No. 20A150

In the Supreme Court of the United States

TEXAS, ALABAMA, ARIZONA, ARKANSAS, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MONTANA, OHIO, OKLAHOMA, SOUTH CAROLINA, AND WEST VIRGINIA

Applicants,

v.

COOK COUNTY, ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS, CHAD F. WOLF, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF U.S. DEPARTMENT OF HOMELAND SECURITY, U.S. DEPARTMENT OF HOMELAND SECURITY, KENNETH T. CUCCINELLI, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. IMMIGRATIONS AND CUSTOMS ENFORCEMENT,

Respondents.

REPLY IN SUPPORT OF APPLICATION FOR LEAVE TO INTERVENE AND FOR A STAY OF THE JUDGMENT ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

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INTRODUCTION

Respondents, the United States and Cook County and the Illinois Coalition for Immigrant and Refugee Rights ("Cook County"), confirm what was already obvious: Aligned as a matter of policy, they stipulated to dismiss this case to leverage the district court's nationwide vacatur of the Public Charge Rule ("Rule") in order to avoid the requirements of the APA. That is, rather than defend a rule that this Court had already determined would likely withstand scrutiny, the United States and its allies "implemented a plan to instantly terminate the rule with extreme prejudice—ensuring . . . that it could effectively never, ever be resurrected, even by a future administration." *City & County of San Francisco v. U.S. Citizenship & Immigr. Servs.*, No. 19-17213, 2021 WL 1310846, at *1 (9th Cir. Apr. 8, 2021) (VanDyke, J., dissenting).

Though the States moved to vindicate their interests only two days later in multiple courts of appeals, the United States and Cook County now insist this was too slow. Never mind that they would have insisted that the States could not intervene earlier because their interests were adequately represented by the United States. *Cf.* Letter Mot., *New York v. Dep't of Labor*, No. 1:21-CV-00536-SHS at 1 (S.D.N.Y. Apr. 1, 2021) (opposing intervention in part because "DOL and the plaintiffs are not in settlement negotiations at this time").

This procedural gamesmanship has harmed, is harming, and will continue to harm the States for years to come. It vitiates their procedural right to engage in the notice-and-comment rulemaking that would be required to amend or reverse the Rule under *any* other circumstance. *See, e.g.*, *id.* at 1-2 (noting that "DOL expects to ask the Court to maintain the stay throughout the APA rulemaking process" during which the proposed intervenors may "make their views known"). It deprives them of the ability to plan their expenditures in the orderly manner that would be available

under ordinary procedures. And it obligates them to expend Medicaid and other public-benefit funds on aliens that would be inadmissible under the Rule.

By contrast, none of the procedural obstacles identified by respondents—several of which they *created* to sidestep the APA—preclude this Court's review. This Court should not countenance their "coordinated efforts to eliminate the rule while avoiding APA review." *City & County of San Francisco*, 2021 WL 1310846, at *8 (VanDyke, J., dissenting).

ARGUMENT

Rather than defend their unprecedented litigation tactics, respondents chide the States for not anticipating that the United States would depart from well-established practices that have ensured the orderly transition of power between administrations for decades. They raise a host of procedural objections. And they insist that the States' arguments are meritless even though this Court has already concluded—multiple times—that the defense of the Rule is likely to succeed on the merits. Most fundamentally (and frequently), they seek to avoid review of their extraordinary conduct based on the extraordinary vehicle the States have been forced to employ. These objections demonstrate chutzpah, but little else.

I. This Court Can Grant Relief.

A. The States Have Standing.

Respondent Cook County asserts (at 11-15) that the States lack standing. In brief, Cook County suggests that it is conjecture that fewer aliens who would use Medicaid would be admitted to the United States but for the Rule, so the States cannot demonstrate standing.[1]

[1] The United States acknowledges (at 22 n.5) that the States have at least as much interest in the validity of the Rule as the plaintiff in *Massachusetts v. EPA*, 549 U.S. 497 (2007).

This argument contradicts this Court's recent precedent. In *Department of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019), this Court credited a theory of standing more attenuated than the on advanced by the States here. And it accepted the district court's conclusion that "the reinstatement of a citizenship question would result in noncitizen households responding to the census at lower rates, . . . caus[ing] them to be undercounted," which in turn would lead the plaintiff States to "lose out on federal funds that are distributed on the basis of population." *Id.*

Applying *Department of Commerce* in this very case, the Seventh Circuit allowed Cook County to proceed because "municipalities generally have standing to challenge laws that result (or immediately threaten to result) in substantial financial burdens and other concrete harms." *Cook County v. Wolf*, 962 F.3d 208, 218 (7th Cir. 2020) (citing *Dep't of Commerce*, 139 S. Ct. at 2565), *cert. dismissed sub. nom. Mayorkas v. Cook County*, 141 S. Ct. 1292 (2021).

The States' interest is the flipside of Cook County's and is, if anything, more clear. The States' financial interest here does not depend on potential illegal action, and though there is significant disagreement about the scope and direction of the Rule's effects, both proponents and opponents of the Rule agree that it would significantly affect public-benefit enrollment and, therefore, state budgets.[2] Due to the district court's vacatur of the Rule, some number of aliens will be admitted to the United States who would not otherwise be admitted. And those individuals will be eligible for programs like Medicaid that directly impact the States' budgets. Their participation in such programs will necessitate payments that the State would not

[2] *Compare, e.g.*, 84 Fed. Reg. 41,292, 41,301-03 (Aug. 14, 2019) (estimating budgetary benefits), *with* Leighton Ku, *New Evidence Demonstrates that the Public Charge Rule Will Harm Immigrant Families and Others*, HEALTH AFFAIRS (Oct. 9, 2019), https://tinyurl.com/3tve8bvn (estimating potential harms).

otherwise have to make—a paradigmatic actual injury-in-fact. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

That pocketbook injury is fairly traceable to the district court's erroneous vacatur of the Rule. *Dep't of Commerce*, 139 S. Ct. at 2565. Once again, this case is easier than *Department of Commerce* because there is no intervening action by third parties "choosing to violate their legal duties" or "motivated by unfounded fears." *Id.* at 255-56. Rather, aliens otherwise inadmissible will be admitted and then rationally take advantage of state services like Medicaid. Even if this Court were to conclude that the Rule is unlawful (which is unlikely), its correction of the district court's error and allowing the States to participate in any new rulemaking would redress the States' procedural injury. *Larson v. Valente*, 456 U.S. 228, 242-43 (1982); *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

B. The States Are "Parties" for Purposes of this Court's Jurisdiction.

Equally without merit is the United States' contention (at 12-21)—to which it devotes most of its brief—that this Court lacks appellate jurisdiction because the States were not parties before the court of appeals. The States properly invoked the jurisdiction of the court of appeals by seeking to recall the mandate and to intervene in this lawsuit as a party. Because intervention gives the States the right to participate fully in the litigation, the United States' effort to artificially limit the scope of this Court's review is without legal basis.

1. At the outset, the United States concedes—as it must—that a party to a motion to intervene may seek review of the denial of that motion. *See id.* at 18 (citing *Cameron v. EMW Women's Surgical Center*, No. 20-610, 2021 WL 1163735 (Mar. 29, 2021)). So whatever the outer bound of the term "party" contained in 28 U.S.C. § 1254 is, this Court's recent precedent firmly establishes that a party seeking to intervene in the court of appeals qualifies.

The United States seeks to distinguish this case and *Cameron* because the Attorney General of Kentucky moved to intervene before the mandate had issued. *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 831 F. App'x 748, 749-50 (6th Cir. 2020), *cert. granted in part sub nom. Cameron*, *supra*. Since the States here did not seek to intervene until after the Seventh Circuit granted the United States' request to dismiss the appeal, the United States says, the case was not "in the court of appeals" at that time. U.S. Resp. at 18 (quoting 28 U.S.C. § 1254).

This willfully ignores that the States moved both to recall the mandate and to intervene. Even after the mandate issues, the court of appeals retains jurisdiction to determine whether to recall it. *Calderon v. Thompson*, 523 U.S. 538, 549 (1998). As a result, the States' motion to intervene was "in the court of appeals" (U.S. Resp. at 18) for that determination. The court of appeals could have recalled the mandate to allow the States to intervene. *Calderon*, 523 U.S. at 549. The States seek review in this Court because the Seventh Circuit unjustifiably failed to do so.

The United States' argument to the contrary would require the States to seek to intervene while the United States adequately represented their interests. Yet the United States regularly opposes such motions. *See, e.g.*, Defs.' Br. in Opposition to Texas's Mot. to Intervene at 1, 3, *Pennsylvania v. Rosenfelt,* No. 1:20-cv-01468-CJN (D.D.C. Feb. 2, 2021) (opposing intervention based on argument that "a new presidential administration might decide to amend or eliminate" a regulation that the intervenors supported). This is hardly surprising: For decades, whether "representation of the applicant's interest by existing parties is or may be inadequate" has been one of the primary factors that courts have been required to consider in assessing intervention requests. *Sutphen Ests. v. United States*, 342 U.S. 19, 21 (1951); *e.g.*, *Sam Fox Pub. Co. v. United States*, 366 U.S. 683, 688 (1961).

The United States' position here is that intervention is impossible because it is impermissible until it is untimely. "With a reaction time the envy of every appellate

court, the Seventh Circuit only a few hours after DHS's statement granted the motion to dismiss and immediately issued the mandate." *City & Cty. of San Francisco*, 2021 WL 1310846, at *4 (VanDyke, J., dissenting) (footnote omitted). The States reacted to the United States' abrupt change in position in a mere two days; they cannot be expected to do so in only hours.

As a result, the States may seek certiorari review of the denial of their motions to recall the mandate, to reconsider the motion to dismiss, and to intervene.

2. The United States' fallback position (at 19-21) is that even if the States are properly before the Court, they can seek review only of the court of appeals' denial of their motion to intervene. This is wrong. Because the States independently have standing (*see supra* at 2-4), their intervention gives them the right to litigate this case "in the absence of the party on whose side intervention was permitted." *Diamond v. Charles*, 476 U.S. 54, 68 (1986). That is, the States' request to intervene as a defendant, if granted, would permit them to seek any relief that the United States as the original defendant could seek. *Cf. id.* And it gives this Court jurisdiction to preserve those rights while the intervention is adjudicated.

This Court can grant such relief in at least two ways: *First*, this Court can summarily reverse and allow this case to proceed in the ordinary course through the Seventh Circuit. *Second*, because the Court unquestionably has jurisdiction to determine whether intervention should have been permitted, the Court may "issue a restraining order for the purpose of preserving existing conditions" while it resolves that question. *United States v. United Mine Workers of Am.*, 330 U.S. 258, 290 (1947). Staying the effect of the district court's judgment pending a petition for certiorari or summarily reversing the Seventh Circuit's orders is one way the Court could preserve that status quo ante.

C. Given the States' Prompt Motions to Intervene, The Administration's Reversal of Position Does Not Render this Case Not Moot.

Cook County is likewise incorrect to contend (at 7-11) that the States' intervention was not timely and that the case is moot. Cook County argues that the States should have sought to intervene before the United States' reversal of position, and that the promulgation of a new rule, 86 Fed. Reg. 14,221, 14,221 (Mar. 15, 2021), renders the case moot. Wrong on both counts.

A. The States' intervention, a mere two days after they learned they *could* intervene, was timely. It is hornbook law that intervention as of right is proper only when the existing parties to a proceeding do not adequately represent a proposed intervenor's interests. *See* Fed. R. Civ. P. 24(a)(2); *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 (1972). While the United States was vigorously defending the Rule—including in this Court—the States' interests were adequately represented by the United States. Intervention became proper when the United States, without warning to the States, switched sides in the litigation on the very day that the mandate was issued. The States moved swiftly thereafter to intervene.

Cook County proposes (at 8-9) that States should prophylactically intervene any time the United States suggests it *may* change positions in litigation or regarding a rule. The United States does not suggest anything of the sort for good reason: It would induce a blizzard of largely unnecessary motion practice at the change of each administration, burdening the States, the United States, the courts, and this Court. And Cook County's citation (at 9) to *Pennsylvania v. Rosenfelt*, No. 1:20-cv-01468-CJN (D.D.C.) only illustrates the flaw in Cook County's non-solution: As discussed above, the United States *opposed* Texas's intervention in that case as premature. Defs. Br. in Opposition to Texas's Mot. to Intervene, *supra*.

Indeed, Cook County's reliance on *Rosenfelt* illustrates the double-bind it means to impose on the States: If a State seeks to intervene after an incoming administration announces that it is *considering* a change in position but before the government actually does so, that intervention is premature. *Id.* at 3. But if a State seeks to intervene after the United States and a now-aligned plaintiff have secretly and collusively stipulated to judgment, intervention is untimely. Cook County—and the United States—cannot have it both ways.

B. Cook County further asserts that this case is moot because (1) the United States declined to pursue further litigation, and (2) DHS promulgated a new rule rescinding the public charge rule. Both arguments fail.

The first is foreclosed by this Court's precedents. *See, e.g.*, *United States v. Windsor*, 570 U.S. 744, 754 (2013); *Texas v. United States*, 945 F.3d 355, 373 (5th Cir. 2019), *cert. granted sub nom.*, *California v. Texas*, 140 S. Ct. 1262 (2020). Indeed, if this were the law, there would be no impediment to plaintiffs like Cook County suing, settling, and binding a friendly administration nationwide and across elections to a specific policy preference. By respondents' theory, no putative intervenor could intervene.

The second is foreclosed by the history of this case. The new rule Cook County relies on cites only the judgment that the States challenge here. *See* 86 Fed. Reg. 14,221. Because that judgment provides DHS's sole basis for avoiding notice-and-comment procedures in promulgating a new rule, the new rule plainly violates the APA if the judgment is overturned. The viability of the new rule turns exclusively on respondents' attempt to protect their judgment—or, in other words, there is a live, real-world controversy that a reversal would settle. This Court can therefore provide the States with relief, and the case is not moot.

II. The Court Should Grant the States Relief Because They Are Likely to Succeed on the Merits of Their Request.

Stripped of the procedural assertions that the Court *may* not grant review, respondents present very little reason for why the Court *should* not grant review. For good reason: Given the history of this litigation, the Court plainly should.

A. This Court Should Grant a Stay Pending Certiorari.

As the States explained in their application, this Court has repeatedly granted stays in cases related to the Rule, including in this matter, and has previously granted a petition for a writ of certiorari to review a materially indistinguishable challenge to the Rule. *Dep't of Homeland Sec. v. New York*, No. 20-449, 2021 WL 666376 (U.S. Feb. 22, 2021); *Wolf v. Cook County*, 140 S. Ct. 681 (2020). Those stays necessarily required "a fair prospect that a majority of the Court will conclude that the decision below was erroneous." *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers).

Neither the United States nor Cook County linger to defend the reasoning of the court of appeals' decision on the merits, likely because this Court has already concluded that, prior to its change in position, the United States was likely to succeed in defending the Rule. Instead, they focus on the irreparable harm and the public interest. U.S. Resp. at 21-26; Cook County Resp. at 20-22.

As explained in their application, the States will suffer irreparable harm in at least two ways. *First*, the States will be required to budget for and expend millions of dollars in additional aid through Medicaid and other programs that they would not have been otherwise required to budget. These funds will not be recoverable, and the abruptness with which the United States abandoned its defense of the Rule means that the States have been deprived of an orderly process allowing them to plan future expenses.

Second, the States have also been deprived of their procedural right to defend their interests in the Rule. App. at 20-21. It is no answer to say, as Cook County does (at 22), that the States may participate in any future rulemaking that may be undertaken by DHS. By collusively stipulating to dismissal with the United States, Cook County has obtained vacatur of the Rule and so deprived the States of their procedural interest in preserving it. Of course, the States may participate in a hypothetical future rulemaking, but it should be against the backdrop of a full APA notice-and-comment rulemaking to revise or rescind the Rule. Moreover, that hypothetical future rulemaking will be in the shadow of a final judgment that—while ambiguous—may have held that the current Rule is inconsistent with the text of the statute. *Cook County v. Wolfe*, No. 19 C 6334, 2020 WL 6393005, at 2 & n* (N.D. Ill. Nov. 2, 2020). Though that decision was unreviewed (and likely incorrect), it would become by its very finality unreviewable. And under this Court's current precedent, such a holding would arguably preclude the next administration from re-adopting the Rule *even with* notice-and-comment rulemaking. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005); *see also City & Cty. of San Francisco*, 2021 WL 1310846, at *1 (VanDyke, J., dissenting) (noting the "extreme prejudice" of the United States' actions).

For its part, the United States misconstrues the States' position. The States do not contend that they have a "procedural right to be consulted in advance (or after the fact) about the federal government's litigation decisions." U.S. Resp. at 22 n.5. But they do insist that they have a procedural right to participate in the regular APA process for amending or repealing a rule duly promulgated through notice-and-comment rulemaking. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). By collusively stipulating to dismissal with Cook County, the United States has deprived the States of that right.

The United States further contends (at 24) that the States fail to consider equitable factors such as "substantial confusion in immigrant communities" that would arise from "[p]utting the 2019 Rule back into effect weeks after it was vacated." Any confusion that arises from a stay of the district court's order vacating the Rule is of the United States' and Cook County's own making. Like "the man sentenced to death for killing his parents, who pleads for mercy on the ground that he is an orphan," *Glossip v. Gross*, 576 U.S. 863, 898 (2015) (Scalia, J., concurring), the United States cannot by its actions create conditions ripe for confusion and then rely on that very confusion as a reason to deny relief. *See Tex. Democratic Party v. Abbott*, 961 F.3d 389, 412 (5th Cir. 2020) (criticizing plaintiffs for arguing that court intervention would cause confusion in light of the plaintiffs' own efforts to sow confusion).

By contrast, "[t]he public interest is served by compliance with the APA" because it "creates a statutory scheme for informal or notice-and-comment rulemaking reflecting a judgment by Congress that the public interest is served by a careful and open review of proposed administrative rules and regulations." *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) (citation and internal quotation marks omitted). "[T]he public interest is served from proper process itself" irrespective of whether "notice and comment could have changed the substantive result," *id.* at 581-82, not by "a cursory rulemaking . . . without the normal notice and comment typically needed to change rules," *City & Cty. of San Francisco*, 2021 WL 1310846, at *1 (VanDyke, J., dissenting).

B. In the Alternative, this Court Should Summarily Reverse and Allow the States to Intervene to Defend the Rule.

As this Court has confirmed, the court of appeals has authority to recall its mandate in "extraordinary circumstances." *Calderon*, 523 U.S. at 550. The United States asserts (at 27) that there are no unusual circumstances present here because "[i]t is

hardly extraordinary (or even unusual) . . . for the federal government to decide not to pursue further review of a lower-court decision vacating a federal rule."

While the States certainly do not suggest that the United States must appeal every adverse ruling of every district court, the United States should not be permitted to secure vacatur of the Rule through a collusive dismissal in lieu of going through the usual notice-and-comment process. At the very least, it should not be permitted to use the courts to try to tie future administrations' hands when, after defending the Rule vigorously throughout the United States, the Administration simply switched sides. The United States has offered no example of any comparable case, and the cases it has offered are easily distinguishable. *See*, *infra*, at 15-16.

III. To the Extent that the States Seek Extraordinary Relief, It Is Because Respondents' Conduct Has Been Extraordinary.

Respondents intone over and over that they view the States' request as "extraordinary." U.S. Resp. at 11, 12, 27, 29, 31; Cook County Resp. at 2, 7, 15, 18, 23. But it is the collusive conduct between the United States and its allies to avoid both this Court's review and the APA's notice-and-comment requirements that is "quite extraordinary." *See City & Cty. of San Francisco*, 2021 WL 1310846, at *1 (VanDyke, J., dissenting).

A. The States do not dispute that when campaigning, then-Candidate Biden promised to "'[r]everse [the] public charge rule' within [his] first 100 days." Cook County Resp. at 4. The States anticipated, however, that his Administration would comply with the rule of law, including long-running norms regarding litigation before this Court. Its failure to do so was extraordinary.

It is no surprise that an incoming administration may wish to amend, repeal, or replace rules promulgated by an outgoing administration. That is why "[t]he APA establishes the procedures federal administrative agencies use for rule making, defined as the process of formulating, amending, *or repealing* a rule." *Perez v. Mortg.*

Bankers Ass'n, 575 U.S. 92, 95 (2015) (emphasis added). The United States knows how to engage in APA rulemaking—it simply chose not to do so here.

As respondents conspicuously do not contest, the Public Charge Rule was promulgated using full notice-and-comment rulemaking, so the APA required the Administration engage in full notice-and-comment rulemaking to replace it. *See* 5 U.S.C. §§ 551(5), 553; *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 the regular process, DHS would be required to "issue a general notice of proposed rulemaking," "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," and "consider and respond to significant comments received during the period for public comment." *Perez*, 575 U.S. at 96 (cleaned up).

If the Administration had used these procedures, the States would have had an opportunity to vindicate their interests through the APA's mandatory regulatory process. And as respondents well know, the States could have tested the legality of the Rule's amendment or repeal in court. 5 U.S.C. § 706(2)(A). DHS would at a bare minimum be required to "display awareness that it *is* changing positions" and "show that there are good reasons for the new policy." *F.C.C.*, 556 U.S. at 515. Where, as here, the "new policy" would likely "rest[] upon factual findings that contradict those which underlay its prior policy" and that policy has "engendered serious reliance interests that must be taken into account," DHS would be required to provide "a more detailed justification than what would suffice for a new policy created on a blank slate." *Id.* "It would be arbitrary and capricious to ignore such matters." *Id.*

The new Administration apparently viewed these requirements as too cumbersome. But that was not their choice to make. These requirements reflect Congress's considered judgment. *See* 5 U.S.C. §§ 551(5), 553. They also have substantial value to entities like the States, namely by "ensur[ing] that an agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to

comment on the wisdom of repeal." *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n*, 673 F.2d 425, 446 (D.C. Cir. 1982). Being deprived of this opportunity is precisely what the States complain of here.

B. Like any other litigant, the Administration may sometimes choose not to prosecute an appeal that it views as not in its best interests. Of course, the United States has traditionally only refused to defend government actions when there was no colorable basis to do so.[3] But even disregarding that tradition, courts routinely allow interested parties to intervene directly in an appeal when they learn that their interests are not being protected by the parties. *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, 518 (7th Cir. 2004); *Texas v. U.S. Dep't of Energy*, 754 F.2d 550, 551 (5th Cir. 1985).

As Judge VanDyke recognized, the United States has an additional remedy where it concludes that current litigation is inconsistent with its policy preferences. Courts recognize that elections have consequences, and that a new administration may wish to change its legal positions. As a result, the United States may pursue the "traditional route" and "hold . . . cases in abeyance" while it pursues the APA process. *See City & Cty. of San Francisco*, 2021 WL 1310846, at *7 (VanDyke, J., dissenting). The Administration has followed this course recently in numerous cases—including in this Court.[4] As did the prior administration. *See* Bethany A. Davis Noll

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[3] *See* Attorney General Benjamin Civiletti, *The Att'y Gen.'s Duty to Defend & Enforce Constitutionally Objectionable Legislation*, 4A Op. O.L.C. 55, 55 (1980), https://tinyurl.com/264etc5u (reflecting view "expressed by nearly all of [his] predecessors").

[4] *See, e.g.*, Mot. of Pet'rs to Hold the Briefing Schedule in Abeyance and to Remove the Case from the February 21 Argument Calendar, *Biden v. Sierra Club*, No. 20-138 (U.S. Feb. 01, 2021); Mot. of Pet'rs to Hold the Briefing Schedule in Abeyance and to Remove the Case from the February 2021 Argument Calendar, *Mayorkas v. Innovation Law Lab, et al.*, No. 19-1212 (U.S. Feb. 01, 2021); Mot. for Abeyance, *Sierra Club v. EPA*, No. 20-1115 (D.C. Cir. Feb. 3, 2021); Joint Stipulation and Order

& Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 28 nn. 129 & 130 (2019) (collecting examples).[5]

Again, if the Administration had followed either of these ordinary procedures, the States would not be here. A motion to hold the Seventh Circuit case in abeyance would have alerted them that the Administration intended to initiate new rulemaking, and the States could have intervened (or participated in that rulemaking). But the States are unaware of—and the United States does not point to—any case where the United States has vigorously defended a final rule in courts across the country, obtained certiorari to challenge an adverse judgment, and then engaged in an abrupt about face to stipulate to judgment after this Court has determined that it is likely to succeed on the merits of its appeal.

The cases that the United States *does* cite are entirely distinguishable. In each case, the court found procedural defects that were curable by further agency process rather than that the underlying rule was arbitrary and capricious. In *Natural Resources Defense Council v. Wheeler*, the D.C. Circuit held that the rule at issue "was a legislative rule and was thus improperly promulgated without the required notice-and-comment procedures." 955 F.3d 68, 83 (D.C. Cir. 2020). In *Conservation Law Foundation v. Ross*, the D.C. District Court held that the Sustainable Fisheries Di-

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to Hold Case in Abeyance, *Centro Legal de la Raza v. EOIR*, No. 21-cv-00463-SI (N.D. Cal. Mar. 24, 2021); Defs.' Mot. to Cont. Stay at 5 n.5, *California v. Nishida*, No. 3:20-cv-03005, (N.D. Cal. April 9, 2021) (collecting cases).

[5] When the United States has changed position in this Administration in a case where this Court has granted certiorari, it has also filed a notification of its change in position and a suggestion that the Court appoint counsel as amicus curiae. *See* Letter of Respondent United States, *Terry v. United States*, No. 20-5904 (U.S. March 15, 2021). Once again, the United States declined to follow this well-worn process in service of expeditiously ending the Rule and insulating that decision from review.

vision of the National Marine Fisheries Service had violated the Endangered Species Act by failing to consult with the Protected Resources Division of the same agency. 422 F. Supp. 3d 12, 30-31 (D.D.C. 2019). And in *Center for Science in the Public Interest v. Perdue*, the District of Maryland held only that "the Final Rule is not a logical outgrowth of the Interim Final Rule." 438 F. Supp. 3d 546, 558 (D. Md. 2020). In none of these cases, had the United States lost on *statutory* (as opposed to procedural) grounds. And in none of these cases had this Court already determined that the United States' position regarding the proper interpretation of the underlying statute would likely succeed on the merits.

C. The United States characterizes the relief the States seek as "extraordinary." *E.g.*, U.S. Resp. at 11. If that is so, it is because the United States presents a "novel problem." *City & Cty. of San Francisco*, 2021 WL 1310846, at *2 (VanDyke, J., dissenting). It has used procedural gamesmanship to leverage a nationwide injunction—a tool that the United States has repeatedly decried as jurisdictionally illegitimate[6]—into a rule that "removed the 2019 Rule from the Code of Federal Regulations." U.S. Resp. 10-11. That notice points solely to "the court's order vacating the rule" as justification for bypassing "[n]otice and comment" and other APA requirements. 86 Fed. Reg. 14,221. No other basis is provided, because none can be.[7]

The United States can point to no other instance when a "new federal administration deliberately [] short-circuit[ed] the normal APA process by using a single

[6] *See* Office of the Attorney General, *Memorandum For Heads of Civil Litigating Components and United States Attorneys re: Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions* at 1, (Sept. 13, 2018), https://www.justice.gov/opa/press-release/file/1093881/download.

[7] While the notice explains that courts had enjoined the Rule on a preliminary basis, it does not explain that this Court had repeatedly issued stays and granted certiorari to determine the validity of the Rule. 86 Fed. Reg. 14,221; *see Dept. of Homeland Sec.*, 2021 WL 666376.

judge to engage in de facto nationwide rulemaking." *City & Cty. of San Francisco*, 2021 WL 1310846, at *2 (VanDyke, J., dissenting). "Absent intervention, the parties' strategic cooperative dismissals preclude those whose interests are no longer represented from pursuing arguments that [this] Court has already alluded are meritorious." *Id.* at *8. And "[e]ven more concerning, the dismissals lock in a final judgment and a handful of presumptively wrong appellate court decisions in multiple circuits, and circumvent the APA by avoiding formal notice-and-comment procedures." *Id.*

These acts disregard requirements of the APA and any semblance of orderly process. They also conflict with longstanding precedent—honored by this very Administration in other contexts. This Court should conclude that such behavior is improper and grant the Application.

CONCLUSION

This Court should permit the States to intervene and stay the district court's judgment pending the timely filing of a petition for a writ of certiorari. In the alternative, this Court should summarily reverse the court of appeals' order denying the States' motions to intervene.

Respectfully submitted.

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