No. 21-2561

In the United States Court of Appeals for the Seventh Circuit

COOK COUNTY, ILLINOIS, ET AL.,
Plaintiffs-Appellees,

v.

STATE OF TEXAS, ET AL.,
Intervenors-Appellants.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

REPLY BRIEF FOR INTERVENORS-APPELLANTS

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Introduction

During the recent oral argument in a parallel case, several Supreme Court Justices expressed great skepticism of the federal government's efforts to rescind the Public Charge Rule while evading the requirements of the Administrative Procedure Act ("APA"). *See* Transcript of Oral Argument at 45:21-24, 47:25-48:1, 67:1-6, 68:7-9, 77:23-78:3, *Arizona v. City & County of San Francisco*, No. 20-1775 (U.S. Feb. 23, 2022) ("Transcript"). Two Justices, however, questioned whether they could provide effective relief because of the district court's judgment here. *See id.* at 14:4-15:12, 24:14-22, 25:3-12. This case provides a suitable vehicle to repudiate the federal government's attempt to jettison the Public Charge Rule without complying with the APA's notice-and-comment requirement: the State Intervenors timely moved to intervene in this litigation after the federal government abandoned its defense of the Public Charge Rule, they have a sufficient interest in the rule to intervene, and the federal government's extraordinary conduct warrants the extraordinary remedy of relief under Rule 60(b) of the Federal Rules of Civil Procedure. This Court should reject the federal government's and Plaintiffs' attempts to salvage their collusive settlement and allow the State Intervenors to defend the Public Charge Rule on appeal.

ARGUMENT

I. The State Intervenors Are Entitled To Intervene.

A. The State Intervenors' motion was timely.

1. The State Intervenors promptly moved to intervene once the federal government abandoned its defense of the Public Charge Rule.

"Here, the most important circumstance relating to timeliness is that the [State Intervenors] sought to intervene 'as soon as it became clear' that [their] interests 'would no longer be protected' by the parties in the case.'" *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, No. 20-601, 2022 WL 618961, at *8 (U.S. Mar. 3, 2022) (citation omitted). The State Intervenors learned that the federal government would no longer represent their interests in the Public Charge Rule on March 9, 2021, when the federal government abandoned its defense of the Rule with "military precision to effect the removal of the issue from [the Supreme Court's] docket and to sidestep notice-and-comment rulemaking." Transcript, *supra*, at 45:22-24 (Alito, J.). Within two days, the State Intervenors moved to intervene in multiple courts of appeals where challenges to the Rule were pending. *E.g.*, Motion to Recall the Mandate to Permit Intervention as Appellant, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 11, 2021), ECF No. 25-1; *see* Transcript, *supra*, at 91:17-92:5 (discussion between Chief Justice Roberts and California's counsel).

a. Like the district court, Plaintiffs and the federal government nonetheless maintain that the State Intervenors should have intervened as soon as the results of the 2020 presidential election became clear because then-candidate Biden's campaign promises. At the very least, the now-aligned parties insist, the State

Intervenors should have intervened no later than February 2, 2021, based on an executive order issued by now-President Biden. Plaintiffs (at 21-22) and the federal government (at 28) also argue that the State Intervenors delayed moving to intervene until May 12, 2021, when they moved to intervene in the district court.

Plaintiffs and the federal government are wrong on both counts. *First*, the State Intervenors did not delay moving to intervene until May 2021. They first moved to intervene on March 11, 2021—only two days after the federal government both announced and consummated its plan to rescind the Public Charge Rule through collusive settlement. Opposed Motion to Intervene as Defendant-Appellants, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 11, 2021), ECF No. 25-3; *see also* Opposed Motion for Leave to Intervene as Defendant-Appellants, *Casa de Md., Inc. v. Biden*, No. 19-2222 (4th Cir. Mar. 11, 2021), ECF No. 215.

Notably, that is just one day later than the State Intervenors moved to intervene in the Ninth Circuit litigation about the Public Charge Rule. Motion to Intervene by the States of Arizona, Alabama, Arkansas, Indiana, Kansas, Louisiana, Mississippi, Montana, Oklahoma, Texas, and West Virginia, *City & County of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 992 F.3d 742 (9th Cir. Mar. 10, 2021) (Nos. 19-17213, 19-17214, 19-35914), ECF No. 143 (in lead case No. 19-17213). Though neither federal government nor the respondent States and local governments were willing to raise a timeliness argument in the Supreme Court, and for good reason, the federal government and Plaintiffs shamelessly do so here.

When this Court denied the State Intervenors' March motions, the State Intervenors immediately sought relief from the Supreme Court—which all but directed

the State Intervenors to move to intervene in the district court. *See Texas v. Cook County*, 141 S. Ct. 2562 (2021). The State Intervenors promptly moved to intervene, and they have made no secret of why they did so: they want to defend the Public Charge Rule on appeal. And yet Plaintiffs and the federal government fault the State Intervenors for attempting to intervene in this Court (and other courts of appeals)—where the litigation had been pending most recently—and seeking relief from the Supreme Court immediately after the State Intervenors learned that the federal government would abandon its defense of the Public Charge Rule. But if the State Intervenors' motion to intervene in the district court were untimely, then the Supreme Court would not have invited the State Intervenors to move to intervene in the district court. *See id.*

Second, even if then-candidate and now-President Biden's policy statements and executive order gave the State Intervenors notice that the federal government might seek to repeal the Public Charge Rule through notice-and-comment rulemaking,[1] the State Intervenors "could not have reasonably anticipated" that the federal government would resort to extraordinary and collusive litigation tactics to evade the APA. *Illinois v. City of Chicago*, 912 F.3d 979, 986 (7th Cir. 2019); *see Cameron*, 2022 WL 618961, at *8 (holding that an interested party need not seek to defend a state law immediately following an administration change).

[1] *But see Republican Party of Minn. v. White*, 536U.S. 765, 70 (2002) ("[O]ne would have to be naïve not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment.").

b. As the district court acknowledged, it would have been "inappropriate" for the State Intervenors to seek intervention before the district court entered its partial final judgment in this case because "there was no prospect at that point" that the federal government "would cease defending the Rule." Dkt. 285 at 13 (emphasis omitted). Even now, the federal government "has not advanced a new position on the merits of this case," U.S. Br. 32 n.11, instead standing by the position the federal government pressed across the country and at every stage of the federal judicial system—including multiple petitions for certiorari, one of which was granted by the Supreme Court, *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020)—that a nationwide injunction against the Public Charge Rule was improper.

Indeed, when asked by the Supreme Court whether it "agree[d] that, therefore, the Northern District of Illinois erred when it issued a nationwide injunction?", Transcript, *supra*, at 50:22-25, the United States confirmed "[w]e do." *Id.* at 51:1. That continued denial means that the federal government's acquiescence in the district court's erroneous judgment can only be explained as an effort to obtain through litigation what it could not through regulation—an instantaneous end to a disfavored rule.

That the current administration disagreed with the Public Charge Rule as a matter of policy is no excuse: "the Justice Department, which represents federal agencies in the courts, has no authority to change the agency's policy position . . . ." Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 Minn. L. Rev. 1, 26 (2019) (footnotes omitted). That is why, as Judge VanDyke has noted, the federal government's general practice when it wants to rescind a rule that is subject

to ongoing litigation is to move to hold that litigation in abeyance, "rescind[] the rule per the APA, and then promulgat[e] a new rule through notice and comment rule-making." *City & County of San Francisco*, 992 F.3d at 751 (VanDyke, J., dissenting).

The federal government (at 32) and Plaintiffs (at 24 n.8) criticize Judge VanDyke for declining to support his account of the federal government's general practice with citations. But there is no shortage of support for the proposition that new administrations usually either "continue to defend" rules promulgated by previous administrations "in court where they have been challenged or . . . seek continuances and abeyances to buy time to consider their rescission and then initiate the complex notice-and-comment processes required for their undoing." Cristina M. Rodríguez, *Foreword: Regime Change*, 135 Harv. L. Rev. 1, 50 (2021). That is particularly true where—as here—the U.S. Office of the Solicitor General "had staked out a position in the [Supreme] Court," which "with rare exceptions" was seen as "the position of the United States, full stop." Michael R. Dreeben, *Stare Decisis in the Office of the Solicitor General*, 130 Yale L.J. Forum 541, 542 (2021) (describing three decades of experience).

Indeed, every other administration this century has followed this practice. Opening Br. 22-23. Even the current administration followed this practice in several other cases involving policies enacted by the previous administration while this administration was reviewing the Public Charge Rule. Opening Br. 23 (collecting cases).

c. Plaintiffs and the federal government fault the State Intervenors for not intervening in this litigation earlier even though Texas intervened in *Pennsylvania v.*

DeVos, No. 1:20-cv-1468 (D.D.C. filed June 4, 2020), shortly before the inauguration "based merely on President Biden's prior statements about the regulation at issue in that case." U.S. Br. 35; *see* Pls.' Br. 24-25. This argument fails for at least three reasons. *First*, that there is a circuit split regarding when a movant may seek to intervene on the same side as a government litigant, *compare* Petition for a Writ of Certiorari at 18-19, *Found. for Individual Rts. in Educ. v. Victim Rts. Law Ctr.*, 142 S. Ct. 754 (2022) (No. 21-84) (describing this Court's position), *with id.* at 22-24 (D.C. Circuit), and *DeVos* is in a different Circuit.

Second, when Texas moved to intervene in *Devos*, the federal government had not yet filed its answer. *See* Texas' Partially Opposed Motion to Intervene as Defendant, *Pennsylvania v. DeVos*, No. 1:20-cv-1468 (D.D.C. Jan. 19, 2021), ECF No. 130; Defendants' Answer to Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief, *Pennsylvania v. DeVos*, No. 1:20-cv-1468 (D.D.C. Jan. 19, 2021), ECF No. 135. By contrast, the federal government had put considerable effort into defending the Public Charge Rule, including filing multiple petitions for writs of certiorari. As the Principal Deputy Solicitor General of the United States recently acknowledged to the Supreme Court that he is "not aware of another case that transpired" like the litigation about the Public Charge Rule. Transcript, *supra*, at 47:11-12. The State Intervenors thus could not have reasonably anticipated that the federal government would take the extraordinary steps it took here.

Third, it ignores that the federal government *opposed* the motion in *Devos*, Defendants' Brief in Opposition to Texas' Motion to Intervene, *Pennsylvania v. Rosenfelt*, No. 1:20-cv-1468 (D.D.C. Feb. 2, 2021), ECF No. 141, as well as in other

litigation involving challenges to Trump-era rules. For example, less than a month after the federal government abandoned its defense of the Public Charge Rule, Texas sought to intervene to defend a rule concerning Title IX proceedings enacted during the Trump administration. Intervenor-Defendant State of Texas's Notice of Motion and Motion To Intervene as Defendant, *Women's Student Union v. Dep't of Educ.*, No. 3:21-cv-1626 (N.D. Cal. Apr. 7, 2021), ECF No. 19. Like the Public Charge Rule, then-candidate Biden had opposed the rule at issue on policy grounds because he saw it as "a green light to ignore sexual violence," *The Biden Agenda for Women*, JoeBiden.com, https://joebiden.com/womens-agenda/ (last visited Mar. 7, 2022). And he promised to put a "quick end" to the rule. Joe Biden, *Statement on the Trump Administration Rule to Undermine Title IX and Campus Safety* (May 6, 2020), https://medium.com/@JoeBiden/statement-by-vice-president-joe-biden-on-the-trump-administration-rule-to-undermine-title-ix-and-e5dbc545daa.

But unlike here—where the federal government insists that the Intervenor States should have taken a candidate's promises as gospel—there it argued that "neither the administration's stated policy position nor the Department's review of existing regulations abrogate the government's duty to defend federal regulations in court as a legal matter." Defendant's Opposition to Texas's Motion to Intervene at 3, *Women's Student Union*, No. 3:21-cv-1626 (N.D. Cal. May 6, 2021), ECF No. 28. Thus any request to intervene would be "premature" before "the Department of Education's review of the regulations implementing Title IX [under the Trump administration] is complete." Defendant's Opposition to Texas's Motion to Intervene

at 4, *Women's Student Union*, No. 3:21-cv-1626 (N.D. Cal. Nov. 22, 2021), ECF No. 98.

If anything, Texas's experience in *DeVos* reinforced the State Intervenors' reasonable expectation that the federal government would (at most) move to hold this litigation in abeyance while it pursued notice-and-comment rulemaking to rescind and replace the Public Charge Rule, because that is precisely the path the federal government has taken with respect to the rule at issue in *DeVos*. Joint Motion to Hold Case in Abeyance, *Pennsylvania v. Rosenfelt*, No. 1:20-cv-1468 (D.D.C. Feb. 3, 2021), ECF No. 143.

The federal government insists (at 33), however, that it "does not appeal every adverse decision entered against it" and that "a decision not to press further review may be based on a variety of considerations." And the federal government provides (at 33 n.12) a list of cases in which it has either declined to appeal adverse decisions or dismissed pending appeals and petitions for writs of certiorari challenging adverse decisions. But those exceptions to the federal government's general practice hardly show that the Intervenor States should have anticipated the federal government's extraordinary abandonment of its defense of the Public Charge Rule.

Indeed, the federal government itself acknowledged that at least one part of its abandonment of the defense of the Public Charge Rule—withdrawing two petitions for writs of certiorari regarding injunction orders (one of which the Supreme Court had granted)—was "very unusual." Brief for the Federal Respondents at 37, *Arizona v. City & County of San Francisco*, No. 20-1775 (U.S. Jan. 12, 2022). As the Principal Deputy Solicitor General put it, "one of the things that made this case different and

that's important to keep in mind . . . is that this was a case that the government had brought into th[e] [Supreme] Court and gotten certiorari granted and gotten extraordinary stays entered before DHS decided that it wanted to replace the rule." Transcript, *supra*, at 72:16-23.

The federal government's sudden abandonment of its defense of the Public Charge Rule is all the more extraordinary because it has taken the seemingly unprecedented step of opposing intervention by the State Intervenors, who seek only to defend the rule on appeal. *Id.* at 42:21-22 (Justice Thomas: "I don't recall the government opposing such interventions . . . . "); *id.* at 84:2-15 (Justice Barrett: "What about the government opposing intervention in this circumstance? . . . What has the historical practice been there?" Principal Deputy Solicitor General Fletcher: "So I don't have a lot of examples of that, I think, in part, because it just hasn't come up.").

The federal government and Plaintiffs acknowledge that when the federal government declines to defend federal laws from certain challenges, Congress requires the Department of Justice to provide the leadership of both houses of Congress "special notification under 28 U.S.C. § 530D(a)(1)(B)(ii)." U.S. Br. 33; Pls.' Br. 41-42. And Congress made it clear why it wanted such special notice: to "reasonably enable the House of Representatives and the Senate to take action, separately or jointly, *to intervene* in timely fashion in the proceeding." 28 U.S.C. § 530D(b)(2) (emphasis added). In other words, Congress considers the Department of Justice's refusal to defend a federal law so extraordinary that it requires the Department to facilitate intervention by a nonparty to timely take up the defense of that law—which is what the State Intervenors have tried to do.

So even if the federal government has occasionally declined to defend federal laws from court challenges, nothing in the months leading up to the abandonment of its defense of the Public Charge Rule put the State Intervenors on notice that the federal government would take that unusual and extraordinary path here—much less that it would oppose the State Intervenors' attempts to take up the defense of the Public Charge Rule. To the contrary, the status reports the parties filed below made it reasonable for the State Intervenors to believe that the federal government would either continue to defend the Public Charge Rule both here and in the Supreme Court or (at most) move to hold this litigation in abeyance while the new administration attempted to address the Public Charge Rule through notice-and-comment rulemaking. Opening Br. 20-22.

The federal government's suggestion in one of those status reports that it might take actions to moot Plaintiff Illinois Coalition for Immigrant and Refugee Rights' ("ICIRR") equal protection claim, Dkt. 245 at 4, did not indicate that it would simply abandon its appeal of the district court's partial final judgment. *But see* U.S. Br. 30-31; Pls.' Br. 23. The district court previously concluded that vacatur of the Public Charge Rule based on Plaintiffs' APA claims would not moot ICIRR's equal protection claim because ICIRR sought relief above and beyond the Public Charge Rule's vacatur. Dkt. 222 at 9-11. Thus, the most likely way ICIRR's equal protection claim would have become moot was for the federal government to rescind the rule and replace it through notice-and-comment rulemaking. *See, e.g.*, *City & County of San Francisco*, 992 F.3d at 751 (VanDyke, J., dissenting). Indeed, "abeyances in a pending lawsuit are granted" precisely "to allow a new rulemaking to 'run its

course' and save the judicial resources, which would otherwise be involved in deciding the pending matter" that might otherwise be mooted. Davis Noll & Revesz, *supra*, at 24 (footnotes omitted)).

And neither the federal government's suggestion in one status report that ICIRR may agree to a voluntary dismissal of its equal protection claim, Dkt. 245 at 4, nor ICIRR's suggestion that it would be open to staying its equal protection claim if the federal government dismissed its appeal, *id.* at 3, indicated that the federal government would enter into a collusive settlement to prevent interested parties from defending the law. The federal government raised the possibility of ICIRR voluntarily dismissing its equal protection claim only in a parenthetical and only after suggesting that either ICIRR's equal protection claim would become moot or ICIRR would agree to "a more lengthy stay," *id.*—*i.e.*, a stay long enough for the federal government to rescind and replace the Public Charge Rule through notice-and-comment rulemaking. Taken in context, the government's suggestion of a possible voluntary dismissal indicated that the federal government would pursue notice-and-comment rulemaking, not abruptly abandon its defense of the Public Charge Rule.

Similarly, ICIRR's suggestion that the federal government voluntarily dismiss its appeal demonstrated only that ICIRR had nothing to gain from agreeing to stay its equal protection claim without receiving something in return from the federal government. But had ICIRR refused to agree to move to hold the case in abeyance after the federal government issued a notice of proposed rulemaking, the federal government could have filed an opposed motion—or the district court could (and

should) have placed the case in abeyance sua sponte. *See Am. Petrol Inst. v. EPA*, 683 F.3d 382, 386 (D.C. Cir. 2012).

In short, the State Intervenors' "need to seek intervention did not arise until the [federal government] ceased defending" the Public Charge Rule, "and the timeliness of [their] motion should be assessed in relation to that point in time." *Cameron*, 2022 WL 618961, at *8. Because the State Intervenors "sought to intervene two days after learning" that the federal government "would not continue to defend" the Public Charge Rule, *id.*, the State Intervenors' motion to intervene was timely. *See id.* at *13 (Kagan, J., concurring in the judgment) ("The intervention motion, though coming late in the suit, was still timely. The attorney general intervened as soon as he had a reason to do so—more specifically, two days after he learned that the secretary would no longer defend the challenged law.").

2. The original parties fail to identify any prejudice they may face that should factor into the timeliness analysis.

The federal government (at 37-42) and Plaintiffs (at 26-28) insist that they would suffer various types of prejudice if the State Intervenors are allowed to defend the Public Charge Rule on appeal. But none of that alleged prejudice should factor into the timeliness analysis.

The federal government (at 41) and ICIRR (at 26-27) assert that they would be prejudiced by the State Intervenors' alleged delay in intervening because of issues related to the potential discovery for ICIRR's equal protection claim. Specifically, the parties echo the district court's observation that the federal government would "once again" face "the risk of losing privilege battles and having to present former

administration officials for deposition." Dkt. 285 at 27. But the federal government would have had to face that risk even if the State Intervenors had moved to intervene immediately after the district court issued its partial final judgment. That risk thus has no bearing on the timeliness question, which is "ultimately an equitable sort of . . . question[.]" Transcript, *supra*, at 78:6-8 (Gorsuch, J.). *See also Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (en banc) ("In evaluating whether Rule 24(a)(2)'s requirements are met, we normally follow 'practical and equitable considerations' . . . . " (citation omitted)); *Schultz v. Connery*, 863 F.2d 551, 554 (7th Cir. 1988) ("[T]he 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." (citation omitted)). To the extent that there is any *greater* risk as a result of the parties' collusive litigation conduct, "[t]he self-inflicted nature of the . . . asserted harm 'severely undermines'" their claims. *Texas v. Biden*, 10 F.4th 538, 558 (5th Cir. 2021) (per curiam) (citation omitted) (collecting cases).

ICIRR's worry (at 27) that discovery has grown stale since the State Intervenors moved to intervene is similarly irrelevant. This Court "measure[s] the prejudice to the parties . . . at the time the petition was filed, not now." *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 322 (7th Cir. 1995).

The federal government also complains (at 38) that it has already removed the Public Charge Rule from the Code of Federal Regulations. Leaving aside that its only asserted basis for doing so was its own collusive dismissal of its appeal, the federal

government did not take that step until a few days after the State Intervenors had moved to intervene in this Court and in the Fourth and Ninth Circuits. *Compare* Opposed Motion to Intervene as Defendant-Appellants, *Cook County*, No. 20-3150 (7th Cir. Mar. 11, 2021), ECF No. 25-3; Opposed Motion for Leave to Intervene as Defendant-Appellants, *Casa de Md.*, No. 19-2222 (4th Cir. Mar. 11, 2021), ECF No. 215; *and* Motion to Intervene by the States of Arizona, Alabama, Arkansas, Indiana, Kansas, Louisiana, Mississippi, Montana, Oklahoma, Texas, and West Virginia, *City & County of San Francisco*, 992 F.3d 742 (9th Cir. Mar. 10, 2021), ECF No. 143, *with Inadmissibility on Public Charge Grounds; Implementation of Vacatur*, 86 Fed. Reg. 14,221, 14,221 (Mar. 15, 2021). The federal government thus had notice that litigation about the validity of the Public Charge Rule was not over before it tried to remove the rule from the Code of Federal Regulations.

The federal government next complains (at 37-38) that it spent five weeks deciding what to do in this litigation, factoring in the lack of intervenors, before it chose to acquiesce in the district court's judgment and simply reinstate the Clinton-era guidance that preceded the Public Charge Rule. But there is no indication that the federal government took any resource-intensive steps to abandon its defense of the Public Charge Rule. To the contrary, all the federal government had to do was file several short motions to dismiss and stipulations of dismissal. And any resources the federal government spent *deciding* on a new policy would have been necessary regardless of whether it decided to rescind the rules through the process required by the APA or through collusive litigation tactics.

The federal government also notes (at 42) that even if it had moved to hold this case in abeyance, the stay of the district court's judgment would still have been in effect, and the federal government likely would have had to litigate whether the stay should remain in effect. In other words, the federal government complains that it would not have been able to enjoy the fruits of its evasion of the APA. As Justice Kagan recently explained:

> The real issue to me is the evasion of notice-and-comment. And, I mean, basically, the government bought itself a bunch of time where the rule was not in effect. If you—if the administration had come in and said, oh, my gosh, we have a notice-and-comment rule, we really hate it, we have to change it, I mean, it would have taken months to change it. And the administration didn't have to do that.

Transcript, *supra*, at 47:25-48:8.

But any "unrealized gain" from the federal government's effort to evade the APA "does not count as a legally cognizable harm" in the timeliness inquiry contemplated by the federal rules. *Cameron*, 2022 WL 618961, at *13 (Kagan, J., concurring in the judgment). Although the federal government calls the State's position that the federal government should not be rewarded for attempting to evade the APA's requirements "remarkable," U.S. Br. 39; *see also* Pls.' Br. 27-28, this type of extraordinary litigation conduct is precisely the kind of "unusual circumstance[]" that courts must consider in the timeliness analysis, *City of Chicago*, 912 F.3d at 984 (citation omitted); *cf. Liu v. Sec. & Exch. Comm'n*, 140 S. Ct. 1936, 1943 (2020) ("[I]t would be inequitable that [a wrongdoer] should make a profit out of his own wrong." (citation omitted)). That lack of prejudice is particularly apparent given the Deputy

Solicitor General Fletcher's *explicit* concession that the underlying judgment here is illegal. *Supra* at 5. The government is thus not making even the slightest attempt to conceal their attempt to profit from a judgment that even it regards as patently erroneous.

3. The State Intervenors will suffer substantive and procedural harms if they cannot defend the Public Charge Rule.

By contrast, as the State Intervenors have explained (at 31), they will suffer considerable prejudice if they cannot defend the Public Charge Rule because the States must bear the burden of admitted aliens residing within their borders who become public charges. The State Intervenors thus are the "direct beneficiaries" of the Public Charge Rule. *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009); *cf. id.* (concluding that a "statute's direct beneficiaries" could intervene as of right because they would be harmed by the invalidation of that statute). Indeed, the federal government acknowledges that DHS estimated that the Public Charge Rule would save the States $1.01 billion a year. U.S. Br. 59 (citing Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,301 (Aug. 14, 2019)).

The federal government now tries (at 42-43) to distance itself from its own calculations because DHS cited the Public Charge Rule in only five cases during the one year the rule was in effect. But that ignores the deterrent effect the Public Charge Rule almost certainly had on individuals who might have applied for admission or a change in status but whose applications would have been denied under the rule, as well as those that declined to seek public benefits to preserve their eligibility. Moreover, the one year that the Public Charge Rule was in effect is too small of a sample

size to evaluate the impact of the Rule. The Rule would have mattered in more cases going forward, but the federal government "bought itself a bunch of time where the rule was not in effect" by resorting to the extraordinary tactics it used here. Transcript, *supra*, at 48:2-3 (Kagan, J.).

The federal government and Plaintiffs discount this prejudice because the State Intervenors "have a readily available path to demand that DHS re-promulgate the Rule: a petition for rulemaking." Pls.' Br. 29 (quoting Dkt. 285 at 28); *see* U.S. Br. 44. But that path is much more fraught than defending the Public Charge Rule in this litigation, in which the Public Charge Rule would receive "deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." Dkt. 285 at 28. If, on the other hand, the federal government denies a petition for rulemaking to reinstate the Public Charge Rule, that denial would be reviewed only under the "deferential arbitrary-and-capricious standard." *Id.* at 29 (citation omitted).

The federal government and Plaintiffs dismiss the importance of the standard of review in litigation about federal rules. But the standard of review is often "decisive." *United States v. Rice*, 673 F.3d 537, 541 (7th Cir. 2012); *see also, e.g.*, *Tineo v. Att'y Gen.*, 937 F.3d 200, 212 (3d Cir. 2019) ("[T]he standard of review . . . is often outcome determinative." (citation omitted) (omission in original)). Thus, recognizing that the State Intervenors have an interest in the federal government following the proper procedure to rescind rules that had been promulgated through the notice-and-comment process does not, as Plaintiffs assert (at 30), "incentivize gamesmanship." It does the opposite: it incentivizes the federal government to comply with

the procedures Congress required in the APA by preventing the federal government from benefitting from its own gamesmanship to avoid the APA.

The federal government also downplays (at 43-44) the impact that the district court's nationwide vacatur of the Public Charge Rule will have on future rulemaking and litigation if that vacatur is allowed to stand. But for that vacatur, the federal government would have had to explain its reasons for abandoning the Public Charge Rule. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009). Although DHS "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one," U.S. Br. 44 (quoting *Fox*, 556 U.S. at 515), DHS would still have had to provide "a reasoned explanation . . . for disregarding [the] facts and circumstances that underlay or were engendered by" the Public Charge Rule, *Fox*, 556 U.S. at 516, and that reasoned explanation would be subject to an arbitrary-and-capricious challenge. Now the federal government need only say that the Public Charge Rule is not a viable option because of the district court's judgment.

DHS announcing its intention to promulgate a new rule does not eliminate the prejudice the State Intervenors will face if they are not allowed to intervene here. *Contra* U.S. Br. 43-44. Again, the regulatory framework for that contemplated rulemaking has fundamentally changed. And there is no guarantee that the rulemaking process will produce a new rule. But even if it does, that shows that the case should have been held in abeyance—then, at the very least, the Intervenor States could have asked that the district court's judgment be vacated under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

4. The federal government's extraordinary abandonment of its defense of the Public Charge Rule warrants allowing the State Intervenors to intervene.

For the reasons discussed above, *supra* section I.A.1, the federal government's abandonment of the Public Charge Rule and acquiescence in a judgment the federal government still maintains is erroneous presents the sort of "unusual circumstances" that weigh in favor of allowing intervention. *City of Chicago*, 912 F.3d at 984 (citation omitted).

The federal government again tries (at 39-40) to downplay the extraordinary nature of its actions by asserting that it did not *violate* the APA. But as several Supreme Court Justices recently observed, the federal government's acquiescence in the district court's judgment allowed the federal government to *evade* the APA's requirements. Transcript, *supra*, at 67:1-6 (Chief Justice Roberts observing that a ruling in the federal government's favor would be "really quite a license for collusive action for any incoming administration to change rules that were enacted pursuant to the APA and, therefore, can only be repealed under the APA[.] It's a way to avoid that burden across the board"); *id.* at 68:7-9 (Chief Justice Roberts commenting that the federal government's strategy "avoid[s] notice-and-comment . . . rulemaking on the repeal of the rule"); *id.* at 45:21-24 (Justice Alito noting that the federal government's "strategy" allowed it "to sidestep notice-and-comment rulemaking"); *id.* at 47:25-48:1 (Justice Kagan: "The real issue to me is the evasion of notice-and-comment."); *see id.* at 77:23-78:3 (Justice Gorsuch: "[W]hat is kind of a little different in this case is to tell a state that it has no recourse through the APA, through litigation,

all because [of] the government's acquiescence in a judicial order that it agrees is wrong.").

As government actors are typically presumed to follow their legal obligations in good faith, the State Intervenors can hardly be faulted for failing to predict that the federal government would try to circumvent the obligations imposed by the APA. The State Intervenors' motion to intervene was timely.

B. The State Intervenors satisfy the other requirements for intervention as of right.

The State Intervenor have also amply shown that they meet the other requirements for intervention. Neither the federal government nor Plaintiffs argue that they adequately represent the State Intervenors' interests. Instead, they question the State Intervenors' interests in the Public Charge Rule and the extent to which the federal government's abandonment of its defense of the Public Charge Rule will impair those interests. But as the State Intervenors have explained, Opening Br. 34-36; *supra* section I.A.3, the State Intervenors have important interests relating to the Public Charge Rule, specifically their interests in conserving their Medicaid and related social-welfare budgets. They are thus the "direct beneficiaries" of the Public Charge Rule, so their interest in the rule is "sufficient to warrant intervention under Rule 24(a)(2)." *Flying J*, 578 F.3d at 572. And as noted above, the federal government itself has estimated that the Public Charge Rule will save the States $1.01 billion per year, 84 Fed. Reg. at 41,301, which demonstrates that the State Intervenors will be "directly" harmed if the district court's nationwide injunction of the rule is allowed to stand unchallenged.

Plaintiffs and the federal government dismiss this interest as a "mere economic interest." Pls.' Br. 31 (citation omitted); U.S. Br. 57-61. But this Court rejected the "mere 'economic interest'" formulation as "confusing" because "most civil litigation is based on nothing more than an 'economic interest.'" *Flying J*, 578 F.3d at 571. The Court explained that an economic interest suffices so long as it is not remote, but direct, *see id.* at 571-72—like the State Intervenors' interest in the Public Charge Rule.

Relatedly, the federal government's (at 59-61) and Plaintiffs' (at 32) arguments that the State Intervenors' interests were not sufficiently impaired to warrant intervention as of right also miss the mark. The federal government (at 60) and Plaintiffs (at 32) concede that the Public Charge Rule was outcome-determinative in multiple immigration adjudications. That means that the United States applied the Rule to deny either admission or a change of immigration status to multiple aliens after concluding that they were "likely at any time to become a public charge," 8 U.S.C. § 1182(a)(4)(A), specifically by "receiv[ing] one or more public benefits"—such as Medicaid and other services offered by the State Intervenors—"for more than 12 months in the aggregate within any 36-month period," 84 Fed. Reg. at 41,501. Even one such instance leading to increased public spending by the States Intervenors would directly harm the State Intervenors. *Cf. Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797-800 (2021) (concluding that nominal damages can satisfy Article III).

The federal government also tries (at 55-57) to discredit the State Intervenors' interest in the Public Charge Rule by offering narrow definitions of the interest required under Rule 24(a). But the federal government did not make those arguments

below, so it cannot raise them on appeal. *See, e.g.*, *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012).

The federal government's definitional arguments also fail on the merits. The federal government first argues that the State Intervenors' interests here are the type that would be sufficient for a government entity to seek permissive intervention under Rule 24(b)(2) and that finding such interests sufficient for intervention as of right under Rule 24(a)(2) would render Rule 24(b)(2) superfluous. U.S. Br. 55-56. But Rule 24(b)(2) allows for intervention even when intervention as of right under Rule 24(a)(2) is not available—including when the government entity's interest is adequately represented by the parties. The federal government next argues that intervention as of right is limited to parties with an interest of the sort contemplated in Rule 19(a)(1)(B). U.S. Br. 56-57. But such a reading would render Rule 24(a)(2) superfluous, as it would allow a nonparty to intervene only if that nonparty's joinder was required under Rule 19(a). More fundamentally, this Court has "interpreted 'statements of the Supreme Court as encouraging liberality in the definition of an interest.'" *Lopez-Aguilar v. Marion Cnty. Sheriff's Dep't*, 924 F.3d 375, 392 (7th Cir. 2019) (citation omitted)).

The State Intervenors thus have sufficient interests in the Public Charge Rule to justify intervention, and those interests would plainly be impaired by allowing the federal government to rescind the rule by evading notice and comment.

C. Alternatively, the Court should permit the State Intervenors to intervene under Rule 24(b)(1)(B).

The federal government (at 62-63) and Plaintiffs (at 33-34) primarily rely on their arguments about intervention as of right to counter the State Intervenors' arguments that the district court should have permitted the State Intervenors to intervene under Rule 24(b)(1)(B), although they also point to the discretionary nature of permissive intervention. But because the district court based its denial of permissive intervention solely on its conclusion that the State Intervenors' motion was untimely, the district court's denial of permissive intervention was also error for the same reasons described above.

II. The Federal Government's Conduct and the Resulting Consequences Warrant Rule 60(b) Relief.

As the State Intervenors have explained, Opening Br. 39-44, the State Intervenors are entitled to relief from the district court's partial final judgment for the same reasons their motion to intervene was timely. In other words, the extraordinary means the federal government used to rescind the Public Charge Rule without complying with the APA's notice and comment requirements warrant extraordinary relief under Rule 60(b). *See supra* section I.A.

In arguing otherwise, the federal government (at 46-54) and Plaintiffs (at 36-44) largely rehash their intervention arguments. They also argue that the State Intervenors lack standing to seek relief under Rule 60(b) because they are not parties. But if the district court had not denied the State Intervenors' motion to intervene, they would have "acquire[d] the rights of a party," *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 508 (7th Cir. 1996)—including the right to

seek Rule 60(b) relief, *see id.* (noting than an intervenor "can continue the litigation even if the party on whose side he intervened is eager to settle"). Even absent intervenor status, this Court should adopt the approach taken by other circuits and allow the State Intervenors to seek Rule 60(b) relief because their interests are "directly" and "strongly affected" by the district court's partial final judgment. *Bridgeport Music, Inc. v. Smith*, 714 F.3d 932, 940 (6th Cir. 2013) (collecting cases).

The federal government (at 49-51) and Plaintiffs (at 42-43) also argue that the State Intervenors are improperly trying to use Rule 60(b) as a substitute for a timely appeal. But "[t]he motion to intervene . . . was not an attempt to escape the consequences of failing to adhere to appellate deadlines . . . . The motion was instead a response to a major shift in the litigation, creating a new demand for the [State Intervenors'] participation." *Cameron*, 202 WL 618961, at *13 (Kagan, J., concurring in the judgment). Indeed, even the district court acknowledged that Rule 60(b) was the only avenue for the State Intervenors to obtain the relief they seek. Dkt. 285 at 33. If that relief is not available under Rule 60(b), then there would have been no point in the Supreme Court inviting the State Intervenors to pursue relief in the district court. *See Texas*, 141 S. Ct. at 2562.

III. This Court Should Allow the State Intervenors To Defend the Public Charge Rule on Appeal, and the State Intervenors Will Likely Prevail.

Although this Court's affirmance of the district court's preliminary injunction likely establishes the law of the case on the merits of the State Intervenors' contemplated appeal of the district court's final judgment, the State Intervenors can and will pursue those arguments before this Court sitting en banc and, if necessary, the

Supreme Court. The Supreme Court has already indicated that those arguments are likely to prove successful. *See Wolf v. Cook County*, 140 S. Ct. 681 (2020) (staying the district court's preliminary injunction); *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam) (noting that the Supreme Court will grant a stay only if the movant shows "a fair prospect that a majority of the Court will vote to reverse the judgment below").

CONCLUSION

This Court should reverse the district court's denial of the State Intervenors' motions to intervene and for relief from the district court's partial final judgment. This Court should then treat the State Intervenors as appellants from the district court's partial final judgment so that they can take up the defense of the Public Charge Rule that the federal government so abruptly and extraordinarily abandoned.

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CERTIFICATE OF SERVICE

On March 10, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,974 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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