No. 20-1775

In the Supreme Court of the United States

ARIZONA, ET AL.,

Petitioners,

v.

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

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMERICA FIRST LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

REED D. RUBINSTEIN
America First Legal Foundation
600 14th Street, N.W.
Fifth Floor
Washington, DC 20005
(202) 964-3721

CHRISTOPHER E. MILLS
Counsel of Record
Spero Law LLC
557 East Bay Street
#22251
Charleston, SC 29413
(843) 606-0640
cmills@spero.law

Counsel for *Amicus Curiae*

QUESTION PRESENTED

Whether States with interests should be permitted to intervene to defend a rule when the United States ceases to defend.

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INTEREST OF *AMICUS CURIAE*

America First Legal Foundation is a nonprofit organization dedicated to promoting the rule of law in the United States by preventing executive overreach, ensuring due process and equal protection for every American citizen, and encouraging understanding of the law and individual rights guaranteed under the Constitution and laws of the United States.

America First Legal has a substantial interest in this case. As a participant in notice-and-comment rulemaking and an organization often engaged in litigation about administrative law, it has an interest in ensuring that the Executive Branch does not abuse the Administrative Procedure Act as it has done here. America First Legal also has an interest in ensuring that America's immigration laws are enforced as Congress has written them, with proper regard for the civil rights and liberties of our citizens and legal immigrants.[*]

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[*] All parties have consented to the filing of this brief. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Any America First Legal personnel who were involved with the promulgation of the prior administration's public charge rule had no role in this brief.

SUMMARY OF THE ARGUMENT

"It is procedure that spells much of the difference between rule by law and rule by whim or caprice." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 179 (1951) (Douglas, J., concurring). The prior administration followed the law, adhering to the Administrative Procedure Act's rigorous procedural requirements to adopt a rule that reasonably interpreted a broad statute about immigration eligibility. Under that statute, the Immigration and Nationality Act, an alien is "inadmissible" if "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). The promulgated rule reasonably defined the "public charge" inquiry to encompass both cash assistance and certain non-cash benefits received for more than a year during the past three years.

Lawsuits followed across the country, with several lower courts enjoining the rule. This Court repeatedly signaled to the lower courts that the rule was consistent with the law, issuing multiple stays of lower court injunctions. *DHS v. New York*, 140 S. Ct. 599 (2020); *Wolf v. Cook County*, 140 S. Ct. 681 (2020). The lower courts continued to resist, with the same courts issuing injunctions and judgments that flew in the face of this Court's stay orders. Faced with blatant disregard for the law, this Court was forced to grant certiorari. *DHS v. New York*, 141 S. Ct. 1370 (2021).

Yet the unprincipled resistance to the rule of law continued. After the Biden administration took office, it abandoned the government's traditional role in defending federal law and coordinated a blitzkrieg of

dismissals with the plaintiffs, the government's supposed opponents. The Biden administration had no patience for legal niceties like the APA, much less for passing an immigration law through Congress. So, locking into place a single Illinois district court order purporting to vacate the rule (an order previously stayed by the Seventh Circuit), the government dismissed the various appeals. On command, the lower courts jumped, quickly issuing dismissal mandates. And voilà: on the order of one district court, the rule is purportedly vacated nationwide and the government announces its revocation via press release without having to adhere to the pesky APA requirements. *See* JA 85 & n.4. Thus, the Biden administration (again) "claims the power to implement a massive policy reversal . . . simply by typing out a new Word document and posting it on the internet. No input from Congress, no ordinary rulemaking procedures, and no judicial review." *Texas v. Biden*, No. 21-10806, 2021 WL 5882670, at *1 (5th Cir. Dec. 13, 2021).

Again this Court tried to signal the lower courts, sending objecting states to the Illinois district court to present their intervention request. *Texas v. Cook County*, 141 S. Ct. 2562 (2021). Again the signal was not received. Courts have uniformly denied intervention to these states, which would bear the brunt of the costs imposed if the final rule is not implemented. The Ninth Circuit below could not even be bothered to explain its denial of intervention. The Illinois district court claimed that the states had waited too long and that the Biden administration had already relied on its own manipulation of the litigation.

Enough is enough. The manipulative procedures sanctioned by the lower courts here enables this and future administrations to routinely evade the APA's requirements. Those requirements are a central method of protecting the rule of law in a government that operates largely through unelected bureaucracies. The APA's core mandate of notice and comment gives the People the chance to participate and influence their government's policy. Under Respondents' and the lower courts' views, however, notice-and-comment rulemaking can be avoided by purposely throwing pending cases after a new administration takes office. The government could use any single district court to retract a rule and then issue a new rule without notice and comment.

The specter of a single judge setting unreviewable nationwide policy itself mocks the rule of law. By the federal government's lights, this case is moot because a judge in Illinois already set aside the rule. But, at this Court's direction, that litigation remains ongoing. Regardless, the federal government itself has repeatedly denied that the APA's "set aside" remedy gives a single district judge the immediate power to preempt all other cases and impose a nationwide judgment. As the government has elsewhere argued, that reading of the APA runs into serious statutory, constitutional, and practical problems.

What makes all of these maneuvers particularly damaging to the rule of law is that the prior administration's public charge rule is legal. Members of this Court have explained in exhaustive detail why that is so. And this Court already recognized as much through its various stay orders. Giving a new

administration power to impose a single district judge's *unlawful* order on the nation contradicts the principle that ours is "a government of laws and not of men." Mass. Const. pt. I, art. XXX. "Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." *McGrath*, 341 U.S. at 179 (Douglas, J., concurring). To prevent this and future flagrant violations of both the APA and this Court's orders, the Court should reverse.

ARGUMENT

I. The decision below enables evasion of the APA.

The federal government's gamesmanship shows a disregard for the important procedural requirements of the APA. If this Court permits the government's scheme to succeed, this case will provide a roadmap for the government to routinely avoid those requirements in revoking rules it no longer favors. But those requirements are important, for they ensure that the public has an adequate opportunity to participate in their government and that rulemaking occurs in a reasoned way.

"The APA sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *DHS v. Regents of the University of California*, 140 S. Ct. 1891, 1905 (2020). To issue a rule under the APA, an agency is generally required to notify the public of the proposed rule, invite comments, consider and respond to the comments, and explain its reasoning in its final rule. 5 U.S.C. § 553(b)–(c). The agency must "examine the relevant data and articulate a

satisfactory explanation for its action." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009).

"Notice and comment gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes—and it affords the agency a chance to avoid errors and make a more informed decision." *Azar v. Allina Health Services*, 139 S. Ct. 1804, 1816 (2019). Requiring an agency to "disclose the basis of its action" also "permit[s] meaningful judicial review." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) (cleaned up).

The prior administration's public charge rule complied with the APA's rigorous procedural requirements. DHS considered and responded to hundreds of thousands of comments before issuing its final rule. *See DHS*, 140 S. Ct. at 599 (Gorsuch, J., concurring). And agencies must "use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance." *Perez v. Mortgage Bankers Association*, 575 U.S. 92, 101 (2015).

Here, however, the Biden administration found a quicker way to dispose of a rule that it disliked. As Judge VanDyke explained in dissent below, the government "deliberately [] short-circuit[ed] the normal APA process by using a single judge to engage in de facto nationwide rulemaking." App. 16. On the same day that the government surrendered in all cases, and without notice and comment, it issued a press release announcing the rule's revocation, followed a few days later by a new rule purporting to be retroactively effective. *See* App. 27. These actions

were intended to make it "effectively" impossible for the rule to "be resurrected" "by a future administration." App. 15.

If the government succeeds in its effort here to leverage one (stayed) district court order into a near-permanent rule reversal—on an issue where this Court has issued multiple stays and granted certiorari—the government could routinely follow this route to evade the APA's important procedural requirements. Not only could the government skip notice and comment, it could scuttle judicial review of its actions. And it could bind future administrations by locking in one judge's order.

The federal government does not deny any of this. Instead, it merely notes that "DHS has initiated a new rulemaking process" and that "Petitioners will have the opportunity to comment during that process." BIO 18. As Judge VanDyke pointed out, "This argument might have had more merit had the federal government followed the traditional route of asking the courts to hold the public charge cases in abeyance, rescinding the rule per the APA, and then promulgating a new rule through notice and comment rulemaking." App. 31.

Plus, an eventual rule will not alleviate the years of harm to Petitioners and this country from being subjected in the meantime to an unlawful rule that imposes costs on states. And given that it took the government two decades to move from an "interim" measure announced in 1999 to the final rule here, *New York v. DHS*, 969 F.3d 42, 53 n.7 (2d Cir. 2020), the unlawful rule could govern for a very long time.

The Illinois district court asserted that its "vacatur of the Final Rule does not preclude DHS in the future from promulgating a public charge regulation identical to the Rule." *Cook County v. Mayorkas*, No. 19-6334, 2021 WL 3633917, at *15 (N.D. Ill. Aug. 17, 2021). First, that ignores the intervening years of costs, governance of an unlawful rule, and incentives for future APA evasions. Second, the district court did not explain how the government may disregard a final judgment against it. *Cf. Al-Adahi v. Obama*, 672 F. Supp. 2d 114, 117 (D.D.C. 2009) (holding that the federal government in civil contempt for violating a court order).

Further, an agency changing its position must "display awareness that it is changing position," "show that there are good reasons for the new policy," and provide a "detailed justification" when "its new policy rests upon factual findings that contradict those which underlay its prior policy" or "when its prior policy has engendered serious reliance interests that must be taken into account." *Fox*, 556 U.S. at 515 (cleaned up). So the district court's purported nationwide vacatur at minimum would make it harder to return to the proper rule via the APA.

Finally, under this Court's precedents, "a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 982–83 (2005). The Illinois district court suggested that *Brand X* would not apply here in part because its decision "rests exclusively" on "*Chevron* step two." *Cook County*,

2021 WL 3633917, at *15. Yet the district court's actual decision contained a long discussion equating the two *Chevron* steps and stated that "the statutory term 'public charge' . . . cannot be stretched to cover the full measure of noncitizens deemed by the Final Rule to be public charges." *Cook County v. Wolf*, 498 F. Supp. 3d 999, 1005 n.* (N.D. Ill. 2020).

In short, even if a future administration could eventually promulgate the original rule again, the intervening years will be governed by an unlawful rule that imposes costs on Petitioners. Worse, the government's course here would be followed by every administration seeking to change agency rules without following the APA's notice-and-comment requirements. Such circumvention of the APA would harm organizations like America First Legal and the public at large, depriving them of their opportunity to have a say in how the ever-expanding Fourth Branch governs.

II. The case is not moot.

On the petition for certiorari, Respondents argued that this case is moot because "a district court in separate litigation has since vacated the Rule in its entirety, that court's judgment has become final, and the Rule has accordingly been removed from the Code of Federal Regulations." United States BIO 11 (cleaned up); *accord* California BIO 9. As Petitioners show, that vacatur remains subject to ongoing litigation and any ruling on the merits there could eliminate the basis for the rule's removal, so this case is not moot. Br. 30–37. What's more, Respondents' argument assumes that a district court's power under the APA to "set aside" agency action gives it

the power to single-handedly vacate a rule nationwide, no matter if any (or every) other court has upheld that rule. But the United States itself has repeatedly denied that the APA gives a single district court such unfettered authority to set nationwide policy. And if the Illinois district court's judgment potentially cannot vacate a rule nationwide, that is another reason why this case is not moot.

Under the APA, a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be" contrary to law. 5 U.S.C. § 706. Some, including the Illinois district court, have read this provision to mean that a reviewing court has no choice but to vacate the rule at issue nationwide, not "just for certain plaintiffs or geographic areas." *Cook County*, 498 F. Supp. 3d at 1005 (citing, *inter alia*, *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998)).

But none other than the federal government has recently rejected that reading of the APA. In 2018, the Department of Justice adopted guidelines instructing that "universal vacatur is not contemplated by the APA" and that "the APA's text does not permit, let alone require, such a broad remedy."[1] According to DOJ:

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[1] Memorandum from the Office of the Attorney General to the Heads of Civil Litigating Components & U.S. Attorneys, Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions 7 (Sept. 13, 2018), https://www.justice.gov/opa/press-release/file/1093881/download (cleaned up).

> [T]he text of section 706 does not specify whether the rule, if found invalid, should be set aside *on its face* or *as applied to the challenger*. In the absence of a clear statement in the APA that it displaces traditional rules of equity, courts should adopt the latter reading of the "set aside" language. The historical backdrop to the APA's enactment lends further support to this reading. The absence of nationwide injunctions prior to Congress' enactment of the APA in 1946 (and for over fifteen years thereafter) suggests that the APA was not originally understood to authorize courts to issue such broad relief.[2]

The federal government has repeatedly asserted this position in litigation, including about this rule.[3] In one recent brief before this Court, it explained that "Nothing in the APA's text or history—or this Court's cases construing it—suggests that Congress

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[2] *Id.*

[3] *E.g.*, Reply in Support of Application for a Stay 11–15, *DHS v. New York*, No. 19A785 (U.S. Jan. 23, 2020), https://www.supremecourt.gov/DocketPDF/19/19A785/129741/20200123160342975_19A785%20Reply.pdf; Brief for the Federal Appellants 85, *Pennsylvania v. Trump*, Nos. 17-3752, 18-1253, 19-1129, 19-1189, 2019 WL 721635 (3d Cir. Feb. 15, 2019) ("[T]he D.C. Circuit's practice represents an improper exception to the ordinary rule that relief should be limited to the parties."); Reply Brief for Appellant 22–27, *City of Chicago v. Barr*, No. 18-2885, 2018 WL 6605982 (7th Cir. Dec. 7, 2018) ("The term [set aside] does not itself indicate that the action should be 'set aside' as to anyone other than a plaintiff"); *Make the Road New York v. McAleenan*, 405 F. Supp. 3d 1, 67 (D.D.C. 2019), *New York v. U.S. Department of Commerce*, 351 F. Supp. 3d 502, 678 n.87 (S.D.N.Y. 2019); *District of Columbia v. U.S. Department of Agriculture*, 444 F. Supp. 3d 1, 48 (D.D.C. 2020).

took the dramatic step of *sub silentio* authorizing nationwide relief." Brief for the Petitioners 49, *Trump v. Pennsylvania*, No. 19-454, 2020 WL 1190624 (U.S. Mar. 2, 2020). Yet under the Illinois district court's strong "set aside" reading, a single court is not only authorized but *required* to issued nationwide vacaturs in every case, regardless of any other judicial action.

As the federal government's own arguments reflect, this reading raises serious statutory, constitutional, and practical issues. On the statutory front, "when the APA was enacted the expectation was that agencies would make policy primarily through adjudication," and "'set aside' was a technical term for reversing judgments."[4] Further, "it would be very odd to think 'set aside' means 'enjoin enforcement of against anyone' given the full set of objects for the verb in Section 706," including "findings" and "conclusions" that cannot be "enjoined."[5]

The better reading of "set aside" is to direct courts "not to decide [the case] in accordance with the [challenged] agency action." John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 Yale J. Reg. Bull. 37, 46 (2020). As explained above, this reading would comport with "established [equity] principles," a departure from which may not be "lightly assume[d]." *Weinberger v.*

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[4] Samuel Bray, *Does the APA support national injunctions?*, The Volokh Conspiracy, https://bit.ly/33dW5db (May 8, 2018) (citing *Morgan v. Daniels*, 153 U.S. 120, 124 (1894)).
[5] *Id.*

Romero-Barcelo, 456 U.S. 305, 313 (1982); *see generally* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 438 n.121, 449–52 (2017); Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 Geo. Mason L. Rev. 29, 75–77 (2019); Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L.J. 291, 309–15 (2003).[6]

On the constitutional front, when a district court's order goes beyond "order[ing] the government not to enforce a rule against the plaintiffs in the case before it," "it is hard to see how the court could still be acting in the judicial role of resolving cases and controversies." *DHS*, 140 S. Ct. at 600 (Gorsuch, J., concurring). Yet that is a federal court's *only* permissible role under Article III. The traditional understanding of the "judicial power" is "fundamentall[y] the power to render judgments in individual cases." *Trump v. Hawaii*, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring).

Last, on the practical front, the strong "set aside" reading undermines the rule of law. Take this hypothetical. A rule is challenged in all 94 district courts nationwide, and every district court save one upholds the rule. Call that one (hypothetically) the Northern District of California, and it has yet to rule.

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[6] In addition, if "set aside" requires universal vacatur, it is unclear how courts could routinely "remand for the agency to" "offer a fuller explanation" of infirm rules. *Regents*, 140 S. Ct. at 1907 (cleaned up).

Every Court of Appeals affirms save the Ninth Circuit, where cases remain pending. Because of the rule's significance, this Court has granted certiorari and heard argument in one of the cases upholding the rule but not yet issued a decision. The Northern District of California waits until the day after the inauguration of a new president to "set aside" the rule. Under the strong reading of "set aside," that one district court decision immediately overrides every single other decision—trial or appellate—across the country. It would presumably moot the case pending before this Court, for the rule would no longer exist. And even if this Court went ahead and affirmed some other decision upholding the rule, it would make no difference; the Northern District of California's final judgment would override even this Court's decision.

Now change the hypothetical so that the Northern District of California rules *before* the other 93 district courts. Under the strong "set aside" reading, no other court would then face a judiciable case because the rule no longer exists, whether by direct operation of the purported nationwide vacatur order or the added obstacle of a quick rule change. *See, e.g.*, *Walker v. Azar*, No. 20-2834, 2020 WL 4749859, at *7 (E.D.N.Y. Aug. 17, 2020) (stating "that [the court] has no power to revive a rule vacated by another district court").

Even courts adopting the strong reading have acknowledged that it conflicts with "the 'non-acquiescence' doctrine, under which the government may normally relitigate issues in multiple circuits." *National Mining*, 145 F.3d at 1409. Thus, the strong reading "would substantially thwart the development of important questions of law by freezing the first

final decision rendered on a particular legal issue." *United States v. Mendoza*, 464 U.S. 154, 160 (1984).

In sum, the strong reading gives one court the power to set nationwide policy, no matter what every other court in the country—potentially including this Court—thinks about the rule's validity. Professional plaintiffs would have every incentive to file cases in every district nationwide. They would slow-walk enough cases to give them a likelihood that a future administration could surrender to a single adverse decision. And they would expedite enough cases to find some court that would "prevent[]" the executive from enforcing its rule "during an entire Presidential term." *Regents*, 140 S. Ct. at 1932 (Alito, J., concurring in the judgment in part and dissenting in part). "Our constitutional system is not supposed to work that way." *Id.*

Distorting our constitutional system this way harms nonparties too. "The nature of governmental regulations is such that nearly every rule some group of plaintiffs finds burdensome likely benefits some other group." Zayn Siddique, *Nationwide Injunctions*, 117 Colum. L. Rev. 2095, 2125 (2017). "[A]n overbroad injunction can cause serious harm to nonparties"—like the Petitioners here—"who had no opportunity to argue for more limited relief." *Id.*

These many problems with the strong "set aside" reading underscore that giving the Illinois district court's vacatur universal effect is not a forgone conclusion. The other basis for the Respondents' mootness argument—that the federal government took the single vacatur and invoked it to remove the public charge rule without notice and comment—

fares no better. The government relied on the APA's "good cause" exception, asserting that "[n]otice and comment and a delayed effective date are unnecessary for implementation of the court's order vacating the rule and would be impracticable and contrary to the public interest in light of the agency's immediate need to implement the now-effective final judgment." Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. 14,221, 14,221 (Mar. 15, 2021); *see* 5 U.S.C. § 553(b)(3)(B).

The government does not explain why a new rule was necessary at all, given its view that the district court's vacatur operated as an immediate and permanent nationwide injunction. In any case, if the district court's order does not and could not act as a nationwide vacatur, then no good cause could exist for the government to revoke the rule without notice and comment. Especially given this Court's repeated interventions, any suggestion then that judicial action *required* revoking the rule would be "contrived." *Department of Commerce*, 139 S. Ct. at 2575. "Good cause" could not mean a single district court decision any more than it could mean some court's issuance of a preliminary injunction, a statement at a court hearing, or the filing of a complaint attacking the rule.

Again, recognizing *this* case's ongoing validity does not depend on resolving these various issues. Instead, these arguments show that many avenues remain for this case to have real effect despite the existence of one district court's purported universal vacatur. This case is not moot, and the Ninth Circuit erred in denying Petitioners intervention.

III. The public charge rule is valid.

What makes the federal government's manipulation here especially damaging to the rule of law is that the public charge rule is valid. This Court recognized as much in granting multiple emergency stays of lower court injunctions against the rule. Even the Seventh Circuit recognized as much, staying the very order that the government now casts as an appropriate rule of law. These stays would have been "impossible had the government, as the stay applicant, not made 'a strong showing that it was likely to succeed on the merits.'" *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 229 (4th Cir.) (Wilkinson, J.), *reh'g en banc granted*, 981 F.3d 311 (4th Cir. 2020). Yet the federal government's and the lower courts' subsequent conduct denied this Court's actions their "obvious and relevant import." *Id.* at 230. Rewarding the government's manipulation would undermine not just the rule of law but also this Court's role within the federal judiciary.

The Immigration and Nationality Act provides for the inadmissibility of "[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." 8 U.S.C. § 1182(a)(4)(A). The Secretary's assessment "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." *Id.* § 1182(a)(4)(B).

Until recently, the "public charge" assessment was governed only by informal field guidance, which focused on whether the alien was likely to receive

cash assistance. App. 17. In October 2018, DHS proposed a new approach that would consider both cash assistance and other non-cash government benefits. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (Oct. 10, 2018). After considering and responding to 266,000 comments over 10 months—*i.e.*, how rulemaking is supposed to happen—DHS promulgated a final rule. 84 Fed. Reg. 41,292 (Aug. 14, 2019); *see DHS*, 140 S. Ct. at 599 (Gorsuch, J., concurring). 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 relevant government benefits include cash assistance and several non-cash benefits, including most Medicaid benefits, Supplemental Nutrition Assistance Program benefits, and federal housing assistance. *Id.*

This rule is a valid interpretation of the statute's reference to "public charge," a phrase that "gives DHS relatively wide discretion to specify the degree of benefit usage that renders someone a 'public charge.'" *Cook County v. Wolf*, 962 F.3d 208, 248 (7th Cir. 2020) (Barrett, J., dissenting). "The term 'public charge' was broad when it entered federal immigration law in 1882," and subsequent congressional acts only confirm that the term properly includes "supplemental dependence in enforcing the public charge exclusion." *Id.* The plaintiffs' contrary arguments were "inconsistent with history" and with logic, as they could never "articulate why it mattered whether the government chose to give someone $500 for groceries or $500 worth of food." *Id.* at 249. "As a matter of both history

and text, a 'public charge' lacks self-sufficiency in the sense that she lacks the financial resources to provide for herself," and "[t]he benefits designated in DHS's definition are all consistent with this concept of self-sufficiency." *Id.* at 250.

Thus, as then-Judge Barrett recognized, "the plaintiffs' objections reflect[ed] disagreement with" policy, and "[l]itigation is not the vehicle for resolving policy disputes." *Id.* at 254. Judges Wilkinson, Niemeyer, Bybee, Ikuta, and VanDyke agreed that the rule is valid.[7] As shown by the stays, a majority of this Court did too.

This Court did not here grant certiorari on the rule's merits. But recognizing the rule's legality makes the government's "postcertiorari maneuvers designed to insulate [the] decision from review" breathtaking. *Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298, 307 (2012). If the Court does not step in, the rule of law enacted in accord with this country's statutes—adopted by the People—will not govern. Instead, two men, the President and a district court judge, will have imposed an unlawful rule on the nation. And they will have defied this Court to do it. If the executive and one district court "may, at will, annul" valid rules passed in accordance with federal statute

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[7] *See CASA*, 971 F.3d at 263 (finding it "plain" that "the challenged action comports with law"); *City & County of San Francisco v. U.S. Citizenship & Immigration Services*, 944 F.3d 773, 790 (9th Cir. 2019) ("The Final Rule's definition of 'public charge' is consistent with the relevant statutes, and DHS's action was not arbitrary or capricious."); *City & County of San Francisco v. U.S. Citizenship & Immigration Services*, 981 F.3d 742, 763 (9th Cir. 2020) (VanDyke, J., dissenting).

"and destroy the rights acquired under those [rules], the constitution itself becomes a solemn mockery." *United States v. Peters*, 9 U.S. 115, 5 Cranch 115, 136 (1809).

CONCLUSION

This Court should reverse.

Respectfully submitted,

REED D. RUBINSTEIN
America First Legal Foundation
600 14th Street, N.W.
Fifth Floor
Washington, DC 20005
(202) 964-3721

CHRISTOPHER E. MILLS
Counsel of Record
Spero Law LLC
557 East Bay Street
#22251
Charleston, SC 29413
(843) 606-0640
cmills@spero.law

Counsel for *Amicus Curiae*

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