No. 21-2561

In the United States Court of Appeals For the Seventh Circuit

COOK COUNTY, ILLINOIS, ET AL.,
Plaintiffs-Appellees,

v.

STATE OF TEXAS, ET AL.,
Intervenors-Appellants.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

BRIEF FOR PLAINTIFFS-APPELLEES

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Andrew F. Rodheim
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Counsel for Cook County, Illinois

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-2561

Short Caption: Cook County, IL, et al. v. State of Texas, et al.

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N/A

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N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: /s/ David A. Gordon Date: 8/26/2021

Attorney's Printed Name: David A. Gordon

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: Sidley Austin LLP, 1 South Dearborn Street, Chicago, IL 60603

Phone Number: 312-853-7159 Fax Number: 312-853-7036

E-Mail Address: dgordon@sidley.com

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Appellate Court No: 21-2561

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: /s/ Tacy Flint Date: 8/26/2021

Attorney's Printed Name: Tacy Flint

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: Sidley Austin LLP, 1 South Dearborn Street, Chicago, IL 60603

Phone Number: 312-853-7875 Fax Number: 312-853-7036

E-Mail Address: tflint@sidley.com

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: /s/ Marlow Svatek Date: 8/26/2021

Attorney's Printed Name: Marlow Svatek

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: Sidley Austin LLP, 1 South Dearborn Street, Chicago, IL 60603

Phone Number: 312-853-7028 Fax Number: 312-853-7036

E-Mail Address: msvatek@sidley.com

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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Short Caption: Cook County, IL, et al. v. State of Texas, et al.

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Attorney's Signature: /s/ Andrew F. Rodheim Date: 8/26/2021

Attorney's Printed Name: Andrew F. Rodheim

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Phone Number: 312-853-2235 Fax Number: 312-853-7036

E-Mail Address: arodheim@sidley.com

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-2561

Short Caption: Cook County, IL et al., v. State of Texas, et al.

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Stephen Spector Date: 1/17/2022

Attorney's Printed Name: Stephen Spector

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Phone Number: 312-853-7587 Fax Number: 312-853-7036

E-Mail Address: sspector@sidley.com

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-2561

Short Caption: Cook County, IL, et al. v. State of Texas, et al.

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Attorney's Signature: /s/ Robert S. Velevis Date: 8/26/2021

Attorney's Printed Name: Robert S. Velevis

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: Sidley Austin LLP, 2021 McKinney Ave., Suite #2000, Dallas, TX 75201

Phone Number: 214-969-3501 Fax Number:

E-Mail Address: rvelevis@sidley.com

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Caroline Goodwin Chapman Date: 09/07/2021

Attorney's Printed Name: Caroline Goodwin Chapman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: Legal Council for Health Justice, 17 N. State St., Ste. 900, Chicago, IL 60602

Phone Number: 312-605-1981 Fax Number: 312-427-8419

E-Mail Address: cchapman@legalcouncil.org

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-2561

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N/A

Attorney's Signature: /s/ Meghan P. Carter Date: 09/07/2021

Attorney's Printed Name: Meghan P. Carter

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: Legal Council for Health Justice, 17 N. State St., Ste. 900, Chicago, IL 60602

Phone Number: 312-605-1979 Fax Number: 312-427-8419

E-Mail Address: mcarter@legalcouncil.org

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N/A

Attorney's Signature: /s/ Militza M. Pagán Date: 09/08/2021

Attorney's Printed Name: Militza M. Pagán

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: Shriver Center on Poverty Law, 67 E. Madison St, Suite 2000, Chicago, IL 60603

Phone Number: 312-690-5907 Fax Number:

E-Mail Address: militzapagan@povertylaw.org

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-2561

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N/A

Attorney's Signature: Nolan Downey Date: 09/08/21

Attorney's Printed Name: Nolan Patrick Downey

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: Shriver Center on Poverty Law
67 E Madison St #2000, Chicago IL, 60603

Phone Number: 312-854-3375 Fax Number:

E-Mail Address: nolandowney@povertylaw.org

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N/A

Attorney's Signature: /s/Katherine E. Walz Date: 09/13/21

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-2561

Short Caption: Cook County, Illinois, et al. vs. David P. Pekoske, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Cook County, Illinois

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Goldberg Kohn Ltd.

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: /s/ David E. Morrison Date: September 3, 2021

Attorney's Printed Name: David E. Morrison

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: /s/ Steven A. Levy Date: September 3, 2021

Attorney's Printed Name: Steven A. Levy

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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JURISDICTIONAL STATEMENT

The Intervenors-Appellants' jurisdictional statement is complete and correct.

INTRODUCTION

The latest attempt to defend the vacated Public Charge Rule (the "Rule" or "Vacated Rule") comes far too late. Plaintiffs Cook County, Illinois and the Illinois Coalition for Immigration & Refugee Rights ("ICIRR") brought suit challenging the Rule in November 2019, alleging the Rule was an impermissible construction of the Immigration and Nationality Act ("INA"), arbitrary and capricious under the Administrative Procedure Act ("APA"), and in violation of the Equal Protection Clause of the U.S. Constitution. Shortly thereafter, the district court preliminarily enjoined the Rule in Illinois, and this Court affirmed, finding it substantively and procedurally defective under the APA. Then, the district court granted summary judgment to Plaintiffs and vacated the Rule, and the Department of Homeland Security ("DHS") appealed.

Meanwhile, as early as December 2019, then-candidate Joe Biden publicly announced his intention to reverse the Rule within his first 100 days in office. On November 7, 2020, news organizations declared candidate Biden the winner of the election, and he was inaugurated on January 20, 2021. Two weeks later, on February 2, 2021, the administration issued an Executive Order condemning the basic premise of the Rule in clear terms. The very next day, DHS stated publicly that it was revaluating its approach to this case.

And yet, Texas and thirteen other states (the "States") waited until March 11, 2021, to seek intervention in this Court. By then, judgment on the APA claims had long since been entered, and DHS and Plaintiffs already had reached a *de facto*

settlement to end the litigation—ICIRR agreed to dismiss its equal protection claim in exchange for DHS dismissing its appeal of the district court's summary judgment ruling. This Court denied the States' motion, so the States appealed to the Supreme Court, where their petition was rejected as well.

Then, in May 2021—almost six months after President Biden was declared the winner of the election—the States finally appeared in the district court and asked to intervene under Rule 24 and to reopen the case under Rule 60(b). The district court too denied the States' motions, holding that the States failed to satisfy the timeliness requirement of Rule 24 because their inexcusable delay was "plainly unreasonable," and reviving the case notwithstanding that delay would cause prejudice to the original parties. Because the States could not intervene, they could not seek relief under Rule 60(b), either.

Nothing about the district court's well-reasoned opinion was an abuse of discretion. This Court should affirm.

ISSUES PRESENTED

1. Whether the district court abused its discretion in denying the States' motion to intervene as untimely given that they did not seek to intervene until March 11, 2021—four months after now-President Biden had won the 2020 presidential election, and more than five weeks after President Biden issued an Executive Order that directed DHS to review the Public Charge Rule and condemned the Rule's basic premise in clear terms?

2. Whether the district court abused its discretion in denying the States' motion for relief from the final judgment vacating the Rule because the States were not parties to the action, and even if they were, no extraordinary circumstances justified upsetting the final judgment under Rule 60(b)(6)?

STATEMENT OF THE CASE

A. The Public Charge Rule.

The INA allows the federal government to deny admission or adjustment of immigration status to any non-citizen "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). The statutory term "public charge" first entered the U.S. Code through the Immigration Act of 1882, ch. 376 §§ 1-2, Stat. 214, 214 (Aug. 3, 1982), and Congress has retained functionally identical "public charge" language ever since. The statute does not define the term "public charge." For decades, however, the term had been understood to refer to a noncitizen who is "primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense." *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28,689 (May 26, 1999) ("1999 Field Guidance").

In August 2019, DHS introduced the now-vacated Inadmissibility on Public Charge Grounds Rule. 84 Fed. Reg. 41,292-508 (Aug. 14, 2019). The Vacated Rule "redefine[d] the term 'public charge' to mean an alien who receives one or more designated public benefits for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as

two months)." *Id.* at 41,295. The redefinition altered the public charge landscape in two important ways. First, by implementing a duration-based standard, the Vacated Rule barred immigrants who received—or were likely to receive—even minimal benefits so long as they received them for the requisite time period. *Id.* Second, the Vacated Rule expanded the definition of "public benefit" to include non-cash benefits such as SNAP, most forms of Medicaid, and various forms of housing assistance. *Id.* Each benefit a recipient received, no matter how small, was to be counted separately and stacked, so that receipt of multiple benefits in one month was considered receipt of multiple months' worth of benefits. *Id.*

B. Pre-Biden Administration Proceedings.

Plaintiffs Cook County and ICIRR brought suit in September 2019 challenging the now Vacated Rule. Plaintiffs alleged that the Rule's dramatically expanded definition of "public charge" exceeded DHS's statutory authority under the INA and was arbitrary and capricious in violation of the APA. *See* Dkt. 1[1] (Counts I-III). ICIRR separately asserted that the Rule violated the Equal Protection Clause. *Id.* (Count IV).[2] On October 14, 2019, the district court granted

[1] Citations to "Dkt. [docket number]" are to district court docket entries in *Cook County v. Mayorkas*, No. 19-cv-6334.

[2] This case was one of several filed against the Vacated Rule. *See CASA de Md., Inc. v. Biden*, No. 8:19-cv-02715-PWG (D. Md.); *California v. U.S. Dep't of Homeland Sec.,* No. 19-cv-04975-PJH (N.D. Cal.); *City and County of San Francisco et al v. U.S. Citizenship & Immigr. Servs.*, 4:19-cv-04717-PJH (N.D. Cal.); *La Clinica De La Raza v. Trump*, 4:19-cv-04980-PJH (N.D. Cal.); *Washington v. U.S. Dep't of Homeland Sec.*, No. 4:19-cv-5210-RMP (E.D. Wash.); *New York v. U.S. Dep't of Homeland Sec.*, 1:19-cv-7777-GBD (S.D.N.Y.); *Make the Road N.Y. v. Cuccinelli*, 1:19-cv-07993-GBD (S.D.N.Y). The States assert that only three other challenges are still pending (Brief for Intervenors-Appellants ("Br.") at 7 n.2), but they omit

Plaintiffs' motion for a preliminary injunction and enjoined the Rule's application within Illinois. App.24-56[3] (Dkt. 106).

DHS appealed. Dkt. 96. This Court denied DHS's motion to stay the preliminary injunction pending appeal, Order, *Cook County v. Wolf*, No. 19-3169 (7th Cir. Dec. 23, 2019), ECF No. 41, but the Supreme Court issued a stay, *Wolf v. Cook County*, 140 S. Ct. 681 (2020) (mem.). The district court then denied DHS's motion to dismiss Plaintiffs' equal protection claim and granted ICIRR's request for extra-record discovery. Supp1-30 (Dkt. 150). ICIRR's equal protection claim alleged that racial animus toward nonwhite immigrants motivated the Rule's promulgation. *See* Dkt. 1 ¶¶ 170-188.

Shortly thereafter, this Court affirmed the district court's preliminary injunction, holding that the Rule was substantively and procedurally defective under the APA. *Cook County v. Wolf*, 962 F.3d 208, 222-33 (7th Cir. 2020), *cert. dismissed sub nom. Mayorkas v. Cook County*, 141 S. Ct. 1292 (2021). First, this Court explained that, although "the term 'public charge' is ambiguous," the Vacated Rule's definition fell outside the bounds of a reasonable understanding of the statutory text because "it does violence to the English language and the statutory context to say that it covers a person who receives only *de minimis* benefits for a *de minimis* period of time." *Id. at* 229. Second, this Court held that the Rule was

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that the litigation in the Southern District of New York (Nos. 19-cv-7777 and 19-cv-7993) is still ongoing.

[3] Citations to "App.[##]" are to States' Appendix (ECF No. 30) filed contemporaneously with their opening brief.

"likely to fail the 'arbitrary and capricious' standard" due to "numerous unexplained serious flaws" in DHS's rulemaking process. *Id*. at 233. While DHS petitioned for a writ of certiorari, the Supreme Court's stay of the district court's preliminary injunction remained in effect.

Meanwhile, on August 31, 2020, Plaintiffs moved for summary judgment on their APA claims. Dkt. 201. In its opposition brief, DHS agreed that this Court's preliminary injunction opinion effectively required the district court to grant Plaintiffs' motion. *See* Dkt. 209 at 1 ("Defendants do not dispute that the Seventh Circuit's legal conclusions concerning the Rule may justify summary judgment for Plaintiffs on their APA claims here."). On November 2, 2020, the district court granted Plaintiffs' motion and entered a partial final judgment on those claims under Rule 54(b), vacating the Rule. App.6-19 (Dkt. 222).

The court's November 2 order also addressed ICIRR's equal protection claim. DHS had requested that proceedings on the equal protection claim be stayed while it appealed judgment on the APA claims. App.13. The district court denied a stay, concluding that there was "minimal factual (or legal) overlap" between the APA and equal protection claims, and further that the two claims sought different relief. App.14-15. Specifically, Plaintiffs' APA claims sought only vacatur of the Rule, but ICIRR's equal protection claim sought "a declaration that the Rule violates the Fifth Amendment and, more importantly, a permanent injunction enjoining DHS and its officials from implementing and enforcing the Rule." App.15. The court accordingly

allowed ICIRR to continue to litigate its equal protection claim, including the continuation of discovery. *Id.*

DHS appealed again. Dkt. 224. This Court stayed the judgment pending appeal, and stayed briefing on the appeal pending the Supreme Court's resolution of DHS's still-pending petition for a writ of certiorari seeking review of this Court's prior decision affirming the preliminary injunction. Order, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Nov. 19, 2020), ECF No. 21. In the meantime, discovery continued in the district court on ICIRR's equal protection claim, *see* Dkts. 232, 236, 238, which resulted in several disputes related to the deliberative process privilege. In December 2020, the district court held that it would need to conduct an *in camera* review to resolve the privilege dispute. *See id.*

C. The New Administration Signals Intention to Reverse the Rule.

These events occurred against the backdrop of the 2020 presidential election. For more than a year before his inauguration, then-candidate Biden campaigned on the assurance that his administration would "[r]everse [the] public charge rule" within its first 100 days. *See* Biden for President, *The Biden Plan for Securing Our Values as a Nation of Immigrants*, https://joebiden.com/immigration/ ("the Biden Plan"). Since at least December 2019,[4] the Biden Plan has stated that the Vacated Rule "runs counter to our values as Americans and the history of our nation," and that the Vacated Rule's penalization of Medicaid and SNAP "and other

[4] The internet archive confirms that this statement has been publicly posted since at least December 2019. *See* https://web.archive.org/web/20191212040308/https://joebiden.com/immigration/.

discriminatory criteria undermines America's character as land of opportunity that is open and welcoming to all, not just the wealthy." *Id.*

On November 7, 2020, major news organizations declared candidate Biden the winner of the election. SA17. President Biden was subsequently inaugurated on January 20, 2021.

The change in administration had obvious import for this litigation. On January 22, 2021, the district court *sua sponte* entered an order directing DHS (now headed by Secretary Alejandro Mayorkas instead of former Secretary Chad Wolf) to "file a status report addressing: (1) whether they plan to pursue their appeal in No. 20-3150 (7th Cir.); [and] (2) whether they plan to pursue their petition for certiorari in No. 20-450 (U.S.)." Dkt. 240. The report was due on February 4, 2021.

On February 2, 2021—less than two weeks after the inauguration—the new administration issued an Executive Order implementing the public statements of the Biden campaign regarding the Vacated Rule. *See* Exec. Order. No. 14,012, *Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans*, 86 Fed. Reg. 8,277 (Feb. 2, 2021) (the "Executive Order"). Section 1 of the Executive Order, titled "Policy," stated "it is essential to ensure … that immigration processes and other benefits are delivered effectively and efficiently; and that the Federal Government eliminates sources of fear and other barriers that prevent immigrants from accessing government services available to them." *Id.* at 8,277. Section 4 of the Executive Order, titled "Immediate Review of Agency Actions on Public Charge Inadmissibility," directed

DHS to "consider and evaluate the current effects of [the Rule] and the implications of [its] continued implementation in light of the policy set forth in section 1 of this order." *Id.* at 8,278. It also called upon federal agencies to evaluate their "public charge policies," identify "appropriate agency actions … to address concerns about the current public charge policies[ ]," and submit a report to the President on these matters within 60 days. *Id.*

The next day, DHS notified the district court that, in light of the Executive Order, it "intend[ed] to confer with [ICIRR] over next steps in this litigation." Dkt. 241 at 2. On February 19, in a joint status report, ICIRR and DHS agreed to a two-week stay to "provide DHS and DOJ with additional time to assess how they wish to proceed." Dkt. 245 at 3-4. DHS explained that a time-limited stay would "spare the parties and the Court from the burdens associated with briefing and resolving the merits of the equal protection claim … all of which may ultimately prove unnecessary." *Id.* at 3. ICIRR agreed to the two-week stay, but argued that it should be allowed to continue probing through discovery the motivations behind the Rule. *Id.* In a March 5 joint status report, ICIRR objected to any further stay because DHS's appeal and petition for certiorari remained pending—which meant that this Court's stay of the district court's vacatur (and accordingly the Rule) remained in effect. Dkt. 247 at 2. As ICIRR explained, "Plaintiff and the communities it serves are facing well-documented harms each day the Rule is in effect," and ICIRR accordingly desired to pursue any possible path toward an effective vacatur. *Id.*

D. DHS Voluntarily Dismisses Its Appeal of Partial Final Judgment and Petition for Writ of Certiorari, and ICIRR Dismisses Its Equal Protection Claim.

A few days later, on March 9, 2021, DHS filed an unopposed motion to voluntarily dismiss its appeal of the district court's order granting partial final judgment to Plaintiffs on their APA claims. Unopposed Motion to Voluntarily Dismiss Appeal, *Cook County v. Mayorkas,* No. 20-3150 (7th Cir. Mar. 9, 2021), ECF No. 23. This Court granted the motion and, as provided in 7th Cir. Rule 41, immediately issued the mandate. Order, *id.*, ECF No. 24-1; Notice of Issuance of Mandate, *id.*, ECF No. 24-2. The same day, the parties filed a joint stipulation dismissing DHS's petition for a writ of certiorari before the Supreme Court, and the petition was dismissed. Joint Stipulation to Dismiss, *Mayorkas v. Cook County*, 141 S. Ct. 1292 (2021) (No. 20-450). In a public statement, DHS explained that during its review of the Rule pursuant to the Executive Order, it concluded that continuing to defend the Rule was "neither in the public interest nor an efficient use of government resources." Press Release, Dep't of Homeland Sec., *DHS Statement on Litigation Related to the Public Charge Ground of Inadmissibility* (Mar. 9, 2021) (Dkt. 252-1). DHS also announced that, in compliance with the district court's judgment, it would no longer enforce the Rule. Press Release, Dep't of Homeland Sec., *DHS Secretary Statement on the 2019 Public Charge Rule* (Mar. 9, 2021) (Dkt. 252-2).

DHS notified the district court of those developments the next day. Dkt. 252. On March 11, the parties filed a joint stipulation dismissing ICIRR's equal protection claim with prejudice. App.1 (Dkt. 253). ICIRR's decision to voluntarily

dismiss the claim was made in reliance on the final judgment of the APA claims and the dismissal of DHS' appeal. *Id.* (voluntarily dismissing still-pending equal protection claim "[i]n light of Defendants' decision to voluntarily dismiss its appeal of this Court's final judgment … and because the Rule challenged in this lawsuit is therefore no longer in effect").

On March 15, DHS promulgated a final rule, removing the Rule's text from the Code of Federal Regulations. *See Inadmissibility on Public Charge Grounds; Implementation of Vacatur*, 86 Fed. Reg. 14,221, 14,227-29 (Mar. 15, 2021) (the "Vacatur Rule"). The Vacatur Rule's preamble stated that "[b]ecause [the Vacatur Rule] simply implements the district court's vacatur of the [Final Rule] … DHS is not required to provide notice and comment or delay the effective date of [the Vacatur Rule]." *Id.* at 14,221. DHS cited its authority under the APA to forgo notice and comment "when the agency for good cause finds … that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B).

E. The States Seek Intervention and Relief From Judgment and the District Court Denies the States' Motion.

Though conceding to the district court that they "ha[d] been aware of their interests in the Rule for some time" (Dkt. 257 at 5), Texas and the other states did not move to intervene in this case until March 11. At that time, this Court had issued its mandate, and the case was pending in the district court. Regardless, the States did not file any motion in the district court. Instead, notwithstanding that this Court no longer had jurisdiction, the States moved this Court to recall its

March 9 mandate, reconsider its order dismissing the appeal, and grant the States leave to intervene to defend the Vacated Rule. Opposed Motion to Reconsider, or in the Alternative to Rehear, the Motion to Dismiss, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Nov. 3, 2020), ECF No. 25-2; Opposed Motion to Intervene as Defendant-Appellants, *id.*, ECF No. 25-3. This Court denied the motions. Order, *id.*, (Mar. 25, 2021), ECF No. 26.

The States still did not move to intervene in the district court, where the case was pending. Instead, on March 19, the States applied to the Supreme Court for a stay of the district court's judgment pending their filing of a petition for a writ of certiorari or, in the alternative, for summary reversal of this Court's denial of their motions. Application for Leave to Intervene and for a Stay of the Judgment Issued by the United States District Court for the Northern District of Illinois, *Texas v. Cook County*, No. 20A150 (Mar. 19, 2021). The Supreme Court denied the States' application, stating that the States could "rais[e] these and other arguments before the District Court, whether in a motion for intervention or otherwise." *Texas v. Cook County*, 141 S. Ct. 2562, 2562 (Apr. 26, 2021) (mem.).

On May 12—two months after their unsuccessful motion to intervene in this Court, more than three months after President Biden had issued the Executive Order, and nearly six months after the partial final judgment was entered and President Biden was declared the winner of the 2020 election—the States for the first time appeared in the district court, moving to intervene under Rule 24 and for

relief from judgment under Rule 60(b)(6). Dkts. 256, 259. The district court denied the States' motions on August 17, 2021. *See* SA1-39.[5]

The district court held that the States' motion to intervene was untimely because the States knew or should have known of the need to intervene months earlier. SA12-23. By November 7, 2020, the States knew or should have known that candidate Biden—who had publicly and consistently stated his intent to reverse the Rule in the first 100 days of his administration—had been declared the winner of the presidential election. SA17-18. Consistent with his statements during the campaign, President Biden issued the Executive Order on February 2, 2021, which "confirmed" for the States "their need to quickly intervene" since it "condemned" the Rule "in clear terms." SA19. "Any reasonable observer," the court explained, "would have known at that point that intervention had become extremely urgent." *Id.* Nonetheless, the States took no action for an additional month, and the district court held that their "inexplicab[le] delay" in a case where judgment already had been entered precluded intervention. SA32-33. The district court also determined that (1) the States' motion would substantially prejudice the original parties due to "reliance costs … that would not have accrued had the States timely sought intervention," SA24, (2) the States were not prejudiced by denial of their motion

[5] The district court's Memorandum Opinion and Order (Dkt. 285) denying the States' Rule 24 motion to intervene and Rule 60(b)(6) motion for relief from judgment can be found at pages SA1-39 of the State's short appendix bound with their opening brief.

since the APA provided them with several routes to vindicate their rights, SA28-30, and (3) no unusual circumstances justified relief, SA32-33.

The district court denied the States' motion for relief under Rule 60(b)(6) because the States were not parties to the case. SA33-34. The court further held, assuming *arguendo* that the States could intervene, that their Rule 60(b)(6) motion still must be denied for many of the same reasons that it denied intervention: it was untimely and no extraordinary circumstances justified upsetting the final judgment. SA34-37. Finally, the court explained that "granting Rule 60(b)(6) relief would improperly allow the States to use Rule 60(b) as a substitute for a timely appeal." SA37.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in denying the States' motion to intervene as untimely. After candidate Biden had announced his intention to take action against the Public Charge Rule within his first 100 days in office, President Biden did exactly that—issuing the Executive Order directing DHS to review the Rule on February 2. SA13-20. Yet the States waited until March 11, 2021 before moving in this Court to intervene, and until May 12 before moving in the district court. The district court was well within its discretion to find that lengthy delay "plainly unreasonable under the circumstances of this case." SA20. And although the States try to excuse their delay by complaining about DHS's decision to dismiss the appeal, federal agencies regularly take the same action that DHS took in this case. *See* SA23. Plus, as the district court explained, the States' arguments cannot

be squared with the position Texas took in other lawsuits following the election, in which Texas moved to intervene much sooner than it did here and for reasons the States now disclaim. SA14-16. None of the court's conclusions regarding timeliness was an abuse of discretion.

Besides the unreasonable delay, the States' motion was correctly denied for other reasons, too. As the district court held, allowing the States to intervene would prejudice both Plaintiffs and DHS because they incurred reliance costs that would not have accrued had the States timely intervened. SA24-27. Allowing the States to intervene now would unravel the parties' *de facto* compromise in resolving this case. As the court recognized, ICIRR agreed to forgo significant discovery, which DHS had opposed, in exchange for DHS's agreement to dismiss its appeal and allow the vacatur to take effect. SA27. On the other hand, the States suffered no prejudice from the denial of their motion because, as the district court explained, the APA provides multiple avenues for the States to pursue their arguments in support of the Rule. SA28-30. And although the States claim that the Vacated Rule would have helped reduce their public expenditures, the States have never provided any evidence to substantiate that assertion.

The district court also acted well within its discretion in denying the States' motion to disturb the final judgment under Rule 60(b)(6). As an initial matter, the plain language of Rule 60(b) and this Court's long-standing precedent require a "party" to bring such a motion, and the States are not a "party" here. SA33-34. The district court also correctly determined that the States' motion faced other

"insurmountable obstacles" and denied it for many of the same reasons that it denied intervention, including the States' delay in bringing the motion and the prejudice Plaintiffs and DHS would face. SA34-36. And importantly, there is nothing "exceptional" about this case that warrants upending the district court's final judgment, which was entered more than a year ago. It is commonplace for agencies to shift their policies and positions—including in litigation— following a change in administration, and federal agencies regularly choose, as DHS did here, to dismiss their appeals of district court judgments that invalidate regulations. SA36-37.

Finally, although the States boldly argue that they should be allowed to defend the Vacated Rule on appeal because they "will likely prevail," Br. at 44, this Court already held that the Rule is substantively and procedurally defective under the APA. *Cook County*, 962 F.3d at 222-33. The States do nothing but rehash the same merits arguments this Court previously rejected.[6]

STANDARD OF REVIEW

Because the question of timeliness under Rule 24 is "committed to the sound discretion of the district judge," *South v. Rowe*, 759 F.2d 610, 612 (7th Cir. 1985),

[6] As discussed *infra* at 47-48, this Court is in good company. The Second and Ninth Circuits also held that the Vacated Rule violated the APA, and the Fourth Circuit vacated its decision holding otherwise. *See City & County of San Francisco v. U.S. Citizenship & Immigration Servs.*, 981 F.3d 742 (9th Cir. 2020), *cert. dismissed*, No. 20-962, 2021 WL 1081068 (U.S. Mar. 9, 2021); *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42 (2d Cir. 2020), *cert. dismissed*, No. 20-449, 2021 WL 1081216 (U.S. Mar. 9, 2021); *CASA de Md., Inc. v. Trump*, 971 F.3d 220, 250 (4th Cir.), *vacated for reh'g en banc*, 981 F.3d 311 (4th Cir. 2020) (dismissed Mar. 11, 2021); *see also* 4th Cir. R. 35(c).

where, as here, the district court denies a motion to intervene as untimely, this Court reviews only for an abuse of discretion. *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 945 (7th Cir. 2000). Likewise, because the district court's denial of the States' motion for permissive intervention was "wholly discretionary," it also is reviewed only for an abuse of discretion. *Id.* at 949.

Similarly, this Court reviews the district court's decision regarding Rule 60(b) relief for "abuse of discretion only": "[o]nce a district court has denied relief, 'Rule 60(b) proceedings are subject to only limited and deferential appellate review.'" *Jones v. Ramos*, 12 F.4th 745, 749 (7th Cir. 2021) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005)); *see also Bakery Mach. & Fabrication, Inc. v. Traditional Baking, Inc.*, 570 F.3d 845, 848 (7th Cir. 2009) ("The district court has great latitude in making a Rule 60(b) decision because that decision is discretion piled on discretion." (citation and internal quotation marks omitted)). "Abuse of discretion in denying a 60(b) motion is established only when no reasonable person could agree with the district court …." *Bakery Mach. & Fabrication*, 570 F.3d at 848 (citation omitted). And as it relates to Rule 60(b)(6)—the only provision of Rule 60(b) that the States invoke here, *see* Br. at 34—"an appellate court will rarely disturb a district court's decision." *Neuberg v. Michael Reese Hosp. Found.*, 123 F.3d 951, 955 (7th Cir. 1997).

ARGUMENT

I. The District Court Did Not Abuse Its Discretion In Denying the States' Motion to Intervene.

"[I]ntervention post-judgment—which necessarily disturbs the final adjudication of the parties' rights—should generally be disfavored." *Bond v. Utreras,* 585 F.3d 1061, 1071 (7th Cir. 2009). The district court held that the States could not disturb the final judgment and intervene as of right under Rule 24(a)(2) or by permission under Rule 24(b)(1)(B), because their motion was untimely. The court's decision was well reasoned and not an abuse of discretion.

A. The States Cannot Intervene As Of Right Under Rule 24(a)(2).

To intervene as of right under Rule 24(a)(2), a prospective intervenor bears the burden to establish four elements: (1) a timely application; (2) an interest relating to the subject matter of the action; (3) the potential impairment of that interest by the disposition of the action; and (4) a lack of adequate representation by the existing parties to the action. *Planned Parenthood of Wis., Inc. v. Kaul,* 942 F.3d 793, 797 (7th Cir. 2019).

1. The district court did not abuse its discretion in finding the States' motion untimely.

To determine whether a motion to intervene is timely, courts consider four factors: "(1) the length of time the intervenors knew or should have known of their interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenors if the motion is denied; and (4) any other unusual circumstances." *Heartwood, Inc. v. U.S. Forest Serv., Inc.,* 316 F.3d 694, 701 (7th Cir. 2003) (cleaned up). If a motion for intervention is untimely, "the explicit

language of the rule dictates that 'intervention must be denied.'" *Amador County v. U.S. DOI*, 772 F.3d 901, 903 (D.C. Cir. 2014) (quoting *NAACP v. New York*, 413 U.S. 345, 365 (1973)).

a. *The States' delay made intervention untimely.*

The district court held that the States' delay in moving to intervene was "plainly unreasonable" and "weigh[ed] heavily" against intervention. SA20, SA24. The court was correct, and certainly did not abuse its discretion.

A proposed intervenor must "move promptly to intervene as soon as it *knows or has reason to know* that its interests *might be* adversely affected by the outcome of the litigation." *Heartwood*, 316 F.3d at 701 (emphasis added); *see also Illinois v. City of Chicago*, 912 F.3d 979, 985 (7th Cir. 2019) ("[W]e measure from when the applicant has reason to know its interests *might* be adversely affected, not from when it knows for certain that they will be.") (emphasis in original); *Nissei Sangyo Am., Ltd. v. United States*, 31 F.3d 435, 438 (7th Cir. 1994) ("Intervention is unavailable to the litigant who 'dragged its heels' after learning of the lawsuit." (citation omitted)). This is an objective "reasonableness standard," requiring the court to determine whether the movants were "reasonably diligent in learning of a suit." *Nissei Sangyo Am.*, 31 F.3d at 438. Potential intervenors therefore "cannot claim subjective ignorance of a case's effect on their interests if ordinary diligence would have alerted them of the need to intervene." SA12 (citing *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 798 (7th Cir. 2013)).

The district court acted squarely within the bounds of its discretion in denying the States' motion as untimely. As the court explained, events had made

clear long before March 2021 that the federal Defendants and the States were no longer aligned—such that the States' alleged interest in preserving the Rule might be impacted by the litigation. Then-candidate Biden publicly committed as early as December 2019—more than fifteen months earlier—that his administration "[i]n the first 100 days" would "[r]everse [the] public charge rule, which runs counter to our values as Americans and the history of our nation." SA13 (quoting a December 12, 2019 archived version of President Biden's campaign website). On November 7, 2020, major news organizations "declared candidate Biden the winner" of the 2020 election. SA17. Although the election results were challenged in litigation, the States "knew or should have known" that then-candidate Biden would become President Biden "at the very latest" by December 11, 2020—"when the Supreme Court rejected [Texas's lawsuit challenging the election] in a one paragraph order." SA18 (citing *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (mem.)). Counsel for Texas conceded as much to the district court. Supp98-99 (July 22, 2021 Hr'g Tr.) at 49:23-50:1 (Dkt. 282) ("Your Honor, there was significant amounts of litigation, but yes, I will generally agree that by December, there was certainty … that candidate Biden would be elected.").

The clock's ticking only grew louder after President Biden's inauguration. On February 2, 2021, the new administration issued an Executive Order—consistent with then-candidate Biden's prior public statements—that "directed DHS to review the Final Rule and condemned [the Rule's] basic premises in clear terms." SA19 (citing 82 Fed. Reg. at 8,227); *see also supra* at 8-9. DHS immediately notified the

district court that the Order might influence the "next steps in this litigation." SA19 (citing Dkt. 241 at 2). At that point, as the district court stated, "[a]ny reasonable observer would have known … that intervention had become extremely urgent for anyone who wished to ensure the Rule's continued defense here and in the Seventh Circuit." *Id.* Yet the States continued to sit on the sidelines, even though counsel for Texas admitted to the district court that the States "[kept] tabs on the litigation," were "aware of their interest in the Rule for some time," knew that the Biden administration had a negative view of the Rule, and knew that the administration "was planning on looking at [the Rule] within the first 100 days." Supp41-43 (May 18, 2021 Hr'g Tr.) at 10:10-12:14 (Dkt. 267-1); Dkt. 257 at 5. Not until March 11, 2021 did the States finally move to intervene. "That was over four months past November 7, exactly three months past December 11, and over five weeks past February 2, in a case where judgment had already been entered." SA19. And even then, the States did not move to intervene in the district court, notwithstanding that jurisdiction had transferred to that court upon issuance of this Court's mandate on March 9. Instead, the States made a tactical choice to seek intervention in this Court—which necessitated that they seek additional, extraordinary relief: a recall of the Court's mandate and rehearing of the Court's dismissal of DHS's appeal.[7] Motion to Recall the Mandate to Permit Intervention as Appellant, *Cook*

[7] An appellate court's power to recall its mandate "can be exercised only in extraordinary circumstances," and is "one of last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 550 (1998). Rehearing is similarly reserved for "extraordinary circumstances." *Easley v. Reuss*, 532 F.3d 592, 594 (7th Cir. 2008).

County v. Wolf, No. 20-3150 (7th Cir. Mar. 11, 2021), ECF No. 25-1; Opposed Motion to Reconsider, or in the Alternative to Rehear, the Motion to Dismiss, *id.*, ECF No. 25-2. When this Court promptly denied the States' motions, Order, *id.*, (Mar. 15, 2021), ECF No. 26, the States extended the proceedings even further by pursuing relief in the Supreme Court—which likewise denied relief, and directed that the proper forum in which to seek intervention was the district court. *Texas v. Cook County*, 141 S. Ct. 2562 (Apr. 26, 2021) (mem.).

Only after this unnecessary, two-month appellate detour—when their attempt to bypass the district court had been firmly rejected—did the States at last seek intervention in the district court, on May 12. While "[t]here is no simple formula for determining how long a delay is too long," the district court had ample discretion to find the States' delay "plainly unreasonable under the circumstances." SA20.

The States' arguments to the contrary are unavailing. First, the States assert that joint status reports filed in the district court made it "reasonable" for them to believe that DHS still intended to defend the Rule. Br. at 20-22. But the status reports confirmed that it was incumbent on the States to intervene without delay.

On January 22, 2021, two days after President Biden's inauguration, the district court directed DHS to file a status report addressing "whether they plan to pursue their appeal." Dkt. 240. In its report, DHS very clearly did not answer that question "yes." Instead, DHS explained that it was "currently reviewing the Public Charge Rule, and the Department of Justice ('DOJ') is likewise assessing how to

proceed with its appeals in relevant litigations in light of the … Executive Order." Dkt. 245 at 3. DHS then all but told the States that their interests were at stake: DHS requested a time-limited stay, which it said "may spare the parties and the Court from the burdens associated with briefing and resolving the merits of the equal protection claim … all of which may *ultimately prove unnecessary*." *Id.* (emphasis added). DHS reiterated that a time-limited stay "would provide DHS and DOJ with additional time to assess how they wish to proceed, and further developments during that time period may either *moot Plaintiffs' equal protection claim or ultimately lead Plaintiffs to agree that a more lengthy stay (or a voluntary dismissal) is appropriate*." *Id.* at 4 (emphasis added). Of course, the reason briefing would become "unnecessary" or Plaintiffs might agree to a voluntary dismissal is if DHS stopped defending the Rule, which is exactly what happened. This clear statement put the States on notice that their interests "might be adversely affected." *See Heartwood*, 316 F.3d at 701.

Nor could the States have been misled by ICIRR's statements in the status reports to the effect that DHS's appeal remained pending. It was imperative for ICIRR to push forward with discovery on its equal protection claim in order to pursue an alternative path to vacatur. So long as the appeal remained pending, and the stay of the district court's vacatur remained in effect, the Rule remained in effect—and the irreparable harms that drove ICIRR to obtain a preliminary injunction continued to accrue.

The States also argue that they reasonably believed that DHS would hold the Rule in abeyance while it pursued notice-and-comment rulemaking, and that they therefore did not realize until March 9 that intervention was necessary. Br. at 22-24.[8] There are several problems with this argument. First, it rests on an incorrect premise: As the district court explained, "federal agencies regularly choose to for[]go appeal, or to dismiss their appeals, of district court judgments that invalidate regulations." SA23 (citing cases). The States now assert that the vacaturs in the cases that the district court cited were "based on procedural—not substantive—issues," Br. at 24-25, but that is a distinction without a difference. Regardless of the grounds on which vacatur was based, the federal agency did not hold those cases in abeyance while pursuing new rulemaking.

Additionally, the States' argument "cannot be reconciled, on any level, with the position [Texas] took in *Pennsylvania v. DeVos*." SA15; *see Pennsylvania v. DeVos*, No. 20-cv-1468 (D.D.C. filed June 4, 2020). Indeed, Texas in that case moved to intervene to defend a Department of Education regulation the day before Inauguration Day (almost two months before moving to intervene in this case). *See DeVos*, No. 20-cv-1468 (Jan. 19, 2021), ECF No. 130 (available at Supp112-132).

[8] As support for this assertion, the States rely almost exclusively on a dissent in *City & County of San Francisco v. United States Citizenship & Immigration Services*, 992 F.3d 742, 743-55 (9th Cir. 2021) (VanDyke, J., dissenting). The dissent asserted that "every administration before" "the current administration" would have followed the "traditional route" and "ask[ed] the court[] to hold the public charge cases in abeyance … and then promulgate[d] a new rule through notice and comment." *Id.* at 743, 749, 751, 754. This single dissenting opinion is not persuasive; as the district court aptly noted, "[t]he dissent did not favor those assertions with citation to any legal authority." SA22.

Texas cited in support of intervention the President-elect's website (the same website discussed above) which condemned the DOE regulation. SA14 (citing Supp117, Supp119, Supp128 & n.8). Texas's argument was that "it could 'no longer rely on [DOE] to adequately represent its interests in defending [the DOE regulation],' and it predicted the DOE's position would shift 'when the President-elect is inaugurated into office.'" *Id.* (quoting Supp117–118). "Texas pointed to candidate Biden's statements as 'evidence of an unavoidable, fundamental divide between Texas and [DOE] under the President-elect's incoming administration,'" *id.* (quoting Supp128), and emphasized the new administration's "open and adamant hostility to the [regulation]," *id.* (citing Supp121).

The States attempt to distinguish the situation Texas faced in *DeVos* from the situation here, arguing that *DeVos* was at an earlier stage in the proceedings when Texas moved to intervene. Br. at 26-27. But as the district court correctly pointed out, that distinction "cuts against Texas, not in its favor, as the judgment vacating the Final Rule made prompt action to intervene even more crucial here" than it was in *DeVos*. SA16.

Finally, the States liken their situation to *Flying J, Inc. v. Van Hollen*, 578 F.3d 569 (7th Cir. 2009). Br. at 28. That case, however, is "easily distinguished" because the trade association there had no prior notice that the Attorney General of Wisconsin planned to forgo an appeal. SA21. As this Court observed, "there was *nothing* to indicate that the attorney general was planning to throw the case—until he did so by failing to appeal." *Flying J,* 578 F.3d at 572 (emphasis added). In

contrast, by virtue not only of public statements but also the various status reports filed in this very case, there was "ample basis for months before March 9, when DHS dismissed its appeal, to expect that DHS might and likely would cease its defense of the Final Rule." SA21.

b. *The States' delay would prejudice the original parties.*

Another timeliness factor "is whether the delay in moving for intervention will prejudice the existing parties to the case." *Nissei Sangyo Am*, 31 F.3d at 439. It is well recognized that a "tardy intervenor" creates prejudice to the original parties when its intervention would "derail[] a lawsuit within sight of the terminal," including by upsetting the parties' settlement of their dispute. *Sokaogon Chippewa*, 214 F.3d at 949-50.

Here, the district court correctly found that intervention would substantially prejudice both Plaintiffs and DHS due to "reliance costs … that would not have accrued had the States timely sought intervention." SA24-28. One such cost was "the *de facto* settlement that [ICIRR] and DHS reached during the period of the States' delay," when ICIRR voluntarily dismissed its equal protection claim with prejudice. SA27. As the court explained, the parties were engaged in discovery disputes concerning ICIRR's equal protection claim from July 2020 through the stipulated dismissal in March 2021. *Id.* "After DHS dismissed its appeal, ICIRR agreed to dismiss its equal protection claim, thereby eliminating the risks to DHS that it would lose the privilege battle and that former high-ranking officials would be deposed." *Id.* Allowing the States to intervene and reopen the case would

"subject[] DHS once again to the risk of losing the privilege battles and having to present former administration officials for deposition," thus depriving DHS of the benefit of the parties' *de facto* settlement. *Id.*; *see also Sokaogon Chippewa*, 214 F.3d at 950 ("To allow a tardy intervenor to block the settlement agreement after all that effort would result in the parties' combined efforts being wasted completely."); *Ragsdale v. Turnock*, 941 F.2d 501, 504 (7th Cir. 1991) ("Once parties have invested time and effort into settling a case it would be prejudicial to allow intervention."). Intervention at this stage also would impose substantial prejudice on ICIRR's ability to litigate its equal protection claim, as an entire year has passed that ICIRR could have spent uncovering documents from the prior administration and third parties and taking depositions while memories were still fresh. Those documents and testimony would be crucial to ICIRR's efforts in showing that the prior administration acted with discriminatory animus in promulgating the Vacated Rule.

Unable to discount the prejudice that intervention would cause to the parties, the States essentially ask the Court to ignore it, arguing that the prejudice stems not from their late intervention but from DHS's decision not to rescind the Vacated Rule through rulemaking. Br. at 29-31. The States specifically contend that the federal government "could avoid th[e] discovery [with ICIRR] by following the traditional route of asking the district court to hold the litigation on the [equal protection] claim in abeyance while it addressed the Public Charge Rule through notice-and-comment rulemaking." *Id.* at 30. This argument misses the point. The

relevant inquiry is not what the potential intervenor wishes the original parties did in the litigation, but how the potential intervenor's delay in seeking intervention would prejudice the original parties. *See Sokaogon Chippewa*, 214 F.3d at 950. And in any event, the States are wrong—as ICIRR stated at the time, it agreed to dismiss its equal protection claim because DHS dismissed its appeal of the district court's judgment on the APA claim; ICIRR would not have agreed to forgo discovery if DHS had merely asked the court to hold the case in abeyance.

c. *Denial of intervention did not prejudice the States.*

The States also cannot show any abuse of discretion in the district court's finding that the "States will suffer no prejudice for Rule 24 purposes if their motion to intervene is denied." SA32. The States argue that they "will suffer great prejudice" because they "provide billions of dollars in Medicaid services and other public benefits to indigent individuals, including individuals who would be inadmissible under the Public Charge Rule," and "the Public Charge Rule would have helped to reduce such expenditures." Br. at 31. But the States have never provided any evidence to substantiate their claim that the Vacated Rule—much less their ability to defend the Vacated Rule by intervening in this litigation—would mean fewer state expenditures. And although the States cite the size of Texas's and Montana's international borders and reports showing Texas's total Medicaid budget

for *all* residents—immigrants or not (Br. at 34-35)—the Vacated Rule changed *just three* admissions nationally during the year it was in effect. *See* SA8.

Additionally, and as the district court explained, the States "have a readily available path to demand that DHS re-promulgate the Rule: a petition for rulemaking." SA28. "The States may submit a petition at any time, and if DHS denies it, the denial would be reviewable in court." *Id.*; *see Auer v. Robbins*, 519 U.S. 452, 459 (1997) ("The proper procedure ... is set forth explicitly in the APA: a petition to the agency for rulemaking, § 553(e), denial of which must be justified by a statement of reasons, § 555(e), and can be appealed to the courts, §§ 702, 706."). Accordingly, as the district court reasoned, "the marginal prejudice to the States of denying intervention here is not the loss of the Final Rule itself, but rather the shift in the procedural posture of their effort to obtain the Rule's reinstatement." SA28.

The States contend that they should be able to intervene rather than seek a petition for rulemaking because a denial of that petition would be reviewed under the arbitrary-and-capricious standard, while an already-promulgated regulation that is defended on appeal receives *Chevron* deference. Br. at 32. But the States have no "cognizable interest in application of the *Chevron* doctrine," nor any right to "the best possible forum in which to present their claims." SA29 (citing *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 821 (7th Cir. 2015)); *see also Hadson Gas Sys., Inc. v. FERC*, 75 F.3d 680, 684 (D.C. Cir. 1996). Crediting the

States' argument here would serve only to incentivize gamesmanship in the future, causing actual prejudice to the parties who appear on the merits.[9]

As the States acknowledge, they have "routes"—plural—"available" for the relief they seek. Br. at 33. That they may prefer intervention to those routes does not mean that they are prejudiced. And whatever marginal impact on their litigation position may result does not outweigh the significant prejudice that excusing the States' delay would inflict upon the original parties.

d. *No "unusual circumstances" excused the States' delay.*

Finally, the district court did not abuse its discretion when it found that no unusual circumstances excused the States' delay in moving to intervene. SA32-33. As the court explained, "the States themselves knew from *CSPI v. Perdue*[10] that agencies can decide not to pursue appeals of district court decisions that vacate regulations, and they knew from *Pennsylvania v. DeVos* that they could seek

[9] The States also argue that any new rulemaking regarding the INA's public charge provision "will take place in a regulatory framework that has been fundamentally changed," and the "federal government can say the outcome of this litigation ties its hands—even though the federal government helped tie the knot." Br. at 32-33. Again, the States rely solely on a single dissenting opinion, *City & County of San Francisco*, 992 F.3d at 743 (VanDyke, J., dissenting), and again, as the district court observed, "the dissent did not favor its assertions with any citation to legal authority," SA31.

[10] In *CSPI v. Perdue*, No. 19-cv-1004 (D. Md.), ECF Nos. 40 (Sept. 6, 2019), 58 (Apr. 13, 2020), five of the States, including Texas, were *amici curiae* in a case where an agency chose not to bring an appeal. *See* SA23.

intervention before a successful presidential candidate who expressed deep hostility to a regulation assumes office." *Id.*

2. The States fail to identify a sufficient interest or any impairment of that interest under Rule 24(a)(2).

The district court declined to address Rule 24(a)(2)'s other requirements because it correctly found that the States' motion was untimely. This Court can do the same. *See Planned Parenthood of Wis.*, 942 F.3d at 797 ("the lack of even one" element of the Rule 24(a)(2) intervention analysis "requires that the court deny the motion"). Nevertheless, the States also fail to show that they have a cognizable interest for purposes of intervention, or even if they did, that such interest was impaired.

First, the only interest the States cite is "their interests in conserving their Medicaid and related social-welfare budgets." Br. at 34. According to the States, they spend an unspecified amount of their budgets on providing healthcare benefits for economically disadvantaged individuals, noting, for example, that Texas spends billions of dollars on Medicaid. *Id.* at 34-35. By admitting fewer immigrants who require Medicaid into the United States, the States argue that the Vacated Rule "would reduce that burden." *Id.* at 35. But this Court requires "more than the minimum Article III interest" to warrant intervention as of right, *Planned Parenthood of Wis.*, 942 F.3d at 798, and a "mere economic interest" "is not enough." *Flying J*, 578 F.3d at 571. Yet the States offer nothing more; their supposed budgetary interest is precisely the type of "economic interest" that cannot justify intervention as of right.

Further, this Court's interest inquiry requires that an intervenor "be someone whom the law on which [their] claim is founded was intended to protect." *Id.* at 572. The States identify no unique interest in immigration policy that would warrant intervention. Moreover, in promulgating the Vacated Rule, DHS explained that it would have no direct effect on State budgets. 84 Fed. Reg. at 41,492. As this Court recognized, the Vacated Rule's alleged cost savings were indirect and resulted not from barring people currently eligible for benefits (a de minimis number), nor from barring those eligible in the future (a speculative harm), but from people not subject to the Rule who immediately abstained from benefits out of fear. *See Cook County*, 962 F.3d at 231. This is the "chill" at the root of the Vacated Rule, and it came at great cost to people, communities, hospital systems, cities, and counties, including those in the States. *See id.* at 219 (explaining the Vacated Rule's "chilling impact on immigrants" who were not covered by the Rule but who "nonetheless fear immigration consequences based on their receipt of public benefits"). The States have no cognizable interest in preserving resources through fear.

Second, the States have not shown the potential impairment of that purported budgetary interest. As noted above, the States' baseless speculation that the Rule would affect admissions so as to reduce their Medicaid and social welfare benefits is belied by the fact that while the Vacated Rule was in effect, it caused the denial of only three cases. *See* SA8.

B. The States Cannot Permissively Intervene Under Rule 24(b)(1)(B).

The district court also did not abuse its discretion by denying the States' motion for permissive intervention. The Rule 24(b) permissive intervention analysis focuses on similar concepts as those discussed in the context of Rule 24(a). Most notably, requests for permissive intervention under Rule 24(b)(1)(B) must also be "timely." Fed. R. Civ. P. 24(b)(1); *see NAACP*, 413 U.S. at 365 ("Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rule 24(a) and Rule 24(b), that the application must be 'timely.' If it is untimely, intervention must be denied."); *Sokaogon Chippewa*, 214 F.3d at 949 (applying the same four timeliness factors to permissive intervention). Likewise, in "exercising its discretion to grant or deny permissive intervention, the court 'shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.'" *Heartwood*, 316 F.3d at 701 (quoting Fed. R. Civ. P. 24(b)(3)). For the reasons discussed above, the district court did not abuse its discretion in finding that: (1) the States' delay in moving to intervene was unreasonable, SA11-24; *see supra* at 19-26; (2) granting the States' dilatory intervention would prejudice Plaintiffs (and DHS), SA24-28; *see supra* at 26-28; (3) denying the States' motion would not prejudice the States, SA28-32; *see*

supra at 28-30; and (4) there are no other unusual circumstances justifying intervention, SA32-33; *see supra* at 30-31.

II. The District Court Correctly Denied the States' Rule 60(b)(6) Motion.

The district court did not abuse its discretion when it denied the States' motion under Rule 60(b)(6). *See* SA33-39.

A. The States Cannot Obtain Rule 60(b) Relief as Non-Parties.

Most obviously, the States were not entitled to Rule 60(b) relief because they are not parties. Rule 60(b) permits a court to "relieve *a party or its legal representative* from a final judgment, order, or proceeding." Fed R. Civ. P. 60(b) (emphasis added). Recognizing this unambiguous language, this Court has consistently held that only parties or their legal representatives can seek relief under Rule 60(b). *See, e.g.*, *Pearson v. Target Corp.*, 893 F.3d 980, 984 (7th Cir. 2018) (holding that an absent class member "must count as a 'party' to bring the [Rule 60(b)] motion"); *Adelson v. Ocwen Fin. Corp.*, 621 F. App'x 348, 351 (7th Cir. 2015) ("By its own terms Rule 60(b) applies only to parties and their legal representatives."); *United States v. 8136 S. Dobson St., Chi., Ill.*, 125 F.3d 1076, 1082 (7th Cir. 1997) ("The person seeking relief [under Rule 60(b)] must have been a party."); *Nat'l Acceptance Co. of Am., Inc. v. Frigidmeats, Inc.*, 627 F.2d 764, 766 (7th Cir. 1980) ("It is well-settled that … 'one who was not a party lacks standing to make (a 60(b)) motion.'" (quoting 11 Charles Alan Wright et al., Federal Practice and Procedure § 2865 (1973))); *cf. Bunge Agribusiness Singapore Pte. Ltd. v. Dalian Hualiang Enter. Grp. Co. Ltd.*, 581 F. App'x 548, 551 (7th Cir. 2014) ("[T]he

question whether one may intervene logically precedes whether one may do so to reopen a judgment.").

Notwithstanding the text of Rule 60(b) and this Court's settled precedent, the States insist that they can seek relief even as nonparties. Br. at 39-41. The States cite no Seventh Circuit authority recognizing this exception, and instead point only to a Sixth Circuit decision recognizing an "'exceedingly narrow'" exception to the rule allowing nonparties to seek relief if their interests are "directly or strongly affected by the judgment." *Bridgeport Music, Inc. v. Smith*, 714 F.3d 932, 940 (6th Cir. 2013) (quoting *Grace v. Bank Leumi Tr. Co.*, 443 F.3d 180, 188-89 (2d Cir. 2006)).

The problem for the States is that this Court has never adopted such an exception. Nor did this Court "allude[] to" it in *National Acceptance Co. of America, Inc. v. Frigidmeats, Inc. See* Br. at 40. The "exception" this Court referenced in *Frigidmeats* is that a nonparty in *privity* with a party may seek Rule 60(b) relief. 627 F.2d at 766 (affirming denial of nonparties motion for Rule 60(b) relief because "[i]t was neither a party … nor in privity with any of the parties"). The Wright & Miller section that the States cite, *see* Br. at 40 & n.5, and on which *Frigidmeats* relied, recognized privity as the one exception to the general rule. *See* Wright & Miller § 2865 (["O]ne who is in privity with a party [can] move under the rule. With this exception, one who was not a party lacks standing to make the motion ….").
Neither *Frigidmeats* nor Wright & Miller say anything about an exception for other nonparties such as the States here.

Even the Sixth Circuit's approach in *Bridgeport* does not help the States here. The examples discussed in *Bridgeport* involve cases where a Rule 60(b) movant who was technically not a party was permitted to challenge a judgment by which the movant was *directly, immediately, and tangibly* impacted. This "exceedingly narrow" exception, *id.*, has never been applied to permit supporters of a federal rule, like the States, to use Rule 60(b)(6) to challenge a judgment vacating the rule without being parties to the case. The law provides ample avenues for stakeholders to comment on agency rules and actions—but filing a Rule 60 motion in litigation to which the commenter is not a party is not one of them.

B. Even If the States Were "Parties," The District Court Correctly Found They Are Not Entitled to Rule 60(b)(6) Relief.

"[A]ssum[ing] for the sake of argument that [the States] are entitled to intervene," the district court also analyzed the merits of the States' Rule 60(b)(6) motion and properly denied it. SA34.[11] The court found that the States' motion faced "insurmountable obstacles" because it was untimely and no "extraordinary circumstances" warranted relief. SA35-38. This Court need not reach these latter

[11] Because the States cannot satisfy any of the enumerated grounds for relief from a final judgment listed in Rule 60(b), they exclusively rely upon Rule 60(b)'s catchall provision in Rule 60(b)(6): "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6); *see* SA34.

issues, but if it does, it should hold that the district court did not abuse its discretion.

1. The States' request for Rule 60(b) relief was untimely.

A party must raise a motion under Rule 60(b) "within a reasonable time." Fed. R. Civ. P. 60(c)(1); *see also Arrieta v. Battaglia*, 461 F.3d 861, 865 (7th Cir. 2006) ("A motion under the 'catchall' provision contained in Rule 60(b)(6) … must be made 'within a reasonable time.'"). Like the timeliness analysis under Rule 24, "what constitutes 'reasonable time' for filing under Rule 60(b) depends on the facts of each case." *Ingram v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 371 F.3d 950, 952 (7th Cir. 2004). Courts take into account "the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and the consideration of prejudice, if any, to other parties." *Id.* (quoting *Kagan v. Caterpillar Tractor Co.*, 795 F.2d 601, 610 (7th Cir. 1986)).

For all the same reasons that supported the court's timeliness and prejudice analysis in connection with Rule 24, the district court acted within its discretion when it held that these factors "weigh heavily against the States" under Rule 60(b)(6). SA35. As explained above, "there were no good reasons for the States' delay, and they knew of their interests in this suit and the reasonably possible, in fact likely, consequences for the Final Rule of the impending presidential transition." *Id.*; *see also supra* at 20-23. And "reopening the judgment" would impose substantial prejudice on the parties due to "the costs they incurred in reliance on their resolution of th[e] suit." *Id.*; *see also supra* at 26-28. "Denial of the States' Rule 60(b) motion is warranted on this ground alone." *Id.*

2. No exceptional circumstances justify Rule 60(b)(6) relief.

Rule 60(b)(6) relief is an "extraordinary remedy" that is only available in "exceptional circumstances." *Banks v. Chi. Bd. Of Educ.*, 750 F.3d 663, 668 (7th Cir. 2014); *see also Neuberg*, 123 F.3d at 955 ("Rule 60(b)(6) is [an] even more highly circumscribed exception in [a] rule already limited to exceptional circumstances." (citing *Provident Sav. Bank v. Popovich*, 71 F.3d 696, 700 (7th Cir. 1995))). As the moving party, the States bear the burden to "establish that 'exceptional circumstances' justify upsetting [the] final decision." *Choice Hotels Int'l, Inc. v. Grover*, 792 F.3d 753, 754 (7th Cir. 2015) (quoting *Gonzalez*, 545 U.S. at 535). There are none here.

The district court was well within its discretion when it found that the circumstances were far from extraordinary and that there was no reason to vacate the judgment. SA36-37. As the court explained, "the 'extraordinary circumstances' for Rule 60(b)(6) relief asserted by the States strongly resemble their failed arguments for intervention." SA36. The court specifically rejected the States' argument that they had "no notice" that DHS might dismiss its appeal, instead finding that the "States had ample notice that what came to pass in DHS's handling of this suit and the Final Rule might come to pass." *Id.* The court likewise found unavailing the States' contention that DHS's handling of the suit was unusual. *Id.* As the court observed, "federal agencies regularly decide—presumably for a variety of reasons—to dismiss appeals of judgments invalidating regulations or to not appeal in the first place," and it is not the role of a court "to scrutinize those reasons

and label some 'extraordinary' for purposes of Rule 60(b)(6), unless there is some hint of illegality or impropriety." *Id.*; *see also* SA23 (citing cases); *United States v. Carpenter*, 526 F.3d 1237, 1241-42 (9th Cir. 2008) (holding that "the Attorney General has plenary discretion … to settle litigation to which the federal government is a party" unless "he settled the lawsuit in a manner that he was not legally authorized to do").

The district court issued thorough and well-reasoned findings, and the State's disagreements do not come close to establishing that discretion was abused. For example, the States assert that the court abused its discretion because it was extraordinary for the federal government to "abandon[]" its defense of the Rule "abrupt[ly]" without first taking "any other concrete" steps to reverse its position. Br. at 41. The States further claim that they "had no notice of the federal government's intentions before it dismissed its appeals in cases challenging the Public Charge Rule." *Id.* But the district court rightly dismissed these assertions, explaining that the States had plenty of notice starting, at the latest, when candidate Biden became President Biden. SA17. And more than a month before the States moved for relief, the Biden Administration issued an Executive Order that "condemned" the Vacated Rule "in clear terms." SA19. On the very next day, DHS informed the district court that the Order might influence the "next steps in this litigation." *Id.* Far from acting abruptly, the federal government told the States well before they filed their motions—and repeatedly—that its position regarding the Rule was evolving. *See supra* at 21-23.

The district court also considered and rejected the States' argument that it was extraordinary for the federal government "to rescind" the Vacated Rule and that the government's dismissal amounted to an "end-run around the APA." Br. 41-42. As an initial matter, after the district court pressed the States on this argument, the States conceded that "DHS did not violate the APA by dismissing its appeal … without first engaging notice-and-comment rulemaking." SA36; *see also* Br. at 44. So even the States admit that no real "end-run" has occurred.

In any event, the States are wrong that the federal government's actions were extraordinary. The APA instructs that notice and comment is not required when an agency finds for good cause that compliance would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B). When DHS issued a final rule removing the Vacated Rule from the Code of Federal Regulations, *see* 86 Fed. Reg. 14,221, it stated that it had determined good cause existed to bypass the notice-and-comment requirement based on the immediate need to implement the district court's vacatur order. *Id.* Consistent with the agency's approach, courts have affirmed the "good cause" exception where, as here, "rulemaking without notice and comment is 'a reasonable and perhaps inevitable response to' a 'court order.'" *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 134 (D.C. Cir. 2015) (quoting *Am. Fed'n of Gov't Emps. AFL-CIO v. Block*, 655 F.2d 1153, 1157 (D.C. Cir. 1981)). Rather than constituting "extraordinary circumstances," DHS's rescission of the Rule in response to the district court's vacatur order represented the course of events envisioned by the APA.

Nor was it extraordinary that DHS chose not to devote its resources to pursuing the appeal. It is routine for an agency, after a change in presidential administration, to shift its policies and positions—including in litigation. "A change in administration … is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its … regulations," as well as a reevaluation of its "priorities in light of the philosophy of the administration." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part); *see also Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984) (noting that the "incumbent administration" makes policy choices with regard to ambiguous congressional directives "in light of everyday realities"); *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 599 (7th Cir. 2012) (explaining that "oscillation" in views from administration to administration is a "normal phenomenon of American politics"). It is therefore "commonplace" for the "incumbent administration [to] abandon[] a previous administration's interpretation of a statute," and such changes "are not always implemented through the formal notice-and-comment process" but instead can be implemented in a variety of ways, including legal briefs. Josh Blackman, *Presidential Maladministration*, 2018 U. Ill. L. Rev. 397, 405.[12] This prospect is so

[12] For example, the Bush administration filed a petition for writ of certiorari in *EPA v. New Jersey* (No. 08-512) in August 2008, and in February 2009, just before the petition would have been distribution for conference, the Obama administration's Acting Solicitor General moved to dismiss the petition. Blackman, *supra*, at 414. The Supreme Court granted the motion and dismissed the petition. *Id.* Likewise, the Trump administration changed positions compared to the Obama administration regarding the interpretation of multiple federal statutes. *See* Adam

far from "unusual and extraordinary" that the U.S. Code explicitly addresses the scenario where the Department of Justice "determines … not to appeal or request review of any judicial, administrative, or other determination" holding a federal rule or regulation unconstitutional. 28 U.S.C. § 530D(a)(1)(B)(ii).

To the extent the States now argue that they were somehow prejudiced by not being able to submit comments through the rulemaking process, *see* Br. at 41-42, their concerns ring hollow. The States did not participate at all in the rulemaking that led to the Vacated Rule. Nor did the States submit comments when DHS recently invited all interested parties to do so during the Advanced Notice of Proposed Rulemaking process last year. *See* DHS/USCIS, Public Charge Ground of Inadmissibility, RIN 1615-AC74 (Dec. 30, 2021), https://www.federalregister.gov/documents/2021/08/23/2021-17837/public-charge-ground-of-inadmissibility.[13]

The States also take issue with the district court's conclusion—based on this Circuit's precedent—that granting Rule 60(b)(6) relief "would improperly allow the States to use Rule 60(b) as a substitute for a timely appeal." SA37 (citing cases); *see Mendez v. Republic Bank*, 725 F.3d 651, 659 (7th Cir. 2013) ("Rule 60(b) relief is

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Liptak, *Trump's Legal U-Turns May Test Supreme Court Patience*, N.Y. TIMES (Aug. 29, 2017), https://www.nytimes.com/2017/08/28/us/politics/trump-supreme-court.html.

[13] DHS recently announced that it intends to issue a Notice of Proposed Rulemaking regarding the term "public charge" in March 2022. *See* DHS, Inadmissibility on Public Charge Grounds, RIN 1615-AC74 (Jan. 9, 2022), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=1615-AC74. DHS will be welcoming public comments in connection with the NPRM.

appropriately denied when a party fails to file a timely appeal and the relief sought could have been attained on appeal."). The States assert that they did not have an "opportunity" to take an appeal because the federal government "would have objected on the ground that it adequately represented" their interests. *See* Br. at 42-43. But noticeably absent from the States' argument is any suggestion that they *asked* counsel for the federal government whether it would have objected if they sought to intervene sooner. *See id.* Counsel for Texas represented to the district court that she did not know whether the States had even asked. Supp46 (May 18, 2021 Hr'g Tr.) at 15:9-15 (Dkt. 267-1). And although the States now assert that the federal government objected to a motion to intervene filed by Texas in a *different* dispute, *see* Br. at 43 (citing *Huisha-Huisha v. Mayorkas*, No. 21-5200 (D.C. Cir. Oct. 15, 2021), ECF No. 1918415),[14] Texas moved to intervene in that case seven months *after* it moved to intervene in this case. The States could not have expected the federal government to object to intervention in this case based on events that had not yet occurred.

In short, there is no reason for the district court's well-reasoned final judgment to be disturbed. Following a change in administrations, it is *expected* that the incumbent will evaluate the wisdom and legality of the prior administration's policies, and potentially shift positions—including in litigation. When these position

[14] Notably, the D.C. Circuit denied Texas's motion for leave to intervene in *Huisha-Huisha*, finding that Texas had "not demonstrated that its motion meets the standards for intervention on appeal." Order, *Huisha-Huisha v. Mayorkas*, No. 21-5200 (D.C. Cir. Oct. 26, 2021), ECF No. 1919599.

shifts involve agency rules, the APA serves as a check on the administration's actions. Consistent with these expectations and the APA, the new administration issued an Executive Order condemning the Vacated Rule, DHS told the district court that it was reconsidering its litigation position, the federal government dismissed this case, the district court's order went into effect, and the Vacated Rule was removed from the Code of Federal Regulations for "good cause." If the States wanted a say, they should have spoken up sooner.

III. This Court Already Held That The Rule Violates The APA.

The States boldly contend that "they should be allowed to defend the Vacated Rule on appeal" because they "will likely prevail" and "Plaintiffs' challenges to the [Rule] will likely fail." Br. at 44. As a preliminary matter, the merits of Plaintiffs' successful APA challenge to the Vacated Rule does not change anything about the district court's well-reasoned determination that the States should not be permitted to intervene or obtain relief under Rule 60(b)(6). *See Bell v. McAdory*, 820 F.3d 880, 883 (7th Cir. 2016) ("Instead of trying to relitigate the merits through Rule 60(b), a litigant has to come up with something *different*—perhaps something overlooked before, perhaps something new.") (emphasis in original); *Gleash v. Yuswak*, 308 F.3d 758, 761 (7th Cir. 2002) ("[R]ule [60(b)] is designed to allow modification in light of factual information that comes to light only after the judgment, and could not have been learned earlier.").

Regardless, the States' arguments on the merits simply rehash the same arguments that this Court already carefully weighed—and rejected—when it held

more than a year ago that the Vacated Rule is substantively and procedurally defective under the APA. *See* Br. at 45-49; *Cook County*, 962 F.3d at 222-33. That holding—as the States acknowledged in their district court brief—"likely establishes the law of the case." SA38 (quoting Dkt. 260 at 9); *see Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991); *Sherley v. Sebelius*, 689 F.3d 776, 782-83 (D.C. Cir. 2012) (an appellate ruling on a preliminary injunction is law of the case if—as here—it "was established in a definitive, fully considered legal decision based on a fully developed factual record and a decision-making process that included full briefing and argument without unusual time constraints" (collecting cases)).

In concluding that the Vacated Rule was substantively invalid, this Court held that it violated *Chevron* step two and fell "outside the boundaries set by the statute." *Cook County*, 962 F.3d at 229. The Court explained that the Rule's stacking mechanism exacerbates its 12/36 standard, as "the receipt of multiple benefits in one month, no matter how slight, counts as multiple months of benefits." *Id.* ("DHS … runs into trouble as a result of its decision to stack benefits and disregard monetary value."). *Id.* This "stacking rule means that a person can use up her '12 months' of benefits in a far shorter time than a quick reading of the Rule would indicate." *Id.* at 215. As DHS admitted, a person receiving "only hundreds of dollars, or less, in public benefits annually" could be deemed a public charge. 84 Fed. Reg. at 41,360-61.

This "extreme view" has "no basis in the text or history of the INA." *Cook County*, 962 F.3d at 232. To the contrary, "since the first federal immigration law in

1882, Congress has assumed that immigrants (like others) might face economic insecurity at some point." *Id.* As this Court explained, "[t]here is a floor inherent in the words 'public charge.'" *Id.* at 229. Specifically, "[t]he term requires a degree of dependence that goes beyond temporary receipt of supplemental in-kind benefits from any type of public agency." *Id.* Therefore, even if the term public charge "might encompass more than institutionalization or primary, long-term dependence on cash benefits, it does violence to the English language and the statutory context to say that it covers a person who receives only *de minimis* benefits for a *de minimis* period of time." *Id.*

This Court also explained that the Vacated Rule "create[d] serious tensions, if not outright inconsistencies, within the statutory scheme." *Id.* at 228. For example, the Rule reinvented immigrant self-sufficiency to mean near total abstention from public benefits; "[t]his is an absolutist sense of self-sufficiency that no person in a modern society could satisfy." *Id.* at 232. Rather, "Congress has assumed that immigrants (like others) might face economic insecurity at some point," and "[i]nstead of penalizing immigrants by denying them entry or the right to adjust status, Congress built into the law accommodations for that reality." *Id.* at 232.

Finally, this Court explained that the Vacated Rule conflicts with the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), because "it takes disability into account in its public charge analysis, and it does so in an unfavorable way." *Cook County*, 962 F.3d at 227. The Rule "in many instances makes it all but inevitable

that a person's disability will be the but-for cause of her being deemed likely to become a public charge." *Id.* at 228.

Separately, this Court also held that the Rule was procedurally invalid because it was arbitrary and capricious. *Id.* at 229-33. As the Court explained, "even if [it was] wrong about step two," the Vacated Rule was "likely to fail the 'arbitrary and capricious' standard" of the APA due to "numerous unexplained serious flaws." *Id.* at 233. More specifically:

> DHS did not adequately consider the reliance interests of state and local governments; did not acknowledge or address the significant, predictable collateral consequences of the Rule; incorporated into the term 'public charge' an understanding of self-sufficiency that has no basis in the statute it supposedly interprets; and failed to address critical issues such as the relevance of the five-year waiting period for immigrant eligibility for most federal benefits.

Id.

Retreating from their earlier acknowledgment of this Court's preliminary injunction opinion as the law of the case, the States point to panel decisions from the Fourth and Ninth Circuits. *See* Br. at 44. The States ignore the subsequent history of these decisions. A panel of the Ninth Circuit in 2019 stayed two preliminary injunctions of the Rule issued by district courts, but a subsequent panel of the Ninth Circuit in December 2020 affirmed the Northern District of California preliminary injunction and vacated only the portion of the Eastern District of Washington injunction making it applicable nationwide, otherwise affirming the injunction. *City & County of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 981 F.3d 742 (9th Cir. 2020). Similarly, a panel of the Fourth Circuit initially

reversed a preliminary injunction of the Rule, but the court subsequently granted rehearing en banc, vacating the panel opinion. *Casa de Md., Inc. v. Trump*, 981 F.3d 311 (Mem) (4th Cir. 2020); *see* 4th Cir. R. 35(c).[15] The States also ignore that the Second Circuit affirmed preliminary injunctions of the Vacated Rule. *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42 (2d Cir. 2020), *cert. dismissed*, No. 20-449, 2021 WL 1081216 (U.S. Mar. 9, 2021). The other circuits to address the validity of the Public Charge Rule thus agree with this Court: The Rule is invalid.

The States ultimately point to the Supreme Court's orders granting stays. Br. at 45, 49. But as this Court already held in affirming the preliminary injunction, the stay orders—unaccompanied by any supporting opinion—were not "merits ruling[s]" and have no precedential effect. *Cook County*, 962 F.3d at 233; *see also Ind. State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 960 (2009) (per curiam) (emphasizing that decision to grant or deny stay is "not a decision on the merits of the underlying legal issues"); *Barefoot v. Estelle*, 463 U.S. 880, 907 n.5 (1983) (Marshall, J., dissenting) ("the denial of a stay can have no precedential value"); *compare also, e.g.*, *Doe v. Reed*, 130 S. Ct. 486 (2009) (granting stay against disclosure requirements), *with Doe v. Reed*, 130 S. Ct. 2811 (2010) (upholding disclosure requirements on the merits against facial challenge).

In sum, there is simply no basis for allowing the States to take up on appeal the defense of a rule that was vacated nearly a year ago and has been repeatedly

[15] The Fourth Circuit appeal was voluntarily dismissed before the en banc Court ruled. *See* Order, *Casa de Md., Inc. v. Biden*, No. 19-2222 (4th Cir. Mar. 11 2021), ECF No. 211.

and thoroughly criticized by this Court and others. Unlike in *Flying J*, on which the States rely, no time would be "save[d]" by "treat[ing]" the States as appellants from the judgment because they are not entitled to relief in the first place. *See* 578 F.3d at 574. The district court's decision should be affirmed in its entirety.

CONCLUSION

For these reasons, the district court's order denying the States' Rule 24 motion to intervene and Rule 60(b)(6) motion for relief from judgement should be affirmed.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(A), as modified by Circuit Rule 28.1. The brief contains 13,090 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2022, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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