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

COOK COUNTY, ILLINOIS et al, *Plaintiffs,* v. WOLF et al., *Defendants.*	No. 1:19-cv-06334

MEMORANDUM IN SUPPORT OF OPPOSED MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FED. R. CIV. P. 60(B)

TABLE OF CONTENTS

INTRODUCTION

The States of Texas, Alabama, Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, and West Virginia (the "State Intervenors") respectfully request this Court reconsider its grant of partial summary judgment, Mem. Op. & Order, *Cook County v. Wolf*, No. 1:19-CV-06334 (N.D. Ill. Nov. 2, 2020) ECF 222; Partial Final Judgment, *Cook County v. Wolf*, No. 1:19-CV-06334 (N.D. Ill. Nov. 2, 2020) ECF 223, to allow them to defend the public-charge rule (the "Rule") in this Court, and, as necessary, before the Seventh Circuit and before the Supreme Court. *See Texas v. Cook County*, No. 20A150, 2021 WL 1602614 (U.S. Apr. 26, 2021).

This Court vacated the Rule that—after notice-and-comment rulemaking—interpreted the Immigration and Nationality Act's prohibition against admission of those who would become a public charge. Until only weeks ago, the United States vigorously defended the Rule in multiple courts, including this Court and the United States Supreme Court.

Until the United States abandoned its vigorous defense of the Rule, that defense proved largely successful. Panels of both the Fourth Circuit and the Ninth Circuit had concluded that the Rule was lawful. *See CASA de Md., Inc. v. Trump*, 971 F.3d 220, *vacated for reh' en banc*, 981 F.3d 311 (4th Cir. 2020) (dismissed Mar. 11, 2021); *City & County of San Francisco v. U.S. Citizenship & Immigration Servs.*, 944 F.3d 773 (9th Cir. 2019). And where the Second Circuit concluded that the Rule was unlawful, the Supreme Court granted certiorari. *Dep't of Homeland Sec. v. New York*, 141 S. Ct. 1370 (2021). Indeed, the Supreme Court granted stays of multiple orders invalidating or enjoining the Rule, including in this very case. *Wolf v. Cook County*, 140 S. Ct. 681 (2020); *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020).

In granting those stays, the Supreme Court necessarily concluded that there was "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). As the Fourth Circuit and the Seventh Circuit acknowledged, the Supreme Court's decision to grant a stay "would have been improbable if not impossible had the government, as the stay applicant, not

made a strong showing that it was likely to succeed on the merits." *CASA de Md.* , 971 F.3d at 229 (citation and internal quotation marks omitted); *Cook County v. Wolf*, 962 F.3d 208, 234 (7th Cir. 2020) (the Supreme Court's "stay provides an indication that the Court thinks that there is at least a fair prospect that DHS should prevail and faces a greater threat of irreparable harm than the plaintiffs.").

On March 9, 2021, without advance notice—save to the plaintiffs, their ostensible litigation opponents—the United States abandoned its defense of the Rule. "In concert with the various plaintiffs who had challenged the rule in federal courts across the country, the federal defendants simultaneously dismissed all the cases challenging the rule (including cases pending before the Supreme Court)" and acquiesced in this Court's partial grant of summary judgment vacating the Rule. *City & County of San Francisco v. U. S. Citizenship & Immigr. Servs.*, 992 F.3d 742, 743 (9th Cir. 2021) (VanDyke, J., dissenting). Cutting off all appellate review, including before the Supreme Court, allowed the new Administration to "leverage[] that now-unopposed vacatur to immediately remove the rule from the Federal Register." *Id.*; *see* 86 Fed. Reg. 14,221 (Mar. 15, 2021). The United States thereby evaded the requirements of the APA and "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*, 992 F.3d at 743 (VanDyke, J., dissenting).

This procedural gamesmanship has harmed, is harming, and will continue to harm the Intervenor States for years to come. It prevents the States from seeking future re-adoption of the rule—a rule that the Supreme Court repeatedly suggested was lawful. It vitiates their procedural right to participate in the notice-and-comment rulemaking that would be required to amend or reverse the Rule under *any* other circumstance. *See, e.g.*, Letter Mot., *New York v. Dep't of Labor*, No. 1:21-CV-00536-SHS at 1-2 (S.D.N.Y. Apr. 1, 2021) (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 to them under ordinary procedures. It

obligates them to expend Medicaid and other funds on providing public benefits to individuals who would be inadmissible under the Rule. And it subjects them to collusive litigation tactics that the United States continues to defend as permissible.

Intervenor States recognize that the Seventh Circuit's prior affirmance of this Court's temporary injunction is likely law of the case. Nevertheless, under these extraordinary circumstances, this Court should reconsider and vacate its grant of partial summary judgment so that the Intervenor States may step into the place the United States formerly occupied and seek relief before this Court, in the Seventh Circuit, and, as necessary, the Supreme Court. The Supreme Court has already suggested that the Intervenor States may seek this relief. *See Texasv. Cook County*, No. 20A150, 2021 WL 1602614 (U.S. Apr. 26, 2021).

This Court's nationwide vacatur of the Rule implicates the interests of the Intervenor States who, until the stipulation was filed, had no notice that they needed to intervene in order to protect those interests. Allowing the federal government to collude with private parties to, in effect, insulate the repeal of a rule from judicial challenges not only vitiates the procedural protections that Congress has provided for those affected by administrative actions, but it will also alter how the States approach litigation for years to come. The States will not be hoodwinked twice: if permitted to stand, the United States' repeal-by-stipulation strategy will compel the States to intervene aggressively into future cases to prevent future collusive dismissals. This Court should not countenance that result—let alone the simultaneous stifling of public participation in major policy initiatives at the federal level and encouragement of ever-more-complex procedural gamesmanship in the federal courts. This Court should grant Rule 60(b) relief.

BACKGROUND

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 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). This

provision's application has evolved over time to consider "a totality-of-the-circumstances test" where "different factors . . . weigh[] more or less heavily at different times, reflecting changes in the way in which we provide assistance to the needy." *City & County of San Francisco*, 944 F.3d at 796.

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 (May 26, 1999). At the same time, it issued an informal guidance document that applied 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. 41,292, 41,348 n.295 (Aug. 14, 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 considered not just cash aid for purposes of discovering whether an immigrant was 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. Under the Rule, officials were to 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.* These circumstances included 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 Cook County and the Illinois Coalition for Immigrant and Refugee Rights, a non-profit advocacy organization. They brought this action challenging the Rule under the APA, initially seeking a preliminary injunction. *Cook County v. McAleenan*, 417 F. Supp. 3d 1008, 1013-14 (N.D. Ill. 2019). Applying *Gegiow v. Uhl*, 239 U.S. 3 (1915), this Court concluded that the term "'public charge' encompasses only

persons . . . with 'a mental or physical defect of a nature to affect their ability to make a living'—[who] would be substantially, if not entirely, dependent on government assistance on a long-term basis." *Cook County*, 417 F. Supp. 3d at 1023. Because the Rule extended beyond that narrow definition to cover individuals who depend on supplemental, often non-cash benefits, this Court invalidated the Rule and issued preliminary relief enjoining the Rule within Illinois. *Id.* at 1030.

The United States immediately appealed and moved to stay the preliminary injunction. The Seventh Circuit denied the stay application, but the Supreme Court ultimately granted a stay. *Cook County*, 962 F.3d at 217; *Wolf*, 140 S. Ct. 681.

A divided panel of the Seventh Circuit subsequently affirmed this Court's preliminary injunction. *Cook County*, 962 F.3d at 234. With the Supreme Court's stay of this Court's injunction still in place, the United States filed a petition for a writ of certiorari. *Mayorkas v. Cook County*, No. 20-450 (U.S. Oct 7, 2020). While that petition remained pending, the Supreme Court granted certiorari in another case concerning the validity of the Rule. *See Dep't of Homeland Sec. v. New York*, 141 S. Ct. 1370 (U.S. 2021).

Litigation continued in this Court during these proceedings, and the plaintiffs moved for partial summary judgment on their APA claims. ECF 200. Relying primarily on the Seventh Circuit's decision affirming the grant of a preliminary injunction, this Court granted the motion, vacated the Rule, and entered a partial final judgment under Rule 54(b). ECF 222 at 14; ECF 223. Unlike this Court's preliminary injunction, the vacatur was explicitly "not limited to the State of Illinois." *Id.* at 8. The United States then appealed that ruling to the Seventh Circuit, obtaining an administrative stay.

The new Administration ostensibly decided not to defend the Rule, though it did not make that change in position public. On March 9, 2021, the United States filed nearly simultaneous motions to dismiss all cases challenging the rule, including (among others) in this case and in *New York*, which had been awaiting review by the Supreme Court. *See* Joint Stipulation to Dismiss at 1, *Dep't of Homeland Sec. v. New York*, No. 20-449 (Mar. 9, 2021); Unopposed Motion to Voluntarily Dismiss Appeal at 1, *Cook County v. Wolf*, No. 20-3150 (Mar. 9, 2021). The Seventh

Circuit granted the motion and issued its mandate the same day. Order Granting Unopposed Motion to Voluntarily Dismiss, *Cook County v. Wolf*, No. 20-3150 (March 9, 2021).

ARGUMENT

Under Rule 60(b), "the court may relieve a party or its legal representative from a final judgment, order, or proceeding" for any of the five specific grounds listed in Rule 60(b)(1) to (5) or—as provided in Rule 60(b)(6)—for "any other reason that justifies relief." Fed. R. Civ. P. 60(b). "Rule 60(b)(6) is . . . open-ended; it is flexible and gives courts 'wide discretion.' It is 'available only in 'extraordinary circumstances,' but courts may consider 'a wide range of factors' to determine if 'extraordinary circumstances are present.'" *Pearson v. Target Corp.*, 893 F.3d 980, 984 (7th Cir. 2018) (quoting *Buck v. Davis*, 137 S. Ct. 759, 777-78 (2017)).

Though not parties to this case prior to this Court's judgment, the Intervenor States may nonetheless seek relief. The States have moved to intervene, and if the Court grants that motion the States will "acquire[] the rights of a party," *Solid Waste Agency of N. Cook Cty. 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.* ("An intervenor . . . can continue the litigation even if the party on whose side he intervened is eager to settle."). But even if the Court denies the States' motion to intervene, the States can still file this Rule 60(b) motion. *Bridgeport Music, Inc. v. Smith*, 714 F.3d 932, 940 (6th Cir. 2013) (noting that "[s]everal courts have also allowed a nonparty to seek relief under Rule 60(b) where its interests were directly or strongly affected by the judgment" and collecting cases); *cf. United States v. Kirschenbaum*, 156 F.3d 784, 794 (7th Cir. 1998) ("[N]on-parties who are bound by a court's equitable decrees have a right to move to have the order dissolved . . . .").

Rule 60(b) relief is appropriate given the United States' unusual and extraordinary litigation conduct. Rather than follow "the traditional route of asking the courts to hold . . . cases in abeyance, rescinding the rule per the APA, and then promulgating a new rule through notice and comment rulemaking," *City & County of San Francisco*, 992 F.3d at 751 (VanDyke, J., dissenting), the United States and the plaintiffs in this matter collusively stipulated to judgment. Like the United States prior to March 9, the State Intervenors are likely to succeed on the merits if

allowed to intervene, as shown by the Supreme Court's multiple stays in this and related cases. By contrast, if the United States' attempt to rescind the Rule without going through the normal notice-and-comment rulemaking process required by the APA succeeds, the State Intervenors will suffer irreparable harm.

The State Intervenors ask this Court to vacate its judgment to allow the State Intervenors to defend the Rule, as the United States previously did on appeal. *See* Order Granting Stay Pending Appeal and Request for Immediate Administrative Stay, *Cook County v. Wolf*, No. 20-3150, (Nov. 3, 2020). The Intervenor States are aware that in responding to plaintiffs' motion for summary judgment, the United States effectively conceded that the Seventh Circuit's holding affirming this Court's grant of a primary injunction entitled plaintiffs to relief. *See* Mem. Op. at 2–3, ECF No. 222. The Intervenor States further agree that the Seventh Circuit's holding likely establishes the law of the case for this Court. But as of when the United States abandoned defense of the rule, the Seventh Circuit's decision had been stayed pending the disposition of a then-pending petition for certiorari. *Wolf*, 140 S. Ct. at 681. As the Seventh Circuit recognized, "the stay provides an indication that the Court thinks that there is at least a fair prospect that [defenders of the rule] should prevail and face[] a greater threat of irreparable harm than the plaintiffs." *Cook County*, 962 F.3d 234.

I. The United States' Conduct And The Resulting Consequences Warrant Rule 60(b) Relief.

Because the United States simultaneously stipulated to dismissal in every case involving the Rule, this Court's judgment vacating the Rule affects the State Intervenors, who have not had opportunity to participate in either this litigation or the regulatory process that would normally accompany a procedurally proper repeal of the Rule. The 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—concerns that the States could provide via a subsequent notice-and-comment process implicating the Rule. And the United

States ably defended the Rule in the litigation that inevitably followed. Though this Court ordered the rule vacated in November of last year, Mem. Op. at 14, ECF No. 222, the United States nonetheless continued to vigorously defend the Rule until March when it abruptly changed course. The State Intervenors—whose interests are directly implicated by both the Rule and the United States' abandonment of its defense of the Rule—had no notice of the United States' intentions before it dismissed its appeals of decisions vacating the Rule.

By colluding with now-aligned plaintiffs to dismiss this action, the United States has improperly sought to rescind the Rule by stipulation rather than rulemaking. Ordinarily, a Rule adopted through notice-and-comment rulemaking can be rescinded only 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 rescission of the Rule—including the State Intervenors—would have had the right to submit input, 5 U.S.C. § 553, and ultimately to challenge the final outcome of the regulatory process in court, *Dep't of Com. v. New York,* 139 S. Ct. 2551, 2569-70 (2019).

The United States typically respects these procedural protections even when it wishes to rescind a rule that has been challenged. It does so in the lower courts by asking courts to abey challenges to actions it no longer supports while it formally reverses those actions. *See City & County of San Francisco*, 992 F.3d at 751 (VanDyke, J., dissenting). When it seeks to change position after the Supreme Court has granted certiorari, the United States typically notifies the Court and requests that the Court appoint counsel as amicus curiae. *See, e.g.*, Letter of Respondent United States, *Terry v. United States*, No. 20-5904 (U.S. March 15, 2021). The United States has followed this procedure in numerous cases since the change in Administrations.[1] But here, the

[1] *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. 1, 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*, No. 19-1212 (U.S. Feb. 1, 2021); Mot. for Abeyance, *Sierra Club v. EPA*, No. 20-1115 (D.C. Cir. Feb. 3, 2021); Joint Stipulation and Order 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. Apr. 9, 2021) (collecting cases).

United States refused to follow this well-worn process for one reason: to prevent parties supporting the Rule from availing themselves of the courts.

The United States' use of this litigation to make an end-run around the APA constitutes the type of "extraordinary circumstances" that warrants relief under Rule 60(b)(6), *Pearson v. Target Corp.*, 893 F.3d 980, 984 (7th Cir. 2018), especially considering the amount of time that has elapsed since this Court entered its final judgment. By the time the United States dismissed its appeal of this Court's final judgment, the time to file a notice of appeal of that judgment had long since passed. *See* Fed. R. App. P. 4(a). The State Intervenors promptly moved to intervene in both the Seventh Circuit and the Supreme Court. Though the State Intervenors were unsuccessful before the Seventh Circuit, the Supreme Court all but invited the State Intervenors to seek relief in this Court and take up the defense of the Rule abandoned by the United States, *Texas v. Cook County*, No. 20A150, 2021 WL 1602614 (U.S. Apr. 26, 2021).

Because of these extraordinary circumstances, the general rule that Rule 60(b) cannot be used "to remedy a failure to take an appeal" does not apply. *Local 332, Allied Indus. Workers of Am. v. Johnson Controls, Inc.,* 969 F.2d 290, 292 (7th Cir. 1992) (quoting 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 2864, at 214–15 (2d ed. 1992)). After all, the State Intervenors did not fail to take an appeal: they did not have the opportunity. The State Intervenors could not have intervened before the time to appeal the Court's judgment passed because the United States would have objected on the ground that it adequately represented the States' interests. *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), ECF No. 141 (opposing intervention based on argument that "a new presidential administration might decide to amend or eliminate" a regulation that the intervenors supported). There also would have been no need for the Court to permit the State Intervenors to intervene during that time because the United States *was* vigorously representing their interests—right until the moment it was not, and dismissed its appeal. *See* Fed. R. Civ. P. 24. The State Intervenors thus did not fail to take an appeal; instead,

they are seeking relief from this Court's final judgment under Rule 60(b) so that they can defend the Rule and the important state interests the Rule serves on appeal.

II. If Granted Relief From The Court's Final Judgment, The State Intervenors Will Likely Prevail In This Litigation.

Once again properly defended, challenges to the Rule will likely fail, as a panel of the Fourth and Ninth Circuits held, and as the Supreme Court's repeated stay grants indicate. *See CASA de Md., Inc.*, 971 F.3d 220, *City & County of San Francisco*, 944 F.3d 773. The Rule's interpretation of "public charge" is consistent with the ordinary meaning of the term "public charge," other statutes enacted by Congress at the same time, and the historic usage of the term "public charge."

A. The Rule's Interpretation of "Public Charge" Is Consistent with the Ordinary Meaning of the Term "Public Charge."

The Rule is consistent with how the term "public charge" is typically used. Congress has not defined the term "public charge," 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; and (V) education and skills." 8 U.S.C. § 1182(a)(4)(B)(i). And since at least the late 1990s, the United States has recognized that the term is ambiguous.

The Rule gives the term "public charge" its natural meaning by including non-cash benefits as a consideration in determining whether an alien will rely on public support and thus be inadmissible. As the Fourth Circuit explained, "[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 Md.*, 971 F.3d at 242 (quoting *Black's Law Dictionary* 295 (4th ed. 1951)).

After all, the Rule encompasses benefits that allow an immigrant to buy food, obtain housing, and pay for medical care. 84 Fed. Reg. at 41,501. These benefits are no less expensive to the States or significant to the immigrant because they are provided in kind rather than in cash. *See Cook County*, 962 F.3d at 241 (Barrett, J., dissenting). An immigrant who relies on multiple such

benefits for a period of time, or on one such benefit for an extended period, falls easily within the ordinary usage of the term "public charge."

B. The Rule's Interpretation Of "Public Charge" Is Consistent With The Other Statutes Congress Entered at the Same Time.

The Rule is further consistent with the text of the immigration laws. In legislation adopted concurrently with the public-charge provision, *see* 8 U.S.C. § 1182(a)(4)(B)(i), Congress determined that it should be the official "immigration policy of the United States" to ensure that "availability of public benefits not constitute an incentive for immigration to the United States." 8 U.S.C. § 1601(2)(B). Congress again cited the "compelling" interest in ensuring "that aliens be self-reliant in accordance with national immigration policy." *Id.* at § 1601(5). Congress further emphasized that "[s]elf-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes," and that it "continues to be 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." *Id.* at § 1601(1)(2).

The Rule is also congruent with the Immigration and Nationality Act's structure and context. For example, Congress required that an alien seeking admission or adjustment of status to submit "affidavit[s] of support" from sponsors. *See Id.* § 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).

The States' interests here provide an obvious example of how the INA's statutory scheme functions as a practical matter. That state-obligated Medicaid funding does not come in the form

of cash does not mean that the States are not obligated to raise and expend many millions of dollars on Medicaid for these individuals. For example, in 2018, the cost of the average Medicaid beneficiary in Texas was $9,247 per capita; in Ohio, $8,248; in West Virginia, $7,232. Medicaid.gov, *Medicaid Per Capita Expenditures*, https://tinyurl.com/heayt2 (last visited May 10, 2021). That figure is higher for older beneficiaries or those with chronic illness or disabilities. *See id.* Likewise, the availability of substantial assistance—though not granted in the form of direct cash payments—may well provide significant nonmonetary inducement for aliens to immigrate to the United States contrary to law.

C. The Rule's Interpretation Of "Public Charge" Is Consistent With The Historic Usage of the Term "Public Charge."

Finally, as explained by the Ninth Circuit, the Rule is consistent with the history of the term "public charge." "Since 1882, when the Congress enacted the first comprehensive immigration statute, U.S. law has prohibited the admission to the United States of 'any person unable to take care of himself or herself without becoming a public charge.'" *City & County of San Francisco*, 944 F.3d at 779. As the Ninth Circuit concluded "[t]he history of the term 'public charge' confirms that its definition has changed over time to adapt to the way in which federal, state, and local governments have cared for our most vulnerable populations." *Id.* at 792. The court recognized that the meaning of "public charge" has involved "a totality-of-the-circumstances test" with "different factors . . . weigh[ing] more or less heavily at different times, reflecting changes in the way in which we provide assistance to the needy." *Id.* at 796.

In short, the Court is likely to reject challenges to the Rule because it "easily" qualifies as a "permissible construction of the INA." *Id.* at 799; *see CASA de Md.*, 971 F.3d at 251 (holding that the Rule is "unquestionably lawful"); *Cook County*, 962 F.3d at 234 (Barrett, J., dissenting). If anything, the Supreme Court's ruling in this case further underscores this conclusion. Plaintiffs and the United States asked the Supreme Court to reject the Intervenor States' participation in this suit outright on numerous grounds, including the timeliness of the States' request to intervene, Opposition to Application for Leave to Intervene and for a Stay of the Judgment Issued by the

United States District Court for the Northern District of Illinois at 9–10, 20–21, *Texas v. Cook County*, No. 20A150, 2021 WL 1602614 (U.S. Apr. 26, 2021) , and the merits of the States' position, *id.* at 11–22; Federal Respondents' Response in Opposition to Application for Leave to Intervene and for a Stay of the Judgment Entered by the United States District Court for the Northern District of Illinois at 22–25, *Texas v. Cook County*, No. 20A150, 2021 WL 1602614 (U.S. Apr. 26, 2021). Rather than accepting any of those grounds, the Supreme Court directed the Intervenor States to seek relief first in this Court "without prejudice" to renewing their request should such relief not be granted. *Texas v. Cook County*, No. 20A150, 2021 WL 1602614 (U.S. Apr. 26, 2021).

III. If The Court Does Not Grant The State Intervenors Relief From Its Final Judgment, They Will Suffer Irreparable Harm.

The State Intervenors will suffer irreparable harm in at least two ways absent relief from this Court's judgment.

First, as a direct consequence and as the State Intervenors explain in their motion to intervene, the State Intervenors will be required to budget for and expend many millions of dollars in additional aid through Medicaid and other programs that would otherwise not have been required. Funds spent to provide public services to the economically disadvantaged will, by definition, never be recoverable. The abruptness with which the Executive abandoned the Rule also deprives the States of the ability to plan for this additional expense as they would during an orderly rulemaking process.[2]

Second, and only slightly less directly, States lose their procedural right to defend their interests. To be clear, the States do not contest that the Executive may change the Rule through further rulemaking about the definition of "public charge" so long as its preferred interpretation is

[2] For example, Texas's Legislature is now nearing the end of its biennial Session. Bills to amend the State's budget and public-benefit programs to account for the United States' change in position are exceptionally unlikely to pass. *Cf.* Karen Brooks Harper, *Medicaid expansion for uninsured Texans had bipartisan support, but lawmakers won't pass it this session*, Texas Tribune (May 7, 2021), https://tinyurl.com/32rb7m97 (describing how bills that have not yet been reported from committee likely will not be passed this Session). The Legislatures of Arkansas, Indiana, Kentucky, Mississippi, Montana, and West Virginia have already adjourned—some of them, weeks ago.

reasonable and falls within the scope of authority delegated by Congress. But the requirements of APA rulemaking apply with equal force whether the Executive is creating a rule or modifying it. *See e.g.*, *Dep't of Com.*, 139 S. Ct. at 2569–71. Because the public-charge Rule was made through formal notice-and-comment procedures, the only way it can be unmade is through those same procedures. *Cf. Motor Vehicle Mfr's Ass'n*, 463 U.S at 41, 46–47.

As part of that process, the States would have had the right to submit input and to protect their interests before the agency. 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 Com.*, 139 S. Ct. at 2569 (quoting *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43).

Yet by voluntarily dismissing the challenges to the Rule while leaving a favorable judgment in place, the new Administration has short-circuited that process, made an end run around the requirements of the APA, and deprived the States of the input they would have under the normal process. This type of procedural harm is also one that is remediable by the courts. *See Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) ("When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.").

Moreover, any attempt to revive the Rule by a future administration would be in the shadow of this Court's memorandum opinion and order, which is somewhat ambiguous as to whether it held that the current Rule violated *Chevron* Step 1 or *Chevron* Step 2. Mem. Op. & Order at 3 & n.*, *Cook County v. Wolf*, No. 1:19-CV-06334 (N.D. Ill. Nov. 2, 2020) ECF 222. Under the Supreme Court's current precedent, a holding based on a conclusion that the statute was ambiguous would preclude the next Administration from re-adopting the Rule *even with* notice-and-comment rulemaking. *Nat'l Cable & Telecom. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005); *see also City & County of San Francisco*, 992 F.3d at 743 (VanDyke, J. dissenting) (noting the "extreme prejudice" of the United States' actions). Though this Court's decision had not been reviewed, it would become by its very finality unreviewable. And it would bar the next

Administration from taking regulatory action in a manner that was "presumptively wrong." *City & County of San Francisco*, 992 F.3d at 752 (VanDyke, J., dissenting). For the reasons that the Intervenor States explain in their motion to intervene, such a ruling harms their interests and should not be allowed to stand.

CONCLUSION

For the reasons set forth in this Motion, the State Intervenors request this Court grant the State Intervenors' motion for relief from the Court's memorandum opinion and order and partial final judgment entered on November 2, 2020.

Dated: May 12, 2021

Respectfully submitted.

STEVE MARSHALL
Attorney General of Alabama

MARK BRNOVICH
Attorney General of Arizona

LESLIE RUTLEDGE
Attorney General of Arkansas

TODD ROKITA
Attorney General of Indiana

DEREK SCHMIDT
Attorney General of Kansas

DANIEL CAMERON
Attorney General of Kentucky

JEFF LANDRY
Attorney General of Louisiana

LYNN FITCH
Attorney General of Mississippi

AUSTIN KNUDSEN
Attorney General of Montana

DAVE YOST
Attorney General of Ohio

MIKE HUNTER
Attorney General of Oklahoma

ALAN WILSON
Attorney General of South Carolina

PATRICK MORRISEY
Attorney General of West Virginia

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JUDD E. STONE II
Solicitor General

LANORA C. PETTIT
Assistant Solicitor General

/s/ Mindy Wetzel
MINDY WETZEL
Assistant Attorney General
Illinois Bar No.: 6314257
Texas Bar No.: 24115673

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Counsel for State Intervenors[3]

[3] Pursuant to Local Rule 83.12, Counsel for State Intervenors are excepted from the requirement that they hold membership in the Northern District of Illinois trial bar.

Certificate of Conference

On May 10 and 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/ Mindy Wetzel
Mindy Wetzel

Certificate of Service

On May 12, 2021, this motion was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

/s/ Mindy Wetzel
Mindy Wetzel