No. 21-2561

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

COOK COUNTY, ILLINOIS, et al.,

Plaintiffs-Appellees,

v.

ALEJANDRO MAYORKAS, in his official capacity as Secretary of Homeland Security, et al.,

Defendants-Appellees,

STATE OF TEXAS, et al.,

Proposed Intervenors-Appellants.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 19-cv-6334 (Feinerman, J.)

BRIEF FOR DEFENDANTS-APPELLEES

SARAH E. HARRINGTON
Deputy Assistant Attorney General

JOHN R. LAUSCH, JR.
United States Attorney

DANIEL TENNY
GERARD SINZDAK
JOSHUA DOS SANTOS
Attorneys, Appellate Staff
Civil Division, Room 7243
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 353-0213

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Regulations:

Rules:

Other Authorities:

INTRODUCTION

This appeal concerns an effort by a collection of States to revive litigation over a judgment that the federal government decided not to continue appealing. The judgment vacates a 2019 Rule published by the Department of Homeland Security (DHS), which implemented the Immigration and Nationality Act's provisions regarding denial of admission to certain noncitizens who are likely to become a "public charge."

The district court rejected the States' effort on two related, but independently adequate, grounds. First, the court determined that the States' intervention motion was untimely because the States had been on notice that the government was reassessing its litigation approach and the States' delay would cause the parties substantial prejudice. In particular, then President-elect Biden had announced his opposition to the rule at issue here; President Biden had subsequently issued an Executive Order requiring review of the rule; and status reports filed in this case had made clear that the federal government was considering whether to change its litigating position. The district court did not abuse its discretion in concluding that the States should have moved to

intervene before the government had concluded its review, dismissed its pending appeal, persuaded the plaintiff to drop its remaining claim, and begun to implement interim guidance as it embarked on new rulemaking to replace the 2019 Rule.

Second, the district court reasonably determined that the States were not entitled to upset the judgment under Rule 60(b)(6) because the motion was untimely, because the States had not demonstrated extraordinary circumstances, because Rule 60(b)(6) motions cannot be used to restart the time for appeal, and because non-parties lack standing to file such motions.

The States' arguments on appeal reduce to a disagreement with the federal government's litigation decisions. In their view, the federal government should not have dismissed its appeal in this case—along with appeals in related cases and a pending case in the Supreme Court—and should instead have held this case in abeyance while it pursued new rulemaking. The States concede, however, that the federal government's litigation decisions were lawful. And as the district court correctly explained, the government's exercise of its litigation judgment was neither extraordinary nor unexpected, and did

not warrant bending the rules of intervention and Rule 60(b) relief. At a minimum, the district court's view is one with which a reasonable person could agree, which is all that is required for this Court to affirm.

STATEMENT OF JURISDICTION

Appellants' jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in concluding that the States' post-judgment motion to intervene was not timely.

2. Whether the district court abused its discretion in concluding that the States did not meet the requirements for relief from the judgment under Rule 60(b).

3. Whether the States meet the requirements for intervention as of right or permissive intervention.

STATEMENT OF THE CASE

A. The 2019 Rule and Ensuing Litigation

The Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, provides that a noncitizen is "inadmissible" if, "in the opinion of the [Secretary of Homeland Security] at the time of application for admission or adjustment of status," the noncitizen "is likely at any time

to become a public charge." 8 U.S.C. § 1182(a)(4)(A).[1] In August 2019, DHS adopted a rule under which DHS would treat certain applicants for admission or adjustment of status as likely to become "public charge[s]" for purposes of that provision if DHS determined that the applicants were likely to receive specified public benefits, including by participating in Medicaid or the Supplemental Nutrition Assistance Program, for more than 12 months (in aggregate) within any 36-month period. *See* 84 Fed. Reg. 41,292, 41,501 (Aug. 14, 2019) (2019 Rule or Rule). The 2019 Rule represented a significant departure from the definition and standards that DHS had previously used in applying the public-charge ground of inadmissibility.

The 2019 Rule generated extensive litigation across the United States at all levels of the federal judiciary. Plaintiffs who had opposed adoption of the Rule (including 21 States and numerous local governments and nongovernmental organizations) filed suits in five district courts in four circuits alleging that the Rule was unlawful on

[1] This brief uses "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. § 1101(a)(3)).

numerous grounds. All five district courts concluded that the 2019 Rule was likely unlawful, and each entered a preliminary injunction in October 2019 barring the Rule from taking effect.[2] The government sought stays pending appeal of those preliminary injunctions. The Fourth and Ninth Circuits granted stays of the preliminary injunctions entered by district courts in their jurisdictions, and the Supreme Court granted stays of preliminary injunctions entered by district courts in Illinois and New York after this Court and the Second Circuit declined to do so.[3] DHS began implementing the Rule for the first time in February 2020. *See New York* v. *DHS*, 969 F.3d 42, 58 (2d Cir. 2020).

---

[2] *See Make the Road N.Y. v. Cuccinelli*, 419 F. Supp. 3d 647 (S.D.N.Y. 2019); *New York v. DHS*, 408 F. Supp. 3d 334 (S.D.N.Y. 2019); *Cook County v. McAleenan*, 417 F. Supp. 3d 1008 (N.D. Ill. 2019); *Casa de Maryland, Inc. v. Trump*, 414 F. Supp. 3d 760 (D. Md. 2019); *City & County of San Francisco v. USCIS*, 408 F. Supp. 3d 1057 (N.D. Cal. 2019); *Washington v. DHS*, 408 F. Supp. 3d 1191 (E.D. Wash. 2019).

[3] *See City & County of San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019); Order, *Casa de Maryland, Inc. v. Trump*, No. 19-2222 (4th Cir. Dec. 9, 2019); *Wolf v. Cook County*, 140 S. Ct. 681 (2020); *DHS v. New York*, 140 S. Ct. 599 (2020); *see also New York v. DHS*, Nos. 19-3591 & 19-3595, 2020 WL 95815 (2d Cir. Jan. 8, 2020); Order, *Cook County v. Wolf*, No. 19-3169 (7th Cir. Dec. 23, 2020).

This Court subsequently affirmed the preliminary injunction entered by the district court in this case, holding in a published decision that the Rule was likely unlawful in various respects. *See Cook County v. Wolf*, 962 F.3d 208 (7th Cir. 2020). The Second and Ninth Circuits agreed that the Rule was likely unlawful.[4] The government filed petitions for writs of certiorari in all three cases.[5] In the meantime, although a divided panel of the Fourth Circuit initially reversed the preliminary injunction entered by the District of Maryland, the en banc Fourth Circuit vacated that decision and set the case for re-argument.[6]

District court litigation continued in several courts across the country. One set of plaintiffs added a claim relating to whether the official who signed the Rule was properly appointed under the Federal

[4] *New York v. DHS*, 969 F.3d 42 (2d Cir. 2020); *City & County of San Francisco v. USCIS*, 981 F.3d 742 (9th Cir. 2020).

[5] *See DHS v. New York*, No. 20-449 (filed Oct. 7, 2020); *Wolf v. Cook County*, No. 20-450 (filed Oct. 7, 2020); *USCIS v. City & County of San Francisco*, No. 20-962 (submitted on Jan. 19, 2021 and docketed on Jan. 21, 2020).

[6] *See Casa de Maryland, Inc. v. Trump*, 971 F.3d 220 (2020) (initial panel decision); 981 F.3d 311 (2020) (order granting rehearing en banc).

Vacancies Reform Act of 1998.[7] Various plaintiffs sought discovery, including discovery from high-ranking officials, related to their claims that the Rule was intentionally discriminatory in violation of the Equal Protection component of the Fifth Amendment's Due Process Clause.[8]

B. The District Court Orders Discovery and Enters a Partial Final Judgment Vacating the Rule.

District court proceedings in this case continued in similar fashion. The district court ruled that the government would be required to produce emails and other documentary evidence from certain high-level White House officials who had been involved in formulating the 2019 Rule, including former Senior Advisor to the President Stephen Miller and former Acting White House Chief of Staff Mick Mulvaney. Dkt. No. 190, at 2 (July 24, 2020). The court also ordered the parties to attempt to reach agreement about possible depositions of senior officials. *Id.* at 1. The court concluded that this discovery was necessary to allow one of

[7] *See* First Am. Compl. ¶¶ 309-315, *New York v. DHS*, No. 19-cv-7777 (S.D.N.Y. Oct. 2, 2020) (adding claim that the 2019 Public Charge rule was issued in violation of the Federal Vacancies Reform Act of 1998).

[8] *See* Order, *Washington v. DHS*, No. 19-cv-05210 (S.D.N.Y. Apr. 17, 2020), Dkt. No. 210 (granting discovery); Order, *State of New York v. DHS*, No. 19-cv-7777 (S.D.N.Y. Sept. 30, 2020), Dkt. No. 249 (same).

the plaintiffs, Illinois Coalition for Immigrant and Refugee Rights, Inc. (Illinois Coalition), to develop its claim that adoption of the Rule had been motivated by racial animus, in violation of the equal-protection component of the Due Process Clause. *See id.* at 1-3; *see also Cook County v. Wolf*, 461 F. Supp. 3d 779 (N.D. Ill. 2020) (earlier order denying motion to dismiss equal-protection claim).

In November 2020, the district court in this case also entered a partial final judgment under Federal Rule of Civil Procedure 54(b), which vacated the 2019 Rule on a nationwide basis. *See Cook County v. Wolf*, 498 F. Supp. 3d 999 (N.D. Ill. 2020). Applying this Court's decision in the government's prior appeal from the district court's preliminary injunction, the district court concluded that the 2019 Rule did not represent a reasonable interpretation of the INA and that DHS had acted arbitrarily and capriciously in adopting it. *See id.* at 1003-05.

This Court granted a stay pending appeal of the partial final judgment and placed the appeal in abeyance pending the disposition of the government's petitions for writs of certiorari in *DHS v. New York*, No. 20-449, and *Wolf v. Cook County*, No. 20-450.

Discovery continued in the district court, and the government asserted various forms of privilege as to certain documents. In December 2020, the district court held that in camera review was necessary to resolve the parties' discovery dispute. Dkt. Nos. 234, 235.

C. The Government Indicates That It Is Reassessing Its Litigation Options and Withdraws Its Appeal Five Weeks Later.

On February 2, 2021, shortly following the change in Administration, President Biden issued an Executive Order directing the Secretary of Homeland Security, along with the Attorney General, the Secretary of State, and other relevant agency heads, to "review all agency actions related to implementation of the public charge ground of inadmissibility … and the related ground of deportability." Exec. Order No. 14,012 of February 2, 2021, § 4, 86 Fed. Reg. 8277, 8278 (Feb. 5, 2021). The President ordered the agencies to complete that review within 60 days. *Id.*

The next day, the government notified the district court about the Executive Order and stated that the government would "confer with" plaintiff Illinois Coalition "over next steps." Dkt. No. 241, at 2 & n.1.

The government also continued to oppose plaintiff's discovery requests. *Id.*

On February 19, in a joint status report, plaintiff Illinois Coalition agreed to a two-week stay, but objected to any further stay of proceedings on its equal protection claim, arguing that it should be allowed to continue discovery. Dkt. No. 245, at 3. The government explained that "further developments" in the following weeks "may … moot [plaintiff's] equal protection claim." *Id.* at 4.

On March 5, 2021, plaintiff Illinois Coalition again stated that it objected to any further stay in district court because the government was continuing to seek reversal of the district court's judgment vacating the Rule. Dkt. No. 247, at 2. On March 8, the district court issued a minute order explaining that it intended to ask DHS "for a more detailed assessment as to when DHS and DOJ will decide how to proceed in the pending suits" and that "Defendants' answer w[ould] bear heavily on whether discovery w[ould] resume." Dkt. No. 248.

On March 9, 2021, DHS announced that the government had determined that continuing to defend the 2019 Rule in numerous still-active cases would not be in the public interest or an efficient use of

government resources. Press Release, DHS, *DHS Statement on Litigation Related to the Public Charge Ground of Inadmissibility* (Mar. 9, 2021) (Dkt. No. 252-1). By this time, the Supreme Court had granted a writ of certiorari in *DHS v. New York*, No. 20-449 (U.S. Feb. 22, 2021), to review a preliminary injunction issued by the Southern District of New York. On March 9, 2021, the government filed stipulations dismissing that case and the other pending cases before the Supreme Court. The government likewise filed motions to dismiss public-charge related appeals in the various courts of appeals, including—as most relevant here—its appeal of the partial final judgment entered by the district court in this case. This Court and the other courts of appeals granted the government's motion and dismissed the appeals.[9]

In reliance on that dismissal, plaintiff Illinois Coalition dismissed its remaining equal-protection claim in the district court on March 11, 2021, terminating the case. Dkt. No. 253. Because the district court's judgment vacating the 2019 Rule had taken effect and was final, the government published a rule that removed the 2019 Rule from the Code

[9] *See, e.g.*, Order, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 9, 2021); Order, *Casa de Maryland, Inc. v. Trump*, No. 19-2222 (4th Cir. Mar. 11, 2021).

of Federal Regulations. *Inadmissibility on Public Charge Grounds; Implementation of Vacatur*, 86 Fed. Reg. 14,221, 14,221 (Mar. 15, 2021).

Although DHS had acknowledged in promulgating the 2019 Rule that the effects of the Rule were uncertain, it had anticipated that the 2019 Rule would result in increased denials of lawful-permanent-resident status to applicants. *See* 84 Fed. Reg. at 41,313, 41,348. In reality, the Rule proved to have an exceedingly modest impact on such denials: during the roughly one year the 2019 Rule was in effect, DHS "issued only 3 denials and two Notices of Intent to Deny based solely on the basis of the INA § 212(a)(4) public charge ground of inadmissibility evaluated under the Rule's totality of the circumstances framework." Dkt. No. 269-1, ¶ 8. The 2019 Rule thus resulted in adverse decisions on only five of the 47,555 applications for adjustment of status to which it was applied. *See* Dkt. No. 269-2, ¶ 10.

D. The States' Unsuccessful Motions to Intervene on Appeal.

Following the government's dismissal of its pending cases before this Court, the Supreme Court, and other courts of appeals, a group of States that had not previously participated in any of the above-

described litigation (or in the rulemaking that led to the 2019 Rule) filed a series of motions attempting to intervene in order to revive the litigation about the 2019 Rule.

Of most direct relevance here, on March 11, 2021—two days after this Court granted the government's voluntary motion to dismiss its appeal and the same day that plaintiff Illinois Coalition dismissed its remaining claim in district court—the proposed-intervenor States filed a motion in this Court to recall the mandate in the appeal of the district court's partial final judgment vacating the Rule. The States further sought leave to intervene in the appeal and defend the Rule.

This Court denied the States' motions to recall the mandate and intervene. Order, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 15, 2021). The States thereafter filed a stay application asking the Supreme Court to stay the effect of the district court's final judgment vacating the 2019 Rule pending the filing of a petition for certiorari, or, in the alternative, to summarily reverse this Court's denial of the States' motions. *See Texas v. Cook County*, No. 20A150 (U.S. Mar. 19, 2021). The Supreme Court denied the application, "without prejudice to the States raising this and other arguments before the District Court,

whether in a motion for intervention or otherwise." *Texas v. Cook County*, 141 S. Ct. 2562, 2562 (2021). The Supreme Court further noted that "[a]fter the District Court considers any such motion, the States may seek review, if necessary, in the Court of Appeals, and in a renewed application in this Court." *Id.*

Overlapping groups of States also filed motions seeking leave to intervene in the preliminary injunction appeals in the Fourth and Ninth Circuits. Both courts of appeals denied the motions, with Judge VanDyke dissenting from the denial of the motion in the Ninth Circuit. *See* Order, *Casa de Maryland, Inc. v. Biden*, No. 19-2222 (4th Cir. Mar. 18, 2021); Order, *City & County of San Francisco v. USCIS*, Nos. 19-17213, 19-17214, 19-35914 (9th Cir. Apr. 8, 2021). The States who had sought to intervene in the Ninth Circuit case petitioned for certiorari, and the Supreme Court granted certiorari limited to the question of intervention. *See Arizona v. City and County of San Francisco*, No. 20-1775 (U.S. Oct. 29, 2021).[10]

[10] Petitioners filed their opening brief on December 13, 2021, and the government filed its response brief on January 12, 2022. Oral argument is set for February 23, 2022.

E. The District Court Denies the States' Post-Judgment Motions for Intervention and Rule 60(b) Relief.

On May 12, 2021, two weeks after the Supreme Court denied the States' request, the States filed motions in the district court seeking to intervene and asking the district court to set aside its judgment under Rule 60(b)(6).

Although the court concluded that the States had Article III standing to seek to defend the 2019 Rule, Appellants' Short Appendix (SA) 10, the court denied the States' post-judgment motions. SA11, 37.

1. As to intervention, the district court determined that the States' motion was untimely after considering a variety of relevant factors identified in this Court's cases. SA10-11 (quoting *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 945, 949 (7th Cir. 2000)).

The court first concluded that the "States' delay in seeking intervention was plainly unreasonable under the circumstances of this case." SA20. The court noted that the "suit concerned a major immigration regulation and was subject to significant media and other attention," and "the States do not dispute that they were aware of their interests in the Final Rule during the previous Administration." *Id.* (quotation marks omitted). Yet the States took no action to participate

in the litigation even after various signs indicated that the federal government's interests and the States' alleged interests in the litigation might diverge.

In particular, the district court noted that by December 2020, widely available press coverage indicated that the incoming President did not share the prior administration's views on the merits of the 2019 Rule. SA13-18. In addition, "the Executive Order issued by President Biden on February 2, 2021 confirmed (or should have confirmed) for the States their need to quickly intervene." SA19. That "Executive Order directed DHS to review the Final Rule," and "on February 3, DHS notified [the] court of the Executive Order and that it might influence the 'next steps in this litigation.'" SA19 (quoting Dkt. No. 241, at 2). "Any reasonable observer would have known at that point that intervention had become extremely urgent for anyone who wished to ensure the Rule's continued defense" in the district court or this Court. SA19. "Yet the States did not move to intervene until March 11, 2021," several months after President Biden's election and "five weeks" after the Executive Order and the government's public statements that it was conferring with

plaintiff and assessing its next steps—all "in a case where judgment had already been entered." SA19.

The court concluded that these circumstances distinguished this case from a situation in which "there was nothing to indicate" that a party would not appeal an adverse ruling. SA21 (emphasis omitted) (quoting *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009)). The court also noted that, contrary to the approach taken here, one of the proposed-intervenor States (Texas) had moved to intervene in a different case in January 2021 based on "President-elect Biden's" statements criticizing the regulation at issue in that case. SA14-16 (citing statements from Texas's intervention motion in *Pennsylvania v. DeVos*, No. 20-cv-1468 (D.D.C.)).

The district court likewise rejected the States' arguments "that they reasonably believed that DHS would seek to reverse the Final Rule through notice-and-comment rulemaking, not by dismissing its appeal." SA22. The court noted that "the States now admit" that the Administrative Procedure Act (APA) "does *not* prohibit an agency from taking the course that DHS took here." SA22 (quoting Texas's statements at the motion hearing). "[F]ederal agencies regularly choose

to forego appeal, or to dismiss their appeals, of district court judgments that invalidate regulations." SA23 (collecting cases). And in fact, during the previous year, the federal government had dismissed an appeal in a case in which several of the States had participated as amici. SA23 (citing amicus brief filed in *Center for Sci. in the Pub. Interest v. Perdue*, No. 19-cv-1004 (D. Md.)).

The court next concluded that intervention would "greatly prejudice the parties." SA27. The court stated that the government's dismissal reflected a "negotiated compromise to end the litigation," and that intervention would "[u]nravel[] the parties' compromise." SA27. The court accordingly explained that "[i]f the States were allowed to intervene," plaintiff Illinois Coalition "would move to revive its equal protection claim … subjecting DHS once again to the risk of losing the privilege battles and having to present former administration officials for deposition." SA27.

In addition, post-judgment intervention would "squander the resources that DHS invested … in deciding how to proceed with the Final Rule and the case." SA26. The parties' February 2021 status reports reflected DHS's considered "process to evaluate its next steps …

premised on all the circumstances, including that no other party had appealed or taken any steps to intervene." SA25. That "process culminated in a considered decision in March 2021 that continued defense of the Rule was 'neither in the public interest nor an efficient use of government resources.'" SA25 (quoting Dkt. No. 252-1, at 2). Had the States intervened earlier, DHS "might have taken a different approach." SA26. Moreover, "[a]llowing intervention now could require DHS to again shift the public charge guidance it issued in light of the Rule's vacatur, a back-and-forth that could have been avoided if the States had acted promptly." SA26 (quotation marks and brackets omitted).

Next the district court considered the alleged prejudice to the States if intervention were denied. Because the States may petition for rulemaking or otherwise participate in DHS's rulemakings, the court explained that the "marginal prejudice to the States of denying intervention here is not the loss of the Final Rule itself," but the loss of "the benefit of defending an already-promulgated regulation, which under current precedent receives deference." SA28. "The States therefore must be understood as claiming an interest in preserving for

themselves a favorable legal standard," which was not sufficient "for Rule 24 purposes." SA29, 32.

The district court also disagreed with the States' assertion that the district court's final judgment vacating the 2019 Rule would "preclude the next Administration from re-adopting the Rule *even with* notice-and-comment rulemaking." SA30 (quoting Dkt. No. 260, at 16). The court explained that "a district court decision does not qualify as precedent," and noted that the district court's holding "rests exclusively on the Seventh Circuit's opinion," which did not hold that the "public charge" statute has a single meaning under *Chevron* step one. SA31-32. The court also observed that, at the motion hearing, the States had expressly "waived" their suggestion that "they had a procedural right under the APA for DHS to proceed via notice-and-comment rulemaking." SA30.

For these reasons, the district court rejected the States' assertion that the government's decision to withdraw its appeal constituted an "unusual circumstance[]" that excused the States' delay. SA32-33. The court thus did not address the remaining requirements for intervention under Rule 24. *Id.*

2. Even assuming that the States were entitled to intervention, the district court explained that it would deny the States' request to set aside the final judgment under Rule 60(b)(6). SA35.

First, the court concluded that the States' motion was untimely for the same reasons that their intervention motion was untimely. SA35.

Second, the district court held that the States had not established the "extraordinary circumstances" necessary to "justify upsetting a final decision" under Rule 60(b)(6). SA34 (quoting *Choice Hotels Int'l, Inc. v. Grover*, 792 F.3d 753, 754 (7th Cir. 2015)). The court noted that "federal agencies regularly decide … to dismiss appeals of judgments invalidating regulations." SA36.

Third, the district 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. The States "point[ed] to nothing unknown or unnoticed at the time judgment was entered," and the States did not dispute that the district court was bound to hold the 2019 Rule unlawful in light of this Court's decision in the prior appeal from the preliminary injunction. SA38. Rather, the States appeared to ask for "the court to vacate the judgment and then simply re-enter it in

identical form so that they can appeal." SA38. And "[t]hat use of Rule 60(b) would violate the tenet that 'a collateral attack on a final judgment is not a permissible substitute for appealing the judgment within the required time.'" SA38-39 (brackets omitted) (quoting *Bell v. Eastman Kodak Co.*, 214 F.3d 798, 801 (7th Cir. 2000)).

Finally, the district court also concluded that, because the court had denied the States' motion for intervention, the States were non-parties who lacked standing to bring a Rule 60(b) motion under the Rule's plain text. SA33-34.

F. DHS's Forthcoming Rulemaking

On August 23, 2021, consistent with its previously expressed intent to engage in further rulemaking on the public-charge ground of inadmissibility, DHS published an Advance Notice of Proposed Rulemaking (ANPRM) and notice of virtual public listening sessions. *See Public Charge Ground of Inadmissibility*, 86 Fed. Reg. 47,025 (Aug. 23, 2021). That ANPRM solicited data and other information from the public, including States and other governmental entities, that DHS intends to use in a Notice of Proposed Rulemaking that will, among other things, provide a new regulatory definition of the statutory term

"public charge." *Id.* at 47,028. As part of this effort, DHS held two virtual public listening sessions, including one for state, territorial, local, and tribal benefits granting agencies and nonprofit organizations on October 5, 2021. *Id.* at 47,025.

Just as with the rulemaking process that led to the adoption of the 2019 Rule, petitioners did not submit comments or otherwise respond to the ANPRM. The Fall 2021 Unified Agenda of Regulatory and Deregulatory Actions forecasted that a notice of proposed rulemaking will issue in early 2022. *See* USCIS, DHS, *Inadmissibility on Public Charge Grounds, Unified Agenda* (Fall 2021), https://go.usa.gov/xt4Dm (Fall 2021 Unified Agenda).

SUMMARY OF ARGUMENT

The district court's denial of the States' request to intervene and to reopen the judgment under Rule 60(b) was correct for multiple reasons. The court reasonably concluded that both the States' intervention motion and their Rule 60(b) motion were untimely. The court's conclusion was justified by the States' delay after knowing that their alleged interests could be affected, the fact that the time for appeal had already expired, and the prejudice to the parties if the intervention

were allowed to unravel the steps they had taken to end the litigation and their actions taken in reliance on the court's judgment.

In particular, President Biden—consistent with statements made before his inauguration indicating that he did not support the 2019 Rule—issued an Executive Order on February 2, 2021 requiring that the rule be reconsidered. Status reports filed in this case subsequently made clear that the federal government was reconsidering its litigation position. But the States did not file their motions until after the federal government had dismissed its appeal and plaintiff Illinois Coalition had dismissed its remaining claim in reliance on that action—all months after the district court's judgment and well after the time for filing an appeal had run.

The district court also did not abuse its discretion in concluding that no "extraordinary circumstances" warranted relief under Rule 60(b), that Rule 60(b) relief was additionally unavailable because Rule 60(b) cannot be used as a way to get around appeal deadlines, and that non-parties in any event may not file Rule 60(b) motions.

The States essentially urge that all these obstacles should be overlooked based on their criticism of the federal government's decision

to withdraw its appeal instead of asking to hold this case in abeyance. But the States concede that the federal government's decision was lawful, and the district court properly explained that the decision was neither unforeseeable nor extraordinary—and certainly did not warrant disregarding the governing standards of intervention and Rule 60(b) relief. At a minimum, the district court's view is one with which a reasonable person could agree, and therefore constituted a proper exercise of its discretion.

In addition, although the district court did not decide the question, the States are incorrect that they otherwise would be entitled to intervention as of right or permissive intervention. The States have failed to identify a direct, legally enforceable interest that would entitle them to intervention as of right. And the district court was entitled to deny the States' request for permissive intervention for the reasons it articulated even if the States' motion were considered timely as a technical matter.

STANDARD OF REVIEW

This Court reviews for abuse of discretion a district court's conclusion that a motion for intervention is untimely. *Illinois v. City of*

Chicago, 912 F.3d 979, 984 (7th Cir. 2019). The Court also reviews a "district court's decision to deny relief under Rule 60(b)" under an "extremely deferential abuse of discretion standard." *Eskridge v. Cook County*, 577 F.3d 806, 808-09 (7th Cir. 2009) (quotation marks omitted).

ARGUMENT

The States sought to intervene in this case in May 2021 in order to reopen a judgment entered in November 2020. That effort was flawed for two separate (though overlapping) reasons. First, the district court properly denied their motion for intervention on the ground that it was untimely and would prejudice the existing parties. Second, the district court properly rejected the Rule 60(b) motion, reasoning both that the States could not file such a motion because they were not parties (their intervention motion having been denied) and, in the alternative, that relief under Rule 60(b) would not be warranted in any event. To obtain relief, the States would have to establish that both of these decisions were an abuse of discretion. As discussed below, neither was.

I. The District Court Did Not Abuse Its Discretion by Determining That the States' Motion to Intervene Was Untimely.

The district court did not abuse its discretion in concluding that the States' post-judgment request for intervention was untimely. The district court thoroughly addressed each of the factors relevant to the timeliness of an intervention motion under this Court's cases: "(1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenor if the motion is denied; (4) any other unusual circumstances." *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 797-98 (7th Cir. 2013) (quotation marks omitted). In its discretion, the court reasonably concluded that each factor pointed toward the conclusion that the States' motion was untimely.

1. The district court began by determining that, under the circumstances of this case, the States had waited too long to seek intervention. "[I]ntervention postjudgment … should generally be disfavored," *Bond v. Utreras*, 585 F.3d 1061, 1071 (7th Cir. 2009), and the court correctly determined that the circumstances belied the States'

assertion that the government's dismissal of its appeals was wholly unforeseeable.

The States do not identify any recent development that gave rise to an interest in the case in May 2021 that had not existed in the eighteen months of prior litigation, in which they had not participated in any capacity. Instead, their sole argument is that they were only made aware of the need to intervene when the government dismissed its appeal in this case, and dismissed its other appeals and pending petitions for certiorari, in March 2021. The district court did not abuse its discretion in concluding that the States were or should have been aware of the need to intervene well before that.

As the district court recognized, a "would-be 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.'" SA11 (district court's emphasis) (quoting *Heartwood, Inc. v. U.S. Forest Serv.*, 316 F.3d 694, 701 (7th Cir. 2003)). In particular, this Court has emphasized that courts "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." *Illinois v. City of Chicago*, 912 F.3d

979, 985 (7th Cir. 2019), *quoted in* SA12. And where, as here, the issue is whether an existing party might not adequately represent a possible intervenor's interests, intervention is timely only if "the intervenor could not have reasonably anticipated that its interests were at issue or unrepresented until immediately prior to the attempted intervention." *Id.* at 986.

The final judgment that the States seek to challenge was entered on November 2, 2020, and the deadline to file a notice of appeal was January 4, 2021. As the district court recognized, SA16, those circumstances should have caused a reasonable person to pay close attention to the possible need to seek intervention quickly. And the States do not dispute that they were on clear notice by at least the beginning of February 2021 that the federal government was reassessing its litigation options. SA13-19. Widespread media coverage had for months noted that President-elect, and then President, Biden disagreed with the prior administration on the merits of the Rule, and on February 2, 2021, President Biden ordered DHS to review the Rule within 60 days. SA13-20. On February 3, the government submitted a status report to the district court explaining that it was assessing the

"next steps" in this litigation. Dkt. No. 241, at 2. The government explained that it still opposed plaintiff Illinois Coalition's discovery requests regarding the still-pending equal protection claim, but that it would "confer" with plaintiff on further proceedings. *Id.*

Subsequent status reports in February 2021 further highlighted the possibility that the government would choose to cease litigating these cases. In the status report on February 19, for example, the government asked for a "time-limited stay" in part because "further developments" in the coming weeks could "moot [plaintiff Illinois Coalition's] equal protection claim." Dkt. No. 245, at 3-4. And plaintiff Illinois Coalition made clear that it opposed further stays of the district court litigation while the government's appeals remained pending, and wished to continue discovery relating to its equal protection claim. Dkt. No. 245, at 3. Plaintiff urged that "if the Defendants agree to end their appeal of the final judgment, allowing the vacatur to go into effect, Plaintiff is open to talking to them about staying the equal protection claim." *Id.*

The States do not address these aspects of the status reports when they insist that they were entitled to rely on their prediction that "at

worst the federal government would seek to stay the pending litigation." Br. 22. They do not explain, in particular, why they did not reasonably anticipate that the federal government might dismiss its appeal after the government stated that plaintiff's equal protection claim could become "moot" or that plaintiff might agree to "voluntary dismissal" within "two weeks." Dkt. No. 245, at 4.

Even the portions of the status reports that the States discuss do not support their position. They highlight that the federal government stated that it was considering seeking a stay of proceedings, and note that plaintiff Illinois Coalition opposed that course of action—hardly a reason to be sure that the federal government would ultimately pursue that course, let alone that the district court would accept it. *See* Br. 21. They emphasize that Illinois Coalition complained that the federal government had not yet dropped its appeal in this Court and its petition for certiorari in the Supreme Court, *see id.*, without explaining why plaintiff's dissatisfaction with the federal government's failure to dismiss its appeal while it continued to review the Rule reassured them that the federal government would not ultimately settle on dismissal as the appropriate course—particularly when coupled with plaintiff's

willingness to negotiate about its equal protection claim in exchange for dismissal of that appeal.

The States assert that they were entitled to presume that the federal government would put this case in abeyance, citing a dissenting opinion in a separate public-charge case from the Ninth Circuit. *See* Br. 22 (quoting *City & County of San Francisco v. USCIS*, 992 F.3d 742, 751 (9th Cir. 2021) (VanDyke, J., dissenting)). As the district court noted, that dissent's characterization of the government's actions in this case as "extraordinary" was unaccompanied by any citations. SA22. The States attempt to fill in the gap by citing two law review articles that describe the availability of abeyance as a potential route for changing position, as well as the Department of Justice's hesitance to change its legal position on the validity of an agency rule (something that the Department of Justice has not done in this case).[11] Br. 22-23, 25-26. The States also note that the federal government sought to put various unrelated cases in abeyance when agencies were considering changes to rules as to which judicial challenges were pending. Br. 23.

[11] The government has not advanced a new position on the merits of this case; the government's decision was simply that it should no longer pursue further review of previously entered adverse judgments.

The States' assertions about the federal government's practice is—as the district court recognized (SA23)—inaccurate. The United States does not appeal every adverse decision entered against it, and a decision not to press for further review may be based on a variety of considerations, including ones that are unrelated to a determination that no reasonable legal defense is available. Thus, over the years the government has frequently declined to appeal or seek certiorari, or dropped appeals, in cases in which agencies' rules were invalidated on procedural or substantive grounds—including even on constitutional grounds, decisions for which Congress has requested special notification under 28 U.S.C. § 530D(a)(1)(B)(ii), and decisions that would plainly prevent the agency from "reenact[ing] the substance of the challenged rule," Br. 24.[12]

[12] *See*, *e.g.*, *Merck & Co. v. U.S. Dep't of Health & Human Servs.*, 962 F.3d 531, 535-41 (D.C. Cir. 2020) (affirming vacatur of Department of Health and Human Services rule requiring disclosure of wholesale acquisition cost of prescription drugs paid for by Medicare or Medicaid on the ground that it exceeded statutory authority; no certiorari sought); *Chamber of Commerce of U.S. v. U.S. Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018) (invalidating 2016 Department of Labor "fiduciary rule" on the ground that it was inconsistent with statutory text; no certiorari sought); *National Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015) (decision invalidating Commission's rule on the ground

that it required companies to make disclosures that violated their free speech rights under the First Amendment; no certiorari sought); *National Ass'n for Advancement of Colored People v. DeVos*, 485 F. Supp. 3d 136, 145 (D.D.C. 2020) (declaring Department of Education "interim final rule" to be "void" on the ground that it was substantively inconsistent with the governing statute and beyond the agency's delegated authority; no further review sought); *Tiwari v. Mattis*, 363 F. Supp. 3d 1154 (W.D. Wash. 2019) (decision invalidating Department of Defense regulation on the ground that it violated equal-protection component of the Due Process Clause), *appeal dismissed sub nom. Tiwari v. Shanahan*, No. 19-35293, 2019 WL 3047272 (9th Cir. Apr. 26, 2019); *Desert Survivors v. U.S. Dep't of Interior*, 336 F. Supp. 3d 1131 (N.D. Cal. 2018) (vacating legally binding Department of the Interior policy, adopted in 2014 after notice and comment, on the ground that it represented an impermissible interpretation of the governing statute), *appeal dismissed*, No. 18-17054 (9th Cir. Nov. 19, 2018); *Latif v. Holder*, 28 F. Supp. 3d 1134, 1162-63 (D. Or. 2014) (decision holding that procedures for U.S. person to challenge asserted inclusion on the "No Fly List" did not satisfy due process), *appeal dismissed*, No. 14-36027 (9th Cir. Dec. 31, 2014); *Free Speech Coal., Inc. v. Holder*, 957 F. Supp. 2d 564, 570 (E.D. Pa. 2013), *aff'd in part, vacated in part, and remanded sub nom. Free Speech Coal., Inc. v. Attorney Gen. of the U.S.*, 825 F.3d 149 (3d Cir. 2016) (no cross-appeal of district court judgment holding that a Department of Justice regulation relating to record-keeping requirements for producers of sexually explicit material violated the Fourth Amendment); *Gonzales & Gonzales Bonds & Ins. Agency Inc. v. DHS*, 913 F. Supp. 2d 865, 880 (N.D. Cal. 2012) (declaring 2003 DHS regulation "invalid" on the ground that it was "inconsistent with Congress's statutory mandate"), *appeal dismissed*, No. 13-15415 (9th Cir. Aug. 9, 2013); *Boardley v. U.S. Dep't of Interior*, 605 F. Supp. 2d 8 (D.D.C. 2009), *aff'd in part*, No. 09-5176, 2009 WL 3571278 (D.C. Cir. Oct. 19, 2009), *rev'd in part*, 615 F.3d 508 (D.C. Cir. 2010) (no appeal from portion of district court order invalidating Park Service regulation governing permitting process for demonstrations and picketing); *Linares v. Jackson*, 548 F. Supp. 2d 21, 24 (E.D.N.Y. 2008) (enjoining the Department of Housing and Urban Development from

Although it is enough that the States reasonably *should* have known that the United States might not protect their putative interests, the district court also properly recognized that the States had actual knowledge that such a risk could arise when the federal government was reconsidering a rule that was at issue in pending litigation. As the district court noted, Texas (one of the putative intervenors here) moved to intervene in another case, *Pennsylvania v. DeVos*, as early as January 2021 based merely on President Biden's prior statements about the regulation at issue in that case. SA14-16. The States offer no plausible reason why the need to intervene quickly would not have been all the more salient here—where President Biden had formally directed the agency to review the Rule, where the case had already proceeded to a final judgment and the Rule had been held unlawful by numerous courts, and where the government had publicly stated that it was reassessing its approach to this litigation.

---

enforcing regulation allowing no-cause evictions on the ground that it denied tenants due process), *appeal dismissed on parties' stipulation*, No. 08-4522 (2d Cir. Dec. 18, 2008); *see also* SA23 (collecting additional cases).

The States now assert that "Texas was right to be concerned that the new administration would quickly change its stance in the *DeVos* litigation" because the government moved "to place that litigation in abeyance while it reviewed the rule at issue." Br. 27. That assertion is inconsistent with the States' theory that there is no need to intervene in cases involving challenges to rules because putative intervenors can rely on the "established practice" of seeking abeyance. *See* Br. 17. In any event, the point is not whether Texas was wrong to seek to intervene in *DeVos*, but rather that it was evidently aware of the potential need to do so in that case and cannot explain why its rationale in that case would not have applied in this one. The States assert that *DeVos* was at a "much earlier stage" and note that the government had not yet filed its answer, Br. 27, without mentioning that the government had opposed the plaintiffs' motion for a preliminary injunction and for summary judgment in *DeVos* and the case had been pending for over six months.[13] As the district court observed, it is not

[13] *See* Defs.' Opp'n. to Mot. for Prelim. Inj., *Pennsylvania v. DeVos*, No. 20-cv-1468 (D.D.C. July 8, 2020), Dkt. No. 63; Defs.' Mem. in Supp. of Their Cross-Mot. for Summ. J. & Opp'n. to Pls.' Mot. for Summ. J., *Pennsylvania v. DeVos*, No. 20-cv-1468 (D.D.C. Jan. 19, 2021), Dkt. No. 132.

clear why the difference in procedural posture is relevant, except insofar as the advanced stage of this case would highlight the need to intervene more quickly. SA16.

The States underscore the error in their argument by comparing this case to *Flying J, Inc. v. Van Hollen*, 578 F.3d 569 (7th Cir. 2009). There, this Court held that intervention was appropriate when the intervenor sought to intervene immediately after the losing party in district court made clear that it did not intend to appeal, within the time to file a notice of appeal, and where there had been "nothing to indicate" that the losing party no longer intended to pursue the litigation. *Id.* at 572. The States urge that there was similarly "nothing" here to indicate that the federal government would not maintain its appeal. Br. 28. An Executive Order directing the agency to review the challenged Rule and a series of status reports indicating that the government was reconsidering its position and might take action to moot plaintiff's remaining claim do not qualify as "nothing."

2. The district court's conclusion that granting the States' post-judgment motion to intervene would "greatly prejudice the parties" was also well within its discretion. SA27. The court correctly observed that

the federal government had engaged in a month-long evaluation of its litigation options, which necessarily took into account the absence of intervenors. SA25. During that time, DHS reached a conclusion that continued litigation in defense of the Rule was neither an efficient use of government resources nor in the public interest. *Id.* Also during that time, plaintiff agreed to dismiss its equal protection claim in light of the government's actions, thus eliminating the prospect of continued discovery battles and possible depositions of former high-ranking government officials. SA27-28. And in reliance on the finality of the district court's judgment vacating the Rule, the government had removed the text of the 2019 Rule from the Code of Federal Regulations and issued updated guidance. SA26.

Had the States moved to intervene during the five weeks in which the federal government was assessing its next steps, the government could have taken their potential participation into account and formulated a different course. SA25-26. In light of these facts, the district court reasonably found that intervention at this late date would waste the parties' efforts to reach an end to the litigation, subject the parties to renewed discovery disputes, and inject renewed uncertainty

into guidance regarding DHS's implementation of the public-charge statute, a "back-and-forth" that could have been avoided if the States had acted more promptly. SA26-27.

The States do not dispute that their late intervention would have these consequences. Instead, they urge that the district court abused its discretion in taking into account the prejudice to the parties from the States' late intervention, contending that all harm should be attributed to the federal government's determination to dismiss its appeal rather than holding the appeal in abeyance. *See* Br. 29-31. The States cite no authority for the remarkable proposition that prejudice from delayed intervention does not count if a putative intervenor disagrees with a litigation decision made before the motion to intervene.

The States' position is all the more remarkable because they explicitly concede that the government's conduct was lawful. The States briefly suggest that the government's litigation decision was an improper attempt to evade the Administrative Procedure Act's notice-and-comment requirements without providing "notice" to the potential intervenors (who up to that time had never participated in any of the numerous judicial proceedings involving the 2019 Rule or in the

preceding administrative process). *See* Br. 2, 17, 22-23. But they quickly retreat from that position, citing no APA provision that was plausibly violated in this case and conceding, as they did in the district court, that the federal government's actions in this case did not violate the APA. Br. 44; SA29-30 (noting that the States had expressly waived this argument). The APA provides for judicial review of final agency actions. *See* 5 U.S.C. § 706. When a district court or court of appeals exercises that power to set aside an agency regulation, complying with its judgment does not overthrow the APA's design but rather is consistent with it.

The government is of course free to seek, and often does seek, review of a district court's decision. But nothing in the APA or any other source of law requires that the government do so invariably. To the contrary, the Solicitor General of the United States has longstanding authority to "[d]etermin[e] whether, and to what extent, appeals will be taken by the Government to" the courts of appeals, and whether to seek further review before the Supreme Court. 28 C.F.R. § 0.20; *see* 34 Fed. Reg. 20,388, 20,390 (Dec. 31, 1969) (similar); *see also* 28 U.S.C. § 517 (authorizing the Solicitor General and other Department of Justice

officials "to attend to the interests of the United States" in the courts). Moreover, as the Supreme Court has recognized, the decision to give the Attorney General and Solicitor General authority to determine not just *how* but *whether* to pursue appellate review "represents a policy choice by Congress." *Federal Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 96 (1994). "Whether review of a decision adverse to the Government … should be sought depends on a number of factors which do not lend themselves to easy categorization," and Congress and the Executive Branch have accordingly determined that such determinations are best "concentrated in a single official" with a "broad[] view of litigation in which the Government is involved throughout the state and federal court systems." *Id.*

The States also dramatically overstate the simplicity of the course that they claim the government should have pursued. The States assert that the federal government should have avoided discovery by seeking abeyance pending a new notice-and-comment rule, Br. 30, ignoring that the plaintiff had specifically objected to a long abeyance and conditioned dropping its discovery demands on the government's dismissal of its appeal, *see* Dkt. 245, at 2. And in asserting that abeyance was a readily

available alternative, the States make no effort to account for the posture of this case, in which a stay had been issued and the Supreme Court had granted certiorari. Nor do the States explain how seeking an abeyance would have avoided the need for additional litigation on whether the stay of the Rule should remain in place during the abeyance period.

3. Relatedly, the district court reasonably determined that this substantial prejudice to the parties would outweigh any prejudice to the States from denial of intervention. In addition to significantly understating the complications associated with the grant of intervention, the States dramatically overstate the effects of the judgment here on their own interests.

The States' allusion to the "billions of dollars" that the States spend "in Medicaid Services" has nothing to do with the costs associated with the vacatur of the 2019 Rule. Br. 31. Virtually all of that money is spent on U.S. citizens or other people who would not have been denied admission or adjustment of status under the 2019 Rule, and thus is entirely unaffected by this case. Although DHS expressed uncertainty about the 2019 Rule's likely effect when it first promulgated the Rule,

84 Fed. Reg. at 41,313, now we have data: in the year that the government applied the 2019 Rule, the Rule resulted in adverse adjudications of only five of the 47,555 adjustment-of-status applications to which it was applied. Dkt. No. 269-1, ¶ 8; Dkt. No. 269-2, ¶ 10. In addition, even noncitizens who are granted adjustment of status are often not immediately eligible for Medicaid benefits. *See* 8 U.S.C. § 1613 (five-year waiting period). The States' suggestion that continuing this appeal could save their treasuries any significant sum of money is therefore speculative at best—particularly because DHS is already working on a new rulemaking that it expects to propose early this year. *See* Fall 2021 Unified Agenda.

The States likewise do not demonstrate cognizable prejudice through speculation about the effect of the district court's judgment on litigation surrounding a future rule. *See* Br. 32-33. When DHS develops a new rule, it will be that rule, and not the 2019 Rule, whose legality will be assessed by a court should any party be dissatisfied with the new rule, and DHS will have to justify the content of the new rule on its own terms. Moreover, the very case on which the States rely (Br. 32-33) establishes that the new rule would not be subject to a heightened

standard merely because it constitutes a change from an old rule: an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

The States' main argument appears to center on the possibility that DHS will *not* promulgate a new rule, or that DHS will want to reenact the same rule that is at issue in this case. As to the former possibility, as the district court explained, the States are free to petition for new rulemaking under 5 U.S.C. § 553(e). SA28-30; *see* 6 C.F.R. pt. 3. The States' observation (Br. 32) that the denial of such a petition would be reviewed deferentially only underscores the discretion inherent in an agency's judgment about how to respond to a judicial decision and about whether further rulemaking is warranted, which does not help the States' position here. And in any event, DHS has announced its intention to promulgate a new rule and has already taken steps to do so.

As to the latter possibility, the States assert that "even if the State Intervenors somehow manage to persuade the federal government to promulgate the Public Charge Rule again," the federal government will be forced to defend that reinstated rule under a less favorable standard of review. Br. 32. But even setting aside the speculation inherent in that contention, the mere loss of "a favorable legal standard" is not sufficient prejudice "for Rule 24 purposes." SA29, 32. *See Flying J, Inc.*, 578 F.3d at 571 ("The fact that you might anticipate a benefit from a judgment in favor of one of the parties to a lawsuit … does not entitle you to intervene in their suit"); *infra*, p. 55-62.

4. The district court was likewise reasonable in finding no "unusual circumstance" that would, in the court's discretion, justify the States' delay. *See* SA32. The States' only argument in that regard was that the federal government's decision to withdraw its appeal was "extraordinary." Br. 34. As discussed above, the federal government withdraws appeals with some regularity, and any unusual features of this case only increased the possibility that the federal government might do so here. The States cannot show that the district court abused its discretion by failing to excuse the States' delay for this reason,

particularly when this Court similarly denied the States' motions to intervene and to recall the mandate despite the State's similar arguments that the government's dismissal was extraordinary. *See* Order, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 15, 2021).

II. The District Court Did Not Abuse Its Discretion in Rejecting the States' Request to Set Aside the Judgment under Rule 60(b)(6).

The district court likewise acted within its discretion in declining to set aside the judgment under Rule 60(b)(6). Because relief under Rule 60(b) is "an extraordinary remedy and is granted only in exceptional circumstances," this Court applies "an extremely deferential abuse of discretion standard" that is met "only when no reasonable person could agree with the decision to deny relief." *Eskridge v. Cook County*, 577 F.3d 806, 808-09 (7th Cir. 2009) (quotation marks omitted). The States cannot satisfy that standard, which provides an independent basis for denying the requested relief and bringing this case to a close.

The States' motion effectively asked the district court to set aside its November 2020 judgment and reenter it for the sole purpose of restarting the time to appeal. *See* SA38. Most of Rule 60(b)'s provisions for relief—such as for mistake, fraud, or newly discovered evidence—are

facially inapplicable in the circumstances here. Fed. R. Civ. P. 60(b)(1)-(5). Accordingly, the States relied exclusively on Rule 60(b)'s catch-all provision providing the court discretion to set aside a judgment for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6); SA34. To invoke this provision, the States were "require[d]" to "establish that extraordinary circumstances justify upsetting a final decision." *Choice Hotels Int'l, Inc. v. Grover*, 792 F.3d 753, 754 (7th Cir. 2015) (quotation marks omitted).

The district court denied the States' extraordinary request for relief for several independent reasons, all of which reflected a reasonable exercise of the court's discretion.

First, the district court concluded that the States' Rule 60(b) motion had not been filed "within a reasonable time," and that denial of the motion was "warranted on this ground alone." SA35. The district court considered a number of relevant factors identified by this Court's cases—including the "interest in finality, the reasons for the delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and the consideration of prejudice … to other parties." SA35 (quoting *Ingram v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 371

F.3d 950, 952 (7th Cir. 2004)). And the court reasonably determined that those "factors weigh[ed] heavily against the States." SA35.

The district court's judgment had become final in November 2020, yet the States had not made any attempt to participate either in the district court or in this Court until March 2021, and only moved to set aside the judgment in May 2021 (7 months after the judgment was entered), after both this Court and the Supreme Court had denied the States' attempts to intervene on appeal. *See* SA3-7. "There were no good reasons for the States' delay" because they knew much earlier "of their interests in this suit and the reasonably possible" chance that the federal government would reassess its ongoing appeals. SA35. In addition, "[r]eopening the judgment at this juncture would prejudice Plaintiffs and, in particular, DHS because of the costs they incurred in reliance on their resolution of this suit." SA35. As more fully discussed above, *supra* p. 27-46, a reasonable person could agree with the district court's decision, which is all that is required to affirm the court's exercise of discretion.

Second, the district court determined in its discretion that the States had not demonstrated "extraordinary circumstances" sufficient to

warrant disturbing the final judgment under Rule 60(b)(6). SA36-37. The court once more explained its reasonable view 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," and noted that the States had "admit[ted] that DHS did not violate the APA by dismissing its appeal of [the] court's judgment." SA36. The court noted that "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." SA36. The court did not believe it was its "role to scrutinize those reasons and label some 'extraordinary' for purposes of Rule 60(b)(6), unless there is some hint of illegality or impropriety." SA36. And the States could "live to fight another day" by participating in the administrative process going forward. SA37. Again, the district court's analysis was reasonable.

Third, the district 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. Citing ample precedent from this Court, the court noted longstanding principles that "[a]rguments that could and should have been made against a judgment through a timely appeal are

not fodder for a Rule 60(b) motion," and "[a] successful movant under Rule 60(b) must instead point to something unknown or unnoticed at the time of final judgment that undermines the judgment's integrity." SA37 (citing, *e.g.*, *Bell v. McAdory*, 820 F.3d 880, 883 (7th Cir. 2016), and *Stoller v. Pure Fishing Inc.*, 528 F.3d 478, 480 (7th Cir. 2008)).

Here, however, "[t]he States point to nothing unknown or unnoticed at the time judgment was entered." SA38. Nor do the States even contend that the district court should have altered its judgment. To the contrary, the States agreed that this Court's prior "holding likely establishes the law of the case," such that the district court *could not* alter its decision. SA38 (quoting Dkt. No. 260, at 9).[14] The district court thus concluded that the States' motion reduced to an improper request for "the court to vacate the judgment and then simply re-enter it in identical form so that they can appeal." SA38. And the district court properly concluded that such a "use of Rule 60(b) would violate the tenet that 'a collateral attack on a final judgment is not a permissible substitute for appealing the judgment.'" SA38-39

[14] Despite that concession, the States now devote several pages of their brief to the merits (Br. 44-49) without so much as acknowledging this Court's precedential decision.

(alterations omitted) (quoting *Bell v. Eastman Kodak Co.*, 214 F.3d 798, 801 (7th Cir. 2000)).

The States cite dicta from this Court suggesting that this rule might not apply in an "unusual case[]." Br. 42-43 (quoting *Local 332, Allied Indus. Workers of Am. v. Johnson Controls, Inc.*, 969 F.2d 290, 292 (7th Cir. 1992)). But the States offer no case where a court has actually applied such an exception in circumstances remotely comparable to this case, much less a case suggesting that the district court abused its discretion by declining to craft an exception to restart the time to appeal more than seven months after the judgment had been entered and where the parties would suffer prejudice. *Cf.* Fed. R. Civ. P. 4(a)(6)(A)-(C) (permitting a district court to reopen the time to appeal "only if" the "the court finds that no party would be prejudiced," "the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice [of the judgment]," and "the court finds that the moving party did not receive notice [of the judgment] within 21 days").

Fourth, the district court also denied relief under Rule 60(b) because it had denied the States' intervention motion as untimely, and therefore

the States were not "a party" that could seek relief under Rule 60(b)'s plain text. SA33 (quoting Fed. R. Civ. P. 60(b)) (emphasis omitted). That conclusion is reinforced by numerous decisions in this Court. *See, e.g.*, *United States v. 8136 S. Dobson Street*, 125 F.3d 1076, 1082 (7th Cir. 1997) ("The person seeking relief [under Rule 60(b)] must have been a party"); *National Acceptance Co. of Am. 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 Rule 60(b)] motion" (quotation marks omitted)); *cf. United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009) ("[I]ntervention is the requisite method for a nonparty to become a party to a lawsuit"); *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (rejecting a suggestion that appeals may be filed by nonparties without intervention because "the better practice is for such a nonparty to seek intervention for purposes of appeal").

The States contend that this Court recognized an exception to the rule that non-parties cannot file Rule 60(b) motions in *National Acceptance Co.*, 627 F.2d at 766. Br. 40. But the Court there was referring to an exception for "one who is in privity with a party," 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure*

§ 2865, which does not apply here. Nor would the States have standing to make a Rule 60(b) motion under the other circuit decisions on which they rely. In each case in which an exception was recognized, the judgment would have bound or directly encumbered the non-party. *See Grace v. Bank Leumi Tr. Co. of N.Y.*, 443 F.3d 180, 188 (2d Cir. 2006) (settlement agreement with "judgment-proof, pro se defendant with the intent at the time of the settlement to collect from [the] third party" that plaintiffs attempted to use "as a predicate for a fraudulent conveyance action against the third party"); *Dunlop v. Pan Am. World Airways, Inc.*, 672 F.2d 1044, 1047 (2d Cir. 1982) (stipulated dismissal that prevented movants from pursuing discrimination claims in state court); *Binker v. Pennsylvania*, 977 F.2d 738, 745 (3d Cir. 1992) (non-parties were "potential recipients of settlement proceeds" and the district court had specifically denied their objections after having encouraged them to participate); *Eyak Native Vill. v. Exxon Corp.*, 25 F.3d 773, 777 (9th Cir. 1994) (nonparties were bound by the judgment); *see also Bridgeport Music, Inc. v. Smith*, 714 F.3d 932, 940-41 (6th Cir. 2013) (declining to decide whether to adopt exception for those "strongly affected" by the judgment because it would not apply in case before the

court). The judgment here operates on DHS, and affects a Rule that does not apply to the States; the chain of inferences by which the States claim that they might be affected cannot satisfy any plausibly relevant standard.

The States similarly do not advance their argument by asserting that "the Supreme Court practically directed the State intervenors" to seek relief in the district court when the Supreme Court denied the States' efforts to intervene on appeal. Br. 43. The Supreme Court simply stated that its decision was "without prejudice" to the States' ability to seek other relief in district court, *Texas v. Cook County*, 141 S. Ct. 2562 (2021), and did not purport to resolve any claim the States might raise there.

III. The States Do Not Meet the Other Requirements for Intervention under Rule 24.

Because the district court determined that the States' intervention motion was untimely, the court had no need to address the remaining requirements for permissive or mandatory intervention under Rule 24. The States are incorrect, however, that they are otherwise entitled to intervention.

1. The States are not entitled to mandatory intervention.[15] Rule 24(a) provides for mandatory intervention in only two narrow circumstances. Rule 24(a)(1) addresses a situation in which a person "is given an unconditional right to intervene by a federal statute." That provision does not apply here. Rule 24(a)(2)—the provision on which the States rely—is limited to a person who "claims an interest relating to the *property* or *transaction* that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2) (emphasis added). That text refers to a direct, legally protectable interest related to the "property" or a "transaction" that "is the subject" of the action. It does not encompass merely indirect interests of the sort the States assert here, such as the possibility of downstream economic effects from the resolution of the parties' claims.

[15] The Supreme Court is currently considering a similar issue in *Arizona v. City & County of San Francisco*, No. 20-1775. The government has briefed the issue in greater detail there. *See* Gov't Br. at 13-31, *Arizona v. City & County of San Francisco*, No. 20-1775 (U.S., filed Jan. 12, 2022).

Rule 24's structure reinforces this point. If interests in the indirect, downstream effects of a judgment were sufficient to entitle an applicant to intervention *as of right*, then a federal or state agency's interest in a case involving a regulation or statute that it administered should *a fortiorari* qualify—because a judicial decision interpreting that regulation or statute could have substantial practical effects for the agency. Yet Rule 24(b)(2) makes such intervention merely *permissive*, stating that the court "may permit" intervention in that circumstance, in the "exercis[e] [of] its discretion." Fed. R. Civ. P. 24(b)(2), (3).

The deliberate textual parallels between Rule 24(a) and Rule 19's provisions for mandatory joinder likewise reinforce the requirement that a person identify a direct, legally protectable interest in a suit in order to claim intervention as-of-right. The text of Rule 24(a) echoes that of Rule 19, which requires mandatory joinder of persons who "claim[] an interest relating to the subject of the action and [are] so situated that disposing of the action in [their] absence may . . . as a practical matter impair or impede [their] ability to protect the interest," Fed. R. Civ. P. 19(a)(1)(B). Thus, as the Advisory Committee on Rules has stated, "an applicant is entitled to intervene in an action when his

position is comparable to that of a person [required to be joined] under Rule 19(a)[] . . . unless his interest is already adequately represented in the action by existing parties." Advisory Committee notes on Rule 24 (1966). And it would be odd to suggest that *all* persons with substantial downstream economic interests may be required parties under Rule 19.

Indeed, such an understanding—under which any person who might experience downstream economic injury from the result of a case is entitled to intervene as of right and required to be joined if feasible—would be unworkable. Because litigation often has indirect economic consequences for countless different entities, such a reading would come close to eclipsing the district court's discretion under Rule 24(b)'s provisions for permissive intervention and "clutter too many lawsuits with too many parties." *City of Chicago v. Federal Emergency Mgmt. Agency*, 660 F.3d 980, 985 (7th Cir. 2011).

Accordingly, courts do not accept indirect downstream interests as sufficient to create a right to intervention under Rule 24(a). *See, e.g.*, *Donaldson v. United States*, 400 U.S. 517, 531 (1971) (rejecting interest in downstream practical consequences of administrative summonses because it was not the type of "significant[] protectable interest"

necessary to support mandatory intervention); *Flying J, Inc.*, 578 F.3d at 571, 572 (explaining that an intervenor must "be directly rather than remotely harmed" and that "a mere economic interest is not enough" (quotation marks omitted)); *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 322 (7th Cir. 1995) (an intervenor must have a "direct, significant legally protectable" interest, not "a mere betting interest in the outcome of a case" (quotation marks omitted)); *Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3d Cir. 1995) ("A mere economic interest in the outcome of the litigation is insufficient to support a motion to intervene."); *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 466 (5th Cir. 1984) (en banc) (holding that "an economic interest alone is insufficient"); *Medical Liab. Mut. Ins. Co. v. Alan Curtis LLC*, 485 F.3d 1006, 1008 (8th Cir. 2007) ("An economic interest in the outcome of the litigation is not itself sufficient to warrant mandatory intervention."); *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993) ("An economic stake in the outcome of the litigation, even if significant," is not sufficient under Rule 24(a)(2).).

b. The interests invoked by the States here do not satisfy Rule 24(a)'s rigorous requirement for a direct, legally enforceable interest.

The States primarily hypothesize an indirect, downstream effect of the Rule's vacatur: specifically, that in the Rule's absence, one or more additional noncitizens might come to reside in the States and use the States' welfare programs at some indeterminate point in the future. Br. 34. That is not the kind of direct interest related to "property" or a "transaction that is the subject of the action" that triggers mandatory intervention. *See* Br. 34. If it were, the number of parties in the case would be unmanageable—as it could include not just States like appellants, but also everyone else with similarly remote downstream economic interests, from local governments to landlords and grocery stores. *See* 84 Fed. Reg. at 41,301 (noting that many types of entities may have economic interests in the downstream effects of the Rule).

In addition to being indirect, moreover, petitioners' interests are also highly speculative. DHS initially estimated that the 2019 Rule would reduce cumulative State expenditures by approximately $1.01 billion annually. 84 Fed. Reg. at 41,301. But in making that projection, DHS acknowledged that it was "difficult to predict" the 2019 Rule's effects because DHS had "neither a precise count nor reasonable estimate" of how many non-citizens "are both subject to the public charge ground of

inadmissibility and are eligible for public benefits." *Id.* at 41,313. And subsequent real-world experience shows that few applicants for adjustment of status were, in fact, receiving the covered benefits: as explained above, during the roughly one year that the Rule was in effect, it resulted in just *five* adverse decisions on applications for adjustment of status that would otherwise have been granted. Dkt. No. 269-1, ¶ 8.

The States ignore that real-world experience, instead relying on assertions that "the *total* budget" for their welfare programs "is always measured in billions of dollars," Br. 35 (emphasis added). They offer no basis, however, for concluding that the Rule's vacatur will have a meaningful effect on those budgets. Indeed, the States identify no non-speculative basis for concluding that any of the small number of noncitizens who would have been deemed inadmissible under the 2019 Rule would make their way to the States' jurisdictions as opposed to the other 36 States. Even if it could be sufficient for standing, the bare possibility that one of those noncitizens would do so (and would then receive benefits from one of the States' voluntary social-welfare programs) does not give petitioners a "significant[] protectable interest"

triggering a mandatory right to intervene. *Donaldson*, 400 U.S. at 531. That is especially so given the fact that reimposition of the Rule could itself impose costs on the States that may outstrip any minimal savings they might hope to obtain. *See Cook County v. Wolf*, 962 F.3d 208, 218 (7th Cir. 2020).

Nor is the States' proffered interest in immigration policy (Br. 35) a direct, legally protectable interest in property or a transaction that is the subject of this suit. Third parties generally lack a "judicially cognizable interest" in the "legal framework" a sovereign adopts to guide its "individual enforcement decisions." *Diamond v. Charles*, 476 U.S. 54, 64-65 (1986) (quotation marks omitted). And that principle applies with particular force in the context of immigration law, where "[t]he power to regulate immigration … has been entrusted by the Constitution to the political branches of the Federal Government." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 864 (1982). Neither private parties nor "the 50 separate States" have a legally recognizable interest in which noncitizens will be inadmissible to, or removable from, the United States. *Arizona v. United States*, 567 U.S. 387, 394-395 (2012).

Moreover, even in areas where the States' quasi-sovereign interests are less attenuated, Rule 24 does not give them a generalized right to mandatory intervention. Under Rule 24(a)(1) and 28 U.S.C. § 2403, a State has a statutory right to intervene whenever "the constitutionality of any statute of that State . . . is drawn in question." 28 U.S.C. § 2403(b). But beyond that narrow circumstance, Rule 24 addresses the States' interests in the interpretation and administration of their own laws through permissive intervention. *See* Fed. R. Civ. P. 24(b)(2); *see also supra* p. 56. Nothing in Rule 24 suggests that States' sovereign or quasi-sovereign interests give them a greater right to intervene in suits implicating federal law than in suits implicating their own laws.

2. The States also are not entitled to permissive intervention. Even if the States' motion were considered technically timely, the district court would be well within its discretion to deny the States' request for permissive intervention on practical grounds similar to those that it considered in its order. In general, "it is wholly discretionary with the court whether to allow intervention under Rule 24(b)," Wright & Miller § 1913. *See* Fed. R. Civ. P. 24(b)(1) (describing circumstances in which a court "may permit" a party to intervene). A district court may

consider "a wide variety of factors," *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 803 (7th Cir. 2019), and its "exercise of discretion" may not be set aside by a reviewing court "unless clear abuse is shown," *Allen Calculators v. National Cash Register Co.*, 322 U.S. 137, 142 (1944). Indeed, "[r]eversal of a decision denying permissive intervention is extremely rare, bordering on nonexistent." *South Dakota ex rel. Barnett v. U.S. Dep't of Interior*, 317 F.3d 783, 787 (8th Cir. 2003).

Accordingly, even if the States had a plausible argument that their intervention motion was timely as a technical matter, the district court would have been well within its discretion to deny permissive intervention based on the States' delay and the prejudice to the parties that it identified in its order, particularly in light of the States' highly attenuated alleged interest in this case. *See* Fed. R. Civ. P. 24(b)(3) (requiring court to consider "delay or prejudice" to existing parties in deciding whether to grant permissive intervention).

3. Finally, because the States are not entitled to an order reopening the case pursuant to Rule 60(b), there is also no case in which the

States may intervene. Intervention may be denied for that basis as well. *See Mittvick v. Illinois*, 672 F. App'x 582, 583 (7th Cir. 2016).

CONCLUSION

For the foregoing reasons, the order of the district court should be affirmed.

Respectfully submitted,

SARAH E. HARRINGTON
Deputy Assistant Attorney General

JOHN R. LAUSCH, JR.
United States Attorney

DANIEL TENNY
GERARD SINZDAK

s/ Joshua Dos Santos
JOSHUA DOS SANTOS
Attorneys, Appellate Staff
Civil Division, Room 7243
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 353-0213
Joshua.y.dos.santos@usdoj.gov

January 2022

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,983 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Century Schoolbook 14-point font, a proportionally spaced typeface.

s/ Joshua Dos Santos
JOSHUA DOS SANTOS

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

s/ Joshua Dos Santos
Joshua Dos Santos