UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Cook County, Illinois; Illinois Coalition for Immigrant and Refugee Rights, Inc.,

Plaintiffs,

v.

Alejandro N. Mayorkas, in his official capacity as Secretary of U.S. Department of Homeland Security; et al.

Defendants.

Case No. 19-cv-6334

COMBINED MEMORANDUM IN RESPONSE TO MOTION TO INTERVENE AND MOTION FOR RELIEF UNDER F.R.C.P. 60(b)

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INTRODUCTION

Fourteen States now seek to intervene, after the Court entered final judgment, and move for extraordinary relief—a Rule 60(b) vacatur of the Court's final judgment—based on Defendants' decision to discontinue an appeal. The States, however, cannot meet the strict requirements for either Rule 60(b) relief or Rule 24 intervention, and the Court should therefore deny both motions.

In 2019, the Department of Homeland Security ("DHS") issued a Rule altering how it would administer the Immigration and Nationality Act's ("INA's") public charge ground of inadmissibility. For well over a year thereafter, the Rule was mired in litigation, resulting in a series of preliminary injunctions against the Rule and a final judgment by this Court vacating the Rule, all of which were followed by stay orders allowing the Rule to go into effect—forcing DHS to repeatedly alter its policies and guidance concerning the public charge ground of inadmissibility.

Following the change in administration, DHS—consistent with President Biden's direction in Executive Order 14,012, 86 Fed. Reg. 8277 (issued Feb. 2, 2021)—reevaluated whether continued defense of the Rule was in the public interest and represented an efficient use of limited Government resources. As part of that evaluation, and against the backdrop of judicial findings that confusion about the Rule was, among other things, discouraging noncitizens from using available medical services during the COVID-19 pandemic, the Government ultimately made a litigation decision to no longer defend the Rule DHS had adopted in 2019. Defendants thus dismissed their pending appeals in cases challenging the Rule, including their appeal of this Court's final judgment vacating the Rule. The Rule is therefore no longer in effect, and DHS has announced plans to initiate a rulemaking in order to institute a new public charge rule.

Now, a group of States that played no previous role in any litigation regarding the Rule—even as amici—seek to intervene and reopen litigation about the merits of the Court's final judgment. The States' motions hinge on the assertion that DHS's determination that "continuing to defend the [Rule] . . . is neither in the public interest nor an efficient use of limited government resources"[1] merits the extraordinary collateral relief that the States seek here. The States' motions lack merit.

First, the States cannot satisfy the requirements for Rule 60(b) relief. The States rely on Rule 60(b)(6), which requires the movant to identify extraordinary circumstances demonstrating that the judgment is both unjust towards the movant and lacks merit for reasons that could not have been uncovered before the court entered the judgment. But the States satisfy neither of those requirements. Indeed, the States appear to recognize that this Court's final judgment represents a correct application of binding circuit precedent, and accordingly that this Court *cannot* reverse its final judgment and hold the Rule lawful. Instead, the States' apparent objective is for this Court to re-enter the same judgment it already entered, thereby extending the time for appeal. As the Seventh Circuit has recognized, that is not an appropriate use of Rule 60(b). *See*, *e.g.*, *Bell v. McAdory*, 820 F.3d 880, 883-84 (7th Cir. 2016) (rejecting use of a Rule 60(b) motion as "a basis for reopening[] when the goal of the Rule 60(b) motion is to extend the time for appeal").

Second, the States cannot satisfy the requirements for Rule 24 intervention. If the Court does not reopen its final judgment under Rule 60(b), then there is no live case in which the States may intervene; thus, if the Court denies the Rule 60(b) motion, the Rule 24 motion must fail as well. Furthermore, the States cannot establish standing to intervene. Their alleged injuries rely

[1] DHS Statement on Litigation Related to the Public Charge Ground of Inadmissibility, Press Release, https://www.dhs.gov/news/2021/03/09/dhs-statement-litigation-related-public-charge-ground-inadmissibility (Mar. 9, 2021).

principally on a speculative theory that, without the Rule, a material number of additional noncitizens will live in the States, that certain of these noncitizens will then rely on public benefits, and that the ensuing costs imposed on the States will eclipse any cost savings caused by the Rule's vacatur. The States fail to submit evidence sufficient to support this theory, and it is belied by the fact that only a negligible number of noncitizens have been found inadmissible due to the Rule. Moreover, even if the States could establish that the Rule would have a meaningful effect on their coffers, they have not shown that they have defenses of their own that they should be permitted to offer as party-defendants in a challenge to the Rule's validity. Finally, the States' motion is untimely. They concede that they have known of their interest in this litigation for some time, and they should have known since early February 2021 that it was possible that Defendants could discontinue their appeal in light of President Biden's Executive Order calling on agencies to reevaluate their public charge policies. Especially given the absence of any non-speculative injury to the States caused by this Court's judgment, the Court should not deem the States' request timely.

Accordingly, the Court should deny the States' Motion for Rule 60(b) Relief and Motion for Rule 24 Intervention.

BACKGROUND

1. Under the Immigration and Nationality Act ("INA"), "[a]ny alien who, in the opinion of" the Secretary of Homeland Security, "is likely at any time to become a public charge is inadmissible." 8 U.S.C. § 1182(a)(4). From 1999 to 2019, DHS and its predecessor agency, the Immigration and Naturalization Service, construed the term "public charge" to include a noncitizen "who is likely to become . . . primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii)

institutionalization for long-term care at government expense." Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689 (May 26, 1999).

On August 14, 2019, DHS issued the Inadmissibility on Public Charge Grounds Final Rule (the "Rule"), "redefin[ing] the term 'public charge.'" 84 Fed. Reg. 41292 (Aug. 14, 2019). Under the Rule, a public charge included certain noncitizens "who receive[] one or more designated public benefits for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months)." *Id.* at 41295. The Rule broadened the list of public benefits that could factor into a public charge inquiry to include, among other things, "[supplemental nutrition assistance program benefits], most forms of Medicaid, . . . and certain . . . forms of subsidized housing." *Id.*

The Rule was challenged in multiple courts, including this Court.[2] The Plaintiffs in these cases brought a number of claims, including that (i) the Rule adopts an impermissible construction of "public charge," and is thus contrary to law in violation of the Administrative Procedure Act ("APA"), (ii) the Rule's construction of "public charge" is arbitrary and capricious in violation of the APA, and (iii) the Rule was adopted in order to disproportionately affect certain groups of noncitizens, in violation of the equal protection component of the Fifth Amendment.

[2] *See*, *e.g.*, *Cook County v. McAleenan*, 19-cv-6334, ECF No. 1 (N.D. Ill. Sept. 23, 2019); *California v. DHS*, 19-cv-4975, ECF No. 1 (N.D. Cal. Aug. 16, 2019); *New York v. DHS*, 19-cv-7777, ECF No. 1 (S.D.N.Y. Aug. 20, 2019); *CASA de Maryland v. Trump*, 19-cv-2715, ECF No. 1 (D. Md. Sept. 16, 2019).

The Plaintiffs all successfully moved for preliminary injunctions; some were geographically limited,[3] while others applied nationwide.[4] The Ninth and Fourth Circuits, however, stayed the preliminary injunctions entered in their respective jurisdictions,[5] and the Supreme Court stayed the remaining preliminary injunctions.[6] Eventually, each preliminary injunction against the Rule was affirmed on appeal,[7] except the preliminary injunction issued by the District of Maryland.[8] There, a panel of the Fourth Circuit reversed the District of Maryland's preliminary injunction order, but the Fourth Circuit agreed to rehear the matter en banc.[9] Defendants petitioned for Supreme Court review of the preliminary injunction decisions issued by the Second, Seventh, and Ninth Circuits.

2. While litigation over the preliminary injunctions continued, this case (and others) proceeded into discovery. On June 23, 2020, the Court allowed one Plaintiff—the Illinois Coalition for Immigrant and Refugee Rights, Inc. ("ICIRR")—to take discovery beyond the administrative record for its equal protection claim, *see* ECF No. 149, and then later, on June 23, 2020, the Court granted ICIRR's motion to expedite discovery, *see* ECF No. 170. Other courts in related cases issued similar orders. *See* Order Granting Mot. to Compel, *State of Washington v. U.S. Dep't of*

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[3] *See*, *e.g.*, *Cook Cty., Illinois v. McAleenan*, 417 F. Supp. 3d 1008 (N.D. Ill. 2019) (granting PI limited to Illinois); *City & Cty. of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 408 F. Supp. 3d 1057 (N.D. Cal. 2019) (granting PI limited to the plaintiff States).
[4] *See*, *e.g.*, *New York v. United States Dep't of Homeland Sec.*, 408 F. Supp. 3d 334 (S.D.N.Y. 2019) (granting nationwide PI); *Casa De Maryland, Inc. v. Trump*, 414 F. Supp. 3d 760 (D. Md. 2019).
[5] *See City & Cty. of San Francisco v. United States Citizenship & Immigr. Servs.*, 944 F.3d 773 (9th Cir. 2019); *CASA de Maryland v. Trump*, 19-2222, Doc. 21 (4th Cir. Dec. 9, 2019).
[6] *See Wolf v. Cook Cty., Illinois*, 140 S. Ct. 681 (2020); *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020).
[7] *See Cook Cty., Illinois v. Wolf*, 962 F.3d 208 (7th Cir. 2020); *City & Cty. of San Francisco v. United States Citizenship & Immigr. Servs.*, 981 F.3d 742 (9th Cir. 2020); *New York v. United States Dep't of Homeland Sec.*, 969 F.3d 42, 54 (2d Cir. 2020).
[8] *See CASA de Maryland, Inc. v. Trump*, 971 F.3d 220 (4th Cir. 2020).
[9] *See CASA de Maryland, Inc. v. Trump*, 981 F.3d 311 (4th Cir. 2020).

Homeland Security, 19-cv-5210, ECF No. 210 (Apr. 17, 2020) (allowing for discovery beyond the administrative record); Order, *State of New York v. U.S. Dep't of Homeland Security*, 19-cv-7777, ECF No. 249 (Sept. 30, 2020) (same).

For over a month, the parties in this case negotiated (and litigated) over the proper scope of discovery. *See*, *e.g.*, ECF Nos. 181, 188. Ultimately, the Court allowed ICIRR to take document discovery from over a dozen custodians, including certain White House personnel. *See* ECF No. 190. The Court also instructed the parties to "meet and confer about deponents and the timing of depositions." ECF No. 192. For roughly two months thereafter, Defendants conducted their document review and made document and privilege log productions on a rolling basis. *See* ECF No. 214, at 1.

On August 31, 2020, Plaintiffs moved for partial summary judgment on their APA claims, seeking a permanent vacatur of the Rule. *See* ECF No. 200. In response, Defendants did "not dispute that the Seventh Circuit's legal conclusions concerning the Rule" in its decision affirming the Court's preliminary injunction order "may justify summary judgment for Plaintiffs on their APA claims." *See* ECF No. 209, at 1. However, Defendants argued that, in light of Plaintiffs' partial summary judgment motion—which could provide Plaintiffs with relief sufficient to address all of their alleged harms—the Court should stay all further discovery over ICIRR's equal protection claim. *See* ECF No. 214, at 14-15.

The Court granted the partial summary judgment motion on November 2, 2020 and vacated the Rule, *see* ECF No. 223 (hereinafter, the "Judgment"), but the Seventh Circuit stayed the Judgment pending an appeal of the Judgment, ECF No. 230. Importantly, the Court rejected Defendants' request for a stay of discovery. *See* ECF No. 222, at 11-12. The parties thus resumed discovery over ICIRR's equal protection claim, a process that included a series of discovery

disputes, several of which were briefed for the Court. *See* ECF Nos. 214, 232, 236, 238. The majority of these discovery disputes were never resolved by the Court.

3. On January 22, 2021, the Court issued a Minute Order instructing Defendants to "file a status report" addressing "whether [Defendants] plan to pursue their appeal" of the Judgment and "whether [Defendants] plan to pursue their petition for" Supreme Court review of the Seventh Circuit's decision affirming the Court's preliminary injunction order.

Then, on February 2, 2021, President Biden issued the "Executive Order on Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans" (the "Executive Order"). *See* 86 Fed. Reg. 8277 (issued Feb. 2, 2021). The Executive Order called for, among other things, an "[i]mmediate [r]eview of [a]gency [a]ctions on [p]ublic [c]harge [i]nadmissibility." *Id.* It provided that "the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the heads of other relevant agencies . . . shall review all agency actions related to implementation of the public charge ground of inadmissibility," and directed that they identify appropriate ways "to address concerns about the current public charge policies' effect on the integrity of the Nation's immigration system and public health." *Id.* The Executive Order gave the Attorney General, the Secretary of Homeland Security, and the Secretary of State sixty days to provide a report to the President concerning their respective reviews. *Id.*

On February 3, 2021, Defendants notified the Court of the Executive Order and proposed that the parties should file a joint status report on February 19, 2021, after they have had a chance to confer "over next steps in this litigation." *See* ECF No. 241, at 2. The Court agreed, *see* ECF No. 244, and on February 19, 2021, the parties filed a joint status report in which Defendants indicated that "DHS is . . . reviewing the [Rule], and the [DOJ] is likewise assessing how to proceed with its appeals in relevant litigations in light of the" Executive Order, *see* ECF No. 245, at 3.

Defendants thus requested a "time-limited stay" of the proceedings before the Court. *See id.*, at 4. ICIRR, however, opposed the stay request, arguing that "Defendants are still requesting that the [Supreme Court] and the [Seventh Circuit] . . . uphold the Rule," and that Defendants continued to enforce the Rule. *Id.*, at 1-2. ICIRR thus insisted that the parties continue litigating the equal protection claim unless "Defendants agree to end their appeal of the [Judgment], allowing the vacatur to go into effect." *Id.*, at 3.

In response to the parties' February 19, 2021 status report, the Court asked the parties to file another joint status report on March 5, 2021. *See* ECF No. 246. There, the parties reiterated their respective positions, with Defendants again arguing that a stay was appropriate because DHS was reviewing the Rule and DOJ "has likewise been assessing how to proceed in the relevant litigations." ECF No. 247, at 1. ICIRR, in turn, argued once more that a stay was inappropriate because Defendants were still pursuing their appeals in the relevant litigations and the Rule remained in effect. *See id.*, at 2. The Court then issued a Minute Order on March 8, 2021 noting that, at an upcoming status hearing, the Court intended to "ask Defendants for a more detailed assessment as to when DHS and DOJ will decide how to proceed in the pending suits concerning the Public Charge Rule" and that "Defendants' answer will bear heavily on whether discovery will resume," ECF No. 248—a discovery process which, as noted above, would likely include depositions of former, high ranking Government officials, *see supra* at 6.

A day later, on March 9, 2021, DHS issued a public statement expressing its conclusion that "continuing to defend the [Rule] is neither in the public interest nor an efficient use of limited government resources," and explaining that the Government would "no longer pursue appellate review of judicial decisions invalidating or enjoining enforcement of the [Rule]." DHS Statement on Litigation Related to the Public Charge Ground of Inadmissibility, Press Release,

https://www.dhs.gov/news/2021/03/09/dhs-statement-litigation-related-public-charge-ground-inadmissibility (Mar. 9, 2021). Consistent with DHS's statement, the Government filed an unopposed motion to voluntarily dismiss its appeal of the Judgment. *See* Unopposed Motion to Voluntarily Dismiss, No. 20-3150, ECF No. 23 (7th Cir. March 9, 2021). The Seventh Circuit granted this motion and issued its mandate. *See* Order Dismissing Appeal, No. 20-3150, ECF No. 24-1 (7th Cir. March 9, 2021); Notice of Issuance of Mandate, No. 20-3150, ECF No. 24-2 (7th Cir. March 9, 2021). Shortly after, DHS announced that this Court's Judgment, and its vacatur of the Rule, were now in effect. *See* DHS Secretary Statement on the 2019 Public Charge Rule, Press Release, https://www.dhs.gov/news/2021/03/09/dhs-secretary-statement-2019-public-charge-rule (Mar. 9, 2021). DHS implemented this Court's vacatur of the Rule by immediately ceasing to apply the Rule, and instead applying the public charge inadmissibility standard that was in effect prior to the Rule's promulgation. DHS also removed the text of the Rule from the Code of Federal Regulations. Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. 14221 (Mar. 15, 2021). Although the Rule is now vacated, "DHS intends to proceed with rulemaking to define the term public charge and identify considerations relevant to the public charge inadmissibility determination." Inadmissibility on Public Charge Grounds, Unified Agenda, RIN: 1615-AC74, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1615-AC74 (June 11, 2021).

Once the Rule had been vacated, ICIRR agreed to dismiss its equal protection claim, the only remaining claim in this case. The parties thus entered a joint stipulation of dismissal on March 11, 2021, *see* ECF No. 253, and the Court closed the case the next day, *see* ECF No. 254.

4. Fourteen States[10] now seek to intervene in order to continue litigating the validity of the Rule. Those States had not previously participated, even as amici, in this case, or any of the other cases challenging the Rule. Nor, to Defendants' knowledge, did the States provide comments on the Rule during the notice-and-comment period that preceded its issuance, a period that generated more than 250,000 public comments. *See* 84 Fed. Reg. at 41305. Nevertheless, on March 11, 2021, the States sought to intervene in the Seventh Circuit to continue Defendants' now-dismissed appeal of the Judgment, and when the Seventh Circuit denied that motion, *see Cook County v. Wolf*, No. 20-3150, Doc. 26 (7th Cir. Mar. 15, 2021), the States sought relief before the Supreme Court, *see* Application for Leave to Intervene and for a Stay of the Judgment, *Texas v. Cook County*, 20A150 (U.S. Mar. 19, 2021). After the Supreme Court denied the States' application "without prejudice to the States raising these and other arguments before the District Court," Order on Application, *Texas v. Cook County*, No. 20A150, 2021 WL 1602614, at *1 (U.S. Apr. 26, 2021), the States filed both a motion to intervene under F.R.C.P. 24 and a motion to vacate the Judgment under F.R.C.P. 60(b) in this Court.

ARGUMENT

I. The States fail to establish the extraordinary circumstances necessary to justify Rule 60(b)(6) relief.

Rule 60(b) "regulates the procedures for obtaining relief from final judgments." *Wesco Prod. Co. v. Alloy Auto. Co.*, 880 F.2d 981, 983 (7th Cir. 1989). "The rule governs collateral attack on a final judgment rendered by a federal district court in a civil case; and collateral attack, especially in civil cases, is disfavored because of the social interest in expedition and finality in litigation." *Bell v. Eastman Kodak Co.*, 214 F.3d 798, 800–01 (7th Cir. 2000). "Rule 60(b) contains

[10] The States of Texas, Alabama, Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, and West Virginia.

five clauses delineating specific grounds for obtaining relief as well as a catchall clause in Rule 60(b)(6)," which applies when "any other reason . . . justifies relief." *Wesco*, 880 F.2d at 983. "A motion under Rule 60(b) seeks an extraordinary remedy . . . especially where," as here, "the motion is based on the catch-all provision of Rule 60(b), Rule 60(b)(6)." *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 682 (7th Cir. 1983); *see also Provident Sav. Bank v. Popovich*, 71 F.3d 696, 700 (7th Cir. 1995) ("In a rule already limited in application to extraordinary circumstances, proper resort to" the Rule 60(b)(6) "'catch all' provision is even more highly circumscribed.").

Rule 60(b) "was [not] designed to address mistakes attributable . . . merely to erroneous applications of law." *Russell v. Delco Remy Div. of Gen. Motors Corp.*, 51 F.3d 746, 749 (7th Cir. 1995). Instead, "relief under 60(b)(6) is warranted only upon a showing of extraordinary circumstances that create a substantial danger that the underlying judgment was unjust," *Margoles v. Johns*, 798 F.2d 1069, 1073 (7th Cir. 1986), and the grounds for questioning the merits of a judgment must have "come[] to light only *after* the judgment" was entered. *Gleash v. Yuswak*, 308 F.3d 758, 761 (7th Cir. 2002) (emphasis added). Cases in which the Supreme Court has found Rule 60(b)(6) relief proper have thus involved a significant risk of injustice towards a party, along with a previously unknown legal basis for vacating a judgment. *See*, *e.g.*, *Buck v. Davis*, 137 S. Ct. 757, 767, 778-80 (2017) (Rule 60(b)(6) relief appropriate for order denying habeas relief since (i) petitioner "may have been sentenced to death in part because of his race," injuring "not just the defendant, but the law as an institution," the "community at large, and" the "democratic ideal," and (ii) the petitioner could now benefit from an intervening change in law); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847-50, 863 n.11, 867-69 (1988) (Rule 60(b)(6) relief appropriate for a judgment when (i) judge had a conflict-of-interest calling into "question [the

judge's] impartiality," and (ii) the conflict-of-interest "was not a matter of public record at the time the case was tried and decided" and so the parties could not have raised the issue earlier).

Here, the States rely upon a number of justifications that fail to show that the Judgment is inflicting a grave injustice upon the States, or that there is a new, previously unavailable legal theory calling into question the Judgment's merit. The States are therefore not entitled to Rule 60(b)(6) relief.

1. The States principally argue that because Defendants dismissed their appeal of the Judgment, the States now wish to step in and challenge the Judgment, and they must do so through a Rule 60(b) motion since the deadline for appealing the Judgment has passed. These circumstances do not justify Rule 60(b)(6) relief.

To start, these circumstances do not speak to the merits of the Judgment itself. They do not show that the Judgment is unjust towards the States, nor do they furnish a previously unknown basis for questioning the Judgment's continued validity. Indeed, the States do not appear to ask this Court to actually alter the Judgment—instead seemingly acknowledging that the Judgment reflected a proper application of binding circuit precedent. *See* Rule 60(b) Mot. at 3 ("the Seventh Circuit's prior affirmance of this Court's temporary injunction is likely law of the case").

Rather, these circumstances explain only why the States wish to intervene and defend the Rule *now*, and why they invoke Rule 60(b)(6) as part of their attempt to do so: to restart the appellate process even though the time for appealing the Judgment has run. The Seventh Circuit, however, has already concluded that a Rule 60(b) motion is improper when "it [is] nothing more than the first step in an attempt to take an untimely appeal." *Eastman Kodak*, 214 F.3d at 800; *see also Russell*, 51 F.3d at 749 ("Rule 60(b)" may not be used to "circumvent the ordinary time limitation for filing a notice of appeal."); *Mendez v. Republic Bank*, 725 F.3d 651, 659 (7th Cir.

2013) (Rule 60(b) may not be used as "a device to avoid expired appellate time limits."). And although the States express doubts over whether they could have successfully intervened earlier and filed a timely appeal, *see* Rule 60(b) Mot. at 9, they cite no case indicating that Rule 60(b) may *ever* be used solely as "a device to avoid expired appellate time limits." *Mendez*, 725 F.3d at 659.

The States fail to show not only that the Judgment is unjust—as required for Rule 60(b)(6) relief—but also that the Government's decision not to pursue an appeal of the Judgment is unjust. The Government regularly determines not to pursue appeals—a litigation decision within the authority of the Department of Justice—including in cases where a court has vacated a federal rule. *See*, *e.g.*, *Center for Sci. in the Public Interest v. Perdue*, 438 F. Supp. 3d 546 (D. Md. 2020) (April 13, 2020 decision striking down Department of Agriculture rule; no further review sought); *Nat'l Ass'n for Advancement of Colored People v. DeVos*, 485 F. Supp. 3d 136, 145 (D.D.C. 2020) (Sept. 4, 2020 decision granting summary judgment and declaring a Department of Education "interim final rule" to be "void"; no further review sought). And just like other litigants, even after taking an appeal, the Government will sometimes dismiss appeals rather than pursue them. *See*, *e.g.*, *Nat'l Educ. Ass'n v. DeVos*, 379 F. Supp. 3d 1001, 1012 (N.D. Cal. 2019) (April 26, 2019 decision striking down Department of Education rule), *appeal dismissed*, No. 19-16260, 2019 WL 4656199 (9th Cir. Aug. 13, 2019); *Council of Parent Att'ys & Advocs., Inc. v. DeVos*, 365 F. Supp. 3d 28, 33 (D.D.C. 2019) (Mar. 7, 2019 decision striking down Department of Education rule), *appeal dismissed*, No. 19-5137, 2019 WL 4565514 (D.C. Cir. Sept. 18, 2019); *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 10 (D.D.C. 2020) (Mar. 1, 2020 decision finding USCIS directives unlawful), *judgment entered*, No. CV 19-2676 (RDM), 2020 WL 1905063 (D.D.C. Apr. 16, 2020), *appeal dismissed*, No. 20-5141, 2020 WL 5358686 (D.C. Cir. Aug. 25, 2020). Nor was the

Government's lack of notice to the States about their appellate litigation decisions unjust. The Government does not ordinarily provide advance notice of its litigation decisions to non-parties (especially non-parties who, like the States, had not previously participated in the case even as amici). Accordingly, the Government's decision to discontinue its appeal of the Judgment does not justify Rule 60(b)(6) relief since it does not show that the Judgment itself has caused any injustice to the States, or that it is legally invalid. And regardless, the decision to discontinue the appeal was not otherwise unjust towards the States.

Furthermore, the States' criticisms of the Government's litigation decisions are not only an inapposite basis for seeking Rule 60(b)(6) relief, but also fail to account for the full range of interests that the Government appropriately considered in making those decisions. The States contend that Defendants should either have continued to defend the Rule or have asked the Seventh Circuit to place their appeal into abeyance indefinitely while DHS pursued further rulemaking. *See* Rule 60(b) Mot. at 8. Pursuing that course, however, might well have exacerbated the already considerable public confusion about the public charge ground of inadmissibility. *See New York v. United States Dep't of Homeland Sec.*, 475 F. Supp. 3d 208, 226 (S.D.N.Y. 2020) ("Doctors and other medical personnel . . . have all witnessed immigrants . . . forgoing testing and treatment for COVID-19, out of fear that accepting . . . care will increase their risk of being labeled a 'public charge'"). Indeed, the Southern District of New York had already found that existing confusion about the Rule's application was interfering with efforts to contain the COVID-19 pandemic, *see id.* ("Plaintiffs provide ample evidence that the Rule deters immigrants from seeking testing and treatment for COVID-19, which in turn impedes public efforts in the Governmental Plaintiffs' jurisdictions to stem the spread of the disease."), and putting the Rule's public charge definition in legal limbo of undefined duration could have further hampered efforts to maximize public

participation in the United States' unprecedented roll-out of COVID-19 vaccines. That context helps to explain the Government's decision to dismiss its appeals rather than prolong the litigation about whether the Rule was within the agency's discretion to maintain (as the agency might have done in other circumstances).

The Government's dismissal of its appeal in this case also avoided the need to litigate Plaintiffs' attempts to obtain discovery from former high ranking Government officials who had been involved in adoption of the Rule during the last administration. *See supra* at 6, 8. As with the public health considerations, the States overlook the Government's substantial interest in avoiding the potential distractions caused by invasive and potentially burdensome discovery into those officials' motivations for adopting the Rule, and whether those motivations caused the Rule to violate the equal protection component of the Fifth Amendment.

2. The States also argue, relying on the Supreme Court's decision to stay this Court's preliminary injunction, that the Rule is lawful. This argument also does not constitute an "extraordinary circumstance" sufficient for Rule 60(b)(6) relief.

First, the States' arguments for why the Judgment rests on incorrect legal conclusions are not grounds "that c[a]me[] to light only after the judgment." *Gleash*, 308 F.3d at 761. To the contrary, the States are raising the same legal theories Defendants previously raised—and that this Court previously rejected. *Compare* 60(b) Mot. at 11-12 (arguing that the Rule's interpretation of "public charge" is consistent with the term's ordinary meaning and historic usage), *with* MSJ Resp., at 6-9 (same). The States, in effect, are simply arguing that the Court committed a "legal error," which "is not a proper ground for relief under Rule 60(b)." *Gleash*, 308 F.3d at 761; *see also Russell*, 51 F.3d at 749 (Rule 60(b) was not "designed to address mistakes attributable . . . merely to erroneous applications of law."). Indeed, Rule 60(b) relief may be unavailable even when

"a judgment [is] *known* to be wrong." *Norgaard v. DePuy Orthopaedics, Inc.*, 121 F.3d 1074, 1076 (7th Cir. 1997) (emphasis in original). Thus, the States' legal defenses for the Rule do not justify Rule 60(b)(6) relief.

Second, as previously noted, the States appear to acknowledge that the Judgment reflected a proper application of binding circuit precedent. *See* Rule 60(b) Mot. at 3. Accordingly, even assuming that relief under Rule 60(b)(6) might be available to correct a truly egregious legal error in a judgment, this case presents no such clear error demanding correction.

3. Finally, the States argue that they will suffer irreparable harm if the Court's Judgment remains in place. In support, the States allege that, absent the Rule, they will have to "budget for and expend" additional funds to provide benefits, including Medicaid benefits, to noncitizens who would otherwise have been rendered inadmissible under the Rule. Rule 60(b) Mot. at 13. But this theory of harm relies on a speculative chain of contingencies. The States would have to show not only that a material number of noncitizens would have been found inadmissible due to the Rule, but also that (i) those noncitizens would live in the Plaintiff States when they become eligible for such benefits (which is unlikely to occur for several years), (ii) they would choose to rely on public benefits when eligible, and (iii) the ensuing costs imposed on the States would be greater than any costs the States would have borne due to the Rule, *see Cook Cty.*, 962 F.3d at 218 (detailing costs the Rule may impose on States).

The States, however, make little effort to provide evidence to support this injury theory, and it is inconsistent with real world experience prior to the Rule's vacatur. "As of March 8, 2021," the day before the Court's vacatur of the Rule again went into effect, "USCIS had issued only 3 denials and two Notices of Intent to Deny based solely on the basis of the INA § 212(a)(4) public charge ground of inadmissibility evaluated under the Rule's totality of the circumstances

framework." Declaration of Michael Valverde ¶ 8 (June 15, 2021) (emphasis added). Regardless, noncitizens admitted to the country on nonimmigrant visas are, with certain limited exceptions, "ineligible for benefits," and even noncitizens with lawful permanent resident status are "eligible to receive very few benefits until [they have] been here for five years." *Cook Cty.*, 962 F.3d at 235-36 (Barrett, J. dissenting); *see also* 8 U.S.C. 1611, 1613, 1621. Thus, based on the evidence in the record, the States have failed to show that the Judgment has had, or will have, a material monetary impact on the States.[11]

The States also contend that the Judgment deprives them of a "procedural right" to "submit input," through a "formal notice-and-comment procedure[]," over modifications to the Rule. Rule 60(b) Mot. at 13-14. But a "procedural right, unconnected to a plaintiff's concrete harm, is not enough to convey standing," *Bensman v. U.S. Forest Serv.*, 408 F.3d 945, 952 (7th Cir. 2005), and thus it cannot be sufficient to establish the type of substantial prejudice necessary for Rule 60(b)(6) relief either. Regardless, DHS will soon initiate a rulemaking over the public charge ground of inadmissibility, and the States may provide input through this process. *See supra* at 9.

Accordingly, the States have failed to identify any extraordinary circumstance sufficient to justify Rule 60(b)(6) relief. They have not shown that the Judgment will create a "substantial

[11] Consistent with concerns regarding the Rule's impact on public health initiatives in the wake of COVID-19, *see supra* at 14-15, the Rule anticipated that it may result in a "total reduction in transfer payments from the Federal and State governments" due "to disenrollment or foregone enrollment in public benefits programs." Rule at 41300-01. The Rule, however, later states that "there is great uncertainty regarding the effects that changes in transfer payments will have on the broader economy and estimating those effects are beyond the scope of this rule," and that "disenrollment or foregone enrollment . . . in public benefits programs are likely to result in a reduction in transfer payments from Federal and State governments," but not necessarily "a cost savings." Rule at 41472. Furthermore, as noted in the text, the empirical data suggests that, in practice, a limited number of noncitizens have been found inadmissible due to the Rule, and the States do not appear to allege an injury based on the Rule's potential to deter noncitizens who are *not* covered by the Rule from using public benefits.

danger" of any injustice towards the States, nor have the States identified a previously unknown basis for concluding that the Judgment is legally flawed. The Court should deny the States' Rule 60(b) motion.

II. The States do not satisfy the requirements for either intervention as of right or permissive intervention.

The Court should deny the States' intervention motion for four reasons. First, for the reasons set forth above, the States are not entitled to an order reopening the case pursuant to Rule 60(b), and thus there is no live case in which the States may intervene. *See Mittvick v. State of Illinois*, 672 F. App'x 582, 583 (7th Cir. 2016) (affirming an order "den[ying] [a party's] petition [to intervene] because the case" was "properly dismissed," and "so there [was] no case in which [the party could] now intervene"); *Gomez v. City of Chicago*, No. 85 C 149, 1986 WL 8733, at *1 (N.D. Ill. Aug. 1, 1986) ("[S]ince the case is dead, there is nothing in which to intervene. Thus, both the Rule 60(b) motion and the Rule 24 motion are denied.").

Second, the States cannot intervene because they have failed to establish that they are being, or will be, injured due to the Judgment. "[A]ny intervenor" must at least satisfy "the minimal standing required by Article III."[12] *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 101 F.3d 503, 507 (7th Cir. 1996); *see Bond v. Utreras*, 585 F.3d 1061, 1071-72 (7th Cir. 2009) (even "permissive intervenors must show standing if there is otherwise no live case or controversy in existence," *e.g.*, "when the case was in fact dismissed"). To establish standing, a

[12] The States argue that they need not establish standing because they seek to intervene as *defendants*, and only plaintiffs must establish standing. *See* Interv. Mot. at 8-9. But the States cite no precedent supporting this theory, and even in the principal case they rely upon—*Flying J*—the petitioners were trying to intervene as defendants, and yet the Seventh Circuit still considered whether they "ha[d] standing in the Article III sense." 578 F.3d at 573. The purpose of imposing a standing requirement on "*intervention in general*" is to ensure that "at some fundamental level the proposed intervenor" has "a stake in the litigation." *Bond*, 585 F.3d at 1070 (emphasis added).

party must establish an "injury-in-fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Bond*, 585 F.3d at 1073. As explained above, the States rely on alleged, speculative economic injuries that are belied by real world experience. *See supra* at 16-17.

Furthermore, these deficiencies in the States' evidentiary showing may independently defeat their request for intervention as a matter of right, even if the Court finds that the States have standing. "[T]he interest required by Article III is not enough by itself to allow a person to intervene in a federal suit" under "Rule 24(a)(2)." *Flying J*, 578 F.3d at 571. "[A] mere 'economic interest' is not enough," and so "the fact that [an intervenor] might anticipate a benefit from a judgment in favor of one of the parties to a lawsuit does not entitle [it] to intervene." *Id.* Here, the States allege only indirect, "economic interests" in the Rule (*i.e.*, the downstream economic effects of the Rule, *see supra* at 16-17).

Third, the States appear to seek only to advance the *Government's* defense, namely, that DHS had the authority to issue the Rule, and not, as Rule 24 requires, to assert their *own* defense based on their *own* legally protected interest. "Federal Rule of Civil Procedure 24(c) is unambiguous in defining the procedure for an intervenor," whether permissive or as-of-right, and "requires that the motion to intervene shall be 'accompanied by a pleading setting forth the claim or defense for which intervention is sought.'" *Shevlin v. Schewe*, 809 F.2d 447, 450 (7th Cir. 1987). Rule 8, in turn, states that in a defensive pleading, "a party must . . . state . . . *its* defenses to each claim *asserted against it*." Fed. R. Civ. P. 8(b)(1) (emphasis added). The States cite to no case construing Rule 24's requirement—that a putative intervenor-defendant submit a "pleading" setting out its "defense"—to permit intervention when the intervenor seeks only to pursue a defense belonging to an existing party, rather than its *own* defense based on its *own* unique,

substantive legal rights. Fed. R. Civ. P. 24(c); *see also Donaldson v. United States*, 400 U.S. 517, 530 (1971) (intervention is improper when the putative intervenor has no "significantly protectable interest" in the subject of the litigation, even if the subject "possess[es] significance" for the intervenor). Here, the States fail to show that they qualify for intervention under Rule 24 based on their intention to assert only a defense belonging to the Government (*i.e.*, that the Rule represented a lawful exercise of DHS's authority). Moreover, any effort to take control of—or assert a claim of right to advance—a defense properly belonging to the Government would be particularly unwarranted in the context of immigration, given the background principle that "private persons . . . have no judicially cognizable interest in procuring enforcement of the immigration laws . . .." *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 897 (1984).

Fourth, and finally, the States' intervention motion is untimely, defeating their request for either intervention as of right or permissive intervention. "A prospective intervenor must move promptly to intervene as soon as it knows or has reason to know that its interests might be adversely affected by the outcome of the litigation." *Heartwood, Inc. v. U.S. Forest Serv., Inc.*, 316 F.3d 694, 701 (7th Cir. 2003). "In determining whether a motion to intervene is timely," the Court must "consider four factors: (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; [and] (4) any other unusual circumstances." *Id.* These factors, on balance, confirm that the States' intervention motion is untimely.

With respect to the first factor, the States note that they "have been aware of their interests in the Rule for some time," Interv. Mot. at 5, and thus they "knew or should have known" of their interest in this litigation long before they moved to intervene. In response, the States cite *Flying J, Inc. v. Van Hollen*, where the Seventh Circuit found that the petitioners had timely moved to

intervene and defend the constitutionality of a State statute since they had filed their motion promptly after the attorney general "decided not to appeal" the district court's adverse decision. 578 F.3d 569, 572 (7th Cir. 2009). But there, the Seventh Circuit found that "there was nothing to indicate that the attorney general was planning to throw the case—until he did so by failing to appeal." *Id.* When the petitioners first learned of the possibility that the attorney general would not take an appeal, they promptly moved to intervene just two weeks after the district court entered its judgment.[13] Here, by contrast, although the States moved to intervene in the Seventh Circuit shortly after Defendants discontinued their appeal of the Judgment, multiple indicia previewed, weeks earlier, that Defendants may potentially dismiss their appeal. *See supra* at 7-8 (discussing President Biden's February 2, 2020 Executive Order, and Defendants' subsequent status reports, leading up to the March 9, 2021 dismissal of the appeal). Thus, unlike the petitioners in *Flying J*, the States here did not move promptly after discovering that Defendants may discontinue their appeal.

Furthermore, the second and third factors—prejudice to the original parties and the aspiring intervenors—counsel against granting the States' motion as well. The Seventh Circuit has cautioned that "intervention postjudgment . . . necessarily disturbs the final adjudication of the parties' rights" and "should generally be disfavored." *Bond*, 585 F.3d at 1071. Additionally, here, once the Judgment went into effect, DHS issued guidance altering how relevant immigration personnel must now administer the public charge ground of inadmissibility, and also began working with "community leaders to ensure immigrants and their families have accurate information about our public charge policies." *See* 2019 Public Charge Rule Vacated and

[13] *See* Judgment, *Flying J., Inc. v. Van Hollen*, 8-cv-110, ECF No. 50 (E.D. Wis. Feb. 11, 2009); Intervention Motion, *Flying J., Inc. v. Van Hollen*, 8-cv-110, ECF No. 52 (E.D. Wis. Feb. 25, 2009).

Removed, Press Release, https://www.dhs.gov/news/2021/03/11/2019-public-charge-rule-vacated-and-removed-dhs-withdraws-proposed-rule-regarding (Mar. 11, 2019). Allowing the States to intervene now, and potentially unsettle the Judgment, may not only require DHS to again shift its public charge guidance, but it may also require adjustments to DHS's community outreach efforts to minimize confusion among immigrant communities. It may also potentially interfere with local public health initiatives concerning COVID-19. *See* supra at 14-15. The speculative possibility that the Rule's vacatur may inflict some unquantified economic harm on the States does not justify imposing these burdens on DHS and other relevant parties.

CONCLUSION

For these reasons, the Court should deny the States' Motion for Rule 60(b) Relief and Motion for Rule 24 intervention.

Dated: June 15, 2021

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

ALEXANDER K. HAAS
Director, Federal Programs Branch

/s/ Kuntal Cholera
KUNTAL V. CHOLERA
JOSHUA M. KOLSKY (DC Bar No. 993430)
KERI L. BERMAN
JASON C. LYNCH
Trial Attorneys
U.S. Dept. of Justice, Civil Division,
Federal Programs Branch
1100 L Street, N.W.
Washington, DC 20001
Phone: (202) 305-8645
Fax: (202) 616-8470
Email: kuntal.cholera@usdoj.gov

Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Cook County, Illinois, *et al.,*

Plaintiffs,

v.

Mayorkas, *et al*.

Defendants.

CASE NO. 19-cv-6334

DECLARATION OF MICHAEL VALVERDE

I, Michael Valverde, declare and say:

1) I am the acting Associate Director of the Field Operations Directorate, U.S. Citizenship and Immigration Services ("USCIS"), Department of Homeland Security ("DHS"). I have held this position since January 20, 2021. Prior to that I served as the Deputy Associate Director of the Field Operations Directorate from Sept. 2015 to Jan. 2020. Prior to that, I served in an acting capacity, managing the four regional offices and the National Benefits Center. From August 2013 – May 2015 I served as the Deputy Chief of the Refugee Affairs Division.

2) In my current position, I oversee the day-to-day operations of USCIS offices that decide immigration benefit applications, petitions, and requests, including naturalization and citizenship applications, through written correspondence and in-person interviews. In addition, FOD is responsible for making decisions on public charge admissibility in connection with adjustment of status applications.

3) On August 14, 2019 DHS issued the Inadmissibility on Public Charge Grounds Final Rule (the "Rule"). 84 Fed. Reg. 41292 (Aug. 14, 2019).

4) The effective date of the Rule was October 15, 2019, but as a result of litigation challenges the Rule was not implemented until February 24, 2020.

5) An additional nationwide injunction issued on July 29, 2020 that caused USCIS to pause application of the Rule; however, on September 11, 2020 that injunction was stayed in its entirety and USCIS resumed nationwide application of the Rule.

6) On November 20, 2020 the Rule was ordered vacated nationwide by the U.S. District Court for the Northern District of Illinois, but that order was stayed.

7) The vacatur order went into effect on March 9, 2021, and USCIS immediately ceased applying the Rule.

8) As of March 8, 2021, USCIS had issued only 3 denials and two Notices of Intent to Deny based solely on the basis of the INA § 212(a)(4) public charge ground of inadmissibility evaluated under the Rule's totality of the circumstances framework. Both of the Notices of Intent to Deny were later rescinded.

9) Since then, all three denials were reopened and approved. Further, both cases involving rescinded Notices of Intent to Deny have been approved.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 15th day of June 2021.

MICHAEL VALVERDE

Digitally signed by MICHAEL VALVERDE
Date: 2021.06.15 16:35:36 -04'00'

Michael Valverde
Acting Associate Director, Field Operations Directorate
U.S. Citizenship and Immigration Services
Camp Springs, Maryland

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Cook County, Illinois, *et al.,*

Plaintiffs,

v.

Mayorkas, *et al*.

Defendants.

CASE NO. 19-cv-6334

DECLARATION OF KATHERINE LOTSPEICH

I, Katherine Lotspeich, declare and say:

1) I am the Chief of the Office of Performance and Quality (OPQ). I have been in this position since September of 2020. Prior to that I served as the Deputy Chief of OPQ since 2018. Prior to that, I served as Acting Chief of the Immigration Records and Identity Services Directorate's Verification Division.

2) The Office of Performance and Quality (OPQ) is responsible for providing data and operational analyses to senior decision makers and key stakeholders, including Congress, DHS, and other governmental agencies to promote a USCIS that is effective and efficient. I am competent to make this declaration. The following declaration is based on my personal knowledge and information acquired in my official capacity and in the performance of my official functions as well as upon reasonable inquiry of appropriate DHS databases and personnel.

3) On August 14, 2019 DHS issued the Inadmissibility on Public Charge Grounds Final Rule (the "Rule"). 84 Fed. Reg. 41292 (Aug. 14, 2019).

4) The effective date of the Rule was October 15, 2019, but as a result of litigation challenges the Rule was not implemented until February 24, 2020.

5) An additional nationwide injunction issued on July 29, 2020 caused USCIS to pause application of the Rule; however, on September 11, 2020 that injunction was stayed in its entirety and USCIS resumed nationwide application of the Rule.

6) On November 20, 2020 the Rule was ordered vacated nationwide by the U.S. District Court for the Northern District of Illinois, but that order was stayed.

7) The vacatur order went into effect on March 9, 2021, and USCIS immediately ceased applying the Rule.

8) As of March 8, 2021 (the date before the vacatur issued by the U.S. District Court for the Northern District of Illinois went into effect), USCIS had received 480,935 Form I-485, Application to Register Permanent Residence or Adjust Status applications for adjustment of status subject to the PC Final Rule. Of those, 433,042 were still pending, and 47,555 were adjudicated (the remaining 338 were administratively closed/ terminated/ withdrawn).

9) As of March 9, 2021, when the vacatur went into effect and USCIS stopped applying the Rule, USCIS began applying the 1999 Interim Field guidance to the 433,042 adjustment applications (pending as of March 8) plus any new adjustment applications USCIS received on or after that date.

10) Of the 47,555 applications adjudicated under the Public Charge Final Rule, 35,119 were for family-based adjustment applicants, and 11,657 were for employment-based adjustment applicants, and 779 were for other immigrant categories.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 15th day of June 2021.

Digitally signed by
KATHERINE J LOTSPEICH
Date: 2021.06.15 17:47:28
-04'00'

Katherine Lotspeich
Chief, Office of Performance and Quality
U.S. Citizenship and Immigration Services
Camp Springs, Maryland