No. 20-1775

In the Supreme Court of the United States

THE STATE OF ARIZONA, ET AL.,
Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

TYLER R. GREEN
CAMERON T. NORRIS
JEFFREY S. HETZEL
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd.,
Suite 700
Arlington, VA 22209

MARK BRNOVICH
Attorney General
JOSEPH A. KANEFIELD
Chief Deputy and Chief of Staff
BRUNN W. ROYSDEN III
Solicitor General
DREW C. ENSIGN
Deputy Solicitor General
Counsel of Record
KATE B. SAWYER
Assistant Solicitor General
KATLYN J. DIVIS
Assistant Attorney General

OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025
drew.ensign@azag.gov

Counsel for Petitioners
(Additional Counsel listed on inside cover)

STEVE MARSHALL
Attorney General of Alabama

LESLIE RUTLEDGE
Attorney General of Arkansas

THEODORE E. ROKITA
Attorney General of Indiana

DEREK SCHMIDT
Attorney General of Kansas

JEFF LANDRY
Attorney General of Louisiana

LYNN FITCH
Attorney General of Mississippi

ERIC S. SCHMITT
Attorney General of Missouri

AUSTIN KNUDSEN
Attorney General of Montana

JOHN M. O'CONNOR
Attorney General of Oklahoma

ALAN WILSON
Attorney General of South Carolina

KEN PAXTON
Attorney General of Texas

PATRICK MORRISEY
Attorney General of West Virginia

QUESTION PRESENTED

Under the Immigration and Nationality Act, 8 U.S.C. §§1101 et seq., an alien is "inadmissible" if, "in the opinion of the [Secretary of Homeland Security] at the time of application for admission or adjustment of status, [the alien] is likely at any time to become a public charge." 8 U.S.C. §1182(a)(4)(A). Following notice-and-comment rulemaking, the United States Department of Homeland Security (DHS) promulgated a final rule (the "Rule") interpreting the statutory term "public charge" and establishing a framework for applying it.

Litigation about the Rule ensued, and the Second, Seventh, and Ninth Circuits affirmed preliminary injunctions, while the Fourth Circuit initially reversed. The United States sought review in multiple cases, and this Court granted review of the Second Circuit's opinion. *DHS v. New York*, No. 20-449 (U.S. Feb. 22, 2021). But the United States suddenly announced it would no longer pursue its appeals. The result was to leave in place a partial grant of summary judgment and vacatur of the Rule in one district court, applying nationwide—evading this Court's review and the procedures of the APA. Petitioners quickly moved to intervene in the Ninth Circuit to protect their interests previously represented by the United States. The Ninth Circuit, however, denied Petitioners' motion.

The question presented is:

1. Whether the Ninth Circuit erred and/or abused its discretion in denying Petitioners' motion to intervene.

PARTIES TO THE PROCEEDINGS

Petitioners are the State of Arizona; the State of Alabama; the State of Arkansas; the State of Indiana; the State of Kansas; the State of Louisiana; the State of Mississippi; the State of Missouri; the State of Montana; the State of Oklahoma; the State of South Carolina; the State of Texas; and the State of West Virginia.

Respondents (plaintiffs-appellees below) are the City and County of San Francisco; the County of Santa Clara; the State of California; the District of Columbia; the State of Colorado; the State of Delaware; the State of Hawaii; the State of Illinois; the State of Maine; the State of Maryland; the Commonwealth of Massachusetts; the State of Minnesota; the State of Nevada; the State of New Jersey; the State of New Mexico; the State of Oregon; the Commonwealth of Pennsylvania; the State of Rhode Island; the Commonwealth of Virginia; the State of Washington; and Dana Nessel, Attorney General on behalf of the People of Michigan. Respondents (defendants-appellants below) are the United States Citizenship and Immigration Services; the United States Department of Homeland Security; Alejandro N. Mayorkas, in his official capacity as Secretary of the United States Department of Homeland Security; and Ur M. Jaddou, in her official capacity as Director of the United States Citizenship and Immigration Services.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

RULES

REGULATIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

OPINIONS BELOW

The panel order denying intervention is reported at 992 F.3d 742. Pet.App. 1-40. The panel opinion affirming the preliminary injunctions is reported at 981 F.3d 742, Pet.App. 41-89, while the published opinion of the same court staying the preliminary injunction is reported at 944 F.3d 773, Pet.App. 90-170. The opinions of the district courts are reported at 408 F. Supp. 3d 1057, Pet.App. 171-307, and 408 F. Supp. 3d 1191, Pet.App. 308-368.

JURISDICTION

The judgment of the court of appeals denying intervention was entered on April 8, 2021. The petition for certiorari was timely filed on June 18, 2021, which this Court granted on October 29, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

The text of 8 U.S.C. §1182(a)(4) is reproduced in the Petition Appendix at Pet.App. 369-71. The text of Federal Rule of Civil Procedure 24 is reproduced in the appendix.

INTRODUCTION

Though this case stems from a regulatory dispute about admissibility requirements for aliens, the core question now before this Court is much simpler: Can States seek relief in federal courts when the Executive Branch evades a statutory command—and breaks from decades of bipartisan practice—to reverse a prior administration's rule? The Biden Administration did just that to rid itself of the Trump Administration's Public Charge Rule. And so far, federal courts of appeals have silently refused States' efforts to intervene in cases that would let them check this Executive misfeasance and protect their interests.

Had settled norms prevailed, the States could have protected their interests through the Administrative Procedure Act ("APA"), which requires agencies to repeal notice-and-comment rules through a successive notice-and-comment rulemaking. Recognizing as much, incoming administrations routinely move to stay pending litigation challenging notice-and-comment rules that they plan to repeal via new rulemakings. The Biden Administration itself has done so in a few instances.

But—with no warning—the administration broke from that settled practice here. Instead of staying pending Public Charge Rule litigation, the Biden Administration decided to exploit it to evade the APA. By the time the administration took office, several district courts had already enjoined the Rule, and appeals of those injunctions were ongoing—including in petitions before this Court. So the administration arranged to simultaneously dismiss all of those appeals. It thereby restored the district court judgments, including one partial final judgment in

Illinois vacating the Rule. Then, acquiescing in that made-final-at-its-request Illinois judgment, the Biden Administration bypassed notice and comment and instead vacated the Rule based solely on that Illinois judgment. In less than a week, this novel strategy obliterated the Rule and deprived the Rule's supporters of any chance to protect their interests via a notice-and-comment rulemaking.

But Petitioners—a coalition of States—saw what was happening. So in less than a day, they moved to intervene in a pending Ninth Circuit case challenging the Rule. They invoked their significant protectable interest in what the Government had previously estimated was hundreds of millions of dollars in budgetary obligations tied to the Rule. And they pointed to the Government's abandoning the case to confirm that the existing parties no longer adequately represented that interest.

Even so, the Ninth Circuit denied the States' motion to intervene. Worse yet, it did so through a one-line order with no analysis or explanation.

The Court should correct this manifest error. The States satisfied every requirement for intervention. And once they become intervenors, the States will seek reversals or *Munsingwear* vacaturs of the district court judgments against the Rule. They will thereby constrain the Biden Administration to rescind its repeal, which it predicated solely on the validity and finality of those same judgments. In other words, allowing Petitioners to intervene will require the Biden Administration to follow the law and do what it should have done in the first place: to respect the duly enacted Rule until it repeals it through notice-and-comment rulemaking.

STATEMENT

I. History of Public Charge inadmissibility

A. The INA has long provided that "[a]ny alien who … in the opinion of the [Secretary of Homeland Security] at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible." 8 U.S.C. §1182(a)(4)(A).[1] Executive-branch officials assessing whether an alien clears that threshold "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). A separate INA provision provides that an alien is deportable if, within five years of entry, the alien "has become a public charge from causes not affirmatively shown to have arisen since entry[.]" 8 U.S.C. §1227(a)(5).

Three agencies make public-charge determinations under this provision: DHS, for aliens seeking admission at the border and aliens within the country applying to adjust their status to that of a lawful permanent resident; the Department of State, for aliens abroad applying for visas; and the Department of Justice, for aliens in removal proceedings. *See Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292, 41,294 n.3 (Aug. 14, 2019). This case arises from a Rule governing public-charge determinations by DHS. *Id.*

---

[1] The statute refers to the Attorney General, but in 2002 Congress transferred the authority to the Secretary of Homeland Security. *See* 8 U.S.C. §1103; 6 U.S.C. §557; *see also* 6 U.S.C. §211(c)(8).

Neither the Rule nor this INA provision affect most immigrants—in any of their dealings with DHS—because a variety of interrelated statutes separately govern the provision of public benefits to immigrants. *See Cook County v. Wolf*, 962 F.3d 208, 236 (7th Cir. 2020) (Barrett, J., dissenting). Instead, this provision primarily applies to nonimmigrant visa holders applying for permanent-resident status, as well as a few other applicants in narrow circumstances. *Id.*

B. The "public charge" ground of inadmissibility is almost 140 years old. It dates to the first general federal immigration statutes in 1882. *See, e.g.*, Immigrant Fund Act, Act of Aug. 3, 1882, ch. 376, §§1-2, 22 Stat. 214. But until 1996, Congress generally left the contours of "public charge" to the agencies who administered the statutes. *See* S. Rep. No. 1515, 81st Cong., 2d Sess. 347, 349 (1950); *see also Cook County*, 962 F.3d at 239-42 (Barrett, J., dissenting).

In 1996, however, Congress made substantive changes to the "public charge" statutory provisions. It provided that any family-sponsored applicant was to be automatically deemed a "public charge" unless the applicant procured a sponsor who guaranteed to pay for any means-tested public benefits that the applicant received, regardless of whether the benefits were in cash or in kind. *See* 8 U.S.C. §§1182(a)(4)(C), 1183a. Many recognize that "the affidavit provision reflects Congress's view that the term 'public charge' encompasses supplemental as well as primary dependence on public assistance." *See Cook County*, 962 F.3d at 246 (Barrett, J., dissenting).

Yet just three years after Congress amended the statute, the Immigration and Naturalization Service

proposed a rule that would have defined "public charge" to mean an 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." *Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28,676, 28,681 (May 26, 1999). If the applicant was likely to receive the same value of government benefits in non-monetary form, the applicant was not to be considered a public charge. *See Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28,689, 28,692 (May 26, 1999).

When it announced the proposed rule, INS also issued "field guidance" adopting the proposed rule's definition of "public charge." 64 Fed. Reg. at 28,689. The 1999 proposed rule was never actually finalized, however, meaning DHS followed only the 1999 Guidance—which implemented the very same policy as the proposed rule—until 2019. *See* 84 Fed. Reg. at 41,348 n.295.

II. The Public Charge Rule

In October 2018, DHS proposed a change from its 1999 Guidance on public-charge determinations by publishing notice of a proposed rule and soliciting comments. *Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51,114 (Oct. 10, 2018). After responding to comments timely submitted, DHS adopted a final rule in August 2019. 84 Fed. Reg. at 41,501.

The Rule defines "public charge" to mean "an alien who receives one or more public benefits as defined in [the Rule] … for more than 12 months in the

aggregate within any 36-month period[.]" 84 Fed. Reg. at 41,501. The designated public benefits include cash assistance for income maintenance and certain non-cash benefits, including most Medicaid benefits, Supplemental Nutrition Assistance Program benefits, and federal housing assistance. *Id.* As the agency explained, the Rule's definition of "public charge" differs from the 1999 Guidance in that (1) it incorporates certain non-cash benefits and (2) it replaces the "primarily dependent" standard with the 12-out-of-36-months measure of dependence. *Id.* at 41,294-95.

Consequently, the Rule "remov[ed] the artificial distinction between cash and non-cash benefits, and align[ed] public charge policy with the self-sufficiency principles set forth in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996." *See* 83 Fed. Reg. at 51,123. It also more accurately reflected the public meaning of the statutory term "public charge" and realigned the public-charge provision with closely related statues governing benefits to noncitizens. *See* DHS Pet. for Writ of Cert. at 14-20, *DHS v. New York*, 141 S. Ct. 1370 (2021) (No. 20-449).

III. Challenges to the Public Charge Rule

In the weeks before the Rule was scheduled to take effect, some States, municipalities, and private organizations challenged the Rule in district courts in four circuits—the Second, Fourth, Seventh, and Ninth Circuits. By October 2019, each district court had preliminarily enjoined the Rule.[2]

---

[2] *Make the Road N.Y. v. Cuccinelli*, 419 F. Supp. 3d 647 (S.D.N.Y. 2019); *New York v. DHS*, 408 F. Supp. 3d 334 (S.D.N.Y. 2019); *Cook County v. McAleenan*, 417 F. Supp. 3d 1008 (N.D. Ill.

All those preliminary injunctions were stayed—some by the Fourth and Ninth Circuits, *see* Order, *CASA de Maryland, Inc. v. Trump*, No. 19-2222, Dkt. 21 (4th Cir. Dec. 9, 2019); Pet.App. 90-170, and the remainder by this Court, *see DHS v. New York*, 140 S. Ct. 599 (2020); *Wolf v. Cook County*, 140 S. Ct. 681 (2020). Granting those two stays required this Court to find a reasonable likelihood that five Justices would vote to reverse the lower-court decision. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) ("To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show … a fair prospect that a majority of the Court will vote to reverse the judgment below[.]"). Nonetheless, the Second, Seventh, and Ninth Circuits proceeded to affirm the preliminary injunctions on the merits.[3]

The United States filed petitions for writs of certiorari seeking review of the decisions of the Second and Seventh Circuits. See *DHS v. New York*, No. 20-449 (filed Oct. 7, 2020); *Wolf v. Cook County*, No. 20-450 (filed Oct. 7, 2020). Those petitions were both fully briefed on December 23, 2020. In addition, DHS obtained from the Ninth Circuit a stay of its mandate and was in the process of seeking certiorari review. Mot. to Stay Mandate, *City & County of San Francisco v. USCIS*, No. 19-17213, Dkt. 138 (9th Cir. Dec. 30, 2020); *pet. for cert. filed*, *USCIS v. City & County of San Francisco*, (U.S. Jan. 21, 2021) (No. 20-962).

2019); *CASA de Md., Inc. v. Trump*, 414 F. Supp. 3d 760 (D. Md. 2019); Pet.App. 308; Pet.App. 171.

[3] *See New York v. DHS*, 969 F.3d 42 (2d Cir. 2020); *Cook County v. Wolf*, 962 F.3d 208 (7th Cir. 2020); Pet.App. 41.

Meanwhile, the Northern District of Illinois had reached a final judgment, vacating the Rule nationwide. *Cook County v. Wolf*, 498 F. Supp. 3d 999 (N.D. Ill. 2020), *stayed*, No. 20-3150, Dkt. 21 (7th Cir. Nov. 19, 2020).

This Court granted the Government's petition for a writ of certiorari in *DHS v. New York*, 141 S. Ct. 1370, on February 22, 2021.

IV. The Biden Administration's post-certiorari maneuvers

Despite this Court's grant of certiorari, the Biden Administration reversed course in its pending Public Charge Rule litigation in this Court and several others, and leveraged its reversals to attempt to repeal the Rule. To be sure, standing alone, it's hardly noteworthy that the Biden Administration dislikes the Public Charge Rule and wants to repeal it; new administrations often disagree with their predecessors' policies. What *is* noteworthy is the proper *process* for repealing the Public Charge Rule: because the Trump Administration enacted it through the rigors of notice-and-comment rulemaking, the Biden Administration—or any succeeding administration—wishing to change it must likewise repeal it through notice-and-comment rulemaking. *See* 5 U.S.C. §553(b)-(c) (requiring notice and comment for rulemaking); §551(5) (defining rulemaking to include "repealing a rule"). In fact, for decades, administrations from both parties have done the hard work of notice and comment when repealing a prior administration's notice-and-comment rules.[4]

---

[4] *E.g.*, *Federal Motor Vehicle Safety Standards; Occupant Crash Protection*, 46 Fed. Reg. 53,419 (Oct. 29, 1981) (repealing past administration's "requirements for installation of automatic

The Biden Administration broke that longstanding, bipartisan norm. In the cases where district courts had enjoined or vacated the Rule, the Government arranged for the simultaneous dismissal of all its appeals, including the writ of certiorari that this Court had already granted.[5] Those voluntary dismissals kept adverse district-court precedents on the books and ended all appellate stays, thereby reviving the district courts' injunctions—including the nationwide vacatur by the Northern District of

---

restraints in the front seating positions of passenger cars" after providing for notice and comment); *Provision of Abortion-Related Services in Family Planning Services Projects*, 65 Fed. Reg. 41,281 (July 3, 2000). ("revoking [past administration's] regulations … commonly known as the 'Gag Rule'" after providing for notice and comment); *National Forest System Land and Resource Management Planning; Removal of 2000 Planning Rule*, 70 Fed. Reg. 1,022 (Jan. 5, 2005) ("remov[ing] [past administration's national-forest] regulations … in their entirety" after providing for notice and comment); *Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws*, 76 Fed. Reg. 9,968 (Feb. 23, 2011) (rescind[ing], in part, and revis[ing]" past administration's Provider Conscience Rule after providing for notice and comment); *Repeal of Consolidated Federal Oil and Gas and Federal and Indian Coal Valuation Reform*, 82 Fed. Reg. 36,934 (Aug. 7, 2017) ("repeal[ing] in its entirety" past administration's energy rule after providing for notice and comment).

[5] *See* Unopposed Motion to Voluntarily Dismiss Appeal, *Cook County v. Wolf*, No. 20-3150, Dkt. 23 (7th Cir. Mar. 9, 2021); Order Dismissing Appeal, *Cook County v. Wolf*, No. 20-3150, Dkt. 24-1 (7th Cir. Mar. 9, 2021); Unopposed Motion to Voluntarily Dismiss Appeal, *CASA de Md. v. Biden*, No. 19-2222, Dkt. 210 (4th Cir. Mar. 9, 2021); Order, *CASA de Md. v. Biden*, No. 19-2222, Dkt. 211 (4th Cir. Mar. 11, 2021); *Mayorkas v. Cook County*, 141 S. Ct. 1292 (U.S. Mar. 9, 2021); *USCIS v. City & County of San Francisco*, 141 S. Ct. 1292 (U.S. Mar. 9, 2021); *DHS v. New York*, 141 S. Ct. 1292 (U.S. Mar. 9, 2021).

Illinois. Back in that particular district court, the Government stipulated to another dismissal that made the nationwide injunction final. *See Cook County v. Wolf*, No. 19-cv-6334, Dkt. 254 (N.D. Ill. Mar. 12, 2021).

The agency then vacated the Rule without notice and comment, citing the Northern District of Illinois's nationwide vacatur as the sole justification. *See Inadmissibility on Public Charge Grounds; Implementation of Vacatur*, 86 Fed. Reg. 14,221 (Mar. 15, 2021). All told, this effective notice-and-commentless repeal took the Government less than a week to pull off.

Nothing about the cases concerning the Rule pending in other courts should have given the new Biden Administration a toehold for abandoning settled repeal-by-notice-and-comment practice. New administrations always inherit litigation from the prior administration—including challenges to rules that the new administration dislikes. If the new administration plans to repeal the challenged rule, the Government traditionally asks the court to hold the litigation in abeyance while the agency works on the replacement. *See* Bethany A. Noll & Richard L. Revesz, *Regulation in Transition*, 104 Minn. L. Rev. 1, 28 (2019). Abeyance prevents litigation over a rule that will likely be repealed anyway, conserving the resources of the parties, the government, and the judiciary. Courts routinely grant these requests.[6] In

---

[6] *See, e.g.*, Order at 1, *Am. Petrol. Inst. v. EPA*, No. 08-1277 (D.C. Cir. Apr. 1, 2009) (granting abeyance); Order at 1, *Mississippi v. EPA*, No. 08-1200 (D.C. Cir. Mar. 9, 2009) (referencing granted abeyance); Order at 1, *Nat'l Waste & Recycling Ass'n v. EPA*, No. 16-1372 (D.C. Cir. June 14, 2017) (granting abeyance); Order at

fact, the Biden Administration itself has made these requests in other cases challenging Trump-era rules that it plans to rescind. *E.g.*, *Pharm. Care Mgmt. Ass'n v. HHS*, No. 21-95, 2021 WL 624229, at *1 (D.D.C. Jan. 30, 2021) (pharmaceutical rebate rule); Minute Order Granting Joint Motion to Hold Case in Abeyance, *Pennsylvania v. DeVos*, No. 20-1468 (D.D.C. Mar. 11, 2021) (Title IX rule).

That contrast only highlights the anomaly in the Biden Administration's choice about the Public Charge Rule. Traditionally the Government has *not* simply dropped its litigation defenses and acquiesced to a final substantive judgment against it, especially one vacating its rule. Doing so would violate the Justice Department's "longstanding" "policy." Peter Fox & Connor Raso, *What a Biden Administration Should Learn from the Trump Administration's Regulatory Reversals*, Brookings (Sept. 28, 2020), brook.gs/3IdtswD; Ed Whelan, *Biden Administration Defies Longstanding DOJ Norm on Agency Litigation*, Nat'l Rev. (Mar. 10, 2021), bit.ly/3Dk9GMh.

This longstanding policy serves crucial interests. Even putting aside the ethical concerns about zealous advocacy, candor to courts, and the duty to defend federal law, the Government's refusal to defend legally defensible regulations would eviscerate the APA. By acquiescing to a judicial order, an agency could bypass the usual notice-and-comment requirements for repealing a rule. *See EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 134 (D.C. Cir. 2015). That notice-and-comment procedure is essential. It "guards against excess in rulemaking."

1, *Am. Petrol. Inst. v. EPA*, No. 13-1108 (D.C. Cir. May 18, 2017) (granting abeyance).

Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 109 (2015) (Scalia, J., concurring). It prevents "arbitrary changes." *See Hollingsworth*, 558 U.S. at 197. It "gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1816 (2019). And it "affords the agency a chance to avoid errors and make a more informed decision." *Id*. Each of those interests fell victim to the Biden Administration's unprecedented gambit on the Public Charge Rule, which it carried out through careful planning, synchronous timing, and healthy collusion with its now-nominal adversaries.

V. Petitioners' near-immediate intervention to defend the Public Charge Rule

One day after the Government initiated its maneuver, Petitioners moved to intervene. They explained that, per the agency's own calculations, the Public Charge Rule would save the States "about $1.01 billion annually." JA 62, 122. The Rule's sudden repeal thus required the States to make equally sudden budget adjustments to account for these new and unexpected costs. JA 56-59. The Government would no longer protect this interest in maintaining the Rule, the States explained, given that it had effectively moved to the other side of the "v." JA 60-64. And the States explained that intervention was timely because it came within the time to pursue an appeal and just one day after the Biden Administration stopped representing their interests. JA 63-64. Until then, the States had expected the Biden Administration to continue defending the rule, an expectation fortified after the administration changed its position in a series of other cases upon taking office but continued defending the Public

Charge Rule. *See, e.g.*, Mot. of Pet'rs. to Hold Briefing Schedule in Abeyance, *Biden v. Sierra Club*, No. 20-138 (U.S. Feb. 1, 2021).[7]

The Government fiercely resisted Petitioners' Ninth Circuit motion, and that court denied it. The court's unpublished order states, "The Motion to Intervene … is **DENIED**," without any reasoning whatsoever. Pet.App. 13. The majority offered no explanation despite a lengthy dissent from Judge VanDyke.

Judge VanDyke concluded that the States were entitled to intervention. Pet.App. 15. He explained why Petitioners satisfied each of the four factors listed in Federal Rule of Civil Procedure 24(a)(2). *See* Pet.App. 29-34. He also warned that, "[b]y denying the motion to intervene, we are sanctioning a collude-and-circumvent tactic by the parties, who clearly now share the same agenda." Pet.App. 33. Judge VanDyke concluded that Petitioners' motion was not moot. Pet.App. 35. He recommended *Munsingwear* vacatur as one form of relief that Petitioners could obtain. Pet.App. 35-38.

Petitioners sought certiorari review, asking this Court to review the denial of intervention, to review

---

[7] Around the same time, similar coalitions of States moved to intervene in other cases implicating the Rule, including in the Northern District of Illinois. *See* Mot. to Recall the Mandate to Permit Intervention as Appellant, *Cook County v. Wolf*, No. 20-3150, Dkt. 25-1 (7th Cir. Mar. 11, 2021); Opposed Motion for Leave to Intervene as Defendant-Appellants, *CASA de Md. v. Biden*, No. 19-2222, Dkt. 215 (4th Cir. Mar. 11, 2021); Opposed Motion to Intervene, *Cook County v. Wolf*, No. 19-cv-6334, Dkt. 256 (N.D. Ill. May 12, 2021). The appeal of the Northern District of Illinois's denial of intervention remains pending. *See Cook County v. Texas*, No. 21-2561 (7th Cir. filed Aug. 24, 2021).

the merits of the Public Charge Rule, or to vacate the lower courts' decisions under *Munsingwear*. This Court granted certiorari on the first question. The district courts have stayed the underlying litigation pending this Court's decision. *See* Order Staying Cases, *City & County of San Francisco v. USCIS*, No. 19-cv-4980, Dkt. 204 (N.D. Cal. May 26, 2021); Text-Only Order, No. 19-cv-5210, Dkt. 299 (E.D. Wash. Apr. 23, 2021).

SUMMARY OF THE ARGUMENT

The States satisfied the requirements for intervention here. As to intervention as of right, all four requirements were plainly met. The States' motion to intervene was timely, filed a mere day after it became clear that the Government no longer intended to defend the Rule. The States also have obvious protectable interests in the Rule being upheld: on its face, the Rule estimated that it would save States "about $1.01 billion annually." JA 122. And those interests could easily be impaired. Indeed, the lower courts' denials of intervention made that risk manifest: without the States to defend the Rule, it was collusively wiped off the face of the CFRs in less than a week. Finally, because the United States abandoned defense of its Rule—and indeed went on active *offense* against it—it is not reasonably contestable that Federal Defendants did not adequately represent the States' interests.

Because all of the requirements for intervention as of right were met, the Ninth Circuit erred in denying intervention and this Court can end its inquiry there. But the Ninth Circuit also abused its discretion in denying permissive intervention. The requirements for such intervention were also met

here: the request was timely and the States sought to raise "a claim or defense that shares with the main action a common question of law or fact," Fed. R. Civ. P. 24(b)(1)(B)—*i.e.*, argue that the Rule was substantively and procedurally valid.

It is unclear if the Ninth Circuit attempted to exercise any discretion on this issue: it offered no reasoning whatsoever, and its order did not even acknowledge the as-of-right/permissive distinction. But if it did, the court abused its discretion. Intervention would have prevented an audacious and collusive end-run around APA rulemaking requirements, and would have instead ensured that issues of great importance would instead be decided on the merits. Indeed, this Court had already granted certiorari as to the validity of the Rule, and had also granted multiple stays pending review. By permitting collusion to replace legal argumentation as the sole currency with any purchase on the outcome of the case, the court of appeals abused its discretion.

Because the States were entitled to intervene both as of right and permissively, the Ninth Circuit's denial of intervention must be reversed. And to the extent that Respondents might rely on potential mootness to evade this straightforward outcome, such contentions would be unavailing. Mootness exists "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, LLC. 1000*, 567 U.S. 298, 307 (2012) (cleaned up). But effective relief is available here, precluding any dismissal for mootness.

Respondents have previously argued that the Northern District of Illinois's vacatur compelled a conclusion that this case was moot. But that out-of-

circuit vacatur does not moot the Ninth Circuit's consideration of the validity of the Public Charge Rule. *California v. HHS*, 941 F.3d 410, 421-22 (9th Cir. 2019), *GVR'd*, 141 S. Ct. 192 (2020). Nor is that vacatur final—it is being actively challenged as this case is briefed by a similar group of States.

But even if the dispute as to the validity of the Public Charge Rule were moot, the States' motion to intervene at issue here is not. The States can still obtain "effective relief" here by seeking a *Munsingwear* vacatur post-intervention. The potential for such relief precludes the controversy here from becoming moot.

An affirmance here would have grave practical effects. As an initial matter, it would bless a particularly pernicious practice that would likely supplant the APA's requirement of notice-and-comment rulemaking for repealing rules. Why bother with the burdensome procedures of the APA when surrendering to aligned groups is so easy? New administrations might thus be marked by a flurry of strategic surrenders until most or all disfavored rules being challenged were vacated through contrivance.

An affirmance would also lead States and other interested parties to seek intervention in virtually all pending challenges to agency actions they looked upon with favor whenever there is an impending change in administration. That could easily be *hundreds* or even *thousands* of cases. The waste of resources of the Judiciary and parties that would occasion is both enormous and pointless. Instead, permitting parties to intervene *after* it becomes apparent that the administration intends to change course is consistent

with all of this Court's governing precedents and the underlying purposes of intervention.

This Court should accordingly reverse the Ninth Circuit's completely unreasoned denial of intervention, and remand so that the validity of the Public Charge Rule can be considered on the merits.

ARGUMENT

I. The Ninth Circuit erred in denying the States' motion to intervene.

While no Rule of Appellate Procedure specifically governs intervention at the courts of appeals, this Court has recognized that Federal Rule of Civil Procedure 24 serves as a "helpful analog[y]" when considering intervention at the appellate level. *International Union, United Auto, Aerospace & Agric. Implement Workers of Am. v. Scofield*, 382 U.S. 205, 216 (1965); *see also* U.S.BIO 13, Cal.BIO 8-9, *Arizona v. City & County of San Francisco*, No. 20-1775 (U.S. Aug. 23, 2021). Rule 24 reflects the fundamental principles underlying intervention. *See Scofield*, 382 U.S. at 217 n.10 ("[T]he policies underlying intervention [in the district courts] may be applicable in appellate courts."). Accordingly, federal courts of appeals regularly look to Rule 24's guidance when ruling on motions to intervene on appeal. *See, e.g.*, *Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007); *Ne. Ohio Coal. for Homeless & Serv. Emps. Int'l Union, Loc. 1199 v. Blackwell*, 467 F.3d 999, 1006 (6th Cir. 2006); *Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1102 (10th Cir. 2005); *Sierra Club v. EPA*, 358 F.3d 516, 517-18 (7th Cir. 2004); *Massachusetts Sch. of L. at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997). And courts generally "follow 'practical and equitable

considerations'" and construe the intervention factors "'broadly in favor of proposed intervenors.'" *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011).

Despite the States satisfying Rule 24(a)'s standard for intervention as of right, as well as Rule 24(b)'s requirements for permissive intervention, the Ninth Circuit denied intervention—without a single word of explanation. This Court should reverse those errors and remand with instructions to grant Petitioners' motion to intervene.

A. The States satisfied Rule 24(a)'s standard for intervention as of right.

Courts assessing a party's motion to intervene as of right under Rule 24(a) consider four distinct elements: (1) whether "the intervention application is timely"; (2) whether movants have "a significant protectable interest relating to the property or transaction that is the subject of the action"; (3) whether "the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest"; and (4) whether "the existing parties" "adequately represent the applicant's interest." *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011). The States' motion to intervene satisfied each of those elements.[8]

---

[8] This Court should review the Ninth Circuit's denial of intervention as of right *de novo*. The majority of circuits review lower courts' determinations as to the second, third, and fourth factors *de novo*, while reviewing timeliness for an abuse of discretion. S*ee, e.g.*, *St. Bernard Parish v. Lafarge N. Am., Inc.*, 914 F.3d 969, 973 (5th Cir. 2019); *Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011); *Planned Parenthood of Wis., Inc. v.*

1. The States' motion to intervene was timely.

a. On March 9, 2021, the United States announced, with no warning, the end of its defense of the Public Charge Rule—and thus the end of defending the States' interests in this case. Despite the lack of warning, the Petitioners moved to

---

Kaul, 942 F.3d 793, 797 (7th Cir. 2019); *United States v. Union Elec., Co.*, 64 F.3d 1152, 1158 (8th Cir. 1995); *Schultz v. United States*, 594 F.3d 1120, 1122 (9th Cir. 2010); *Barnes v. Sec. Life of Denver Ins. Co.*, 945 F.3d 1112, 1121 (10th Cir. 2019).

Many courts even review timeliness *de novo* when—as here—the lower court's determination has little or no reasoning attached to it. *See, e.g.*, *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997) (reviewing timeliness *de novo* because the district court denied the motion to intervene "in a curt, one-sentence order without specifying whether or not its denial was premised upon a finding of untimeliness"); *Sierra Club v. Espy*, 18 F.3d 1202, 1205 n.2 (5th Cir. 1994) ("[W]here the district court makes no finding regarding timeliness, we review this factor de novo.").

Other circuits apply an abuse of discretion standard when reviewing motions to intervene. *See, e.g.*, *T-Mobile Ne. LLC v. Town of Barnstable*, 969 F.3d 33, 38 (1st Cir. 2020); *Floyd v. City of New York*, 770 F.3d 1051, 1057 (2d Cir. 2014).

De novo review, however, most closely aligns with the text of Rule 24 and the concept of intervention of right. If movants have an actual "right" to intervene, that right necessarily cannot be dependent on the discretionary graces of the lower court. A right that can be discretionarily denied by government officials is hardly a right at all.

In any event, the standard of review as to timeliness matters little here. Even if the abuse of discretion standard applied, finding a one-day turnaround in moving to intervene untimely would be a patent abuse of discretion.

intervene the very next day in the Ninth Circuit.[9] JA 55. The Ninth Circuit had not yet even issued its mandate. There was no delay in the States' response to the United States' sudden change of course.

Notably, Plaintiffs below raised a cursory timeliness argument in the Ninth Circuit. JA 90. And the Government gave a token nod to that argument when opposing certiorari review. U.S.BIO at 19.

But it's impossible to know whether the Ninth Circuit thought that Petitioners should have moved to intervene earlier, given that court's refusal to supply any reasoning. In contrast, the Northern District of Illinois adopted that reasoning expressly, holding that the States should have intervened as soon as "November 7, 2020," *i.e.*, "when all creditable news organizations declared candidate Biden the winner." *Cook County v. Mayorkas*, __F.R.D.__, 2021 WL 3633917, *9 (N.D. Ill. Aug. 17, 2021). In that court's view, "[t]he States were required to react promptly to that reasonable possibility"—the possibility that the new Administration *might* abandon its defense of the Rule at *some point*—"even if they could not predict with certainty that DHS would take that course or precisely when." *Id.* at *12.

The proposition that the States should have sought to intervene *before* the United States abandoned the defense of its Rule, however, contravenes this Court's decision in *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394-95 (1977). That

[9] The motion to intervene was originally filed by eleven states, with South Carolina moving the next day to join the original motion, and Missouri similarly moving within two weeks. *See* No. 19-17213, Dkts. 145, 152.

decision recognizes two benchmarks to judge timeliness—both of which confirm that intervention was timely here.

First, the "critical fact" is how quickly would-be intervenors acted once it became clear that existing parties "would no longer" protect their interests. *Id.* at 394. Here, Petitioners acted within a *single day* of discovering the Government's surrender of its successful and pending petitions for certiorari. That overnight turn-around is all the more remarkable since the United States changed position in numerous other pending cases, *see supra* at 12, but did not withdraw its petitions concerning the Public Charge Rule (despite two re-lists)—conveying to any objective observer an intent to continue defending the Rule.

Second, this Court looked to when intervention was sought vis-à-vis final judgment and "the time period in which the named plaintiffs could have taken an appeal." *McDonald*, 432 U.S. at 395-96. The "critical inquiry in every such case is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *Id.*; *see also U.S. ex rel. McGough v. Covington Techs. Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992) ("The 'general rule [is] that a post-judgment motion to intervene is timely if filed within the time allowed for the filing of an appeal.'"). Here, the States filed their motion to intervene before the Ninth Circuit's mandate had even issued and with over a month remaining in the window for filing a petition for a writ of certiorari seeking review of the Ninth Circuit's December 2, 2020 opinion.[10] And the

[10] Under 28 U.S.C. § 2101(c), parties generally have 90 days to file a petition for certiorari. That period was extended to 150 days as a matter of course during the coronavirus pandemic. *See*

United States itself was pursuing review of the equivalent adverse decisions of the Second and Seventh Circuits. *Supra* at 8-9.

b. If this Court rejects that conclusion and holds that the States should have intervened earlier—when the United States was defending the Public Charge Rule, including by seeking this Court's review—it would invite gross inefficiencies. Interested parties would have to intervene in any case in which it was conceivable that the original parties would change their positions.

Under such an approach, States might need to move for anticipatory intervention in thousands of cases when there is a change in administration to protect their interests against unforeseen reversals by the Government. This would not only be a tremendous waste of resources for courts and parties, but it may also be barred by Rule 24 itself, which requires that an intervenor demonstrate that its interests are not adequately protected. *See* Fed. R. Civ. P. 24(a)(2). Still, interested parties might feel compelled to move to intervene in a host of cases between Election Day and Inauguration Day so that they cannot be later accused of intervening too late. If courts denied those motions, interested parties would then need to keep filing seriatim motions to intervene upon any new hint of inadequate representation. And they would do so until intervention was granted or the case reached final conclusion—and potentially for hundreds or

---

March 19, 2020 Order, *available at* https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf. The States filed their motion to intervene on March 10, 2021, well within the 150 days allotted. JA 55.

thousands of cases every time an administration turns over.

This Court's guidance in *McDonald*, the contours of Rule 24, and commonsense all support a finding that the States' motion—filed within one day of the United States' abandonment of its defense and filed within the original time period for seeking this Court's review—was timely.

2. The States have a significant protectable interest that could be impaired.

The States have significant protectable interests in the Public Charge Rule's continuing validity that could—indeed will—be impaired absent intervention.

Most simply, the Public Charge Rule will save the States money. DHS expressly estimated that the Rule would cumulatively save the States $1.01 billion annually. JA 122. "The Rule itself predicts a 2.5 percent decrease in enrollment in public benefits programs," Pet.App. 68, and the federal government only pays a portion of the costs of these programs. Invalidating the Public Charge Rule will thus inflict economic injury on the States, and the avoidance of incurring such economic injury is a classic protectable interest supporting intervention. *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004); *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d 1111, 1115 (10th Cir. 2002); *National Parks Conservation Ass'n v. EPA*, 759 F.3d 969, 976 (8th Cir. 2014). And the potential impairment here is equally obvious: absent intervention, Respondents' collusive conduct will deprive the States of all the benefits they otherwise would have obtained under the Public Charge Rule.

The States also have an important interest in conserving their Medicaid and related social-welfare budgets to ensure that they are able to adequately provide for the economically disadvantaged. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982) (States have "quasi-sovereign interest[s] in the health and well-being—both physical and economic—of [their] residents in general."). Recent spending bills notwithstanding, state and federal social-spending budgets are not unlimited, and freeing up dollars for those in greatest need serves the States' quasi-sovereign interests.

Beyond that, federal courts should be particularly solicitous of State interests in the immigration context. Congress, through preemption, has substantially prevented States from protecting themselves from immigration-related harms by precluding them from enacting their own laws. *See Arizona v. United States*, 567 U.S. 387, 394 (2012) ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."). Given federal preemption, States frequently can protect their interests only by ensuring that the federal government complies with federal law, including both substantive immigration law and the APA's procedural requirements. Denying intervention to the States in this context thus causes particularly acute harms, since it effectively forecloses one of the few (or only) avenues for the States to protect their interests. *See id.* at 397 ("The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States.").

Finally, Rule 24(a)(2) does not require a party to assert its own unique claim or defense to be a proper intervenor. Instead, courts routinely allow

intervention by a party that does not assert a unique claim or defense. *See, e.g.*, *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 530-31, 537 (1972); *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 135-36 (1967); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009). And sanctioning this new requirement would generally undermine intervention.

3. Respondents no longer adequately represent the States' interests.

The adequacy of representation prong is not reasonably disputable here. Without warning, the United States abruptly abandoned its defense of the Rule. In a matter of hours, and at the Government's insistence, litigation was abandoned and every case about the Rule was dismissed—leaving only an unreviewed, nationwide vacatur of the Rule in place. No party now adequately represents the States' interests because no remaining party defends the Rule. In fact, not a single Respondent has suggested—either in their Ninth Circuit briefs opposing intervention, or in their briefs in opposition here—that the United States adequately protected the States' interests. That failure constitutes a waiver of any such contention. S. Ct. R. 15(2); *see, e.g.*, *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env't Prot.*, 560 U.S. 702, 729 (2010) ("Neither objection appeared in the briefs in opposition to the petition for writ of certiorari, and since neither is jurisdictional, we deem both waived.").

* * *

Because Petitioner States satisfied all the requirements for intervention as of right here, the

Ninth Circuit erred in its unreasoned denial of the States' motion to intervene.

B. Alternatively, the Ninth Circuit should have granted permissive intervention.

Under Rule 24(b)(1)(B), federal courts may permit intervention by litigants who file a "timely motion" and have "a claim or defense that shares with the main action a common question of law or fact." That standard was satisfied here. As discussed, the States' motion was timely. *Supra* at 20-24. And the States sought to advance common legal arguments in defense of the Rule—*i.e.*, that the Public Charge Rule was substantively and procedurally valid.

Equity also demanded a favorable exercise of discretion on Petitioners' motion. This Court had already signaled the importance of this issue by granting multiple stays and a writ of certiorari. Issues of such importance should be decided on the merits rather than by strategic surrenders. Indeed, "[i]t is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." *Foman v. Davis*, 371 U.S. 178, 181 (1962).

Permissive intervention was particularly warranted given the unprecedentedly collusive nature of Respondents' actions. Respondents executed a nationwide, multi-court, simultaneous strategic surrender that (they hoped) would move so quickly that no one could intervene before all challenges to the Public Charge Rule were dismissed and appellate mandates issued. And they very nearly succeeded, foiled only by the States' extraordinarily quick actions and this Court granting certiorari.

It appears that no prior Administration—in our Republic's *entire history*—has ever engaged in equivalent conduct. Certainly Respondents have never identified anything remotely comparable in the briefing below or their briefs in opposition here. Denying intervention seeking to stop this norm-breaking conduct cannot constitute an appropriate exercise of discretion.

Beyond that, because denying Petitioners' motion allowed the Government to circumvent APA rulemaking requirements, it was an abuse of discretion to deny permissive intervention. The APA's rulemaking procedures are broadly solicitous of public comments and thus burdensome *by design*. This no doubt tempts agencies to circumvent APA rulemaking via litigation surrender, which is remarkably nonburdensome by comparison. But a core purpose of intervention is to permit unnamed parties that would be injured by existing parties' litigation conduct to join the suit and thereby attempt to prevent the deprivation of their rights—including their APA notice-and-comment rights. That's one reason the States sought intervention here, making the denial of permissive intervention necessarily an abuse of discretion.

Finally, given this case's importance and Judge VanDyke's well-reasoned dissent, the Ninth Circuit's refusal to offer even a scintilla of reasoning was an abuse of discretion. Worse yet, the Fourth and Seventh Circuits likewise failed to offer any reasoning whatsoever when denying motions to intervene and recall the mandates of a similar group of States. *Cook County v. Wolf*, No. 20-3150, Dkt. 26 (7th Cir. Mar. 15, 2021); *CASA de Md., Inc. v. Biden*, No. 19-2222, Dkt. 216 (4th Cir. Mar. 18, 2021).

This unwillingness to treat the States' motions to intervene seriously is troublesome, and this Court should make plain that the complete absence of reasoning in denying intervention in this context was inappropriate.

II. Respondents' mootness arguments are unpersuasive.

Since this case started, Respondents have done all they can to skirt Petitioners' merits arguments. Most prominently, they urged this Court to deny certiorari based on mootness. They contended that the Ninth Circuit correctly denied intervention because when the States filed their motion, the underlying appeal was moot. Respondents based that argument on the Northern District of Illinois's vacatur order and the agency's ensuing repeal of the Rule. *See* U.S.BIO 10-12.

If Respondents re-raise their mootness argument on the merits, it warrants the same credence now as it did at the petition stage—that is, none. Because Petitioners moved to intervene on March 10—before the Government rescinded the Rule or the Northern District of Illinois closed the case—the underlying appeal self-evidently remained live. And even after those events occurred, Petitioners' motion to intervene was not moot. A case is not moot if a litigant retains any "'concrete interest, however small, in the outcome[.]'" *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). Mootness occurs "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox*, 567 U.S. at 307 (cleaned up).

Here, Petitioners could obtain effectual relief upon intervening. A court could conclude that the underlying dispute is not moot and sustain the Public

Charge Rule on the merits. Even if a court thought the underlying appeal was moot, it could still grant Petitioners meaningful relief by vacating all prior decisions under *Munsingwear*.

That means Petitioners clear the mootness threshold. Again, mootness does not depend on whether a court *would* grant either form of relief, but on whether it *could*. *See Chafin*, 568 U.S. at 174. It will be "for lower courts at later stages of the litigation to decide" whether Petitioners are "in fact entitled to the relief" they seek. *Id.* at 177. What matters now is that the possibility of relief not be "so implausible that it may be disregarded" for purposes of jurisdiction. *Id.* Far from implausible, that relief could and should be granted after Petitioners intervene.

A. If Petitioners intervene, they could successfully defend the Rule.

The Government's decision to rescind the Rule could not moot this case because its rescission is a form of voluntary cessation. That "the government withdraws or modifies a [policy] in the course of litigation … does not necessarily moot the case." *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021). Rather, "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Any other rule would allow the Government to frustrate "the 'public interest in having the legality of the [challenged] practices settled.'" *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974). A governmental defendant that tries to moot a case through voluntary cessation "bears the formidable burden of showing that it is absolutely

clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000).

The Government cannot carry its formidable burden here. This Court is "critical" of "postcertiorari maneuvers designed to insulate a decision from review[.]" *Knox*, 567 U.S. at 307. And the Government's maneuvers here were blatant. DHS's rescission of the Rule changes nothing because the agency "retain[s] authority to reinstate [the prior policy] at any time." *Tandon*, 141 S. Ct. at 1297; *accord Trinity Lutheran Church of Columbia, Inc.*, 137 S. Ct. 2012, 2019 n.1 (2017) (governor's directive to end an agency program did not moot the challenge to that program because the State remained free to "revert to its [prior] policy"). Not even the rigors of notice-and-comment rulemaking stand in the agency's way, since the rescission bypassed that process. And, as this case illustrates, a presidential administration can change its opinion on immigration policy at any time. *See also* Zolan Kanno-Youngs, *Biden Reverses Course Again After Backlash and Will Increase Refugee Limit*, N.Y. Times, Apr. 16, 2021, nyti.ms/3Iehy5O (reversal on refugee limit); Erin Brady, *Biden Administration Resuming Trump's 'Remain in Mexico' Policy Starting Next Week*, Newsweek (Dec. 2, 2021), bit.ly/3ppZm0r (reversal on Remain-in-Mexico policy).

The Government might insist that its rescission was *in*voluntary, a mere response to the Northern District of Illinois's vacatur order. That argument strips the word "involuntary" of all meaning. The Government *arranged* to permanently enjoin *itself* by dismissing its appeals, deactivating the appellate

stays, and rushing out a vacatur, while simultaneously refusing to litigate the case that this Court had already granted.

Regardless, the Ninth Circuit has held that even a nationwide injunction in a different circuit does not moot another case seeking the same relief. "[N]o court has adopted the [contrary] view," according to the Ninth Circuit; courts treat the problem of conflicting orders as "a prudential concern, not a jurisdictional one." *California*, 941 F.3d at 421-22. In this very case, the Ninth Circuit held that nationwide injunctions from other circuits could not moot the dispute over whether the Public Charge Rule should be enjoined. Pet.App. 122 (citing *California*, 941 F.3d at 423). It could do the same here.

The Illinois vacatur also cannot moot anything because the litigation over its legality is not yet final. A coalition of States moved to intervene in that case. The district court denied their motion, *Cook County*, 2021 WL 3633917, but the States are actively appealing that denial. *Cook County*, No. 21-2561 (7th Cir.). If this Court concludes that Petitioners should have been granted intervention here, the Seventh Circuit has no justifiable reason for denying intervention there. And if the States can intervene there, it will remove any doubt that they may challenge the district court's vacatur under Federal Rule of Civil Procedure 60(b). The possibility that a Rule 60(b) motion could succeed defeats any suggestion that the motion to intervene is moot. *See Cooper v. Newsom*, 13 F.4th 857, 864 (9th Cir. 2021); *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008).

A successful Rule 60(b) motion would eliminate not only the vacatur, but also the agency's rescission

of the Public Charge Rule. According to the agency, it rescinded the Rule for a single reason: "the agency's immediate need to implement the now-effective final judgment" from Illinois. 86 Fed. Reg. at 14,221. In fact, the agency made its rescission retroactive to the date of that court's order. *Id.* Without that vacatur, the rescission would have no lawful basis. The agency would likely have to rescind the rescission itself. If it declined, Petitioners would sue the agency under the APA and win. *See* 5 U.S.C. §706(2); *e.g.*, *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1910-15 (2020).

So even if the Government were right that the Illinois vacatur forced its hand, the underlying appeal would not be moot. As this Court has explained, "compliance with a judicial decision does not moot a case if it remains possible to undo the effects of compliance[.]" *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1661 (2019) (cleaned up); *accord Bakery Sales Drivers Loc. Union No. 33 v. Wagshal*, 333 U.S. 437, 442 (1948); *Maher v. Roe*, 432 U.S. 464, 468 n.4 (1977). When a government defendant "amend[s] an ordinance or regulation as required by an injunction," the mere "possibility of later repeal or revision defeats mootness." 13B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §3533.2.2 (3d ed. 2021).

That is the case here. The sole basis for the agency's rescission was the Illinois vacatur. Challenges to that vacatur remain pending and could succeed, especially if this Court rules for Petitioners here. And if one of those challenges succeeds, the agency will have to rescind its rescission. No matter that success on this strategy is "not assured"; the fact

that it exists defeats mootness. *Chafin*, 568 U.S. at 175.

B. If Petitioners intervene, they could move for *Munsingwear* vacatur.

Even if Respondents were right that the underlying *appeal* is moot, that fact would not make Petitioners' *motion to intervene* moot. When a case becomes moot before all appellate options are exhausted, the "'established practice'" is to prevent any collateral consequences by vacating all prior decisions. *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018). Petitioners could ask for vacatur if they were granted intervention. And the possibility that they would secure that relief is enough to sustain a live controversy over their motion to intervene. *See Chafin*, 568 U.S. at 176-77.

Munsingwear is "rooted in equity," *Garza*, 138 S. Ct. at 1792, and is thus inherently "flexible," *Alvarez v. Smith*, 558 U.S. 87, 94 (2009). It stems from this Court's broader power to "make such disposition of the whole case as justice may require." *Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 677 (1944); *see* 28 U.S.C. §2106. Courts vacate decisions when the dispute is voluntarily mooted by the winner. *Garza*, 138 S. Ct. at 1792. They vacate decisions when the dispute is mooted by happenstance. *United States v. Munsingwear*, 340 U.S. 36, 40 (1950). They even vacate decisions when the dispute is mooted by the loser. *E.g.*, *United States v. Weatherhead*, 528 U.S. 1042 (1999); *Bd. of Regents of the Univ. of Tex. Sys. v. New Left Educ. Project*, 414 U.S. 807 (1973); *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 268 (1936). In *Munsingwear* itself, the Court explained that the federal government would have been entitled

to vacatur after it mooted the case by voluntarily changing the challenged regulation, even though the prior judgment went against it. 340 U.S. at 39.

Petitioners could obtain *Munsingwear* vacatur here. If this case is moot, that's due to the voluntary, coordinated actions of Respondents. Some of those Respondents were plaintiffs who won below, so it "'would certainly be … strange'" to let them "'retain the benefit of the judgment.'" *Garza*, 138 S. Ct. at 1792. And while the Government formally lost below, that fact does not foreclose vacatur. *See Munsingwear*, 340 U.S. at 39. Now that the Government has switched sides, it benefits from the Ninth Circuit's judgment as much as the Plaintiffs.

Nor does this Court's decision in *Bancorp* counsel against vacatur. *Bancorp* was a bankruptcy dispute about the validity of a reorganization plan. After this Court granted certiorari, both parties "stipulated to a consensual plan of reorganization" and agreed that the dispute was moot. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 19-20 (1994). The petitioner then asked for vacatur. *Id.* at 20. This Court declined. It held that courts can refuse to award vacatur where "the party seeking relief from the judgment below"—that is, the petitioner—"caused the mootness by voluntary action." *Id.* at 24. The Court focused on the petitioner's role because a "'suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.'" *Id.* at 25. A petitioner who agreed to moot a case, the Court explained, was like someone who "failed to appeal at all." *Id.* Such a party forfeits the right to contest the underlying judgment, including by vacatur.

Like *Munsingwear* itself, the *Bancorp* exception is equitable and flexible. *Bancorp*, 513 U.S. at 29. The *Bancorp* Court rejected the notion that "vacatur can never be granted when mootness is produced" via settlement. *Id.* at 29. Vacatur still could be appropriate in "exceptional circumstances," and courts "must also take account of the public interest." *Id.* at 29, 26. The overarching command is to dispose of moot cases "in the manner most consonant to justice in view of the nature and character of the conditions which have caused the case to become moot." *Id.* at 24 (cleaned up).

The *Bancorp* exception should not apply here. Petitioners would be the ones seeking vacatur, and they in no way agreed to settle the underlying case. *Cf. id.* at 26. They vigorously opposed Respondents' case-mooting actions and tried to use the available legal channels to stop them. This case thus does "not present … the kind of voluntary forfeiture of a legal remedy that led the Court in *Bancorp* to find that considerations of fairness and equity tilted against vacatur." *Alvarez*, 558 U.S. at 97 (cleaned up). Nor would denying Petitioners vacatur serve the "public interest" or do "justice" here. *Cf. Bancorp*, 513 U.S at 26, 24. Exactly the opposite: It would reward collusive litigation tactics, allow the Government to bypass the APA, and leave precedents on the books that this Court flagged as dubious.

To be sure, as Judge VanDyke recognized, applying *Munsingwear* to this case would present a question of first impression. *See* Pet.App. 37-38. But Petitioners have powerful arguments for why that remedy is appropriate here. Only intervention would allow Petitioners to make their case.

Vacatur would provide Petitioners with important relief. As it always does, vacatur would preserve all "rights" and prevent any "prejudice[]" by "eliminat[ing] a judgment" and "clear[ing] the path for future relitigation[.]" *Munsingwear*, 340 U.S. at 40. It would allow Arizona, Montana, and other Petitioners to litigate the Public Charge Rule on a clean slate in any pending or future lawsuits in the Ninth Circuit. That important benefit keeps the underlying appeal alive for purposes of deciding whether *Munsingwear* vacatur is appropriate. *See Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm.*, 950 F.3d 790, 794 (11th Cir. 2020) (citing *Bancorp*, 513 U.S. at 21). And that important benefit, no matter how "'small'" or "'partial'" it might be, means that a court could do something meaningful if Petitioners are allowed to intervene. *Chafin*, 568 U.S. at 172, 177. If the Ninth Circuit denied Petitioners' motion to intervene based on mootness, it erred.

III. Denying intervention in these circumstances would sow disorder.

If Petitioners cannot intervene here, future administrations will follow the Biden Administration's unfortunate blueprint. The victims will be good government, agency accountability, and the rule of law.

As explained, administrations seeking to repeal rules have traditionally done so through the statutorily required notice-and-comment process. The APA itself "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance." *Perez,* 575 U.S. at 101; *see also* 5 U.S.C. §§553(b)-(c); 551(5). Thus, "[a] rule promulgated by prior notice and

comment can generally be rescinded only by notice-and-comment procedures." Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 Nw. U. L. Rev. 471, 528 (2011). The Government agrees. *See* Brief for the Fed. Pet'rs at 4, *Perez*, 575 U.S. 92 (Nos. 13-1041, 13-1052), 2014 WL 4101228, at *30. (APA makes "no distinction … between initial agency action and subsequent agency action undoing or revising that action").

The notice-and-comment procedure is a salutary and essential feature of modern administrative law. In mandating it, "Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979).

The Biden Administration's strategy bypassed notice and comment completely. After the Government arranged for the Rule's vacatur by the courts, the agency rapidly arranged for its vacatur by executive fiat. The agency did not provide notice, did not solicit comment, did not analyze the costs and benefits of the change, and offered no reason for the repeal besides "implement[ing] the judgment" of the district court. 86 Fed. Reg. 14,221. By working together with the plaintiffs challenging the Rule, the Government got rid of a notice-and-comment regulation in just one week.

The incentives for future administrations to follow this blueprint are obvious. "Notice-and-comment procedures are elaborate and take time to complete." *Allina Health*, 139 S. Ct. at 1822 (Breyer, J., dissenting). One government study estimated that the

average rule making procedure under the APA took around four years. *See* U.S. Gov't Accountability Off., GAO-09-205, *Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews* 5 (2009). In addition to taking up time and energy, the notice-and-comment process also comes with exacting judicial scrutiny, even when the agency's new rule merely restores a prior status quo. *See State Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

Ethical rules and longstanding traditions are (apparently) no longer enough to stop this tactic. The only way to check norm-breaking actions like those at issue here is by allowing parties who would be injured by a judicial invalidation to intervene once the Government stops defending the rule. Those intervenors (often States) can raise all arguments in defense of the rule, instead of letting it be vacated by default; and the Government is free to join the plaintiffs in arguing against the legality of its own rule or actions. The intervenors may or may not succeed. But at least the rule's fate will be decided based on competing arguments raised by adversaries, rather than backroom deals cut by colluders.

Allowing intervention in those circumstances will not cause any real problems, like a flood of undesirable intervenors. Under existing law, an intervenor can appeal a decision only if it "independently demonstrate[s] [Article-III] standing." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). In other words, any intervenor seeking to appeal a judgment that the original parties do not challenge must establish its own actual or imminent injury, traceable to the judgment below,

and redressable by a favorable appellate decision. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019). That requirement ensures only those parties with "a sufficient stake in the outcome of the controversy" will be able to continue a lawsuit, while the vast majority of interested onlookers will not. *Maine v. Taylor*, 477 U.S. 131, 136 (1986). Article III's real limitations have and will continue to prevent improper parties from abusing intervention.

In fact, it is the Government's position that would engender a flood of intervention motions. As discussed, *supra* at 23-24, if every regulatory challenge could become unreviewable when an administration changes, interested parties would have to preemptively move to intervene in every ongoing case involving a rule that the new administration might abandon. They could not wait until the new administration actually changed position because, as this case shows, it takes only days for the case to be gone and the rule to be rescinded. And the Government would then argue, as it argues here, that the motion to intervene is moot.

Petitioners satisfy the requirements for intervention and continue to have a live interest in the outcome of this case. By holding that the Ninth Circuit should have granted their motion, this Court will retain order. It will prevent a revolution in regulatory repeals, ensuring that sudden changes, coordinated dismissals, and summary orders are not an acceptable substitute for the APA's notice-and-comment process. It will convey to future administrations that similar gambits will likely fail. And it will reiterate the right of injured intervenors to take up abandoned causes on appeal, while reassuring others that they need not

waste party or judicial resources on preemptive intervention.

CONCLUSION

This Court should reverse the Ninth Circuit's judgment denying Petitioners' motion to intervene and remand with instructions to grant that motion.

December 13, 2021

Respectfully Submitted,

TYLER R. GREEN
CAMERON T. NORRIS
JEFFREY S. HETZEL
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209

MARK BRNOVICH
Attorney General
JOSEPH A. KANEFIELD
Chief Deputy and Chief of Staff
BRUNN W. ROYSDEN III
Solicitor General
DREW C. ENSIGN
Deputy Solicitor General
Counsel of Record
KATE B. SAWYER
Assistant Solicitor General
KATLYN J. DIVIS
Assistant Attorney General

OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025
drew.ensign@azag.gov

Counsel for Petitioners
(Additional Counsel listed below)

STEVE MARSHALL
Attorney General of Alabama

LESLIE RUTLEDGE
Attorney General of Arkansas

THEODORE E. ROKITA
Attorney General of Indiana

DEREK SCHMIDT
Attorney General of Kansas

JEFF LANDRY
Attorney General of Louisiana

LYNN FITCH
Attorney General of Mississippi

ERIC S. SCHMITT
Attorney General of Missouri

AUSTIN KNUDSEN
Attorney General of Montana

JOHN M. O'CONNOR
Attorney General of Oklahoma

ALAN WILSON
Attorney General of South Carolina

KEN PAXTON
Attorney General of Texas

PATRICK MORRISEY
Attorney General of West Virginia

APPENDIX

APPENDIX

TABLE OF CONTENTS

Federal Rules of Civil Procedure

Rule 24. Intervention

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

(1) ***In General.*** On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) ***By a Government Officer or Agency.*** On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) ***Delay or Prejudice.*** In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.