to Intervene and for a Stay Injunction of the Judgment Issued by the United States District Court for the Northern District of Illinois

OPPOSITION TO 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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

Rules

Other Authorities

INTRODUCTION

Texas and thirteen additional states (the "States") ask this Court to resurrect and permit them to intervene in a dismissed case in which no dispute remains. The Court should deny this application for several reasons.

First, the application ("App.") should be denied because the States have no jurisdictional basis to seek relief. They ask this Court to grant them leave to intervene in an appeal that has already concluded—with jurisdiction having already transferred to the district court—and to order the Seventh Circuit to recall its mandate so that the States can litigate in their preferred forum. The States cannot evade the well-established limitations on appellate jurisdiction by these means.

Second, the validity of the agency rule at issue (the "Rule" or "Vacated Rule") no longer presents a live controversy. The Rule was vacated in a final judgment on the merits, entered on November 2, 2020, following an adversarial process in which the former administration vigorously defended the Rule. The federal defendants appealed the judgment, but after a change in administrations and the issuance of an executive order directing immediate review of the Rule, the Department of Homeland Security ("DHS") determined that continuing to defend the Vacated Rule was no longer in the public interest. The federal defendants dismissed the pending appeals, including the appeal of the final judgment in this case, and issued a final rule (the "Current Rule") implementing the vacatur order. The States dislike the Current Rule, but that does not give them license to prolong this litigation regarding the Vacated Rule.

Third, the States have not met their burden of showing a direct and personal stake in this litigation for standing purposes, much less a vital interest that meets the high standard for intervention in this Court. Nor have they met the requirements for a stay.

Finally, this Court should reject the States' alternative request for summary reversal because they fail to offer any reason that could warrant the extraordinary step of recalling the Seventh Circuit's appellate mandate or for labeling the Seventh Circuit's refusal to do so an abuse of discretion. For these and the additional reasons discussed below, the application should be denied.

STATEMENT

A. The Facts.

The Immigration and Nationality Act ("INA") allows the federal government to deny admission or adjustment of immigration status to any non-citizen "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). In August 2019, DHS promulgated the Rule to interpret the public charge provision. 84 Fed. Reg. 41,292 (Aug. 14, 2019).

Cook County, Illinois ("Cook County") and the Illinois Coalition for Immigrant and Refugee Rights ("ICIRR") (collectively "Plaintiffs") challenged the Rule in the United States District Court for the Northern District of Illinois on the ground that the Rule violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. ICIRR also asserted that the Rule violated the Equal Protection Clause.

B. Preliminary Injunction Proceedings.

On October 14, 2019, the district court granted Plaintiffs' request for a preliminary injunction barring DHS from implementing the Rule in Illinois. *Cook County v. McAleenan*, 417 F. Supp. 3d 1008 (N.D. Ill. 2019), *aff'd on other grounds sub nom. Cook Cty. v. Wolf*, 962 F.3d 208 (7th Cir. 2020), *cert. dismissed sub nom. Mayorkas v. Cook Cty.*, No. 20-450, 2021 WL 1081063 (U.S. Mar. 9, 2021). This Court stayed the district court's injunction on February 21, 2020. *Wolf v. Cook Cty.*, 140 S. Ct. 681 (2020) (mem.). The Seventh Circuit issued an order affirming the preliminary injunction on June 10, 2020, *Cook Cty. v. Wolf*, 962 F.3d 208 (7th Cir. 2020), *cert. dismissed sub nom. Mayorkas v. Cook Cty.*, No. 20-450, 2021 WL 1081063 (U.S. Mar. 9, 2021), after which DHS filed a petition for a writ of certiorari in this Court. *Mayorkas v. Cook Cty.*, No. 20-450 (U.S. Oct. 8, 2020). DHS also filed petitions seeking review of similar preliminary injunction appeals arising out of the Second and Ninth Circuits. *Dep't of Homeland Sec. v. New York*, No. 20-449 (U.S. Oct. 8, 2020); *U.S. Citizenship & Immigration Servs. v. City of San Francisco*, No. 20-962 (U.S. Jan. 21, 2021). On February 22, 2021, this Court granted the petition for certiorari in the Second Circuit proceeding. *Dep't of Homeland Sec. v. New York*, No. 20-449, 2021 WL 666376 (U.S. Feb. 22, 2021).

C. Summary Judgment Proceedings.

On August 31, 2020, Plaintiffs moved for summary judgment on their APA claims in the district court. On November 2, 2020, the district court granted summary judgment, entering final judgment under the APA pursuant to Federal Rule of Civil Procedure 54(b) and vacating the Rule. *Cook Cty. v. Wolf*, No. 19 C 6334, 2020 WL

6393005 (N.D. Ill. Nov. 2, 2020) (the "Vacatur Order"). DHS appealed this judgment to the Seventh Circuit, which stayed the Vacatur Order and suspended briefing on the appeal pending resolution of the petition for certiorari in *Mayorkas v. Cook County*, No. 20-450. *Cook Cty. v. Wolf*, No. 20-3150 (7th Cir. Nov. 19, 2020).

D. The Current Administration and End to the Vacated Rule.

i. The Executive Order and Agency Review.

Over several months leading up to his inauguration, then-Candidate and subsequently President-Elect Biden stated that his administration would "[r]everse [the] public charge rule" within its first 100 days. *See* Biden for President, *The Biden Plan for Securing Our Values as a Nation of Immigrants*, https://joebiden.com/immigration/ (last visited Apr. 8, 2021) [hereinafter *Biden Plan*].[1] On February 2, 2021, the administration issued an Executive Order directing federal agencies to "eliminate[ ] sources of fear and other barriers that prevent immigrants from accessing government services available to them." Executive Order 14012, 86 Fed. Reg. 8277, 8277 (Feb. 2, 2021) (the "Executive Order"). Among other directives, the Executive Order called upon federal agencies to evaluate their "public charge policies," identify "appropriate agency actions … to address concerns about the current public charge policies[ ]," and submit a report to the President on these matters within 60 days. *Id.* at 8278. Consistent with this review, DHS publicly stated that it was evaluating whether to continue its appeal of the Vacatur Order in light of the Executive Order. *Cook Cty. v. Wolf*, No. 19-cv-6334, Dkt. 241 at 2 (N.D. Ill. Feb.

[1] The internet archive confirms that this statement has been publicly posted since at least December 2019. *See* https://web.archive.org/web/20191212040308/https://joebiden.com/immigration/.

3, 2021); *id.* Dkt. 245 at 3 (N.D. Ill. Feb. 19, 2021); *id.* Dkt. 247 at 1 (N.D. Ill. Mar. 5, 2021).

ii. Dismissal of Pending Litigation and Return to 1999 Guidance.

Ultimately, the agency's review concluded that "continuing to defend" the Vacated Rule on appeal was "neither in the public interest nor an efficient use of limited government resources." U.S. Dep't of Homeland Sec., *DHS Statement on Litigation Related to the Public Charge Ground of Inadmissibility* (Mar. 9, 2021), https://www.dhs.gov/news/2021/03/09/dhs-statement-litigation-related-public-charge-ground-inadmissibility [hereinafter *DHS Statement*]. Accordingly, DHS took action to dismiss the pending petitions for certiorari in this matter and the related matters arising out of the Second and Ninth Circuits. On March 9, 2021, this Court dismissed the pending petitions in all three cases pursuant to Supreme Court Rule 46.1. *Mayorkas v. Cook Cty.*, No. 20-450 (Mar. 9, 2021) (7th Cir. petition); *Dep't of Homeland Sec. v. New York*, No. 20-449 (Mar. 9, 2021) (2d Cir. petition); *U.S. Citizenship & Immigration Servs. v. City of San Francisco*, No. 20-962 (Mar. 9, 2021) (9th Cir. petition).

Also on March 9, 2021, the parties in this matter filed a stipulated agreement to voluntarily dismiss the appeal of the Vacatur Order in the Seventh Circuit under Federal Rule of Appellate Procedure 42(b). The court dismissed the appeal that same day and immediately issued the mandate under Seventh Circuit Rule 41, leaving the Vacatur Order in effect. *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 9, 2021). The parties to the remaining equal protection claim in the district court filed a stipulation

dismissing the case with prejudice on March 11, 2021. *Cook Cty. v. Wolf*, No. 19-cv-6334, Dkt. 253 (N.D. Ill. Mar. 11, 2021).

On March 15, 2021, DHS issued a final rule implementing the Vacatur Order and explaining that the Rule is no longer in effect or being enforced. Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. 14,221 (Mar. 15, 2021). It clarified that the public charge guidance adopted and issued in 1999 once again controls public charge assessments. *See DHS Statement*, *supra*.

iii. Intervention Efforts.

Notwithstanding that (1) the litigation had been pending for a year and a half; (2) President-Elect Biden announced his intention to reverse the Rule well in advance of his inauguration; and (3) DHS stated as early as February 3, 2021 that it was reevaluating its approach to this case and the Seventh Circuit appeal, the States took no action to intervene prior to the dismissal of the appeal and issuance of the mandate on March 9, 2021. On March 11, 2021, the States filed motions in the Seventh Circuit seeking to intervene as defendant-appellants, requesting reconsideration or rehearing of the court's dismissal order, and seeking recall of the mandate. The Seventh Circuit summarily and unanimously denied the States' motions. *Cook Cty. v. Wolf*, No. 20-3150 (7th Cir. Mar. 15, 2021).

ARGUMENT

I. THE APPLICATION SHOULD BE DENIED BECAUSE THE STATES ARE NOT ENTITLED TO SEEK RELIEF IN THIS COURT.

The States were never parties to this now-dismissed case. As such, their ability to seek any relief in this Court—including a stay pending the filing of a petition for

certiorari—depends entirely upon whether they can intervene at this late stage. *See* 28 U.S.C. § 1254 ("Cases in the courts of appeals may be reviewed by the Supreme Court … [b]y writ of certiorari granted upon the petition of *any party* to any civil or criminal case, before or after rendition of judgment or decree …." (emphasis added)). For several threshold reasons, they cannot.

A. No Appellate Proceeding Exists In Which To Intervene.

This Court should deny the application because no appellate proceeding exists in which the States can intervene. The Federal Rules of Appellate Procedure and the Seventh Circuit's rules provide for prompt dismissal and automatic issuance of the mandate where, as here, the parties agree to voluntarily dismiss an appeal. *See* Fed. R. App. P. 42(b) ("The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due."); *see also* 7th Cir. R. 41 ("The mandate will issue *immediately* when an appeal is dismissed … voluntarily …." (emphasis added)).

Consistent with this rule, the Seventh Circuit properly dismissed the appeal under Rule 42(b) and issued its mandate the same day, leaving the district court as the only court with jurisdiction. *See Kusay v. United States*, 62 F.3d 192, 194 (7th Cir. 1995) ("Just as the notice of appeal transfers jurisdiction to the court of appeals, so the mandate returns it to the district court."); *see also Price v. Dunn*, 139 S. Ct. 1533, 1537 (2019) (mem.) (Thomas, J., concurring in the denial of certiorari). Even though jurisdiction had transferred back to the district court, the States asked the Seventh Circuit, and now this Court, to take the extraordinary step of permitting intervention in the dismissed appeal. The States cannot, and do not, explain their departure from

foundational jurisdictional principles, nor why the States did not go to the district court in the first instance.[2] *See, e.g.*, *Lopez-Aguilar v. Marion Cty. Sheriff's Dep't*, 924 F.3d 375, 391 (7th Cir. 2019) (holding that intervention in the district court was proper where proposed intervenor State of Indiana had filed its motion to intervene following entry of final judgment but within the time for filing an appeal).

Instead, the States skip that step and maintain that intervention in this Court is proper because this Court allows "one who has been denied the right to intervene in a case in a court of appeals" to petition for certiorari to review that ruling. App. at 10. But the cases to which the application cites contemplate intervenors who properly filed their initial motion with a court vested with jurisdiction. *See id.* (citing *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 30 (1993) (proposed intervenor first sought to intervene in the Federal Circuit while the case was there on appeal); *Hohn v. United States*, 524 U.S. 236, 247–48 (1998) (discussing motions for leave to intervene in cases properly appealed from administrative agency decisions)). Here, the States improperly sought intervention in the appellate court *after* the Seventh Circuit had issued the mandate and been divested of jurisdiction.

[2] Where, as here, proposed intervenors raise fact-intensive questions surrounding issues of timeliness and injuries-in-fact, adherence to the standard practice of district court intervention remains particularly warranted. *See, e.g.*, *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565–66 (2019) (discussing evidence of standing adduced at trial in statutory interpretation case); *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 72 (1978) (noting that the "District Judge held four days of hearings on the questions of standing and ripeness" before declaring a statute invalid).

The States could have filed a motion in the Seventh Circuit at any point after the current administration announced its intention, because the States were well aware that the Biden administration intended to "[r]everse" the Vacated Rule. *Biden Plan*, *supra*. If the States wished to participate in the appeal, they were required to take action while the appellate court retained jurisdiction. Indeed, Texas *did* intervene in a case where federal government defendants already supported its interests, and did so expressly to preserve its opportunity to defend a particular rule after the change in presidential administration without causing prejudice to the parties. *Pennsylvania v. Devos*, No. 1:20-cv-01468-CJN, Dkt. 130-1 at 10-11 (D.D.C. Jan. 19, 2021), *granted by minute order* (D.D.C. Feb. 4, 2021). There, Texas chose to intervene *before* President Biden's inauguration. Here, despite claiming a vital interest in the outcome of this case (App. at 7), and although the States "have been aware of their interests in the Rule for some time" (App. at 25), they made a tactical decision to sit on the sidelines. The States declined to act for months—even as DHS publicly stated that it was evaluating whether to continue its appeal of the Vacatur Order in light of the Executive Order. *Cook Cty. v. Wolf*, No. 19-cv-6334, Dkt. 241 at 2 (N.D. Ill. Feb. 3, 2021); *id.* Dkt. 245 at 3 (N.D. Ill. Feb. 19, 2021); *id.* Dkt. 247 at 1 (N.D. Ill. Mar. 5, 2021).

By the time the States chose to act with respect to this Rule, there was no "case in a court of appeals" in which the States could intervene. App. at 10. The States should have filed a timely motion to intervene in a court that held jurisdiction when the *Biden Plan* was announced, as Texas did in *Devos* when it learned of President-

Elect Biden's opposition to the rule at issue in that case, but they chose not to do so. The States cannot ignore the jurisdictional implications of that strategic decision.

B. The Application Should Be Denied As Moot.

The application should be denied for the additional reason that there is no longer a dispute for this Court to resolve. Federal courts exercise jurisdiction "only in the last resort, and as a necessity in the determination of real, earnest and vital controversy" between the parties. *Chi. & Grand Trunk Ry. v. Wellman*, 143 U.S. 339, 345 (1892); *accord Allen v. Wright*, 468 U.S. 737, 752 (1984) (quoting *Chicago*), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014); *see also Bond v. Utreras*, 585 F.3d 1061, 1071–72 (7th Cir. 2009) (emphasizing "the established general principle … that 'an actual controversy must be extant at all stages of review'" (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997))).

Here, a final judgment has been entered vacating the Rule, DHS has determined that pursuing an appeal from that judgment is no longer in the public interest, and the previously-filed appeal has been dismissed. *See DHS Statement*, *supra*. Rather than devote its resources to continued litigation attempting to overturn the Vacatur Order, DHS has issued a new final rule implementing that order. 86 Fed. Reg. 14,221. Although the States disagree with the agency's judgment as a matter of policy, that disagreement does not give them license to revive a dismissed case in an effort to impose their own policy priorities in lieu of DHS's priorities. Indeed, "[l]itigation will have no end if every time the parties resolve amicably (or drop) a

point of contention, someone else intervenes to keep the ball in the air." *United States v. City of Chicago*, 897 F.2d 243, 244 (7th Cir. 1990).

In light of DHS's decision (1) to forgo further litigation and (2) to promulgate a new rule implementing the Vacatur Order, this case is over. The States' application to force its prolongation has been mooted by subsequent events. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) ("It is therefore familiar learning that no justiciable 'controversy' exists when parties … ask for an advisory opinion, or when the question sought to be adjudicated has been mooted by subsequent developments.") (citations omitted); *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam) (holding that, when a case has "lost its character as a present, live controversy," the Court will not provide "advisory opinions on abstract propositions of law"). Absent a remaining dispute between the parties in this case, the application should be denied.

II. THE MOTION TO INTERVENE SHOULD BE DENIED.

This Court separately should deny the motion to intervene because the States cannot show that they have a vital interest in the litigation warranting intervention at this late stage. In fact, the States fail to demonstrate even the bare minimum interest required for Article III standing.

A. The States Fail To Establish Article III Standing.

The States may not intervene because they have not shown even a baseline injury for purposes of Article III standing. It is well-settled that "[t]he decision to seek review is not to be placed in the hands of concerned bystanders, persons who would seize it as a vehicle for the vindication of value interests." *Arizonans*, 520 U.S. at 64–65 (internal quotation marks omitted). For this reason, this Court has "repeatedly

recognized" that "to appeal a decision that the primary party does not challenge, an intervenor must independently demonstrate standing." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019); *see also Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016). Here, the States are precisely the type of "concerned bystanders" that this Court has rejected in the past. Accordingly, their request to intervene should be denied for lack of Article III standing.

To have standing, "a litigant must seek relief for an injury that affects him in a 'personal and individual way'" and "must possess a 'direct stake in the outcome' of the case." *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013). This Court has "repeatedly" held that "generalized grievance[s]" are not sufficient to establish standing. *Id.* at 706. An interest in "vindicat[ing] the … validity of a generally applicable" administrative rule, for instance, is not sufficient. *Id.* This principle "ensures that the Federal Judiciary respects 'the proper—and properly limited—role of the courts in a democratic society.'" *Id.* at 715 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006)).

In addition to requiring a concrete and particularized injury, Article III requires the petitioner to demonstrate a "causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court," and it must be "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S.

26, 38, 43 (1976)). Importantly, when "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else* … it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Id.* at 562.

The States cannot meet these bedrock standing requirements. Setting federal immigration policy is not within the purview of the individual States. *See Arizona v. United States*, 567 U.S. 387, 395 (2012). Nonetheless, the States seek to defend the Vacated Rule—a rule that the federal government has deemed contrary to the public interest—based on generalized policy "interests in conserving their Medicaid and related social-welfare budgets." App. at 8. In support of this claimed interest, the States rely exclusively on a report showing Texas's *total* Medicaid and related social-welfare budgets for all residents, immigrants or not. App. at 8–9. But Texas's total Medicaid budget has no relationship to the Vacated Rule. Indeed, the Rule created federal immigration-related consequences only for certain categories of immigrants who use public benefits, not the population writ large.

Nor can the States establish standing based on an unsupported and unquantified reference to the "amount of Texas's Medicaid budget spent on immigrants who would otherwise be inadmissible under the DHS Rule." App. at 9. [3]

[3] The States' failure to provide any factual support for their alleged injury is particularly telling because Texas is one of just six states, along with proposed intervenors Alabama and Mississippi, that generally prohibit even qualified immigrants from receiving Medicaid benefits after the five-year waiting period, even though those benefits would be permitted under federal law. *See* Randy Capps &

In fact, the Vacated Rule itself stated that it has no direct connection to State budgets. 84 Fed. Reg. at 41,492 ("This final rule … does not have substantial direct effects on the States.").[4] DHS also specifically declined to speculate about whether the Vacated Rule would affect admissions. *Id.* at 41,493 ("DHS cannot estimate with any degree of certainty the extent to which" the Rule "would result in fewer individuals being admitted to the United States."). The States cannot now argue that speculation as to the Vacated Rule's general effects on state budgets created a monetary interest sufficient to establish Article III standing. And even beyond the States' failure to show any injury, the States are not without a compensatory remedy. As the States acknowledge, the INA expressly allows state governments to seek reimbursement for public benefits expenditures. App. at 18; 8 U.S.C. § 1183a(b)(1)(A).

For these reasons, the only potential savings that the Vacated Rule might have created for the States were derived from its chilling effect on benefits used by individuals not even subject to the Vacated Rule. 84 Fed. Reg. at 41,312–13. DHS

Julia Gelatt, Migration Pol'y Inst., *Barriers to COVID-19 Testing and Treatment: Immigrants without Health Insurance Coverage in the United States* 5 (May 2020), https://www.migrationpolicy.org/sites/default/files/publications/UninsuredNoncitizens-FS_Final.pdf; *see also* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 411, 110 Stat. 2105, 2268–69 (codified as amended at 8 U.S.C. § 1621) (authorizing state and local benefits); *id.* § 403, 110 Stat. at 2265–67 (codified as amended at 8 U.S.C. § 1613) (five-year bar). This restriction on Medicaid eligibility for immigrants makes the States' broad statements about Medicaid spending even less compelling.

[4] In contrast, DHS expressly acknowledged that the vacated Rule would negatively impact local governments and health systems because of the Rule's chilling effect on individuals who are not even subject to the vacated Rule. 84 Fed. Reg. at 41,463 (conceding that confusion and fear concerning the vacated Rule would cause "some individuals [to] disenroll or forego enrollment in public benefits programs even though they are not directly regulated by this rule.").

expressly acknowledged this chilling effect, conceding that confusion and fear concerning the Vacated Rule would cause "some individuals [to] disenroll or forego enrollment in public benefits programs even though they are not directly regulated by this rule." *Id.* at 41,463. But the States' policy preference for immigrants to refrain from using benefits to which they are entitled due to fear cannot confer Article III standing. *Arizonans*, 520 U.S. at 64–65 (explaining that "concerned bystanders" may not "seize [intervention] as a vehicle for the vindication of value interests" (internal quotation marks omitted)). The States' generalized grievances cannot satisfy their burden of establishing Article III standing to intervene in this suit.

B. There Are No Extraordinary Circumstances Warranting Intervention.

Beyond their failure to establish Article III standing, the States cannot satisfy the high burden for intervention at this late stage. This Court permits parties to intervene for the first time at the Supreme Court only on "rare occasions," and only in cases involving "extraordinary" or "unusual" circumstances where the non-party's rights were "vitally affected by the lower court's decision." Stephen M. Shapiro et al., *Supreme Court Practice* § 6.16(C) (11th ed. 2019). Indeed, intervention before this Court is so rare that it has not had the opportunity to articulate which standard or rule applies to such requests.

Given the "unique problems caused by intervention at the appellate stage," courts of appeals allow intervention "only in an exceptional case for imperative reasons." *Amalgamated Transit Union Int'l v. Donovan*, 771 F.2d 1551, 1552–53 & n.3 (D.C. Cir. 1985) (per curiam); *accord Hutchinson v. Pfeil*, 211 F.3d 515, 519 (10th

Cir. 2000); *see Hall v. Holder,* 117 F.3d 1222, 1231 (11th Cir. 1997) (noting that intervention at the appellate stage is appropriate "only in an exceptional case for imperative reasons"); *In re Grand Jury Investigation Into Possible Violations of Title 18, U.S. Code, Sections 201, 371, 1962, 1952, 1951, 1503, 1343 & 1341*, 587 F.2d 598, 601 (3d Cir. 1978) (same); *McKenna v. Pan Am. Petroleum Corp.*, 303 F.2d 778, 779 (5th Cir. 1962) (same). When intervention is sought in this Court, the bar for intervention is at its apex.

This Court's precedent illustrates the exceptionally close connection that non-parties must demonstrate to warrant intervention in the Supreme Court. In *BNSF Railway v. EEOC*, for instance, the non-party requesting to intervene had originally filed the EEOC complaint prompting the litigation. Russell Holt's Mot. for Leave to Intervene as Resp't at 2–3, No. 18-1139 (U.S. Aug. 22, 2019). After the EEOC confessed error and abandoned its claims, SG Br. at 12, No. 18-1139 (U.S. Aug. 8, 2019), this Court allowed the non-party to intervene to defend the $100,000 judgment secured by the EEOC on his behalf. Holt's Mot. at 3; *BNSF Ry. v. EEOC*, 140 S. Ct. 109 (2019) (mem.) (granting intervention). A similarly intimate connection existed between the intervenor and the case in *Turner v. Rogers*, in which the Court allowed a child's grandfather and current custodian to intervene in an action concerning the father's incarceration for non-payment of child support. 564 U.S. 431, 436 (2011); *Turner v. Rogers*, 562 U.S. 1002 (2010) (mem.) (granting intervention). *See also Beth Isr. Hosp. v. NLRB*, 437 U.S. 483, 485, 487 n.3 (1978) (allowing intervention by union that had filed charges resulting in underlying NLRB complaint); *NLRB v. Acme*

Indus. Co., 384 U.S. 925 (1966) (mem.) and *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 436, 439 (1967) (granting union intervention in dispute concerning enforceability of an order issued in the union's favor).

Here, the States' relationship to the litigation is so tenuous that their only connection to the Rule is an unspecified reduction in Texas's future Medicaid spending. App. at 8–9. Such an indirect and unsupported interest does not come close to warranting intervention in this Court, particularly in a case with a well-publicized dismissal, where the confusion and fear that revoking that dismissal would cause is manifest. *See* App. at 25, *citing Illinois v. City of Chicago*, 912 F.3d 979, 987 (7th Cir. 2019) (district court did not abuse its discretion in denying intervention given, *inter alia*, the manifest prejudice to parties of undoing the well-publicized resolution.)

The cases on which the States rely do not help their position. To the contrary, they aptly illustrate the high threshold for establishing direct and significant interests warranting intervention—a threshold that the States do not meet. In *Pyramid Lake Paiute Tribe of Indians v. Truckee-Carson Irrigation District*, the Court permitted the Paiute Tribe to intervene to contest an order diverting river water from the Tribe's reservation. 464 U.S. 863 (1983) (mem.) (granting motion to intervene); Br. for the United States in Resp. to the Pet. to Intervene and in Opp'n to the Pet. for a Writ of Cert., No. 82-1723,1983 WL 961899, at *10–13 (U.S. Aug. 10, 1983). The intervenors' interests in *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969) (mem.), and *Banks v. Chicago Grain Trimmers Ass'n*, 389 U.S. 813 (1967) (mem.)—where the intervenors were the actual parties in interest—were even more direct and

compelling. *Hunter* concerned the intervenor's ability to run for reelection, and *Banks* determined whether the intervenor was entitled to recover a workers' compensation award for her husband's death. *See* Hunter Mot. to Intervene (reproduced in Shapiro, *supra*, at Appendix IV.FF); *Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 460–61 (1968).

Because the States' alleged interest cannot meet the exceptionally high bar for intervention at this late stage, the Court should deny the request to intervene.

III. THE STATES HAVE NOT MET THE REQUIREMENTS FOR A STAY.

The States have equally failed to demonstrate the "extraordinary circumstances" or carry the "heavy burden" necessary to justify a stay of the district court's judgment. *See Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316–17 (1983) (Blackmun, J., in chambers). A stay pending the disposition of a petition for a writ of certiorari is appropriate if there exists: (1) "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari"; (2) "a fair prospect that a majority of the Court will conclude that the decision below was erroneous"; and (3) "a likelihood that irreparable harm will result from the denial of a stay." *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (mem.) (Ginsburg, J., in chambers) (cleaned up). The States cannot meet even one element of this test.

First, the States cannot establish a reasonable probability that the Court will grant certiorari to review the district court's judgment ordering vacatur of the Rule. The appeal was voluntarily dismissed, without review or decision by the Seventh Circuit. Moreover, the Rule at issue here has been superseded by the Current Rule—with yet further rulemaking likely in light of the Executive Order directing the

agency to review this area of law. Given the events that have occurred since the district court's entry of judgment, this Court's intervention at this stage is unwarranted.

Moreover, and contrary to the States' assertion, this case is not worthy of certiorari simply because this Court previously granted certiorari to review the preliminary injunction issued in the Second Circuit case. App. at 12. At the time the Court granted certiorari, the case concerned a Rule that remained in effect and that had not been superseded by the Current Rule. Moreover, that case allowed the Court to address the propriety of the New York district court's order entering a nationwide preliminary injunction—an issue that Justices Gorsuch and Thomas concluded "this Court must … confront" when they voted to grant a stay of the preliminary injunction. *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (mem.) (Gorsuch, J., concurring in the grant of stay). This case, by contrast, concerns a final judgment ordering vacatur—*i.e.*, the standard relief prescribed by the APA when an agency rule is deemed invalid, *see Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998)—of a Rule that has been superseded by subsequent agency action.

In addition, the Northern District of Illinois was in good company as the Seventh, Second, and Ninth Circuits all have agreed that the Vacated Rule violated the APA. *See Cook Cty.*, 962 F.3d 208; *City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs.*, 981 F.3d 742 (9th Cir. 2020), *cert. dismissed*, No. 20-962, 2021 WL 1081068 (U.S. Mar. 9, 2021); *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d

42 (2d Cir. 2020), *cert. dismissed*, No. 20-449, 2021 WL 1081216 (U.S. Mar. 9, 2021).[5] On December 3, 2020, the Fourth Circuit granted rehearing *en banc* as to the District Court of Maryland's preliminary injunction order, thus vacating the Fourth Circuit's prior opinion upholding the Rule under the APA. *CASA de Md., Inc. v. Trump*, 971 F.3d 220, 250 (4th Cir.), *vacated for reh'g en banc*, 981 F.3d 311 (4th Cir. 2020) (dismissed Mar. 11, 2021); *see also* 4th Cir. R. 35(c). Accordingly, there is no circuit split.

Nor have the States shown irreparable harm. As explained *supra*, the States have not shown that they have suffered an injury-in-fact that is fairly traceable to the Vacated Rule. Nor have they shown any exigency, as, to follow the States' logic, their alleged future harm from increased Medicaid spending could not accrue until five years after the Vacated Rule would have allegedly decreased admissions, and so the alleged savings would be in 2025 when lawful permanent residents admitted under the Vacated Rule would have first become eligible for any federal benefits (which, as noted *supra*, Texas does not generally provide in any event, *supra* fn. 2). They also have not proceeded in a timely manner, despite ample notice of the administration's intent to change the Rule. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) ("Last-minute stays should be the extreme exception, not the norm, and 'the last-minute nature of an application' that 'could have been brought' earlier, or

[5] The States cite to *City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs.*, 944 F.3d 773 (9th Cir. 2019), to show that the Ninth Circuit found that the vacated Rule was permissible under the APA. Yet, in a subsequent opinion, the Ninth Circuit found that the Rule violated the APA. *See City & Cty. of San Francisco*, 981 F.3d 742 (9th Cir. 2020).

'an applicant's attempt at manipulation,' 'may be grounds for denial of a stay.'" (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)). And in any event, sponsor reimbursement remains a compensatory path for the States to pursue as a safety valve against federal fluctuations in public charge decisions.

Similarly, the States have not suffered any "procedural harm." App. at 21. Contrary to the States' assertions, DHS did not "short-circuit[ ]" the APA by implementing the Vacatur Order. *Id.* Congress crafted the APA's remedial scheme specifically to enlist federal courts to check agency decisions. *See* 5 U.S.C. § 706(2)(A) ("The 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."). The APA further provides that notice and comment is not required when the agency for good cause finds that compliance would be "impracticable, unnecessary, or contrary to the public interest." *Id.* § 553(b)(3)(B). Such is the case here.

On March 15, 2021, DHS issued a final rule removing the Vacated Rule from the Code of Federal Regulations. *See* 86 Fed. Reg. 14,221. In that final rule, DHS stated that it had determined good cause existed to bypass the notice and comment requirement based on the need to immediately implement the Vacatur Order. *Id.* The States cannot, and do not, argue that DHS did not possess good cause in bypassing notice and comment. Rather, courts have affirmed the "good cause" exception where, as here, rulemaking without notice and comment is "a reasonable and perhaps inevitable response to" a "court order." *EME Homer City Generation, L.P v. EPA*, 795

F.3d 118, 134 (D.C. Cir. 2015) (quoting *Am. Fed'n of Gov't Emps. v. Block*, 655 F.2d 1153, 1157 (D.C. Cir. 1981)).

Lastly, the States will not be deprived of the benefits of regular APA proceedings. *See* App. at 21. DHS may soon issue notice of a new proposed public charge rule, at which point the States will have the opportunity to comment. The States cannot manufacture a procedural injury now in order to upend that future process.

At bottom, the States seek to use this Court's stay powers to advance their own immigration policy interests. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 866 (1984) ("The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'" (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)). Congress vested the Executive Branch with the authority to make public charge inadmissibility determinations within the confines of the INA. Consistent with this authority, the Executive Branch has decided to pursue a different course of action. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) ("A change in administration … is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its … regulations" as well as a reevaluation of its "priorities in light of the philosophy of the administration."). The States cannot use their policy dispute to usurp this settled authority and to justify a stay.

IV. SUMMARY REVERSAL IS INAPPROPRIATE.

Finally, the States request in the alternative that this Court summarily reverse the action of the Seventh Circuit in declining to recall its mandate. This meritless request should be denied.

The States cite a single case in support of their request, *Calderon v. Thompson*, 523 U.S. 538 (1998). App. at 22. This Court in *Calderon* explained that "[i]n light of 'the profound interests in repose' attaching to the mandate of a court of appeals, … the power [to recall the mandate] can be exercised only in extraordinary circumstances." 523 U.S. at 550. The Court further emphasized that "[t]he sparing use of th[is] power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Id.* Even in a case where recall of the mandate would "implicat[e] no more than ordinary concerns of finality," this Court stated that it "would have grave doubts" about an appellate court's use of that power. *Id.* at 552–53.

The Seventh Circuit's actions below are not extraordinary circumstances that would justify recall of the mandate—much less that would justify labeling the Seventh Circuit's refusal to recall the mandate an abuse of discretion. *Id.* at 549. The Seventh Circuit dismissed the appeal and issued the mandate by means of ministerial application of Federal Rule of Appellate Procedure 42(b) and Seventh Circuit Rule 41. The States must seek recourse in some forum that has jurisdiction to hear their complaint—not by subverting the rules of appellate jurisdiction so that they may proceed in the forum of their choice.

As noted *supra*, the States' inexplicable delay in moving to intervene in this case is in stark contrast to Texas's (successful) decision to intervene and defend a different federal rule *before* President Biden's inauguration. *Pennsylvania v. Devos*, No. 1:20-cv-01468-CJN, Dkt. 130-1 at 10-11 (D.D.C. Jan. 19, 2021), *granted by minute order* (D.D.C. Feb. 4, 2021). Rewarding this dilatory behavior by summarily reversing the court of appeals would incentivize gamesmanship, prejudice parties who do appear on the merits, and undermine confidence in the legal system by calling into question the finality of final judgments and issued mandates. The Court should guard against these pernicious consequences by denying the application.

CONCLUSION

For these reasons, Respondents respectfully request that the Court deny the States' motion to intervene and stay the district court's final judgment.

Respectfully submitted,

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