No. 20-3150

In the United States Court of Appeals for the Seventh Circuit

COOK COUNTY, ILLINOIS, AND ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS,
Plaintiffs-Appellees,

v.

CHAD F. WOLF, ET AL.,
Defendants-Appellants.

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

MOTION TO RECALL THE MANDATE TO PERMIT INTERVENTION AS APPELLANT

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

No. 20-3150

COOK COUNTY, ILLINOIS, and Illinois Coalition for Immigrant and Refugee Rights,

Plaintiffs-Appellees,

v.

CHAD F. WOLF, ET AL.,

Defendants-Appellants.

Pursuant to Circuit Rule 26.1, I represent that the following parties seek to leave to intervene, and that the following attorneys represent, have represented, or expected to represent the State in this matter.

Intervenors:
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
State of West Virginia

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State Intervenors

INTRODUCTION

The States of Texas, Alabama, Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, and West Virginia seek to intervene in this case to defend a duly promulgated rule interpreting the Immigration and Nationality Act's prohibition against immigration by those who would become a public charge (the "Rule"). Two days ago, the named defendants, who are agents or agencies of the United States, filed a stipulated motion to dismiss this appeal. The Court granted that stipulated motion and immediately issued its mandate without offering affected parties, including the States, an opportunity to seek to defend the Rule.

The Rule directly implicates the States' obligations in providing Medicaid and other social services to indigent and low-income individuals. Moreover, the States, especially the border States, have strong interests in enforcing the Rule, which properly interpreted and implemented Congress's long-held policy of immigrant self-sufficiency. This request is timely: until two days ago, the United States and associated federal defendants defended the Rule's legality.

Because the Court issued its mandate within hours of the United States' announcement that it would no longer defend the Rule, interested parties had no ability to intervene before it did so. And because the United States did not inform the States that it intended to cease defending the Rule before abandoning numerous cases supporting the Rule nationwide, the States did not have an opportunity to intervene at an earlier point. The Court should not allow the federal government to use litigation stipulations to evade the Administrative Procedure Act's strictures on modifying

rules a new Administration finds uncongenial without at least allowing interested parties the opportunity to defend the case.

BACKGROUND

Since the late Nineteenth Century, Congress has prohibited immigration by individuals who are likely to become a "public charge." Immigrant Fund Act, Act of Aug. 3, 1882, ch. 376, §§ 1-2, 22 Stat. 214. Congress has not defined that term, stating only that the Executive "shall at a minimum consider the alien's (I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; (V) education and skills." 8 U.S.C. § 1182(a)(4)(B)(i).

In 1999, the Clinton Administration recognized that the definition of "public charge" was ambiguous and proposed a rule that would have defined "public charge" 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.

64 Fed. Reg. 28,676, 28,681 (1999) (emphases added). At the same time, it issued an informal guidance document that would apply the proposed definition pending the issuance of a final rule. 64 Fed. Reg. 28,689 (1999). That rulemaking process was never completed, leaving the 1999 informal guidance in place. 84 Fed. Reg. at 41,292, 41,348 n.295 (2019).

In 2018, the Trump Administration proposed, and in 2019 promulgated, a new rule that defined "public charge" in a way that accounted for a broader range of government benefits. The Rule now considers not just cash aid for purposes of

discovering whether an immigrant is likely to become a public charge, but also valuable non-cash benefits such as Medicaid, food stamps, and federal housing assistance. *Id.* at 41,501. Officials now look at the totality of an alien's circumstances to determine whether that alien is likely to "receive[] one or more" of the specified public benefits "for more than 12 months in the aggregate within any 36-month period." *Id.*; *id.* at 41,369. These circumstances include an alien's age, financial resources, family size, education, and health, *id.* at 41,501-04.

This case is one of several related challenges to the Rule. Plaintiffs are a County and the Illinois Coalition for Immigrant and Refugee Rights, a non-profit organization providing benefits for aliens. They brought this action challenging the Rule under the Administrative Procedure Act and sought a preliminary injunction. *Cook County v. McAleenan*, 417 F. Supp. 3d 1008, 1013-14 (N.D. Ill. 2019). Purporting to apply *Gegiow v. Uhl*, 239 U.S. 3 (1915), the district court concluded that the term "'public charge' encompasses only persons who—like 'idiots' or persons with 'a mental or physical defect of a nature to affect their ability to make a living'—would be substantially, if not entirely, dependent on government assistance on a long-term basis." *Id.* at 1023. Because the Rule extends beyond that narrow definition to cover individuals who depend on supplemental, often non-cash benefits, the district court held the rule invalid. Thus, the district court issued a preliminary injunction blocking the Defendants from enforcing the rule across the State of Illinois. *Id.* at 1030.

The Defendants immediately appealed and moved to stay the preliminary injunction. This Court denied the stay, but the Supreme Court ultimately granted one.

Cook County v. Wolf, 962 F.3d 208, 217 (7th Cir. 2020); *Wolf v. Cook County,* 140 S. Ct. 681 (2020).

This Court then considered the Defendants' appeal. A divided panel affirmed the district court's preliminary injunction. *Cook County*, 962 F.3d at 324. The Supreme Court's stay remained in place, and the Defendants filed a petition for a writ of certiorari. *Mayorkas v. Cook County*, No. 20-450 (U.S. Oct 7, 2020). That petition remained pending while the Supreme Court granted certiorari in another case about the validity of DHS's Rule. *See Department of Homeland Security v. New York*, No. 20-449, 2021 WL 666376 (U.S. Feb. 22, 2021).

Meanwhile, litigation in this case continued in the district court. The Plaintiffs moved for partial summary judgment on their APA claims. *See Cook County v. Wolf*, No. 1:19-cv-06334, ECF 222 at 2. The district court granted the motion, vacated the Rule, and entered a partial final judgment under Rule 54(b). *Id.* at 14. Unlike the district court's preliminary injunction, the vacatur was explicitly "not limited to the State of Illinois." *Id.* at 8. In other words, the district court's ruling applied nationwide. The Defendants appealed that ruling to this Court and had been litigating that appeal for over three months.

Following the change in the Administration, the United States decided not to defend the Rule. On March 9, 2021, the Defendants filed nearly simultaneous motions to dismiss all cases challenging the Rule. *See, e.g.*, ECF 23 at 1 (this court). This Court granted that motion. ECF 24-1 at 1. It also issued its mandate immediately and without allowing any potentially interested parties to seek leave to intervene and

defend the rule. ECF 24-2 at 2. As a result, the public charge rule will become (absent intervention and a stay) unenforceable in any State.

Because the Defendants will no longer defend a rule directly implicating the States' interests, the States now move this Court to recall its mandate, to reconsider its dismissal, and for leave to intervene in defense of the Rule.

I. The Court Should Recall the Mandate.

The Court should recall the mandate and has the "inherent power" to do so. *Calderon v. Thompson*, 523 U.S. 538, 549 (1998); *see also United States v. Tolliver*, 116 F.3d 120, 123 (5th Cir. 1997) ("Our authority to recall our own mandate is clear."). Recalling the mandate is appropriate in "extraordinary circumstances" and to prevent injustice. *Calderon*, 523 U.S. at 550.

As described below, extraordinary circumstances justify recalling the mandate where State Intervenors were presented no opportunity to preserve their interests in this litigation. Until March 9, State Intervenors' interests were represented by the United States. The United States did not inform the State Intervenors that it intended to withdraw its defense of the Rule, depriving the States of an opportunity to seek leave to intervene prior to its seeking dismissal of this appeal. Likewise, the Court's immediate issuance of the mandate following the motion to dismiss prevented the States from seeking leave to intervene prior to dismissal once the intentions of the United States not to defend the Rule became public.

The harms to State Intervenors—who include multiple border States—from allowing the district court's order vacating the Rule nationwide to take effect are

severe and will hamper state officials' ability to act in a period of great budgetary uncertainty. The mandate should be recalled.

II. The Court Should Stay the Mandate Pending Resolution of Any Petition for a Writ of Certiorari.

Once recalled, the Court should stay further issuance of the mandate until Intervenors have been able to seek review of the district court's order in this Court and, if necessary, on a petition for certiorari.

A motion to stay the mandate pending the filing of a petition for writ of certiorari "must show that the petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(1). Under this standard, there must be (1) "a reasonable probability that four members of the [Supreme] Court would consider the underlying issue sufficiently meritorious for the grant of certiorari," (2) "a significant possibility of reversal of the lower court's decision," and (3) "a likelihood that irreparable harm will result if that decision is not stayed." *Baldwin v. Maggio*, 715 F.2d 152, 153 (5th Cir. 1983). This case easily meets that standard.

A. The Supreme Court is likely to grant certiorari.

The Supreme Court is not only likely to grant certiorari—it had already done so. *Dep't of Homeland Sec.*, 2021 WL 666376, at *1. Moreover, the Supreme Court has identified several considerations governing its exercise of discretion in granting certiorari: conflict with another circuit's decision on an important matter, the decision of an important federal question in a way that conflicts with Supreme Court decisions, and the decision of an important question of federal law that has not been but

should be settled by the Supreme Court. Sup. Ct. R. 10. This case meets each criterion.

1. At the time the Administration decided to abandon the Rule, there was a well-defined split among federal courts over the rule's legality. Over the dissent of then-Judge Barrett, this Court had concluded it was likely to be held improper. *Wolf*, 962 F.3d at 228. The Second Circuit had similarly found the rule to exceed the scope of DHS's delegated power. *New York v. U.S. Dep't of Homeland Security*, 969 F.3d 42, 74-75 (2d Cir. 2020).

By contrast, a panel of the Fourth Circuit, reversed a preliminary injunction against enforcement of the Rule based on the conclusion that "[t]he DHS Rule . . . comports with the best reading of the INA." *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 250, *vacated for rehearing en banc*, 981 F.3d 311 (4th Cir. 2020) (dismissed Mar. 11, 2021). Indeed, the Fourth Circuit went so far as to say that "[t]o invalidate the Rule would . . . entail the disregard of the plain text of a duly enacted statute," and would "visit palpable harm upon the Constitution's structure and the circumscribed function of the federal courts that document prescribes." *Id.* at 229. Similarly, in entering a stay pending appeal of preliminary injunctions against the Rule, the Ninth Circuit issued a lengthy published opinion concluding that "[t]he Final Rule's definition of 'public charge' is consistent with the relevant statutes, and DHS's action was not arbitrary or capricious." *City & County of San Francisco v. USCIS*, 944 F.3d 773, 790 (9th Cir. 2019).

2. This question is vitally important. Decisions about whether and under what conditions to admit immigrants implicate a "fundamental sovereign attribute

exercised by the Government's political departments." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). As the Second Circuit noted, making these decisions correctly is essential "[b]ecause there is no apparent means by which DHS could revisit adjustment determinations" once made. 969 F.3d at 86-87.

Congress explicitly directed the Executive Branch to deny admission or adjustment of status to aliens who, "in the opinion of the [Secretary of Homeland Security]," are "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). The Rule provides key guidance in doing so, issuing formal, objective standards by which that determination will be made. The propriety of the Rule is a question of national importance which the Supreme Court has already once determined merits its attention. *Dep't of Homeland Sec.*, 2021 WL 666376, at *1.

B. There is a significant possibility of reversal.

State Intervenors are likely to prevail on the merits following a petition for certiorari because the Rule is lawful. For more than a century, it has been "the immigration policy of the United States that . . . (A) aliens within the Nation's borders not depend on public resources to meet their needs, . . . and (B) the availability of public benefits not constitute an incentive for immigration to the United States," 8 U.S.C. § 1601(2). That long-held policy formed the basis of the public-charge rule. Congress never defined the term "public charge," but "[t]he ordinary meaning of 'public charge' . . . was 'one who produces a money charge upon, or an expense to, the public for support and care.'" *CASA de Maryland*, 971 F.3d at 242 (quoting BLACK'S LAW DICTIONARY 295 (4th ed. 1951)). The Rule reflects that ordinary meaning by defining as public charges those individuals who rely on individual

benefits for a prolonged period, or multiple benefits for a shorter period of time. 84 Fed. Reg. at 41,501; *id.* at 41,294-95.

That the Rule represents the best—or, at least, a reasonable—reading of the public-charge provision of the INA is confirmed by reading that provision within its larger statutory context. *See CASA de Maryland*, 971 F.3d at 243-44. For example, Congress required that an alien seeking admission or adjustment of status to submit "affidavit[s] of support" from sponsors. *See* 8 U.S.C. § 1182(a)(4)(C)-(D). Those sponsors must, in turn, 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). Congress reinforced this requirement for self-sufficiency by allowing federal and state governments to seek reimbursement from the sponsor for "any means-tested public benefit" the government provides to the alien during the period the support obligation remains in effect, *Id.* § 1183a(a)(1)(B). That provision is not limited to cash support. Aliens who fail to obtain the required affidavit are treated by operation of law as inadmissible on the public-charge ground, regardless of individual circumstances. *Id.* § 1182(a)(4).

Taken together, these provisions of the INA demonstrate that Congress did not mandate the narrow reading of "public charge" insisted on by the district court. Instead, "[t]his sponsor-and-affidavit scheme" shows "that the public charge provision is naturally read as extending beyond only those who may become 'primarily dependent' on public support." *CASA de Maryland*, 971 F.3d at 243; *see also Cook County*, 962 F.3d at 246 (Barrett, J., dissenting) ("[T]he affidavit provision reflects

Congress's view that the term 'public charge' encompasses supplemental as well as primary dependence on public assistance.").

Further, the larger statutory context demonstrates why the Executive Branch could—and indeed should—take non-cash benefits into account in making public-charge determinations. The current public-charge provision was adopted in 1996. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, Tit. V, § 531, 110 Stat. 3009-674. In contemporaneous legislation, Congress stressed the government's "compelling" interest in ensuring "that aliens be self-reliant in accordance with national immigration policy." 8 U.S.C. § 1601(5); *see also id.* § 1601(4) (emphasizing the government's strong interest in "assuring that individual aliens not burden the public benefits system"). Congress equated a lack of "self-sufficiency" with the receipt of "public benefits" by aliens, *id.* § 1601(3), which it defined broadly to include any "welfare, health, disability, public or assisted housing . . . or *any other similar benefit*," *id.* § 1611(c)(1)(B) (emphasis added). That is, Congress adopted a broad, plain meaning of the statutory phrase "public charge" as one who receives public benefits, and Congress's statutory policy of ensuring that aliens do "not burden the public benefits system" programs to be "an incentive for immigration to the United States." *Id.* § 1601(2)(B), (4).

Given these statutory provisions, the Supreme Court is likely to agree with the Fourth Circuit's panel decision and the Ninth Circuit's stay decision: The Rule "easily" qualifies as a "permissible construction of the INA." *City & County of San Francisco*, 944 F.3d at 799; *see CASA de Maryland*, 971 F.3d at 251 (holding that the Rule is "unquestionably lawful"). In applying *Chevron*, the Supreme Court has

repeatedly emphasized that the federal courts "may not substitute [their] judgment for that of the [Executive], but instead must confine [themselves] to ensuring that he remained "'within the bounds of reasoned decisionmaking.'" *Dep't of Com. v. New York,* 139 S. Ct. 2551, 2569 (2019) (citation omitted) (quoting *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 105 (1983)). Administrative rules passed regarding immigration are given particular deference because "Congress has expressly and specifically delegated power to the executive in an area that overlaps with the executive's traditional constitutional function." *CASA de Maryland*, 971 F.3d at 251 & n.6; (citing *United States v. Curtiss-Wright Export* Corp., 299 U.S. 304, 319-320 (1936)). The public-charge Rule easily passes muster.

To be clear, State Intervenors do not maintain that the Executive may not *change* the definition of "public charge." But the requirements of APA rulemaking apply with equal force whether the Executive is *creating* a rule or *modifying* it. *E.g.*, *Dep't of Comm,* 139 S. Ct. at 2569-71 Because the public-charge Rule was made through formal notice-and-comment procedures, it can only be unmade the same way. *Cf. Motor Vehicle Mfr's Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S 29, 41, 46-47 (1983). As part of that process, State Intervenors would have had the right to submit input and to protect their interests before the agency. 5 U.S.C. § 553(c). If unsatisfied with the ultimate result, they would have been permitted to challenge whether the Executive "articulated 'a satisfactory explanation' for [its] decision, 'including a rational connection between the facts found and the choice made." *Dep't of Comm.*, 139 S. Ct. at 2569 (quoting *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43). The Administration improperly seeks to short-circuit that process by using early court decisions to "set

aside" the Rule under 5 U.S.C. § 706(2). Accordingly, State Intervenors are likely to prevail in showing that the order under review was improper.

C. There is a likelihood of irreparable harm absent a stay.

Allowing the mandate to issue and permitting the district court to vacate the rule will cause State Intervenors irreparable harm. As an initial matter, a State suffers an "institutional injury" from the "inversion of . . . federalism principles." *Texas v. EPA*, 829 F.3d 405, 434 (5th Cir. 2016); *see Moore v. Tangipahoa Par. Sch. Bd.*, 507 F. App'x 389, 399 (5th Cir. 2013) (per curiam) (finding that a State suffers irreparable harm when an injunction "would frustrate the State's program"). The district court's judgment reverses a formal rulemaking process upon which States have relied in setting law enforcement and budgetary policies, without allowing them input into the process or the time to adjust that normally follows from a formal rescission process. And it interferes with traditional state prerogatives for the reasons described in the accompanying motion to intervene.

As the Court is undoubtedly aware, this is a time of considerable financial strain on all States, given the unprecedented COVID-19 pandemic and associated economic downturn. Immigration can be a driver of cultural and economic growth. But as Congress has recognized for over a century, it can also significantly strain the public fisc. 8 U.S.C. § 1601(1) ("Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes."). By definition, the individuals whose receipt of benefits depends on the definition of "public charge" are among the poorest in our society. Because such benefits can never be

recouped, State Intervenors will be irreparably harmed if the Rule cannot be enforced while its legality is resolved here and elsewhere.

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Conclusion

The Court should recall and stay issuance of the mandate, reconsider its dismissal of the appeal, and permit the States to intervene as Defendant-Appellants.

Respectfully submitted.

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CERTIFICATE OF CONFERENCE

On March 11, 2021, counsel for the State of Texas conferred with counsel for plaintiffs and for the United States, who advised that they are opposed to this motion.

/s/ Judd E. Stone II
JUDD E. STONE II

CERTIFICATE OF SERVICE

On March 11, 2021, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Judd E. Stone II
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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 3,348 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).

/s/ Judd E. Stone II
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No. 20-3150

In the United States Court of Appeals for the Seventh Circuit

COOK COUNTY, ILLINOIS AND ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS,
Plaintiff-Appellees,

v.

CHAD WOLF, ET AL.,
Defendant-Appellants.

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

OPPOSED MOTION TO RECONSIDER, OR IN THE ALTERNATIVE TO REHEAR, THE MOTION TO DISMISS

The States of Texas, Alabama, Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, and West Virginia respectfully ask this Court to reconsider its order dismissing this appeal so that they may intervene as Defendants-Appellants to challenge the district court's order. The district court vacated a final Rule interpreting the Immigration and Nationality Act's prohibition against immigration by those would become a public charge—the public charge rule ("Rule"). Until two days ago, the federal defendants, agents or agencies of the United States (collectively the "United States"), defended this Rule in multiple courts, including the United States Supreme Court.

Two days ago, the named defendants changed tack. Abandoning its typical practice of asking courts to abey appeals of actions it no longer supports while it formally reverses those actions, the federal defendants filed stipulated motions to dismiss numerous appeals defending the Rule across the country, including in this case. Following it normal practice, this Court granted that motion and immediately issued its mandate. Seventh Cir. R. 41.

Under these circumstances, this Court should have rejected that stipulation. The nationwide injunction implicates the interests of countless parties who, until the stipulation was filed, had no notice that they needed to intervene in order to protect those interests. Indeed, the federal defendants here did not notify the States that they intended to withdraw support of the Rule prior to these stipulations becoming common knowledge. Allowing Federal Rule of Appellate Procedure 42(a) to be used in this fashion permits the federal government effectively to rescind rules by litigation rather than through the Administrative Procedure Act's requirements, vitiating numerous procedural protections for adversely impacted parties.

This novel practice will not end here. If permitted to stand, the federal government's repeal-by-stipulation will simultaneously stifle public participation in major policy initiatives at the federal level, encourage ever-more-complex procedural gamesmanship, and will encourage even potentially impacted parties to intervene aggressively into cases to prevent this tactic's future use. The Court should not countenance these results and should reconsider its dismissal.

BACKGROUND

The background of this case is explored in the accompanying motions to withdraw the mandate and to intervene. To avoid burdening the Court, State Intervenors point supply only a truncated background here.

Since the late Nineteenth Century, Congress has prohibited immigration by individuals who are likely to become a "public charge." Immigrant Fund Act, 47th Cong. ch. 376, §§ 1-2, 22 Stat. 214 (1882). Congress has never attempted to define that term, providing only a list of factors that the Executive is to consider. 8 U.S.C. § 1182(a)(4)(B).

In 2018, following an extensive notice-and-comment period, the Trump Administration finalized the first formal rule defining "public charge." This Rule required federal officials to look at non-cash public assistance as well as cash public assistance when determining whether an alien is likely to be a public charge, and therefore inadmissible. Inadmissibility on Public Charge Grounds 84 Fed. Reg. 41,292 (Aug. 14, 2019). Various States, municipalities, and private interest groups immediately filed suit to challenge this Rule in courts across the country. These cases led sometimes overlapping, and sometimes conflicting, orders and injunctions, which are fully described in the federal government's petition for certiorari out of a companion case regarding the Rule in the Second Circuit. Petition for a Writ of Certiorari, *Department of Homeland Security v. New York*, No. 20-449 (U.S. Feb. 22, 2021) (U.S. Oct. 7, 2020).

In November of last year, the district court issued a partial final judgment that vacated the public-charge rule nationwide, Mem. Op. At 14, *Cook County v. Wolf*,

No. 1:19-cv-06334 (N.D. Ill. 2, 2020) (ECF No. 222), which the United States appealed. After a variety of opinions issued by four courts of appeals (including this one), the United States successfully petitioned the U.S. Supreme Court to take up the question of the validity of the public-charge rule. *Dep't of Homeland Sec. v. New York*, No. 20-449, 2021 WL 666376 (U.S. Feb. 22, 2021).

On March 9, 2021, the United States revealed that it no longer intended to defend the Rule, filing nearly simultaneous motions to dismiss litigation pending in the Supreme Court, this Court, and the Fourth Circuit. This Court immediately granted that motion under Federal Rule of Appellate Procedure 42, without offering the opportunity for other parties whose interests would be affected by the nationwide injunction to intervene to defend those interests.

ARGUMENT

The Court should reconsider its ruling on the Motion to Dismiss under Federal Rule of Appellate Procedure 42(b).[1] Motions for reconsideration are appropriate where, through no fault of the movant, a court has committed an error of fact or law in deciding on a motion. *Cf. Lightspeed Media Corp. v. Smith*, 830 F.3d 500, 505-506 (7th Cir. 2016) (collecting cases); *Keene Corp. v. Int'l Fid. Ins. Co.*, 561 F. Supp. 656, 656 (N.D. Ill. 1982) (mem. op.), *aff'd*, 736 F.2d 388 (7th Cir.1984) ("Motions for reconsideration serve a limited function; to correct manifest errors of law or fact or

[1] To the extent that the Court determines that this motion should have been brought as a petition for rehearing, State Intervenors request the Court to construe it as such. The standards for relief are similar, and such rehearing would be appropriate for the same reasons. *See* Fed. R. App. P. 40(a)(2).

to present newly discovered evidence."). State Intervenors respectfully suggest that the Court made such an error here by allowing the parties—who are now aligned—to voluntarily dismiss an appeal of a ruling vacating a final Rule without allowing nonparties whose interests are affected by the Rule the opportunity to intervene to protect those interests.

Federal Rule of Appellate Procedure 42 is an inappropriate mechanism to seek dismissal of an appeal of a nationwide injunction affecting numerous non-parties—particularly when accompanied by the immediate issuance of the court's mandate. Rule 42(b) allows the "circuit clerk [to] 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." This rule typically serves a salutary purpose in that it allows appeals where there is no longer a controversy to dismiss the case rather than incur additional costs. "Normally such stipulations are accepted and the appeal dismissed." *Alvarado v. Corp. Cleaning Servs., Inc.*, 782 F.3d 365, 372 (7th Cir. 2015). This Court has, however, stated that it will "decline to do so if necessary to avoid an injustice, and especially to 'protect the rights of anyone who did not consent to the dismissal.'" *Id.* (quoting *Safeco Ins. Co. of Am. v. Am. Int'l Grp., Inc.,* 710 F.3d 754, 755 (7th Cir.2013)).

Though the nominal parties to this appeal approved the dismissal, the injunction that has now become final affects numerous parties who have not had the opportunity either to consent or deny their consent to the dismissal. Indeed, many States whose interests are directly implicated were not so much as notified about the federal government's intentions before it acted to dismiss these cases. This Rule was

promulgated following a notice-and-comment period that lasted nearly a year. 84 Fed. Reg. at 41,501 (Aug. 2019); Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (Oct. 10, 2018). The final Rule balanced a multitude of concerns and addressed numerous comments, and the federal government, as it typically does, was charged with defending that rule against the litigation that inevitably followed. And though the district court ordered the rule vacated in November of last year, Mem. Op. at 14, *supra* (ECF No. 222), the United States nonetheless continued to fulfill its duties until it filed the motion of March 9, 2021.

The Court should not allow parties to voluntarily dismiss an appeal under these circumstances. Ordinarily, a Rule adopted through notice-and-comment rulemaking can only be rescinded through notice-and-comment rulemaking. *Cf. Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S 29, 36-37, 41 (1983). As part of that process, parties whose interests would be negatively impacted by the rescission of the Rule would have had the right to submit input, 5 U.S.C. § 503, and ultimately to challenge the final outcome in court, *Dep't of Com. v. New York,* 139 S. Ct. 2551, 2569-70 (2019). But this Administration has effectively rescinded the public-charge rule by agreeing to dismiss the case with an adversary in name only under Rule 42(b). That is not what voluntary dismissal under Rule 42(b) was designed to do.

To permit Rule 42(b) to be used as a route around the Administrative Procedure Act would lead to severe adverse consequences. Because rulemaking rarely satisfies everyone, APA challenges are both commonplace and often complex, potentially involving numerous issues and parties. In the early stages of this case, it was

not clear that parties who were aligned with the United States could have become involved. In particular, during preliminary proceedings, the district court only "enjoined [DHS] from implementing the Rule in the State of Illinois." *Cook County v. McAleenan*, 417 F. Supp. 3d 1008, 1014 (N.D. Ill. 2019) (mem. op.), *aff'd on other grounds sub nom. Cook County v. Wolf*, 962 F.3d 208 (7th Cir. 2020). Like all Americans, Intervenor States have an interest in uniform application of our immigration laws. It initially appeared, however, that the United States planned to defend those interests. Now, though vacatur of the Rule would impose direct costs on the States in the form of increased benefit payments to otherwise ineligible immigrants, *see generally* Mot. to Intervene, the States cannot vindicate their interests absent this Court's action because the United States has agreed to dismiss the appeal and allow the district court's order to become final.

If the Court permits Rule 42 to be used to dismiss a case in circumstances like this, nonparties like State Intervenors will be forced to intervene at the first sign of litigation that may affect their interests. Indeed, it would paradoxically require States to more hastily intervene when the federal government already *supports* their interests precisely to avoid the sudden switch-and-dismissal performed here. That is precisely the opposite of what the federal rules are intended to work—namely "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

Conclusion

The Court reconsider the motion to dismiss to allow State Intervenors to intervene and prosecute this appeal as Defendant-Appellants.

Respectfully submitted.

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CERTIFICATE OF CONFERENCE

On March 11, 2021, counsel for the State of Texas conferred with counsel for plaintiffs and for the United States, who advised that they are opposed to this motion.

/s/ Judd E. Stone II
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CERTIFICATE OF SERVICE

On March 11, 2021, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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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 1,718 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).

/s/ Judd E. Stone II
Judd E. Stone II

No. 20-3150

In the United States Court of Appeals for the Seventh Circuit

COOK COUNTY, ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS,

Plaintiffs-Appellees,

v.

CHAD F. WOLFE, *ET AL.*

Defendants-Appellants.

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

OPPOSED MOTION TO INTERVENE AS DEFENDANT-APPELLANTS

The States of Texas, Alabama, Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, and West Virginia move under Federal Rule of Appellate Procedure 27 to intervene as a Defendant-Appellants to challenge the district court's order, which applies nationwide, vacating a rule interpreting the Immigration and Nationality Act's prohibition against immigration by those who would become a public charge ("Rule"). Two days ago, Defendants, who are agents or agencies of the United States (collectively, the "United States"), filed a stipulated motion to dismiss this appeal. The Court granted that stipulated motion and immediately issued its mandate without offering affected parties an opportunity to seek to defend the Rule. Because the Rule at issue

directly implicates the States' obligations in providing Medicaid and other services, they seek leave to defend the suit.

The States timely seek to intervene. Until two days ago, the United States defended the Rule, so that the States' intervention prior to that point would have unnecessarily complicated this suit. But now that the federal government has abandoned that defense—and, by extension, has evaded the Administrative Procedure Act's strictures for modifying a rule it no longer finds genial—no one is left to represent the States' interests in defending the Rule.

Counsel for Texas contacted counsel for all parties regarding this motion. Counsel for Plaintiffs indicated that they opposed this motion. Counsel for the federal governmental agents and agencies likewise indicated that they opposed this motion.

BACKGROUND

This immigration case concerns the hotly contested Public Charge Rule. Under the INA, "any alien who . . . 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." 8 U.S.C. § 1182(a)(4)(A).

In 2019, following extensive notice and comment, the Department of Homeland Security issued a final rule adopting new definition of "public charge" for purposes of this statute. *See Casa de Maryland, Inc. v. Trump*, 971 F.3d 220, 234, *reh'g granted*, 981 F.3d 311, 314 (4th Cir. 2020) (dismissed March 11, 2021). The new rule defines "public charge" as "'an alien who receives one or more public benefits . . . for more than 12 months in the aggregate within any 36-month period.'" *Id.* at 234 (quoting

Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019)). The Rule further explains that "public benefits" include non-cash benefits that are funded in part by the States, including certain Medicaid benefits. *Id.*

This case is one of several related challenges to the Rule. Plaintiffs are a County and the Illinois Coalition for Immigrant Refugee Rights, a non-profit organization providing benefits for aliens. They brought this action challenging the Rule under the Administrative Procedure Act and sought a preliminary injunction. *Cook County v. McAleenan*, 417 F. Supp. 3d 1008, 1013-14 (N.D. Ill. 2019). Purporting to apply *Gegiow v. Uhl*, 239 U.S. 3 (1915), the district court concluded that the term "'public charge' encompasses only persons who—like 'idiots' or persons with 'a mental or physical defect of a nature to affect their ability to make a living'—would be substantially, if not entirely, dependent on government assistance on a long-term basis." *Id.* at 1023. Because the Rule extends beyond that narrow definition to cover individuals who depend on supplemental, often non-cash benefits, the district court held the rule invalid. Thus, the district court issued a preliminary injunction blocking the United States from enforcing the rule across the State of Illinois. *Id.* at 1030.

The United States immediately appealed and moved to stay the preliminary injunction. This Court denied the stay, but the Supreme Court ultimately granted one. *Cook County v. Wolf*, 962 F.3d 208, 217 (7th Cir. 2020); *Wolf v. Cook County*, 140 S. Ct. 681 (2020).

This Court then considered the United States's appeal. A divided panel affirmed the district court's preliminary injunction. *Cook County*, 962 F.3d at 234. The Supreme Court's stay remained in place, and the United States filed a petition for a

writ of certiorari. *Mayorkas v. Cook County*, No. 20-450. That petition remained pending while the Supreme Court granted certiorari in another case about the validity of DHS's Rule. *See Dep't of Homeland Sec. v. New York*, No. 20-449, 2021 WL 666376 (U.S. Feb. 22, 2021).

Meanwhile, litigation in this case continued in the district court. The Plaintiffs moved for partial summary judgment on their APA claims. *See* Memorandum Opinion & Order at 2, *Cook County v. Wolf*, No. 1:19-cv-06334 (N.D. Ill. Nov. 2, 2020) (ECF No. 222). The district court granted the motion, vacated the Rule, and entered a partial final judgment under Rule 54(b). *Id.* at 14. Unlike the district court's preliminary injunction, the vacatur was explicitly "not limited to the State of Illinois." *Id.* at 8. In other words, the district court's ruling applied nationwide. The United States appealed that ruling to this Court and have been litigating that appeal for over three months.

Following the change in Administration, the United States decided not to defend the Rule. On March 9, 2021, the United States filed nearly simultaneous motions to dismiss all cases challenging the Rule. *See, e.g.*, Unopposed Motion to Dismiss Appeal at 1, *Cook County v. Wolf*, No. 20-3150 (ECF No. 23). This Court granted that motion. Order, *Cook County v. Wolf*, No. 20-3150 (ECF No. 24-1). It also issued its mandate immediately and without allowing any potentially interested parties to seek leave to intervene and defend the rule. Notice of Issuance of Mandate at 2, *Cook County v. Wolf*, No. 20-3150 (ECF No. 24-2). As a result, the public charge rule will become (absent intervention and a stay) unenforceable in any State—including the State-Intervenors.

Because the United States will no longer defend a rule directly implicating the States' interests, these States now move this Court to withdraw its mandate, and to reconsider its dismissal, and for leave to intervene in defense of the Rule.

ARGUMENT

Although the Federal Rules of Civil Procedure do not apply directly in appellate proceedings, multiple courts (including this one) have recognized that the rules controlling district court intervention may serve as useful guidance regarding whether to permit intervention in other contexts. *E.g.*, *Int'l Union v. Scofield*, 382 U.S. 205, 217 n.10 (1965); *Sierra Club, Inc. v. E.P.A.*, 358 F.3d 516, 517-18 (7th Cir. 2004); *Texas v. U.S. Dep't of Energy*, 754 F.2d 550, 551 (5th Cir. 1985). The States meet Rule 24's standards for intervention both as of right and as a permissive matter.

I. The States are entitled to intervene as of right.

To intervene as of right under Rule 24(a), an intervenor must show: "(1) [a] timely application; (2) an interest relating to the subject matter of the action; (3) potential impairment, as a practical matter, of that interest by the disposition of the action; and (4) lack of adequate representation of the interest by the existing parties to the action." *Illinois v. City of Chicago*, 912 F.3d 979, 984 (7th Cir. 2019) (internal quotation marks omitted). The States easily meet that standard.

First, this motion is timely. "We look to four factors to determine whether a 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." *Id.* (internal quotation marks omitted).

Although the States have been aware of their interests in the Rule for some time, this case clearly presents "unusual circumstances" warranting intervention. The previous Administration and former federal defendants in this case defended the Rule for years across multiple courts, and the States' interests were appropriately represented in this defense. The States therefore relied on the United States to defend the Rule in lieu of burdening the courts with additional briefing reiterating that defense. It was not until two days ago, on March 9, when the United States voluntarily moved to dismiss this case that the States learned that the new Administration intended to withdraw its defense of the Rule in courts across the country and, in essence, repeal the Rule by stipulation in litigation. On learning of that decision, the States immediately moved to intervene.

Further, the Plaintiffs will not be prejudiced by the States' intervention. Plaintiffs faced the possibility of protracted litigation until two days ago; they suffer no prejudice by litigating the same issues in the same forum against the States rather than the United States. In contrast, the States will suffer great prejudice if they cannot intervene. As discussed in detail below, this is so because the States spend billions of dollars on Medicaid services and other public benefits to indigent individuals, including individuals who would be inadmissible under the Rule. These costs have steadily increased over the past several years, and the Rule would have helped to reduce such expenditures by efficiently and effectively implementing Congress's long-held policy of limiting the immigration of individuals who are not self-sufficient.

Thus, if the States cannot defend the Rule against the district court's nationwide vacatur, their Medicaid and other social-welfare expenditures will be higher than they would if the Rule were enforced. This motion is therefore timely.

Second, the States have important interests relating to the subject matter of this action, specifically their interests in conserving their Medicaid and related social-welfare budgets. Providing for the healthcare needs of economically disadvantaged individuals represents a substantial portion of the States' budgets. For example, in Texas in 2015, approximately 4 million Texans relied on Medicaid. Tex. Health & Human Servs. Comm'n, Texas Medicaid and Chip in Perspective 1-2 (11th ed. 2017), https://hhs.texas.gov/reports/2017/02/texas-medicaid-chip-perspective-eleventh-edition. Medicaid is jointly financed by the federal government and the States. *Id.* at 4. In 2015, total Texas expenditures for Medicaid represented approximately 28% of the State's budget. *Id.* at 4. In the past several years, the federal government has paid for approximately 56-58% of Texas's Medicaid expenditures. *Id.* at 183. Although the exact amount of Texas's Medicaid budget spent on immigrants who would otherwise be inadmissible under the DHS Rule has varied, the total budget is always measured in billions of dollars. *Id.* at 179. And from 2000 to 2015, Medicaid expenses increased from 20% to 28% of the state's budget. *Id.* at 179.

This Court can and should infer that invalidating the Rule will have a disproportionate impact on the States, particularly on border States. For example, Texas and Montana have among the largest international borders in the Union and provide Medicaid services to many immigrants. The Rule would reduce that burden. Under the relevant statute, "[a]ny alien who . . . 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." 8 U.S.C. § 1182(a)(4)(A). DHS's rule defines "public charge" as "'an alien who receives one or more public benefits . . . for more than 12 months in the aggregate within any 36-month period.'" 84 Fed. Reg. at 41,501. "Public benefits" specifically includes, among other forms of public assistance, Medicaid services with some exceptions. *Id.* Thus, if the Attorney General determined that an alien applying for admission to the United States would likely require Medicaid services for more than 12 months in a 36-month period, then that alien would be inadmissible. Accordingly, fewer aliens requiring Medicaid and other public services would be admitted to the United States, including into Texas and Montana, thus reducing the States' Medicaid budgets. Accordingly, each State Intervenor has a state interest in the subject matter of this action.

Third, the States' interests in conserving their increasing Medicaid and related social-welfare budgets will be impaired by the disposition of this case absent intervention. As explained above, the district court's vacatur order was explicitly "not limited to the State of Illinois." *See* Memorandum Opinion & Order at 8, *supra* (ECF 222). In other words, though this case has been litigated by one county and one interest group, the district court's ruling applies nationwide. Now that the United States has voluntarily dismissed this appeal, nothing will stop the district court's nationwide vacatur from taking effect and adversely impacting the States' budgets, including their Medicaid expenditures.

Fourth, no party now adequately represents the States' interests because no party is left to defend the Rule. Absent the States' intervention, all States will be

affected by the invalidation of the Rule without Texas and other similarly situated States having the ability to defend those interests. For these reasons, the States are entitled to intervene as of right.

II. The States also meet the criteria for permissive intervention.

For similar reasons, even if the Court concludes that the States do not meet the standard to intervene as of right, it should use its discretion to allow the States to do so. Under Rule 24(b), a movant seeking permissive intervention must show: (1) that there exists an independent ground of subject matter jurisdiction; (2) that the motion is timely; (3) that the movant's claims or defenses share with the main action a common question of law or fact; and (4) that intervention will not result in undue delay or prejudice to the existing parties. Fed R. Civ. P. 24(b)(1), 24(b)(1)(B), 24(b)(2), 24(b)(3); *Security Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995). Again, the States easily meet that standard.

Here, the requirements of an independent ground of subject-matter jurisdiction and shared claims or defenses are not strictly applicable, as plaintiffs must demonstrate subject-matter jurisdiction, and the States seek to intervene as defendants by stepping into the shoes of the United States. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). But this Court would retain subject-matter jurisdiction over this federal question, and the States intend to present similar defenses of the Rule to those that were (until two days ago) presented by the federal government. *Cook County*, 962 F.3d at 217. The States likewise enjoy an actual controversy against the plaintiffs: they will be tangibly, economically affected by an adverse judgment redressable by this Court, and thus this Court would retain Article III jurisdiction.

The timeliness and prejudice analyses discussed above apply equally to the States' ability to intervene permissively. The States filed this motion promptly after they learned on March 9 that the United States would no longer defend the Rule, and Plaintiffs will suffer no prejudice by this intervention because they were already expected to continue to litigate this case until mere days ago.

This Court should exercise its discretion to permit the States to intervene to defend their interests in avoiding increased costs by the invalidation of the Rule that will otherwise go unprotected. The States have enormous financial obligations in providing Medicaid and other public services and, until quite recently, had no need to intervene to defend those interests. That need has changed due to unexpected litigation tactics by the United States. This Court should not countenance this unprecedented turn.

[Remainder of case intentionally left back.]

Conclusion

This Court should grant the States leave to intervene as Defendant-Appellants.

Respectfully submitted.

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/s/ Judd E. Stone II
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