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 INTERVENORS-APPELLANTS

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Certificate of Interested Persons

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Under the Seventh Circuit Rule 26.1(a), Intervenors-Appellants, as governmental parties represented by government attorneys, need not furnish a certificate of interested persons.

/s/ Cody Rutowski
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Statement Regarding Oral Argument

This case presents issues of exceptional importance and raises complex procedural questions. As a result, the States of Texas, Alabama, Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, and West Virginia (the "State Intervenors") believe that oral argument is likely to aid the Court's decisional process and should thus be permitted.

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INTRODUCTION

For over a year, Plaintiffs and the federal government opposed each other vigorously in this litigation about the validity of the Public Charge Rule—including at the Supreme Court, where the federal government obtained a stay of the district court's preliminary injunction barring enforcement of the Public Charge Rule, *Wolf v. Cook County*, 140 S. Ct. 681 (2020). Indeed, the federal government obtained either a stay or reversal—from a court of appeals or the Supreme Court—of every order enjoining or vacating the Public Charge Rule. In granting multiple stays of orders enjoining the Public Charge Rule, the Supreme Court necessarily concluded that there was "a fair prospect that a majority of the Court will conclude that the decision below was erroneous." *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers). And it did so time and again. Despite over a year of litigation involving numerous challenges across the country and at every level of the federal judiciary, the Public Charge Rule remained in effect until the federal government "thr[ew] the case" by dismissing every pending appeal and acceding to the district court's nationwide vacatur of the rule. *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009).

Now that the federal government has switched sides, Plaintiffs, the federal government, and even the district court have each insisted that former adversaries leveraging the district court's partial summary judgment into a nationwide vacatur of the Public Charge Rule is not a cause of concern. Never mind that the Supreme Court had granted review to determine the validity of the Public Charge Rule. *Dep't of Homeland Sec. v. New York*, 141 S. Ct. 1370 (2021). Never mind that the federal government used the district court's partial final judgment to rescind the Public

Charge Rule "without the normal notice and comment typically needed to change rules." *City & County of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 992 F.3d 742, 743 (9th Cir. 2021) (VanDyke, J., dissenting). Never mind that the federal government ignored the well-worn and "traditional route of asking the courts to hold . . . cases in abeyance" pending notice-and-comment rulemaking. *Id.* at 751. And never mind that no one can point to another instance where the federal government has intentionally agreed to nationwide prospective relief issued by a single district court on the merits. The district court concluded that nothing extraordinary has occurred here and that the State Intervenors are entitled neither to intervene nor to seek relief from the district court's judgment.

That is incorrect. The State Intervenors are entitled to intervene. They moved to vindicate their interests in the Public Charge Rule as soon as the federal government abandoned its defense of it, they have ample interests to justify intervention that will be impaired absent intervention, and those interests are now indisputably unrepresented by the parties.

The State Intervenors are also entitled to relief from the district court's judgment under Rule 60(b) of the Federal Rules of Civil Procedure. While "extraordinary circumstances" are required for relief under Rule 60(b)(6), *Pearson v. Target Corp.*, 893 F.3d 980, 984 (7th Cir. 2018) (quoting *Buck v. Davis*, 137 S. Ct. 759, 777-78 (2017)), the federal government's conduct in this litigation has been at least extraordinary—indeed, wholly unprecedented.

This Court should reverse the district court's denial of the State Intervenors' motions to intervene and for relief under Rule 60(b)(6) so that the State Intervenors

can take up the defense of the Public Charge Rule that the federal government so abruptly and extraordinarily abandoned. And because "there is no point" in remanding this case to the district court, this Court should treat the State Intervenors as the appellants from the district court's judgment on the merits. *Flying J*, 578 F.3d at 574.

Statement of Jurisdiction

Plaintiffs invoked the jurisdiction of the district court under 28 U.S.C. § 1331, raising claims under the Administrative Procedure Act, 5 U.S.C. §§ 704-706, and the Due Process Clause of Fifth Amendment to the U.S. Constitution. Dkt. 1 ¶ 11, at 5; *id.* ¶¶ 140-88, at 44-54. The district court entered a partial final judgment on November 2, 2020, Dkt. 223, and the federal government defendants timely filed a notice of appeal the next day, Dkt. 225; *Cook County v. Wolf*, No. 20-3150 (7th Cir. filed Nov. 3, 2020). On March 9, 2021, the federal government moved to voluntarily dismiss that appeal, Unopposed Motion to Voluntarily Dismiss Appeal, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 9, 2021), ECF No. 23, and this Court granted that motion the day it was filed, Order, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 9, 2021). The parties filed a joint stipulation of dismissal in the district court on March 11, 2021. Dkt. 253.

On May 12, 2021, the State Intervenors moved to intervene as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure, and they moved in the alternative for permissive intervention under Rule 24(b)(1)(B). Dkt. 256; *see also* Dkts. 257, 258. That same day, they also moved for relief from the district court's judgment under Rule 60(b)(6). Dkt. 259; *see also* Dkt. 260. The district court denied both motions on August 17, 2021. Dkt. 284; *see also* Dkt. 285. The State Intervenors filed

a timely notice of appeal on August 20, 2021. Dkt. 287. This Court has jurisdiction over the district court's denial of the State Intervenors' motions because they are both final, appealable decisions under 28 U.S.C. § 1291. *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 796 (7th Cir. 2019) ("We have jurisdiction because, 'from the perspective of a disappointed prospective intervenor, the denial of a motion to intervene is the end of the case, so an order denying intervention is a final, appealable decision under 28 U.S.C. § 1291.'" (citation omitted)); *Grede v. FCStone, LLC*, 867 F.3d 767, 777 (7th Cir. 2017) ("[T]he denial of Rule 60(b) relief is 'appealable as a separate final order.'" (citation omitted)).

Issues Presented

After defending the Public Charge Rule in courts across the country and at all levels of the federal judiciary, the federal government took the unprecedented step of dismissing all of its appeals in defense of the Public Charge Rule—acceding to a single district court's judgment vacating the Public Charge Rule nationwide, even though the Supreme Court had twice suggested challenges to the Public Charge Rule would ultimately fail, *see Wolf*, 140 S. Ct. 681; *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020). Two days after the federal government's extraordinary actions, the State Intervenors moved to intervene in this Court to defend the Public Charge Rule and the important state interests it protects. After this Court denied the State Intervenors relief, they sought relief from the Supreme Court. The Supreme Court also denied relief, but in doing so it all but directed the State Intervenors to pursue relief in the district court. *Texas v. Cook County*, 141 S. Ct. 2562 (2021). The State Intervenors promptly did so. The questions presented are:

1. Are the State Intervenors entitled to intervene in this litigation, and was their motion to intervene timely when they took action only two days after the federal government's extraordinary abandonment of its defense of the Public Charge Rule?[1]
2. Are the State Intervenors entitled to relief from the district court's judgment vacating the Public Charge Rule nationwide because of the federal government's extraordinary abandonment of its defense of the Public Charge Rule?

STATEMENT OF THE CASE

I. The Public Charge Rule

Since the late Nineteenth Century, Congress has prohibited immigration by individuals who are likely to become a "public charge." Immigrant Fund Act, Pub. L. No. 47-376, §§ 1-2, 22 Stat. 214, 214 (1882). Congress has never attempted to define that term, providing only that the Executive "shall at a minimum consider the alien's[:] (I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; and (V) education and skills." 8 U.S.C. § 1182(a)(4)(B)(i). This provision's application has evolved over time to consider "a totality-of-the-circumstances test" where "different factors . . . weigh[] more or less heavily at different times, reflecting

[1] The Supreme Court recently granted a petition for a writ of certiorari on almost this exact issue in a challenge to the Public Charge Rule that originated in the Ninth Circuit. *Arizona v. San Francisco*, No. 20-1775, 2021 WL 5024620 (U.S. Oct. 29, 2021)

changes in the way in which we provide assistance to the needy." *City & County of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 944 F.3d 773, 796 (9th Cir. 2019).

In 1999, the Immigration and Naturalization Service recognized that the term "public charge" was ambiguous and proposed a rule that would have defined "public charge" to include any alien "who is likely to become primarily dependent on the Government for subsistence as demonstrated by either: (i) [t]he receipt of public cash assistance for income maintenance purposes, or (ii) [i]nstitutionalization for long-term care at Government expense." Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676, 28,681 (proposed May 26, 1999). At the same time, INS issued an informal guidance document that applied the proposed definition pending the issuance of a final rule. Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999). But INS did not publish a final rule codifying its proposed definition, so the 1999 informal guidance remained in place. *See* Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114, 51,133 (proposed October 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248).

In 2018, the Department of Homeland Security and U.S. Citizenship and Immigration Services proposed a new rule that defined "public charge" in a way that accounted for a broader range of government benefits. *Id.* After extensive notice-and-comment proceedings under the Administrative Procedure Act, DHS issued the final version of the Public Charge Rule. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (formerly codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248) (final rule). The Public Charge Rule considered not just cash aid for

purposes of discovering whether an immigrant was likely to become a public charge, but also valuable non-cash benefits such as Medicaid, food stamps, and federal housing assistance. 8 C.F.R. § 212.21 (2020). Under the Public Charge Rule, officials were to look at the totality of an alien's circumstances to determine whether that alien is likely to "receive[] one or more" of the specified public benefits "for more than 12 months in the aggregate within any 36-month period." *Id.* § 212.21(a); *see id.* § 212.22. These circumstances included an alien's age, financial resources, family size, education, and health. *Id.*

II. Procedural History

This case is one of several related challenges to the Public Charge Rule.[2] Plaintiffs are Cook County, Illinois, and the Illinois Coalition for Immigrant Refugee Rights ("ICIRR"), a non-profit advocacy organization. Dkt. 1 ¶¶ 13-14, at 5-6. They

[2] Only three other challenges are still pending. One of those challenges originated in the Ninth Circuit. Several of the State Intervenors moved to intervene in that litigation after the federal government abruptly abandoned its defense of the Public Charge Rule, but the Ninth Circuit denied their motion. *City & County of San Francisco*, 992 F.3d 742. Those States later filed a petition for a writ of certiorari challenging (amongst other issues) the denial of their motion to intervene. Petition for Writ of Certiorari, *Arizona v. San Francisco*, No. 20-1775 (U.S. June 18, 2021). On October 29, 2021, the Supreme Court granted the States' petition limited to the question of intervention. *Arizona v. San Francisco*, No. 20-1775, 2021 WL 5024620 (U.S. Oct. 29, 2021).

The other two remaining challenges to the Public Charge Rule are pending in the U.S. District Court for the District of Maryland. Proceedings in that court have been stayed pending the resolution of this litigation. *See CASA de Md., Inc. v. Biden*, No. 8:19-cv-02715-PWG (D. Md.); *City of Gaithersburg v. Dep't of Homeland Sec.*, No. 8:19-cv-02851-PWG (D. Md.).

brought this action in September 2019 against DHS and USCIS, as well as DHS's Acting Secretary and USCIS's acting Director. *Id.* ¶¶ 15-18, at 6. Plaintiffs challenged the Public Charge Rule under the APA and the Due Process Clause of the Fifth Amendment.[3] *Id.* ¶¶140-88, at 44-54.

A. The district court's preliminary injunction

Plaintiffs quickly moved for a preliminary injunction enjoining enforcement of the Public Charge Rule. Dkt. 24; *see also* Dkt. 27. The district court granted the motion and issued a preliminary injunction in October 2019, blocking enforcement of the Public Charge Rule in Illinois. Dkts. 85, 86, 87. The federal government timely appealed, Dkt. 96, and moved to stay the preliminary injunction, Appellants' Motion for a Stay Pending Appeal, *Cook County v. Wolf*, 962 F.3d 208 (7th Cir. 2020) (No. 19-3169), ECF No. 18. This Court denied the motion for a stay over the dissent of then-Judge Barrett, Order, *Cook County*, 962 F.3d 208 (No. 19-3169), ECF No. 41, but the Supreme Court ultimately granted such a stay. *Wolf*, 140 S. Ct. 681. This Court later affirmed the district court's preliminary injunction. *Cook County*, 962 F.3d at 234. The federal government filed a petition for a writ of certiorari. Petition for a Writ of Certiorari, *Mayorkas v. Cook County*, No. 20-450 (U.S. Oct. 7, 2020). That petition remained pending—and the Supreme Court's stay remained in effect—while the Supreme Court granted certiorari in another case concerning the validity of the Public Charge Rule. *See Dep't of Homeland Sec.*, 141 S. Ct. 1370.

[3] Although Cook County and ICIRR brought the APA claims jointly, ICIRR brought the Fifth Amendment claim on its own.

B. The district court's partial final judgment

Meanwhile this litigation continued in the district court. Plaintiffs moved for partial summary judgment on each of their APA claims (but not on ICIRR's Fifth Amendment claim). Dkt. 200; *see also* Dkt. 201. The district court granted the motion, vacated the Public Charge Rule, and entered a partial final judgment under Rule 54(b). Dkts. 221, 222, 223. Unlike the preliminary injunction, the vacatur was explicitly "not limited to the State of Illinois." Dkt. 222 at 8. In other words, the district court's ruling applied nationwide.

The federal government appealed that ruling to this Court. Dkt. 224. The federal government also moved to stay the district court's vacatur pending appeal. Motion for Stay Pending Appeal and Request for Immediate Administrative Stay, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Nov. 30, 2020), ECF No. 2. This Court granted that motion. Order, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Nov. 19, 2020), ECV No. 21. It also stayed that appeal pending the Supreme Court's disposition of the federal government's petition for a certiorari about the district court's preliminary injunction. *Id.*

C. The federal government fails to take a definitive position on whether it will continue to defend the Public Charge Rule

Because ICIRR's Fifth Amendment claim was still pending, litigation continued in the district court. On January 22, 2021, shortly after the change in Administration, the district court ordered the federal government to file a status report by February 4 addressing whether it planned to continue its defense of the Public Charge Rule. Dkt. 240. Instead of directly addressing that issue, the federal government filed a

motion proposing that the parties file a joint status report about the next steps in the litigation. Dkt. 241. In that motion, the government advised the district court that President Biden had issued an executive order on February 2, 2021, that, in relevant part,

> specifically directs relevant agency heads, including the Secretary of Homeland Security, to review agency actions related to implementation of the public charge ground of inadmissibility, 8 U.S.C. § 1182(a)(4)(A), in light of the policy set forth in the Executive Order and certain other considerations, and to "submit a report to the President describing . . . any steps their agencies intend to take" concerning these agency actions . . . .

Id. at 2 (quoting Exec. Order No. 14,012, 86 Fed. Reg. 8277, 8278 (Feb. 2, 2021)). "In light of this Executive Order," the federal government advised the district court that it "intend[s] to confer with Plaintiff over next steps in this litigation, including the propriety of a time-limited stay." *Id.* The court granted the federal government's motion and ordered the parties to file a joint status report by February 19. Dkt. 244.

The federal government and the remaining Plaintiff, ICIRR,[4] filed a status report on February 19. Dkt. 245. In that report, ICIRR noted that the federal government was "still requesting that the U.S. Supreme Court and the U.S. Court of Appeals for the Seventh Circuit overturn th[e] [district court's] prior rulings and uphold the [Public Charge] Rule." *Id.* at 1. ICIRR also pointed out that President Biden's Executive Order

[4] When the district granted Plaintiffs' motion for partial summary judgment on their APA claims, the district court terminated Cook County as a party because the only claim remaining in the case was ICIRR's Fifth Amendment claim. *See* Dkt. 221.

> does not commit DHS to any policy change or set any timeline for implementation of any change that DHS eventually recommends. The Executive Order cannot and does not suspend enforcement of or vacate the [Public Charge] Rule, nor does it guarantee that further court action in the Supreme Court or by new plaintiffs in other forums will not succeed in keeping the Rule in place. . . .
>
> [D]espite weeks of assurances that they are reviewing the Rule, Defendants are still enforcing the Rule and urging that the Supreme Court uphold it.

Id. at 2. ICIRR further objected to a lengthy or indefinite stay:

> Plaintiff [previously] expressed its concern that the [the federal government] would ask for a two-week extension and then when the two weeks ran out ask for a further extension, and we would be stuck indefinitely. [The federal government is] now asking for another 60 days, but there is certainly no guarantee that 60 days will be enough. . . .
>
> If the court is inclined to grant the [federal government] more time, Plaintiff respectfully requests that any stay be brief—7 or 14 days, for example—so that ICIRR and the communities ICIRR serves are not left hanging indefinitely.

Id. at 2-3

In its portion of the status report, the federal government acknowledged that the Public Charge Rule "currently remains in effect while DHS and DOJ undertake the review required by President Biden's Executive Order." *Id.* at 4. But the federal government requested "a brief stay of up to two weeks" to "provide DHS and DOJ with additional time to assess how they wish to proceed," although the federal government hinted that it might later ask for "a more lengthy stay." *Id.*

Based on that status report, the district court ordered the parties to submit another joint status report on March 5, Dkt. 246, which they did, Dkt. 247. In that report, ICIRR noted that "what ICIRR feared would happen—multiple extensions

with no movement—has indeed happened." *Id.* at 2. ICIRR explained that the federal government "continue[s] to provide no assurance that [it] will make any changes to the public charge rule as it currently applies today" and that the federal government "continue[s] to request that the U.S. Supreme Court and the U.S. Court of Appeals for the Seventh Circuit overturn th[e] [district court's] prior rulings and uphold the Rule." *Id.* ICIRR further noted:

> Since the parties' last Joint Status Report, [the federal government] ha[s] succeeded [in] obtaining certiorari in parallel litigation, *Department of Homeland Security v. New York*. The petition for certiorari in this matter continues to pend at the Supreme Court. While the petition is pending with the Supreme Court, briefing is suspended at the Seventh Circuit.

Id. (citations omitted). In its portion of the status report, the federal government noted only that it had "been reviewing the Public Charge Rule" and that it was "assessing how to proceed in the relevant litigations concerning the Public Charge Rule." *Id.* at 1. The federal government promised to "file a notice with the [district court] promptly after a determination is made by DHS and/or DOJ which would have a material effect on this litigation." *Id.*

Based on that status report, the district court advised the federal government on March 8 that during the status hearing the court had scheduled for March 12, the court "will ask [the federal government] for a more detailed assessment as to when DHS and DOJ will decide how to proceed in the pending suits concerning the Public Charge Rule." Dkt. 248.

D. The federal government abruptly abandons its defense of the Public Charge Rule

On March 9, 2021, "[i]n concert with the various plaintiffs who had challenged the [Public Charge Rule] in federal courts across the country, the federal defendants simultaneously dismissed all the cases challenging the Public Charge Rule (including cases pending before the Supreme Court)." *City & County of San Francisco*, 992 F.3d at 743 (VanDyke, J., dissenting); *e.g.*, Unopposed Motion to Voluntarily Dismiss Appeal, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 9, 2021), ECF No. 23. This Court granted the federal government's motion to dismiss its appeal pending in this Court. Order, *Cook County v. Wolf*, No. 20-3150, 2021 WL 1608766 (7th Cir. Mar. 9, 2021), ECF No. 24-1. This Court also issued its mandate immediately and without allowing any potentially interested parties to seek leave to intervene and defend the Public Charge Rule. Notice of Issuance of Mandate at 2, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 9, 2021), ECF No. No. 24-2. This action left in place the district court's vacatur of the Public Charge Rule—which had previously been stayed.

E. The federal government rescinds the Public Charge Rule without going through the notice-and-comment process

Less than a week after abandoning its defense of the Public Charge Rule, the federal government issued a final rule immediately removing the Public Charge Rule from the Code of Federal Regulations without going through the notice-and-comment process generally required by the APA. Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. 14,221 (Mar. 15, 2021). The federal government claimed it was simply "implementing the [district court's]

judgment, i.e., the vacatur" of the Public Charge Rule. *Id.* at 14,221. According to the federal government:

> [G]ood cause exists here for bypassing any otherwise applicable requirements of notice and comment and a delayed effective date. Notice and comment and a delayed effective date are unnecessary for implementation of the court's order vacating the rule and would be impracticable and contrary to the public interest in light of the agency's immediate need to implement the now-effective final judgment. DHS has concluded that each of those three reasons—that notice and comment and a delayed effective date are unnecessary, impracticable, and contrary to the public interest—independently provides good cause to bypass any otherwise applicable requirements of notice and comment and a delayed effective date.

Id. (citation omitted).

The Public Charge Rule thus has become unenforceable in any State.

F. The State Intervenors try to take up the defense of the Public Charge Rule

After the federal government abruptly abandoned its defense of the Public Charge Rule, the State Intervenors moved nearly immediately to vindicate their interests in the Public Charge Rule. On March 11—only two days after the federal government announced and acted on its decision to abandon its defense of the Public Charge Rule—the State Intervenors filed three related motions in this Court. First, the State Intervenors moved the Court to recall its mandate. Motion to Recall the Mandate to Permit Intervention as Appellant, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 11, 2021), ECF No. 25-1. Second, the State Intervenors asked the Court to reconsider or rehear the order granting the federal government's motion to dismiss. Opposed Motion to Reconsider, or in the Alternative to Rehear, the Motion to

Dismiss, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 11, 2021), ECF 25-2. Third, the State Intervenors requested that this Court allow them to intervene in order to defend the Public Charge Rule because the federal government had abandoned its defense. Opposed Motion to Intervene as Defendant-Appellants, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 11, 2021), ECF No. 25-3. This Court denied these motions on March 15. Order, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 15, 2021), ECF No. 26.

On March 19—only four days later—the State Intervenors sought review of that decision in the Supreme Court. 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*, 141 S. Ct. 2562 (2021) (No. 20A150). The Supreme Court denied the State Intervenors' application for a stay pending the filing and disposition of a petition for a writ of certiorari. *Texas*, 141 S. Ct. at 2562. But the Court did so "without prejudice to the States raising this and other arguments before the District Court, whether in a motion for intervention or otherwise." *Id.* And the Court made clear 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.*

G. The State Intervenors move to intervene and for relief from judgment in the district court

Following the Supreme Court's direction, on May 12, 2021, the State Intervenors moved to intervene in the district court proceedings as of right under Federal Rule of Civil Procedure 24(a)(2) and, in the alternative, moved for permissive

intervention under Rule 24(b)(1)(B). Dkt. 256; *see also* Dkts. 257, 258. The State Intervenors explained that they sought to take up defense of the Public Charge Rule that the federal government so abruptly abandoned and, in doing so, defend the important state interests served by the Public Charge Rule. *See* Dkt. 257 at 6-9; *see also* Dkt. 260 at 13-15. That same day, the State Intervenors moved for relief from judgment under Rule 60(b), Dkt. 259, to allow them to "defend the [Public Charge] Rule and the important state interests the Rule serves on appeal," Dkt. 260 at 10.

The district court denied the State Intervenors' motion to intervene and motion for relief from judgment. Dkts. 284; 285. Although the district court concluded that the State Intervenors have standing to intervene as defendants, Dkt. 285 at 7-10, it rejected the State Intervenors' motion to intervene as untimely, *id.* at 32-33. And because the district court denied the State Intervenors' motion to intervene, it ruled that they lacked standing to bring a Rule 60(b) motion because they remained non-parties. *Id.* at 33-34. The court further concluded that their Rule 60(b) motion should be denied as untimely, *id.* at 35-36, because "there are no extraordinary circumstances to justify upsetting this court's judgment," *id.* at 37, and because granting relief "would improperly allow the States to use Rule 60(b) as a substitute for a timely appeal," *id.*

The State Intervenors timely filed a notice of appeal. Dkt. 287.

SUMMARY OF THE ARGUMENT

The district court abused its discretion by denying the State Intervenors' motions to intervene and for relief under Rule 60(b).

The State Intervenors' motion to intervene was timely because they moved to vindicate their interests in the Public Charge Rule as soon as the federal government abruptly abandoned its defense of the rule. Based on the district court's docket and the federal government's established practice, the State Intervenors reasonably believed that the federal government would either continue to defend the Public Charge Rule or at worst move to hold in abeyance the cases involving challenges to the rule while the federal government followed the process prescribed by the APA to formally rescind the rule. Instead, the federal government took the extraordinary step of simultaneously abandoning its defense of the Public Charge Rule in courts across the country without any prior notice.

Any prejudice the original parties may suffer if the State Intervenors are allowed to take up the defense of the Public Charge Rule stems from the federal government's attempt—in which Plaintiffs at least acquiesced—to dodge the requirements of the APA and thus does not weigh against allowing the State Intervenors to timely intervene. The State Intervenors, on the other hand, will suffer great prejudice if they are not allowed to intervene because they will have lost the protection of their public fiscs provided by the Public Charge Rule. The State Intervenors will suffer further prejudice because they will face a far more difficult procedural road to reinstate the rule because of the federal government's extraordinary actions. And the State Intervenors easily satisfy the other requirements for intervention. They have ample interests to justify intervention that will be impaired and those interests are now completely unrepresented by the parties, as the parties' opposition below amply demonstrates.

The State Intervenors are also entitled to relief from the district court's judgment under Rule 60(b). They have standing to seek such relief regardless of whether they are allowed to intervene, and their Rule 60(b) motion was just as timely as their motion to intervene. The way the federal government abandoned its defense of the Public Charge Rule was "quite extraordinary," *City & County of San Francisco*, 992 F.3d at 743 (VanDyke, J., dissenting), and certainly extraordinary enough to warrant the relief they seek under Rule 60(b)—which the Supreme Court all but directed the State Intervenors to pursue.

Because the State Intervenors' "goal in intervening was to litigate this case on appeal," *Flying J*, 578 F.3d at 574, this Court should treat them as the appellants from the district court's judgment. And based on the Supreme Court's stays of decisions enjoining the Public Charge Rule, the State Intervenors are likely to prevail on appeal.

STANDARD OF REVIEW

"A motion to intervene as a matter of right . . . should not be dismissed unless it appears to a certainty that the intervenor is not entitled to relief under any set of facts which could be proved under the complaint." *Illinois v. City of Chicago*, 912 F.3d 979, 984 (7th Cir. 2019) (quoting *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995)). This Court "must accept as true the non-conclusory allegations of the motion." *Id.* When, as here, "the district court denies a motion for intervention as untimely," this Court "review[s] for abuse of discretion." *Id.* This Court also reviews denials of permissive intervention and Rule 60(b) motions for abuse of

discretion. *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 775-76 (7th Cir. 2007) (permissive intervention); *Pearson*, 893 F.3d at 984 (Rule 60(b) motions).

ARGUMENT

I. The State Intervenors Are Entitled To Intervene To Defend the Public Charge Rule.

To intervene as of right under Rule 24(a), an intervenor must show: "(1) [a] timely application; (2) an interest relating to the subject matter of the action; (3) potential impairment, as a practical matter, of that interest by the disposition of the action; and (4) lack of adequate representation of the interest by the existing parties to the action." *City of Chicago*, 912 F.3d at 984. The district court addressed only the first requirement, concluding that the State Intervenors' motion to intervene was untimely. Dkt. 285 at 32-33 (observing that there was "no need to consider Rule 24's other requirements").

A. The State Intervenors' motion was timely.

This Court

> look[s] to four factors to determine whether a motion is timely: "(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."

City of Chicago, 912 F.3d at 984 (quoting *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 797-98 (7th Cir. 2013)). Each of those factors shows that the State Intervenors' motion to intervene in this litigation was timely. The district court abused its discretion by concluding otherwise.

1. The State Intervenors promptly took action to intervene in this litigation once the federal government abruptly abandoned its defense of the Public Charge Rule.

"[I]ntervention may be timely where the movant promptly seeks intervention upon learning that a party is not representing its interests." *Id.* at 985. That is precisely what the State Intervenors did here. They moved to intervene in this Court two days after the federal government abruptly moved to dismiss its appeals in cases challenging the Public Charge Rule, and they moved to intervene in the district court only two weeks after the Supreme Court effectively directed the State Intervenors to do so. Until the federal government abruptly abandoned its defense of the Public Charge Rule, the State Intervenors did not know that the federal government would not only stop representing their interests in the Public Charge Rule, but also use this litigation to rescind the rule without going through the generally required notice-and-comment process.

Indeed, the joint status reports filed in the district court made it reasonable for the State Intervenors to believe that the federal government was still defending the Public Charge Rule in this Court and the Supreme Court despite the change in presidential administrations. Those reports also made it reasonable for the State Intervenors to believe that in the worst case scenario, the federal government would follow the "traditional route" of asking the courts to hold cases challenging the Public Charge Rule in abeyance pending notice-and-comment rulemaking to rescind and potentially replace the rule. *City & County of San Francisco*, 992 F.3d at 751 (VanDyke, J., dissenting).

The federal government gestured toward such a course of action both in the motion it filed to initiate those status reports and in the joint status report filed on February 19, 2021. In its motion, the federal government advised the court that it "intend[ed] to confer with Plaintiff over next steps in this litigation, *including the propriety of a time-limited stay*." Dkt. 241 at 2 (emphasis added). And in the status report filed on February 19, 2021, the federal government suggested that it might ask for "a more lengthy stay." Dkt. 245 at 4. For its part, ICIRR expressed in both status reports its concern that this case would be stayed "indefinitely" while the federal government decided what course of action to take. *Id.* at 2-3; *see also* Dkt. 247 at 2 ("[W]hat ICIRR feared would happen—multiple extensions [of the stay] with no movement—has indeed happened.").

All the while, ICIRR stressed that the federal government was actively defending and enforcing the Public Charge Rule. In the status report filed on February 19, ICIRR told the district court that the federal government was "still requesting that the U.S. Supreme Court and the U.S. Court of Appeals for the Seventh Circuit overturn th[e] [district court's] prior rulings and uphold the [Public Charge] Rule." Dkt. 245 at 1. ICIRR also told the district court that the federal government was "still enforcing the [Public Charge] Rule and urging that the Supreme Court uphold it." *Id.* at 2. And in the status report filed on March 5, ICIRR once again told the district court that the federal government "continue[s] to request that the U.S. Supreme Court and the U.S. Court of Appeals for the Seventh Circuit overturn this Court's prior rulings and uphold the Rule." Dkt. 247 at 2.

So as late as March 5, the district court's docket affirmatively indicated that the federal government was still representing the State Intervenors' interests in the Public Charge Rule by continuing to defend the rule in both this Court and the Supreme Court. And based on the federal government's requests for stays while it decided how it would address the Public Charge Rule, *see* Dkt. 241 at 2; Dkt. 245 at 3, 4, it was reasonable for the State Intervenors to believe that at worst the federal government would seek to stay the pending litigation about the Public Charge Rule while it pursued notice-and-comment rulemaking to address the rule. *See City & County of San Francisco*, 992 F.3d at 751 (VanDyke, J., dissenting).

After all, that would have been "the traditional route" for the federal government to follow, as Judge VanDyke explained in dissenting from the Ninth Circuit's denial of a motion joined by several of the State Intervenors to intervene in the parallel litigation pending in that court. *Id.* The district court faulted Judge VanDyke's dissent (and the State Intervenors' reliance on it) because it "did not favor [its] assertions" about the federal government's customary practice "with citation to any legal authority." Dkt. 285 at 22. But there is ample support for Judge VanDyke's account.

The previous three presidential administrations each sought—and courts granted—abeyances of challenges to rules the sitting administration was reconsidering. Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 Minn. L. Rev. 1, 28 & nn.129-30 (2019) (observing that the "[d]uring the Trump administration, just like under prior administrations, several abeyances were granted in cases" involving challenges to rules from a prior administration and collecting

cases); *id.* at 27 & n.127 (observing that "the Obama administration filed several abeyance requests to facilitate its review of Bush-era rules" and collecting cases); *id.* at 27-28 & n.128 (observing that "during the George W. Bush administration, the courts placed cases in abeyance when agencies explained that they planned to reconsider a portion of the challenged rule" and collecting cases).

In fact, the current administration pursued that course of action in other cases involving policies enacted by the previous presidential administration—at the same time the current administration was deciding what to do in this litigation. *E.g.*, Motion to Hold Cases in Abeyance Pending Implementation of Executive Order and Conclusion of Potential Reconsideration, *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, No. 20-1145 (D.C. Cir. Feb. 19, 2021); Appellants' Supplemental Brief, *O.A. v. Biden*, No. 19-5272 (D.C. Cir. Feb. 18, 2021); Joint Motion to Hold Case in Abeyance, *Pennsylvania v. Rosenfelt*, No. 1:20-cv-01468-CJN (D.D.C. Feb. 3, 2021), ECF No. 143; Motion of Petitioners to Hold the Briefing Schedule in Abeyance and to Remove the Case from the February 21 Argument Calendar, *Biden v. Sierra Club*, No. 20-138 (U.S. Feb. 1, 2021); Motion of the Petitioners to Hold the Briefing Schedule in Abeyance and to Remove the Case from the February 2021 Argument Calendar, *Mayorkas v. Innovation Law Lab*, No. 19-1212 (U.S. Feb. 1, 2021); Motion for Abeyance, *Sierra Club v. EPA*, No. 20-1115 (D.C. Cir. Feb. 3, 2021). And when the federal government seeks to change its position after the Supreme Court has granted certiorari, the federal government typically notifies the Court and requests that the Court appoint counsel as amicus curiae. *See, e.g.*, Letter of Respondent United States at 1, *Terry v. United States*, 141 S. Ct. 1858 (2021) (No. 20-5904).

The district court nonetheless faulted the State Intervenors for trusting that the federal government would continue to follow the practice that was used by every other administration this century and that the federal government followed in other cases at the same time as this case. The district court pointed to several cases in which the federal government either declined to appeal or dismissed its appeal after a district court vacated a rule, Dkt. 285 at 23, but each of those cases is distinguishable. The vacaturs in those cases were based on procedural—not substantive—issues, meaning the agency could still reenact the substance of the challenged rule. *See Ctr. for Sci. in the Pub. Int. v. Perdue*, 438 F. Supp. 3d 546 (D. Md. 2020) (vacating a final rule and remanding it to the agency because "the Interim Final Notice did not provide sufficient notice of the Final Rule," *id.* at 561, but rejecting several substantive challenges to the final rule); *Burt Lake Band of Ottawa & Chippewa Indians v. Bernhardt*, 2020 WL 1451566 (D.D.C. Mar. 25, 2020) (concluding that rule "comports with the agency's authority," *id.* at *6, but vacating a rule as arbitrary and capricious and remanding it to the agency), *appeal dism'd sub. nom. Burt Lake Band of Ottawa & Chippewa Indians v. U.S. Dep't of Interior*, 2020 WL 3635122 (D.C. Cir. June 29, 2020); *Nat'l Educ. Ass'n v. DeVos*, 379 F. Supp. 3d 1001 (N.D. Cal. 2019) (vacating a rule and remanding it to the agency because the agency did not follow the required rulemaking process when it promulgated the rule), *appeal dism'd*, 2019 WL 4656199 (9th Cir. Aug. 13, 2019); *Council of Parent Att'ys & Advocs., Inc. v. DeVos*, 365 F. Supp. 3d 28, 56 (D.D.C. 2019) (vacating a rule because the federal government failed to provide a reasoned explanation for the rule and failed to consider cost), *appeal dism'd*, 2019 WL 4565514 (D.C. Cir. Sept. 18, 2019); *L.M.-M. v. Cuccinelli*, 442 F.

Supp. 3d 1 (D.D.C. 2020) (setting aside two agency directives because the Director who issued the directives "was not lawfully appointed to serve as acting Director and that, as a result, he lacked authority to issue the . . . directives," *id.* at 9), *judgment entered*, 2020 WL 1905063 (D.D.C. Apr. 16, 2020), *appeal dism'd*, 2020 WL 5358686 (D.C. Cir. Aug. 25, 2020).

Here, on the other hand, the district court vacated the Public Charge Rule based (in part) on its conclusion that the rule is "substantively . . . defective," Dkt. 222 at 3 & n.*—meaning DHS cannot reenact the Public Charge Rule without making substantive changes. Moreover, the district court expressly made its vacatur of the Public Charge Rule apply nationwide, *id.* at 8, which none of the courts in the cases cited by the district court did.

The district court also faulted the State Intervenors for not intervening sooner based on then-candidate and now-President Biden's public statements and executive order about the Public Charge Rule, Dkt. 285 at 13-21, but those statements and that executive order do not change the timeliness calculus here. *See Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) ("[C]ampaign promises are—by long democratic tradition—the least binding form of human commitment[.]"); *cf. United States v. Blagojevich*, 612 F.3d 558, 560-61 (7th Cir. 2010) ("[P]eople need not intervene in response to musings."). Nothing in those statements or in the executive order even hinted that the federal government would deviate from its "established process" for changing positions in litigation. Jody Freeman, *The Limits of Executive Power: The Obama-Trump Transition*, 96 Neb. L. Rev. 545, 551 (2018). As Professor

Jody Freeman explained when discussing the transition between the Obama and Trump administrations:

> A new President may want the DOJ to abandon its defense of certain rules, but he cannot simply order the Department to do so. There is an established process to follow. If the DOJ lawyers have already briefed a case, they typically do not change their position until the client agency has taken steps to reverse its position. Once the DOJ can point to a concrete legal shift, like a notice of proposed rulemaking that the agency is reconsidering the rule, it will go into court and say, "Our client agency has reversed its position and we now must change ours." It is not enough though for the White House to say, "We don't like this rule anymore."

Id. (footnotes omitted); *see also* Davis Noll & Revesz, *supra*, at 26 ("[T]he Justice Department, which represents federal agencies in the courts, has no authority to change the agency's policy position and generally disfavors changing the government's litigation position in administrative law cases unless the agency has first repealed or modified the rule." (footnotes omitted)).

Here, although the federal government had defended the Public Charge Rule in countless pages of briefs filed in courts across the country and at every stage of the federal judicial system, the federal government did not take any concrete action before abandoning its defense of the Public Charge Rule. Instead, the federal government just dismissed all of the appeals it had filed to defend the Public Charge Rule and issued a public statement to the effect of "We don't like this rule anymore."

The considerable effort that the federal government had exerted defending the Public Charge Rule distinguishes this litigation from the litigation in *Pennsylvania v. DeVos*, No. 1:20-cv-1468 (D.D.C. filed June 4, 2020). The district court faulted the State Intervenors for not intervening until after the federal government abruptly

abandoned its defense of the Public Charge Rule in March when one of the State Intervenors (Texas) had intervened in *DeVos* to defend a Department of Education regulation on the eve of President Biden's inauguration. Dkt. 285 at 14-17. But the *DeVos* litigation was at a much earlier stage than this litigation—Texas moved to intervene on the same day the federal government filed its answer. *See* Motion to Intervene as Defendant, *Pennsylvania v. DeVos*, No. 1:20-cv-1468 (D.D.C. Jan. 19, 2021), ECF No. 130; Defendants' Answer to Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief, *Pennsylvania v. DeVos*, No. 1:20-cv-1468 (D.D.C. Jan. 19, 2021), ECF No. 135.

And Texas was right to be concerned that the new administration would quickly change its stance in the *DeVos* litigation. Two weeks after President Biden's inauguration, the federal government followed its established practice of moving to place that litigation in abeyance while it reviewed the rule at issue. Joint Motion to Hold Case in Abeyance, *Pennsylvania v. Rosenfelt*, No. 1:20-cv-01468-CJN (D.D.C. Feb. 3, 2021), ECF No. 143. Here, by contrast, the district court's docket reflects that as late as March 5—less than a week before the State Intervenors moved to intervene in this Court—the federal government "continue[d] to request that the U.S. Supreme Court and the U.S. Court of Appeals for the Seventh Circuit overturn this Court's prior rulings and uphold the [Public Charge] Rule." Dkt. 247 at 2.

The State Intervenors thus reasonably believed that the federal government would at worst ask that the litigation about the Public Charge Rule be held in abeyance while the federal government pursued notice-and-comment rulemaking to address the Public Charge Rule. As a result, the State Intervenors' motion to intervene

was timely because here, as in *Flying J, Inc. v. Van Hollen*, 578 F.3d 569 (7th Cir. 2009), "there was nothing to indicate that the [federal government] was planning to throw the case[s]" involving challenges to the Public Charge Rule—until the federal government "threw in the towel" and moved to dismiss all of its appeals. *Id.* at 570, 572.

As this Court has observed, "[i]ntervention not only complicates the process of adjudication (extra parties file extra briefs and may obstruct settlements by the original parties) but also is expensive for everyone involved. That expense should not be incurred unless necessary." *Blagojevich*, 612 F.3d at 561. The State Intervenors sought to avoid that complication and expense in this case while the federal government was still pursuing its defense of the Public Charge Rule. The district court abused its discretion by faulting them for doing so.

2. Any prejudice to the original parties stems from the federal government's failure to address the Public Charge Rule through notice-and-comment rulemaking.

The original parties will not be prejudiced by allowing the State Intervenors to intervene to defend the Public Charge Rule. Plaintiffs "could not have assumed that, if [they] won in the district court, there would be no appeal." *Flying J, Inc.*, 578 F.3d at 573; *see also id.* at 574 ("It's not as if [the plaintiff] had incurred litigation costs in a reasonable expectation that they would not be magnified by an appeal."). Plaintiffs faced the possibility of protracted litigation until the federal government deviated from its traditional practice and abruptly abandoned its defense of the Public Charge

Rule. They suffer no prejudice by litigating the same issues in the same forum against the State Intervenors rather than the federal government. *See id.* at 573-74.

The district court correctly rejected Plaintiffs' arguments about any prejudice they would suffer because of the possibility that the Public Charge Rule would be reinstated. Dkt. 285 at 24 ("'[T]he prejudice to the original parties to the litigation that is relevant to the question of timeliness is only that prejudice which would result from the would-be intervenor's failure to request intervention as soon as he knew or reasonably should have known about his interest in the action.' The effects of the Rule, should it be reinstated, would flow not from the States' delay in seeking intervention, but from the mere fact of intervention, which does not factor in the timeliness inquiry." (quoting *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977)) (citing *Lopez-Aguilar v. Marion Cnty. Sheriff's Dep't*, 924 F.3d 375, 390 (7th Cir. 2019) (holding that no prejudice arose from a delay in filing the motion to intervene where "the burden to the parties of reopening the litigation … would have been the same" no matter the motion's timing)).

Although the district court concluded that allowing the State Intervenors to pick up the defense of the Public Charge Rule would prejudice Plaintiffs and the federal government in other ways, *id.* at 24-28, any such prejudice truly stems from the federal government's deviation from its "established process" for changing positions in litigation, Freeman, *supra*, at 551. The district court pointed to the time and resources the federal government expended both deciding to abruptly abandon its defense of the Public Charge Rule and announcing the new approach the federal government would take instead of the approach codified in the Public Charge Rule. Dkt.

285 at 24-26. But any time and resources spent evaluating the Public Charge Rule as a matter of policy would not be wasted by allowing the State Intervenors to take up the defense of the rule because those efforts could serve as the foundation for future rulemaking on the subject.

And although "[a]llowing intervention now could 'require DHS to again shift [the] public charge guidance' it issued in light of the Rule's vacatur," *id.* at 26 (quoting Dkt. 269 at 28 (alteration in original)), that "back-and-forth . . . could have been avoided," *id.*, if the federal government had pursued the "traditional route of asking the courts to hold the public charge cases in abeyance, rescinding the rule per the APA, and then promulgating a new rule through notice and comment rulemaking," *City & County of San Francisco*, 992 F.3d at 751 (VanDyke, J., dissenting). Any prejudice the federal government may face from its attempt to "dodge the pesky requirements of the APA," *id.* at 749, should not weigh against allowing the State Intervenors to defend their interests in the Public Charge Rule. The district court abused its discretion by relying on this improper consideration.

Nor should the discovery the federal government may face on the Fifth Amendment claim ICIRR agreed to dismiss based on the federal government's abrupt abandonment of its defense of the Public Charge Rule, *see* Dkt. 285 at 27-28, affect the calculus here. The federal government could avoid that discovery by following the traditional route of asking the district court to hold the litigation on that claim in abeyance while it addressed the Public Charge Rule through notice-and-comment rulemaking, as the product of that rulemaking would almost certainly render ICIRR's claim moot.

In short, the prejudice to the original parties the district court described is properly attributed to the federal government's extraordinary actions in this litigation. The district court abused its discretion by relying on that prejudice to deem the State Intervenors' motion to intervene untimely.

3. Not allowing the State Intervenors to defend the Public Charge Rule will inflict both substantive and procedural harms on the State Intervenors.

The State Intervenors will suffer great prejudice if they cannot defend the Public Charge Rule and the important state interest the rule protects. As discussed in detail below, *infra* section I.B.1, the State Intervenors 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. These costs have steadily increased over the past several years, and the Public Charge Rule would have helped to reduce such expenditures by implementing Congress's long-established policy of limiting the immigration of individuals who are not self-sufficient. Because they must bear the burden of admitted aliens residing in their borders who become public charges, the State Intervenors are the Public Charge Rule's "direct beneficiaries," *Flying J*, 578 F.3d at 572. As a result, the State Intervenors will suffer considerable prejudice if they cannot defend the Public Charge Rule. *Cf. id.* (concluding that a "statute's direct beneficiaries" could intervene as of right because they would be harmed by the invalidation of that statute).

The district court rejected that prejudice out of hand "because the States have a readily available path to demand that DHS re-promulgate the Rule: a petition for

rulemaking." Dkt. 285 at 28. But a petition for rulemaking to reinstate the Public Charge Rule is a poor substitute for defending a rule that is still in effect. As a general matter, promulgation of new rules is a largely discretionary enterprise, and such a request would certainly be denied by the federal government (as the extraordinary actions the federal government took here to rescind the Public Charge Rule make clear). And that denial would likely be reviewed only "under the deferential arbitrary-and-capricious standard." *Id.* at 29 (quoting *Hadson Gas Sys., Inc. v. FERC*, 75 F.3d 680, 684 (D.C. Cir. 1996)). And even if the State Intervenors somehow managed to persuade the federal government to promulgate the Public Charge Rule again, they would still be deprived of the protection offered by the rule from the date of the federal government's recission of the original version of the rule until the new version went into effect. But if the State Intervenors are allowed to defend the Public Charge Rule on appeal while the rule is in effect, the rule itself would receive "deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." *Id.* at 28. Contrary to the district court's assertion, there is nothing "odd," *id.* at 29, about recognizing that the State Intervenors would be much better off advocating for the Public Charge Rule by defending the rule while it is still in effect than they would be if they are relegated to filing a petition for rulemaking to reinstate the rule.

Further, any new rulemaking the federal government pursues on this subject will take place in a regulatory framework that has been fundamentally changed by the federal government's decision to acquiesce in the district court's nationwide vacatur. Under *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), if the Public

Charge Rule was still in effect, then any rulemaking on this subject would have had to address why the government saw fit to abandon the Public Charge Rule. *Fox*, 556 U.S. at 515. In other words, the federal government would have had to explain why it thought it should admit immigrants who are likely to "receive[] one or more public benefits . . . for more than 12 months in the aggregate within any 36-month period,'" 84 Fed. Reg. at 41,501. *Fox*, 556 U.S. at 515. Now the federal government can say the outcome of this litigation ties its hands—even though the federal government helped tie the knot. *See City & County of San Francisco*, 992 F.3d at 743 (VanDyke, J., dissenting).

The district court also wrongly asserted that the State Intervenors can "easily" challenge the federal government's rescission of the Public Charge Rule. Dkt. 285 at 30. Because that rescission relied exclusively on the district court's nationwide vacatur, Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. at 14,221, any challenge to that rescission would entail a collateral attack on the district court's judgment.

In short, the routes available to the State Intervenors to pursue the reenactment of the Public Charge Rule are much more procedurally fraught than defending the rule in this litigation would be. The State Intervenors thus face considerable prejudice to both their substantive and procedural interests if they are not allowed to defend the Public Charge Rule in this litigation.

4. The federal government's extraordinary abandonment of its defense of the Public Charge Rule warrants allowing the State Intervenors to intervene.

For the reasons discussed above, *supra* section I.A.1, the federal government's abrupt abandonment of the Public Charge Rule presents the sort of "unusual circumstances" that weigh in favor of allowing intervention. *City of Chicago*, 912 F.3d at 984 (quoting *Grochocinski*, 719 F.3d at 797-98).

* * *

Each of the above factors weighs heavily in favor of allowing the State Intervenors to intervene in this litigation to defend the Public Charge Rule. By concluding otherwise and relying on improper factors, the district court abused its discretion.

B. The State Intervenors easily meet the other requirements for intervention as of right.

The district court declined to address Rule 24(a)(2)'s other requirements. Dkt. 285 at 33. The State Intervenors easily meet all of them, as they explained in their brief in support of their motion to intervene, Dkt. 257 at 6-8. The State Intervenors are entitled to intervene as of right.

1. The State Intervenors have important interests that relate to the subject of this action.

The State Intervenors have important interests relating to the Public Charge Rule, specifically their interests in conserving their Medicaid and related social-welfare budgets. Providing for the healthcare needs of economically disadvantaged individuals represents a substantial portion of the State Intervenors' budgets. For example, in Texas in 2015, approximately 4 million Texans relied on Medicaid. Tex.

Health & Human Servs. Comm'n, Texas Medicaid and CHIP in Perspective 1-2 (11th ed. 2017), https://hhs.texas.gov/reports/2017/02/texas-medicaid-chip-perspective-eleventh-edition. Medicaid is jointly financed by the federal government and the States. *Id.* at 4. In 2018–2019, total Texas expenditures for Medicaid represented approximately 22% of its budget. *Medicaid Expenditures as a Percent of Total State Expenditures by Fund*, KFF, https://tinyurl.com/czpjys9v (last visited Nov. 1, 2021). In the past several years, the federal government has paid for slightly less than 60% of Texas's Medicaid expenditures. Texas Medicaid and CHIP in Perspective at 183, *supra*. Although the exact amount of Texas's Medicaid budget spent on immigrants who would otherwise be inadmissible under the Public Charge Rule has varied, the total budget is always measured in billions of dollars. *Id.* at 179.

The vacatur of the Public Charge Rule will have a disproportionate impact on the State Intervenors, particularly on border states. For example, Texas and Montana have among the largest international borders in the country and provide Medicaid services to many immigrants. The Public Charge Rule would reduce that burden. Under the relevant statute, "[a]ny alien who . . . in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible." 8 U.S.C. § 1182(a)(4)(A). The Public Charge Rule defines "public charge" as "'an alien who receives one or more public benefits . . . for more than 12 months in the aggregate within any 36-month peri-od.'" 84 Fed. Reg. at 41,501. "Public benefits" specifically includes, among other forms of public assistance, Medicaid services with some exceptions. *Id.* Thus, if the Attorney General determined that an alien applying for admission to the

United States would likely require Medicaid services for more than 12 months in a 36-month period, then that alien would be inadmissible. Accordingly, fewer aliens requiring Medicaid and other public services would be admitted to the United States, including into Texas and Montana, thus reducing the State Intervenors' Medicaid budgets. Thus, each State Intervenor has an interest in the subject matter of this action.

2. Disposition of this action will impair the State Intervenors' interests.

The State Intervenors must also show "that disposing of the action may as a practical matter impair or impede" their interests. Fed. R. Civ. P. 24(a)(2). The State Intervenors' interests in conserving their increasing Medicaid and related social-welfare budgets will be impaired by the disposition of this case absent intervention. As explained above, the district court's vacatur order was explicitly "not limited to the State of Illinois." Dkt. 222 at 8. And after the federal government voluntarily dismissed this appeal, the federal government relied solely on that nationwide vacatur to remove the Public Charge Rule from the Federal Register, *see* Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. at 14,221. Thus, the federal government was able to remove the Public Charge Rule "in a way that allowed them to dodge the pesky requirements of the APA," *City & County of San Francisco*, 992 F.3d at 749 (VanDyke, J., dissenting), including notice-and-comment rulemaking. Both the underlying vacatur and the Public Charge Rule's removal from the Federal Register have a direct effect on the State Intervenors' budgets—through expenditures related to Medicaid and other

government services provided to aliens otherwise inadmissible but for vacatur of the Public Charge Rule.

3. No party adequately represents the State Intervenors' interests.

No party now adequately represents the State Intervenors' interests because no party is left to defend the Public Charge Rule. Plaintiffs and their erstwhile opponent the federal government are now firmly aligned, both as a matter of litigation strategy and policy. Absent the State Intervenors' intervention, all States will continue to be affected by the vacatur of the Public Charge Rule without having the ability to defend their interests.

For these reasons, the State Intervenors are entitled to intervene as of right.

C. Alternatively, the Court should permit the State Intervenors to intervene under Rule 24(b)(1)(B).

The district court did not separately address the State Intervenors' alternative motion for permissive intervention, but the State Intervenors have shown that they qualify for permissive intervention because the State Intervenors' position and this suit have a common question of law or fact. *See* Fed. R. Civ. P. 24(b)(1)(B) ("On timely motion, the court may permit anyone to intervene who . . . (B) has a claim or defense that shares with the main action a common question of law or fact.").

Under Rule 24(b), a movant seeking permissive intervention must show: (1) that there exists an independent ground of subject matter jurisdiction; (2) that the motion is timely; (3) that the movant's claims or defenses share with the main action a common question of law or fact; and (4) that intervention will not result

in undue delay or prejudice to the existing parties. Fed. R. Civ. P. 24(b); *Sec. Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995). Again, the State Intervenors easily meet that standard and should be permitted to intervene.

Here, the requirements of an independent ground of subject-matter jurisdiction and shared claims or defenses are not strictly applicable, as Plaintiffs must demonstrate subject-matter jurisdiction, and the State Intervenors seek to intervene as defendants by stepping into the shoes of the federal government. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). But the district court would retain subject-matter jurisdiction over this federal question, and the State Intervenors intend to present defenses of the Public Charge Rule similar to those that were presented by the federal government—as demonstrated by the proposed pleading the State Intervenors attached to the motion to intervene, Dkt. 258. The State Intervenors likewise enjoy an actual controversy against Plaintiffs: they will be tangibly, economically affected by an adverse judgment issued by the district court.

The timeliness and prejudice analyses discussed above apply equally to the State Intervenors' ability to intervene permissively. The State Intervenors took steps to intervene in the pending appeal of this case immediately after they learned on March 9 that the federal government would no longer defend the Public Charge Rule, and they moved to intervene in the district court promptly after the Supreme Court denied their intervention in the pending appeal on April 26. Plaintiffs will suffer no prejudice by this intervention because, until the federal government abruptly dismissed its appeal, they expected to continue to litigate this case against the federal government. *See Flying J,* 578 F.3d at 573-74. Only the federal government's

decision to abandon its defense of the Public Charge Rule relieved them from that obligation.

Although the district court should have granted the State Intervenors' motion to intervene as of right, at the very least the district court should have permitted the State Intervenors to intervene to defend their interests in the Public Charge Rule that will otherwise go unprotected. The State Intervenors have enormous financial obligations in providing Medicaid and other public services, but they had no need to intervene to defend their interests in the Public Charge Rule while the federal government continued its vigorous defense. But that changed when the federal government abandoned its defense of the Public Charge Rule. This Court should not countenance this abrupt turn.

II. The Federal Government's Conduct and the Resulting Consequences Warrant Rule 60(b) Relief.

Because the district court abused its discretion by denying the State Intervenors' motion to intervene, the district court further abused its discretion by concluding that the State Intervenors lack standing to seek relief under Rule 60(b). Had the district court granted the State Intervenors' motion to intervene, they clearly would have "acquire[d] the rights of a party," *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 508 (7th Cir. 1996)—including the right to seek Rule 60(b) relief, *see id.* ("An intervenor . . . can continue the litigation even if the party on whose side he intervened is eager to settle.").

But even if the State Intervenors had not moved to intervene, they still would have standing to seek Rule 60(b) relief. *See Bridgeport Music, Inc. v. Smith*, 714 F.3d

932, 940 (6th Cir. 2013) (citing, *e.g.*, *Grace v. Bank Leumi Tr. Co. of N.Y.*, 443 F.3d 180, 188-89 (2d Cir. 2006); *Binker v. Pennsylvania*, 977 F.2d 738, 745 (3d Cir. 1992); *Dunlop v. Pan Am. World Airways, Inc.*, 672 F.2d 1044, 1051-52 (2d Cir. 1982); *Eyak Native Village v. Exxon Corp.*, 25 F.3d 773, 777 (9th Cir. 1994)). As the Sixth Circuit explained, "[s]everal courts have . . . allowed a nonparty to seek relief under Rule 60(b) where its interests were directly or strongly affected by the judgment." *Id.* The district court wrongly rejected these circuits' interpretations of Rule 60(B) because this Court has not expressly adopted it. Dkt. 285 at 34. This Court has not rejected that interpretation; to the contrary, this Court has alluded to "an exception" to the general rule that "one who was not a party lacks standing to make (a 60(b)) motion." *Nat'l Acceptance Co. of Am. v. Frigidmeats, Inc.*, 627 F.2d 764, 766 (7th Cir. 1980) (quoting 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2865 at 225-26 (1973)[5]).

Under that line of cases, the State Intervenors have standing to request Rule 60(b) relief even if their motion to intervene is denied. The State Intervenors' interests in the allocation of their funds for Medicaid and other public-welfare programs, their interests in the federal government following the proper process for rescinding a rule promulgated through notice-and-comment rulemaking, and their quasi-sovereign interests in immigration, *Texas v. United States*, 809 F.3d 134, 153-54 (5th Cir.

[5] One of the examples of this exception cited in the current version of 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2865 (Apr. 2021 update) is *Dunlop v. Pan American World Airways, Inc.*, 672 F.2d 1044 (2d Cir. 1982)— one of the cases the Sixth Circuit cited. Wright & Miller, *supra* § 2865 n.6.

2015), are directly and strongly affected by this Court's judgment and, by extension, the federal government's abrupt and extraordinary abandonment of its defense of the Public Charge Rule.

The State Intervenors not only have standing to seek relief under Rule 60(b), but they are also entitled to such relief. The district court denied the State Intervenors' motion in part because the court deemed the motion "untimely." Dkt. 285 at 35-37. But the State Intervenors' Rule 60(b) motion was timely for the same reasons that their motion to intervene was timely. *Supra* section I.A.1. The district court also concluded that "there are no extraordinary circumstances to justify upsetting this court's judgment." Dkt. 285 at 36-37; *see Pearson*, 893 F.3d at 984. But as explained above, the federal government's conduct in the litigation related to the Public Charge Rule is "quite extraordinary." *City & County of San Francisco*, 992 F.3d at 743 (VanDyke, J., dissenting).

The federal government's abrupt abandonment of its defense of the Public Charge Rule without first taking any other "concrete" steps to reverse its position—such as notice-and-comment rulemaking—deviated from the federal government's "established process" for changing its litigation position. Freeman, *supra*, at 551. As a result, the State Intervenors—whose interests are directly implicated by both the Public Charge Rule and the federal government's abandonment of its defense of that rule—had no notice of the federal government's intentions before it dismissed its appeals in cases challenging the Public Charge Rule.

The federal government thus has improperly sought to rescind the Public Charge Rule by stipulation rather than rulemaking. Ordinarily, a rule adopted

through notice-and-comment rulemaking can be rescinded only through notice-and-comment rulemaking. *Cf. Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S 29, 36-37, 41 (1983). As part of that process, parties whose interests would be negatively impacted by rescission of the Public Charge Rule—including the State Intervenors—would have had the right to submit input, 5 U.S.C. § 553, and ultimately to challenge the final outcome of the regulatory process in court, *Dep't of Com. v. New York,* 139 S. Ct. 2551, 2569-70 (2019).

The federal government's use of this litigation to make an end-run around the APA constitutes the type of "extraordinary circumstances" that warrants relief under Rule 60(b)(6), *Pearson*, 893 F.3d at 984, especially considering the amount of time that has elapsed since the district court entered its final judgment. By the time the federal government dismissed its appeal of the district court's final judgment, the time to file a notice of appeal of that judgment had long since passed. *See* Fed. R. App. P. 4(a). The State Intervenors promptly moved to intervene in both this Court and the Supreme Court. Although those efforts were unsuccessful, the Supreme Court all but directed the State Intervenors to seek relief in the district court—and then "seek review, if necessary," in this Court—to take up the defense of the Public Charge Rule abandoned by the federal government, *Texas*, 141 S. Ct. at 2562.

Because of these extraordinary circumstances, the general rule invoked by the district court, Dkt. 285 at 37-39, that Rule 60(b) cannot be used "to remedy a failure to take an appeal" does not apply. *Local 332, Allied Indus. Workers of Am. v. Johnson Controls, Inc.,* 969 F.2d 290, 292 (7th Cir. 1992) (quoting 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 2864, at 214-15 (2d ed.

1992)). That general rule "is not inflexible" and does not apply in "unusual cases" such as this. *Local 332*, 969 F.2d at 292 (citation omitted); *see also Servants of Paraclete v. Does*, 204 F.3d 1005, 1009 (10th Cir. 2000) (contemplating that Rule 60(b)(6) may be used to allow an appeal in extraordinary or exceptional circumstances); *Lubben v. Selective Serv. Sys. Loc. Bd. No. 27*, 453 F.2d 645, 651 (1st Cir. 1972) (similar); *Martella v. Marine Cooks & Stewards Union*, 448 F.2d 729, 730 (9th Cir. 1971) (per curiam) (similar).

More fundamentally, the State Intervenors did not fail to take an appeal: they did not have the opportunity. The State Intervenors could not have intervened before the time to appeal the district court's judgment passed because the federal government would have objected on the ground that it adequately represented the State Intervenors' interests, as it has done in other immigration cases this year. *See, e.g.*, Defendants' Opposition to the State of Texas's Motion to Intervene, *Huisha-Huisha v Mayorkas,* Case No. 21-5200 (D.C. Cir. Oct. 15, 2021), ECF No. 1918415 (federal defendants opposing Texas's motion to intervene in immigration-related appeal on grounds that they adequately represented Texas's interests). The State Intervenors thus did not fail to take an appeal; instead, they are seeking relief from the district court's final judgment under Rule 60(b) so that they can defend the Public Charge Rule and the important state interests that rule serves on appeal.

Indeed, the Supreme Court practically directed the State Intervenors to raise their argument that the federal government "rescinded the rule without following the requirements of the Administrative Procedure Act" in the district court—"whether in a motion for intervention or otherwise." *Texas*, 141 S. Ct. at 2562. And

as the district court acknowledged, Rule 60(b)(6) is the appropriate vehicle for the State Intervenors to present those arguments. Dkt. 285 at 33. Although the State Intervenors have not argued that the federal government technically violated the APA (as the district court noted, *id.* at 22-23, 36), the State Intervenors have consistently argued that the federal government rescinded the Public Charge Rule without following the process that would have been required under the APA absent the federal government's unusual, exceptional, and extraordinary conduct.

The Supreme Court further advised the State Intervenors that "[a]fter the District Court considers" their arguments, "the States may seek review, if necessary, in the Court of Appeals." *Texas*, 141 S. Ct. at 2562. That is precisely what the State Intervenors are doing now. And if need be, the State Intervenors will file "a renewed application in th[e] [Supreme] Court." *Id.*

III. This Court Should Allow the State Intervenors to Defend the Public Charge Rule on Appeal, and the State Intervenors Will Likely Prevail.

Because the State Intervenors' "goal in intervening [i]s to litigate this case on appeal," this Court should follow the path it took in *Flying J* and treat the State Intervenors "as the appellant[s] from the judgment on the merits." *Flying J*, 578 F.3d at 574 (citing *Meek v. Metropolitan Dade County*, 985 F.2d 1471, 1480 n.3 (11th Cir. 1993); *Edwards v. City of Houston*, 37 F.3d 1097, 1108, 1116 (5th Cir. 1994)); *id.* (noting that "there [wa]s no point" in remanding the case to the district court)). If the State Intervenors are allowed to properly defend the Public Charge Rule, Plaintiffs' challenges to the Public Charge Rule will likely fail, as a panel of the Fourth and Ninth Circuits held, and as the Supreme Court's repeated stay grants indicate.

By granting a stay in this case, *Wolf*, 140 S. Ct. 681, the Supreme Court necessarily concluded that there was "a fair prospect that a majority of the Court will conclude that the decision below was erroneous," *Conkright*, 556 U.S. at 1402 (Ginsburg, J. in chambers); *see also CASA de Md., Inc. v. Trump*, 971 F.3d 220, 229 (4th Cir. 2020), (acknowledging that the Supreme Court's decision to grant a stay "would have been improbable if not impossible had the government, as the stay applicant, not made a strong showing that it was likely to succeed on the merits" (citation and internal quotation marks omitted)), *vacated for reh'g en banc*, 981 F.3d 311 (4th Cir. 2020) (*appeal dism'd* Mar. 11, 2021); *Cook County*, 962 F.3d at 234 (["[T]he stay provides an indication that the Court thinks that there is at least a fair prospect that DHS should prevail and faces a greater threat of irreparable harm than the plaintiffs."), *cert. dism'd sub nom. Mayorkas v. Cook County*, 141 S. Ct. 1292 (2021). The Public Charge Rule's interpretation of "public charge" is consistent with the ordinary meaning of the term "public charge," other statutes enacted by Congress at the same time, and the historic usage of the term "public charge."

A. The Public Charge Rule's interpretation of "public charge" is consistent with the ordinary meaning of the term "public charge."

The Public Charge Rule is consistent with how the term "public charge" is typically used. Congress has not defined the term "public charge," stating only that the Executive "shall at a minimum consider the alien's (I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; and (V) education and skills." 8 U.S.C. § 1182(a)(4)(B)(i). And since at least the late 1990s, the federal government

has recognized that the term is ambiguous. *See* Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. at 28,677.

The Public Charge Rule gives the term "public charge" its natural meaning by including non-cash benefits as a consideration in determining whether an alien will rely on public support and thus be inadmissible. As the Fourth Circuit explained, "[t]he ordinary meaning of 'public charge' . . . was 'one who produces a money charge upon, or an expense to, the public for support and care.'" *CASA de Md.*, 971 F.3d at 242 (quoting *Public Charge*, *Black's Law Dictionary* 295 (4th ed. 1951)).

After all, the Public Charge Rule encompasses benefits that allow an immigrant to buy food, obtain housing, and pay for medical care. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41,501. These benefits are no less expensive to the States or significant to the immigrant because they are provided in kind rather than in cash. *See Cook County*, 962 F.3d at 241 (Barrett, J., dissenting). An immigrant who relies on multiple such benefits for a period of time, or on one such benefit for an extended period, falls easily within the ordinary usage of the term "public charge."

B. The Public Charge Rule's interpretation of "public charge" is consistent with the other statutes Congress entered at the same time.

The Public Charge Rule is further consistent with the text of the immigration laws. In legislation adopted concurrently with the public-charge provision, *see* 8 U.S.C. § 1182(a)(4)(B)(i), Congress determined that it should be the official "immigration policy of the United States" to ensure that "availability of public benefits not constitute an incentive for immigration to the United States." *Id.* § 1601(2)(B). Congress again cited the "compelling" interest in ensuring "that aliens be self-reliant in

accordance with national immigration policy." *Id.* § 1601(5). Congress further emphasized that "[s]elf-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes," and that it "continues to be the immigration policy of the United States that . . . (A) aliens within the Nation's borders not depend on public resources to meet their needs . . . and (B) the availability of public benefits not constitute an incentive for immigration to the United States." *Id.* § 1601(1)(2).

The Public Charge Rule is also congruent with the Immigration and Nationality Act's structure and context. For example, Congress required that an alien seeking admission or adjustment of status to submit "affidavit[s] of support" from sponsors. *See id.* § 1182(a)(4)(C)-(D). Those sponsors must, in turn, agree "to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line." *Id.* § 1183a(a)(1)(A). Congress reinforced this requirement for self-sufficiency by allowing federal and state governments to seek reimbursement from the sponsor for "any means-tested public benefit" the government provides to the alien during the period the support obligation remains in effect. *Id.* § 1183a(a)(1)(B). That provision is not limited to cash support. Aliens who fail to obtain the required affidavit are treated by operation of law as inadmissible on the public-charge ground, regardless of individual circumstances. *Id.* § 1182(a)(4).

The State Intervenors' interests here provide an obvious example of how the INA's statutory scheme functions as a practical matter. That state-obligated Medicaid funding, for example, does not come in the form of cash does not mean that the States are not obligated to raise and expend many millions of dollars on Medicaid for

these individuals. In 2018 alone, the cost of the average Medicaid beneficiary in Texas was $9,247 per capita; in Ohio, $8,248; in West Virginia, $7,232. Medicaid.gov, *Medicaid Per Capita Expenditures*, https://tinyurl.com/heayt2 (last visited Nov. 1, 2021). That figure is higher for older beneficiaries or those with chronic illness or disabilities. *See id.* Likewise, the availability of substantial assistance—though not granted in the form of direct cash payments—may well provide significant non-monetary inducement for aliens to immigrate to the United States contrary to law.

C. The Public Charge Rule's interpretation of "public charge" is consistent with the historic usage of the term "public charge."

Finally, as explained by the Ninth Circuit, the Public Charge Rule is consistent with the history of the term "public charge." "Since 1882, when the Congress enacted the first comprehensive immigration statute, U.S. law has prohibited the admission to the United States of 'any person unable to take care of himself or herself without becoming a public charge.'" *City & County of San Francisco*, 944 F.3d at 779 (citation omitted). "The history of the term 'public charge' confirms that its definition has changed over time to adapt to the way in which federal, state, and local governments have cared for our most vulnerable populations." *Id.* at 792. The Ninth Circuit recognized that the meaning of "public charge" has involved "a totality-of-the-circumstances test" with "different factors . . . weigh[ing] more or less heavily at different times, reflecting changes in the way in which we provide assistance to the needy." *Id.* at 796.

In short, challenges to the Public Charge Rule are likely to fail in the end because the rule "easily" qualifies as a "permissible construction of the INA." *Id.* at 799; *see*

CASA de Md., 971 F.3d at 251 (holding that the Public Charge Rule is "unquestionably lawful"); *Cook County*, 962 F.3d at 234 (Barrett, J., dissenting). If anything, the Supreme Court's ruling in this case further underscores this conclusion. Plaintiffs and the federal government asked the Supreme Court to reject the State Intervenors' participation in this suit outright on numerous grounds, including the timeliness of the State Intervenors' request to intervene, Opposition to 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 at 9-10, 20-21, *Texas*, 141 S. Ct. 2562 (No. 20A150), and the merits of the State Intervenors' position, *id.* at 11-22; Federal Respondents' Response in Opposition to Application for Leave to Intervene and for a Stay of the Judgment Entered by the United States District Court for the Northern District of Illinois at 22-25, *Texas*, 141 S. Ct. 2562 (No. 20A150). Rather than accepting any of those grounds, the Supreme Court directed the Intervenor States to seek relief first in the district court and then in this Court "without prejudice" to renewing their request should such relief not be granted. *Texas*, 141 S. Ct. at 2562.

CONCLUSION

This Court should reverse the district court's denial of the State Intervenors' motions to intervene and for relief from the district court's partial final judgment and treat the State Intervenors as appellants from the district court's partial final judgment so that they can take up the defense of the Public Charge Rule that the federal government so abruptly and extraordinarily abandoned.

Respectfully submitted.

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[6] Under Circuit Rule 46(c), counsel for the State Intervenors may appear before this Court without being formally admitted to practice before the Court.

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Certificate of Service

On November 3, 2021, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

/s/ Cody Rutowski
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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,824 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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Certificate of Compliance

Under Circuit Rule 30(d), counsel certifies that all materials required by Circuit Rule 30(a) and (b) are included in the short appendix and appendix.

/s/ Cody Rutowski
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Statutory and Regulatory Addendum

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respond: The estimated total number of respondents for the information collection Form I–539 paper filers is 174,289 and the estimated hour burden per response is two hours. The estimated total number of respondents for the information collection Form I–539 e-filers is 74,696 and the estimated hour burden per response is 1.08 hours. The estimated total number of respondents for the information collection I–539A is 54,375 and the estimated hour burden per response is 0.5 hour. The estimated total number of respondents for the information collection of Biometrics is 248,985 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 747,974 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $56,121,219.

USCIS Form I–912

Under the PRA DHS is required to submit to OMB, for review and approval, covered reporting requirements inherent in a rule. This rule will require non-substantive edits to USCIS Form I–912, Request for Fee Waiver. These edits make clear to those who request fee waivers that an approved fee waiver can negatively impact eligibility for an immigration benefit that is subject to the public charge inadmissibility determination. Accordingly, USCIS has submitted a PRA Change Worksheet, Form OMB 83–C, and amended information collection instrument to OMB for review and approval in accordance with the PRA.

USCIS Form I–407

Under the PRA, DHS is required to submit to OMB, for review and approval, covered reporting requirements inherent in a rule. This rule requires the use of USCIS Form I–407 but does not require any changes to the form or instructions and does not impact the number of respondents, time or cost burden. This form is currently approved by OMB under the PRA. The OMB control number for this information collection is 1615–0130.

USCIS Form I–693

Under the PRA, DHS is required to submit to OMB, for review and approval, covered reporting requirements inherent in a rule. This rule requires the use of USCIS Form I–693 but does not require any changes to the form or instructions and does not impact the number of respondents, time or cost burden. This form is currently approved by OMB under the PRA. The OMB control number for this information collection is 1615–0033.

V. List of Subjects and Regulatory Amendments

List of Subjects

8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, Immigration, Privacy, Reporting and recordkeeping requirements, Surety bonds.

8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

8 CFR Part 213

Immigration, Surety bonds.

8 CFR Part 214

Administrative practice and procedure, Aliens, Cultural exchange programs, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

8 CFR Part 245

Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 248

Aliens, Reporting and recordkeeping requirements.

Accordingly, DHS amends chapter I of title 8 of the Code of Federal Regulations as follows:

PART 103—IMMIGRATION BENEFITS; BIOMETRIC REQUIREMENTS; AVAILABILITY OF RECORDS

■ 1. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356, 1365b; 31 U.S.C. 9701; Public Law 107–296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*); E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p.166; 8 CFR part 2; Pub. L. 112–54.

■ 2. Section 103.6 is amended by:

a. Revising paragraphs (a)(1), (a)(2)(i), and (c)(1);

■ b. Adding paragraph (d)(3); and

■ c. Revising paragraph (e) The revisions and additions read as follows:

§ 103.6 Surety bonds.

(a) * * *

(1) *Extension agreements; consent of surety; collateral security.* All surety bonds posted in immigration cases must be executed on the forms designated by DHS, a copy of which, and any rider attached thereto, must be furnished to the obligor. DHS is authorized to approve a bond, a formal agreement for the extension of liability of surety, a request for delivery of collateral security to a duly appointed and undischarged administrator or executor of the estate of a deceased depositor, and a power of attorney executed on the form designated by DHS, if any. All other matters relating to bonds, including a power of attorney not executed on the form designated by DHS and a request for delivery of collateral security to other than the depositor or his or her approved attorney in fact, will be forwarded to the appropriate office for approval.

(2) *Bond riders*—(i) *General.* A bond rider must be prepared on the form(s) designated by DHS, and attached to the bond. If a condition to be included in a bond is not on the original bond, a rider containing the condition must be executed.

* * * * *

(c) * * *

(1) Public charge bonds. Special rules for the cancellation of public charge bonds are described in 8 CFR 213.1.

* * * * *

(d) * * *

(3) *Public charge bonds.* The threshold bond amount for public charge bonds is set forth in 8 CFR 213.1.

(e) *Breach of bond.* Breach of public charge bonds is governed by 8 CFR 213.1. For other immigration bonds, a bond is breached when there has been a substantial violation of the stipulated conditions. A final determination that a bond has been breached creates a claim in favor of the United States which may not be released by the officer. DHS will determine whether a bond has been breached. If DHS determines that a bond has been breached, it will notify the obligor of the decision, the reasons therefor, and inform the obligor of the right to appeal the decision in accordance with the provisions of this part.

■ 3. Section 103.7 is amended by adding paragraphs (b)(1)(i)(LLL) and (MMM) to read as follows:

§ 103.7 Fees.

* * * * *

(b) * * *

(1) * * *

(i) * * *

(LLL) Public Charge Bond, Form I–945. $25.

(MMM) Request for Cancellation of Public Charge Bond, Form I–356. $25.

PART 212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

■ 4. The authority citation for part 212 continues to read as follows:

Authority: 6 U.S.C. 111, 202(4) and 271; 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1185 note (section 7209 of Pub. L. 108–458), 1187, 1223, 1225, 1226, 1227, 1255, 1359; 8 CFR part 2.

■ 5. Amend § 212.18 by revising paragraph (b)(2) and (3) to read as follows:

§ 212.18 Application for Waivers of inadmissibility in connection with an application for adjustment of status by T nonimmigrant status holders

* * * * *

(b) * * *

(2) If an applicant is inadmissible under section 212(a)(1) of the Act, USCIS may waive such inadmissibility if it determines that granting a waiver is in the national interest.

(3) If any other applicable provision of section 212(a) renders the applicant inadmissible, USCIS may grant a waiver of inadmissibility if the activities rendering the alien inadmissible were caused by or were incident to the victimization and USCIS determines that it is in the national interest to waive the applicable ground or grounds of inadmissibility.

■ 6. Add §§ 212.20 through 212.23 to read as follows:

Sec.

* * * * *

§ 212.20 Applicability of public charge inadmissibility.

8 CFR 212.20 through 212.23 address the public charge ground of inadmissibility under section 212(a)(4) of the Act. Unless the alien requesting the immigration benefit or classification has been exempted from section 212(a)(4) of the Act as listed in 8 CFR 212.23(a), the provisions of §§ 212.20 through 212.23 of this part apply to an applicant for admission or adjustment of status to lawful permanent resident, if the application is postmarked (or, if applicable, submitted electronically) on or after October 15, 2019.

§ 212.21 Definitions.

For the purposes of 8 CFR 212.20 through 212.23, the following definitions apply:

(a) *Public Charge.* Public charge means an alien who receives one or more public benefits, as defined in paragraph (b) of this section, 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).

(b) *Public benefit.* Public benefit means:

(1) Any Federal, State, local, or tribal cash assistance for income maintenance (other than tax credits), including:

(i) Supplemental Security Income (SSI), 42 U.S.C. 1381 *et seq.;*

(ii) Temporary Assistance for Needy Families (TANF), 42 U.S.C. 601 *et seq.;* or

(iii) Federal, State or local cash benefit programs for income maintenance (often called ''General Assistance'' in the State context, but which also exist under other names); and

(2) Supplemental Nutrition Assistance Program (SNAP), 7 U.S.C. 2011 to 2036c;

(3) Section 8 Housing Assistance under the Housing Choice Voucher Program, as administered by HUD under 42 U.S.C. 1437f;

(4) Section 8 Project-Based Rental Assistance (including Moderate Rehabilitation) under Section 8 of the U.S. Housing Act of 1937 (42 U.S.C. 1437f); and

(5) Medicaid under 42 U.S.C. 1396 *et seq.,* except for:

(i) Benefits received for an emergency medical condition as described in 42 U.S.C. 1396b(v)(2)–(3), 42 CFR 440.255(c);

(ii) Services or benefits funded by Medicaid but provided under the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. 1400 *et seq.;*

(iii) School-based services or benefits provided to individuals who are at or below the oldest age eligible for secondary education as determined under State or local law;

(iv) Benefits received by an alien under 21 years of age, or a woman during pregnancy (and during the 60-day period beginning on the last day of the pregnancy).

(6) Public Housing under section 9 of the U.S. Housing Act of 1937.

(7) Public benefits, as defined in paragraphs (b)(1) through (b)(6) of this section, do not include any public benefits received by an alien who at the time of receipt of the public benefit, or at the time of filing or adjudication of the application for admission or adjustment of status, or application or request for extension of stay or change of status is—

(i) Enlisted in the U.S. Armed Forces under the authority of 10 U.S.C. 504(b)(1)(B) or 10 U.S.C. 504(b)(2), or

(ii) Serving in active duty or in the Ready Reserve component of the U.S. Armed Forces, or

(iii) Is the spouse or child, as defined in section 101(b) of the Act, of an alien described in paragraphs (b)(7)(i) or (ii) of this section.

(8) In a subsequent adjudication for a benefit for which the public charge ground of inadmissibility applies, public benefits, as defined in this section, do not include any public benefits received by an alien during periods in which the alien was present in the United States in an immigration category that is exempt from the public charge ground of inadmissibility, as set forth in 8 CFR 212.23(a), or for which the alien received a waiver of public charge inadmissibility, as set forth in 8 CFR 212.23(b).

(9) Public benefits, as defined in this section, do not include any public benefits that were or will be received by—

(i) Children of U.S. citizens whose lawful admission for permanent residence and subsequent residence in the legal and physical custody of their U.S. citizen parent will result automatically in the child's acquisition of citizenship, upon meeting the eligibility criteria of section 320(a)–(b) of the Act, in accordance with 8 CFR part 320; or

(ii) Children of U.S. citizens whose lawful admission for permanent residence will result automatically in the child's acquisition of citizenship upon finalization of adoption (if the child satisfies the requirements applicable to adopted children under INA 101(b)(1)), in the United States by the U.S. citizen parent(s), upon meeting the eligibility criteria of section 320(a)–(b) of the Act, in accordance with 8 CFR part 320; or

(iii) Children of U.S. citizens who are entering the United States for the purpose of attending an interview under section 322 of the Act in accordance with 8 CFR part 322.

(c) *Likely at any time to become a public charge.* Likely at any time to become a public charge means more likely than not at any time in the future to become a public charge, as defined in 212.21(a), based on the totality of the alien's circumstances.

(d) *Alien's household.* For purposes of public charge inadmissibility determinations under section 212(a)(4) of the Act:

(1) If the alien is 21 years of age or older, or under the age of 21 and married, the alien's household includes:

(i) The alien;
(ii) The alien's spouse, if physically residing with the alien;
(iii) The alien's children, as defined in 101(b)(1) of the Act, physically residing with the alien;
(iv) The alien's other children, as defined in section 101(b)(1) of the Act, not physically residing with the alien for whom the alien provides or is required to provide at least 50 percent of the children's financial support, as evidenced by a child support order or agreement a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided by the alien;
(v) Any other individuals (including a spouse not physically residing with the alien) to whom the alien provides, or is required to provide, at least 50 percent of the individual's financial support or who are listed as dependents on the alien's federal income tax return; and
(vi) Any individual who provides to the alien at least 50 percent of the alien's financial support, or who lists the alien as a dependent on his or her federal income tax return.
(2) If the alien is a child as defined in section 101(b)(1) of the Act, the alien's household includes the following individuals:
(i) The alien;
(ii) The alien's children as defined in section 101(b)(1) of the Act physically residing with the alien;
(iii) The alien's other children as defined in section 101(b)(1) of the Act not physically residing with the alien for whom the alien provides or is required to provide at least 50 percent of the children's financial support, as evidenced by a child support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided by the alien;
(iv) The alien's parents, legal guardians, or any other individual providing or required to provide at least 50 percent of the alien's financial support to the alien as evidenced by a child support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided to the alien;
(v) The parents' or legal guardians' other children as defined in section 101(b)(1) of the Act physically residing with the alien;
(vi) The alien's parents' or legal guardians' other children as defined in section 101(b)(1) of the Act, not physically residing with the alien for whom the parent or legal guardian provides or is required to provide at least 50 percent of the other children's financial support, as evidenced by a child support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided by the parents or legal guardians; and
(vii) Any other individual(s) to whom the alien's parents or legal guardians provide, or are required to provide at least 50 percent of such individual's financial support or who is listed as a dependent on the parent's or legal guardian's federal income tax return.
(e) *Receipt of public benefits.* Receipt of public benefits occurs when a public benefit-granting agency provides a public benefit, as defined in paragraph (b) of this section, to an alien as a beneficiary, whether in the form of cash, voucher, services, or insurance coverage. Applying for a public benefit does not constitute receipt of public benefits although it may suggest a likelihood of future receipt. Certification for future receipt of a public benefit does not constitute receipt of public benefits, although it may suggest a likelihood of future receipt. An alien's receipt of, application for, or certification for public benefits solely on behalf of another individual does not constitute receipt of, application for, or certification for such alien.
(f) Primary caregiver means an alien who is 18 years of age or older and has significant responsibility for actively caring for and managing the well-being of a child or an elderly, ill, or disabled person in the alien's household.

§ 212.22 Public charge inadmissibility determination.

This section relates to the public charge ground of inadmissibility under section 212(a)(4) of the Act.
(a) *Prospective determination based on the totality of circumstances.* The determination of an alien's likelihood of becoming a public charge at any time in the future must be based on the totality of the alien's circumstances by weighing all factors that are relevant to whether the alien is more likely than not at any time in the future to receive one or more public benefits, as defined in 8 CFR 212.21(b), for more than 12 months in the aggregate within any 36-month period. Except as necessary to fully evaluate evidence provided in paragraph (b)(4)(ii)(E)(*3*) of this section, DHS will not specifically assess whether an alien qualifies or would qualify for any public benefit, as defined in 8 CFR 212.21(b).
(b) *Minimum factors to consider.* A public charge inadmissibility determination must at least entail consideration of the alien's age; health; family status; education and skills; and assets, resources, and financial status, as follows:
(1) *The alien's age*—(i) *Standard.* When considering an alien's age, DHS will consider whether the alien's age makes the alien more likely than not to become a public charge at any time in the future, such as by impacting the alien's ability to work, including whether the alien is between the age of 18 and the minimum ''early retirement age'' for Social Security set forth in 42 U.S.C. 416(*l*)(2).
(ii) [Reserved]
(2) *The alien's health*—(i) *Standard.* DHS will consider whether the alien's health makes the alien more likely than not to become a public charge at any time in the future, including whether the alien has been diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide and care for himself or herself, to attend school, or to work upon admission or adjustment of status.
(ii) *Evidence.* USCIS' consideration includes but is not limited to the following:
(A) A report of an immigration medical examination performed by a civil surgeon or panel physician where such examination is required (to which USCIS will generally defer absent evidence that such report is incomplete); or
(B) Evidence of a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide and care for himself or herself, to attend school, or to work upon admission or adjustment of status.
(3) *The alien's family status*—(i) *Standard.* When considering an alien's family status, DHS will consider the alien's household size, as defined in 8 CFR 212.21(d), and whether the alien's household size makes the alien more likely than not to become a public charge at any time in the future.
(ii) [Reserved]
(4) *The alien's assets, resources, and financial status*—(i) *Standard.* When considering an alien's assets, resources, and financial status, DHS will consider whether such assets, resources, and financial status excluding any income from illegal activities or sources (*e.g.,* proceeds from illegal gambling or drug sales, and income from public benefits listed in 8 CFR 212.21(b)), make the alien more likely than not to become a public charge at any time in the future, including whether:

(A) The alien's household's annual gross income is at least 125 percent of the most recent Federal Poverty Guideline (100 percent for an alien on active duty, other than training, in the U.S. Armed Forces) based on the alien's household size as defined by section 212.21(d);

(B) If the alien's household's annual gross income is less than 125 percent of the most recent Federal Poverty Guideline (100 percent for an alien on active duty, other than training, in the U.S. Armed Forces), the alien may submit evidence of ownership of significant assets. For purposes of this paragraph, an alien may establish ownership of significant assets, such as savings accounts, stocks, bonds, certificates of deposit, real estate or other assets, in which the combined cash value of all the assets (the total value of the assets less any offsetting liabilities) exceeds:

(*1*) If the intending immigrant is the spouse or child of a United States citizen (and the child has reached his or her 18th birthday), three times the difference between the alien's household income and 125 percent of the FPG (100 percent for those on active duty, other than training, in the U.S. Armed Forces) for the alien's household size;

(*2*) If the intending immigrant is an orphan who will be adopted in the United States after the alien orphan acquires permanent residence (or in whose case the parents will need to seek a formal recognition of a foreign adoption under the law of the State of the intending immigrant's proposed residence because at least one of the parents did not see the child before or during the adoption), and who will, as a result of the adoption or formal recognition of the foreign adoption, acquire citizenship under section 320 of the Act, the difference between the alien's household income and 125 percent of the FPG (100 percent for those on active duty, other than training, in the U.S. Armed Forces) for the alien's household size; or

(*3*) In all other cases, five times the difference between the alien's household income and 125 percent of the FPG (100 percent for those on active duty, other than training, in the U.S. Armed Forces) for the alien's household size.

(C) The alien has sufficient household assets and resources to cover any reasonably foreseeable medical costs, including as related to a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide care for himself or herself, to attend school, or to work;

(D) The alien has any financial liabilities; and whether

(E) The alien has applied for, been certified to receive, or received public benefits, as defined in 8 CFR 212.21(b), on or after October 15, 2019.

(ii) *Evidence.* USCIS' consideration includes, but is not limited to the following:

(A) The alien's annual gross household income including, but not limited to:

(*1*) For each member of the household whose income will be considered, the most recent tax-year transcript from the U.S. Internal Revenue Service (IRS) of such household member's IRS Form 1040, U.S. Individual Income Tax Return; or

(*2*) If the evidence in paragraph (b)(4)(ii)(A)(*1*) of this section is unavailable for a household member, other credible and probative evidence of such household member's income, including an explanation of why such transcript is not available, such as if the household member is not subject to taxation in the United States.

(B) Any additional income from individuals not included in the alien's household provided to the alien's household on a continuing monthly or yearly basis for the most recent calendar year and on which the alien relies or will rely to meet the standard at 8 CFR 212.22(b)(4)(i);

(C) The household's cash assets and resources. Evidence of such cash assets and resources may include checking and savings account statements covering 12 months prior to filing the application;

(D) The household's non-cash assets and resources, that can be converted into cash within 12 months, such as net cash value of real estate holdings minus the sum of all loans secured by a mortgage, trust deed, or other lien on the home; annuities; securities; retirement and educational accounts; and any other assets that can easily be converted into cash;

(E) Evidence that the alien has:

(*1*) Applied for or received any public benefit, as defined in 8 CFR 212.21(b), on or after October 15, 2019 or disenrolled or requested to be disenrolled from such benefit(s); or

(*2*) Been certified or approved to receive any public benefit, as defined in 8 CFR 212.21(b), on or after October 15, 2019 or withdrew his or her application or disenrolled or requested to be to disenrolled from such benefit(s);

(*3*) Submitted evidence from a Federal, State, local, or tribal agency administering a public benefit, as defined in 212.21(b), that the alien has specifically identified as showing that the alien does not qualify or would not qualify for such public benefit by virtue of, for instance, the alien's annual gross household income or prospective immigration status or length of stay;

(F) Whether the alien has applied for or has received a USCIS fee waiver for an immigration benefit request on or after October 15, 2019, unless the fee waiver was applied for or granted as part of an application for which a public charge inadmissibility determination under section 212(a)(4) of the Act was not required.

(G) The alien's credit history and credit score in the United States, and other evidence of the alien's liabilities not reflected in the credit history and credit score (*e.g.,* any mortgages, car loans, unpaid child or spousal support, unpaid taxes, and credit card debt); and

(H) Whether the alien has sufficient household assets and resources (including, for instance, health insurance not designated as a public benefit under 8 CFR 212.21(b)) to pay for reasonably foreseeable medical costs, such as costs related to a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide care for himself or herself, to attend school, or to work;

(5) *The alien's education and skills.* (i) *Standard.* When considering an alien's education and skills, DHS will consider whether the alien has adequate education and skills to either obtain or maintain lawful employment with an income sufficient to avoid being more likely than not to become a public charge.

(ii) *Evidence.* USCIS' consideration includes but is not limited to the following: (A) The alien's history of employment, excluding employment involving illegal activities, *e.g.,* illegal gambling or drug sales. The alien must provide the following:

(*1*) The last 3 years of the alien's tax transcripts from the U.S. Internal Revenue Service (IRS) of the alien's IRS Form 1040, U.S. Individual Income Tax Return; or

(*2*) If the evidence in paragraph (b)(5)(ii)(A)(*1*) of this section is unavailable, other credible and probative evidence of the alien's history of employment for the last 3 years, including an explanation of why such transcripts are not available, such as if the alien is not subject to taxation in the United States;

(B) Whether the alien has a high school diploma (or its equivalent) or has a higher education degree;

(C) Whether the alien has any occupational skills, certifications, or licenses; and

(D) Whether the alien is proficient in English or proficient in other languages in addition to English.

(E) Whether the alien is a primary caregiver as defined in 8 CFR 212.21(f), such that the alien lacks an employment history, is not currently employed, or is not employed full time. Only one alien within a household can be considered a primary caregiver of the same individual within the household. USCIS' consideration with respect this paragraph includes but is not limited to evidence that an individual the alien is caring for resides in the alien's household, evidence of the individual's age, and evidence of the individual's medical condition, including disability, if any.

(6) *The alien's prospective immigration status and expected period of admission.*

(i) *Standard.* DHS will consider the immigration status that the alien seeks and the expected period of admission as it relates to the alien's ability to financially support for himself or herself during the duration of the alien's stay, including:

(A) Whether the alien is applying for adjustment of status or admission in a nonimmigrant or immigrant classification; and

(B) If the alien is seeking admission as a nonimmigrant, the nonimmigrant classification and the anticipated period of temporary stay.

(ii) [Reserved]

(7) *An affidavit of support under section 213A of the Act, when required under section 212(a)(4) of the Act, that meets the requirements of section 213A of the Act and 8 CFR 213a*—(i) *Standard.* If the alien is required under sections 212(a)(4)(C) or (D) to submit an affidavit of support under section 213A of the Act and 8 CFR part 213a, and submits such a sufficient affidavit of support, DHS will consider the likelihood that the sponsor would actually provide the statutorily-required amount of financial support to the alien, and any other related considerations.

(A) *Evidence.* USCIS consideration includes but is not limited to the following:

(*1*) The sponsor's annual income, assets, and resources;

(*2*) The sponsor's relationship to the applicant, including but not limited to whether the sponsor lives with the alien; and

(*3*) Whether the sponsor has submitted an affidavit of support with respect to other individuals.

(c) *Heavily weighted factors.* The factors below will weigh heavily in a public charge inadmissibility determination. The mere presence of any one heavily weighted factor does not, alone, make the alien more or less likely than not to become a public charge.

(1) *Heavily weighted negative factors.* The following factors will weigh heavily in favor of a finding that an alien is likely at any time in the future to become a public charge:

(i) The alien is not a full-time student and is authorized to work, but is unable to demonstrate current employment, recent employment history, or a reasonable prospect of future employment;

(ii) The alien has received or has been certified or approved to receive one or more public benefits, as defined in § 212.21(b), for more than 12 months in the aggregate within any 36-month period, beginning no earlier than 36 months prior to the alien's application for admission or adjustment of status on or after October 15, 2019;

(iii)(A) The alien has been diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide for himself or herself, attend school, or work; and

(B) The alien is uninsured and has neither the prospect of obtaining private health insurance, nor the financial resources to pay for reasonably foreseeable medical costs related to such medical condition; or

(iv) The alien was previously found inadmissible or deportable on public charge grounds by an Immigration Judge or the Board of Immigration Appeals.

(2) *Heavily weighted positive factors.* The following factors will weigh heavily in favor of a finding that an alien is not likely to become a public charge:

(i) The alien's household has income, assets, or resources, and support (excluding any income from illegal activities, *e.g.,* proceeds from illegal gambling or drug sales, and any income from public benefits as defined in § 212.21(b)) of at least 250 percent of the Federal Poverty Guidelines for the alien's household size;

(ii) The alien is authorized to work and is currently employed in a legal industry with an annual income, excluding any income from illegal activities such as proceeds from illegal gambling or drug sales, of at least 250 percent of the Federal Poverty Guidelines for the alien's household size; or

(iii) The alien has private health insurance, except that for purposes of this paragraph (c)(2)(iii), private health insurance must be appropriate for the expected period of admission, and does not include health insurance for which the alien receives subsidies in the form of premium tax credits under the Patient Protection and Affordable Care Act, as amended.

(d) *Treatment of benefits received before* October 15, 2019. For purposes of this regulation, DHS will consider, as a negative factor, but not as a heavily weighted negative factor as described in paragraph (c)(1) of this section, any amount of cash assistance for income maintenance, including Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), State and local cash assistance programs that provide benefits for income maintenance (often called ''General Assistance'' programs), and programs (including Medicaid) supporting aliens who are institutionalized for long-term care, received, or certified for receipt, before October 15, 2019, as provided under the 1999 Interim Field Guidance, also known as the 1999 Field Guidance on Deportability and Inadmissibility on Public Charge Grounds. DHS will not consider as a negative factor any other public benefits received, or certified for receipt, before October 15, 2019.

§ 212.23 Exemptions and waivers for public charge ground of inadmissibility.

(a) *Exemptions.* The public charge ground of inadmissibility under section 212(a)(4) of the Act does not apply, based on statutory or regulatory authority, to the following categories of aliens:

(1) Refugees at the time of admission under section 207 of the Act and at the time of adjustment of status to lawful permanent resident under section 209 of the Act;

(2) Asylees at the time of grant under section 208 of the Act and at the time of adjustment of status to lawful permanent resident under section 209 of the Act;

(3) Amerasian immigrants at the time of application for admission as described in sections 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, Public Law 100–202, 101 Stat. 1329–183, section 101(e) (Dec. 22, 1987), as amended, 8 U.S.C. 1101 note;

(4) Afghan and Iraqi Interpreter, or Afghan or Iraqi national employed by or on behalf of the U.S. Government as described in section 1059(a)(2) of the National Defense Authorization Act for Fiscal Year 2006 Public Law 109–163 (Jan. 6, 2006), as amended, and section 602(b) of the Afghan Allies Protection Act of 2009, Public Law 111–8, title VI

(Mar. 11, 2009), as amended, 8 U.S.C. 1101 note, and section 1244(g) of the National Defense Authorization Act for Fiscal Year 2008, as amended Public Law 110–181 (Jan. 28, 2008);

(5) Cuban and Haitian entrants applying for adjustment of status under section 202 of the Immigration Reform and Control Act of 1986 (IRCA), Public Law 99–603, 100 Stat. 3359 (Nov. 6, 1986), as amended, 8 U.S.C. 1255a note;

(6) Aliens applying for adjustment of status under the Cuban Adjustment Act, Public Law 89–732 (Nov. 2, 1966), as amended, 8 U.S.C. 1255 note;

(7) Nicaraguans and other Central Americans applying for adjustment of status under sections 202(a) and section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA), Public Law 105–100, 111 Stat. 2193 (Nov. 19, 1997), as amended, 8 U.S.C. 1255 note;

(8) Haitians applying for adjustment of status under section 902 of the Haitian Refugee Immigration Fairness Act of 1998, Public Law 105–277, 112 Stat. 2681 (Oct. 21, 1998), as amended, 8 U.S.C. 1255 note;

(9) Lautenberg parolees as described in section 599E of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Public Law 101–167, 103 Stat. 1195, title V (Nov. 21, 1989), as amended, 8 U.S.C. 1255 note;

(10) Special immigrant juveniles as described in section 245(h) of the Act;

(11) Aliens who entered the United States prior to January 1, 1972, and who meet the other conditions for being granted lawful permanent residence under section 249 of the Act and 8 CFR part 249 (Registry);

(12) Aliens applying for or re-registering for Temporary Protected Status as described in section 244 of the Act in accordance with section 244(c)(2)(A)(ii) of the Act and 8 CFR 244.3(a);

(13) A nonimmigrant described in section 101(a)(15)(A)(i) and (A)(ii) of the Act (Ambassador, Public Minister, Career Diplomat or Consular Officer, or Immediate Family or Other Foreign Government Official or Employee, or Immediate Family), in accordance with section 102 of the Act and 22 CFR 41.21(d);

(14) A nonimmigrant classifiable as C–2 (alien in transit to U.N. Headquarters) or C–3 (foreign government official), 22 CFR 41.21(d);

(15) A nonimmigrant described in section 101(a)(15)(G)(i), (G)(ii), (G)(iii), and (G)(iv), of the Act (Principal Resident Representative of Recognized Foreign Government to International Organization, and related categories), in accordance with section 102 of the Act and 22 CFR 41.21(d);

(16) A nonimmigrant classifiable as NATO–1, NATO–2, NATO–3, NATO–4 (NATO representatives), and NATO–6 in accordance with 22 CFR 41.21(d);

(17) An applicant for nonimmigrant status under section 101(a)(15)(T) of the Act, in accordance with 8 CFR 212.16(b);

(18) Except as provided in section 212.23(b), an individual who is seeking an immigration benefit for which admissibility is required, including but not limited to adjustment of status under section 245(a) of the Act and section 245(l) of the Act and who:

(i) Has a pending application that sets forth a prima facie case for eligibility for nonimmigrant status under section 101(a)(15)(T) of the Act, or

(ii) Has been granted nonimmigrant status under section 101(a)(15)(T) of the Act, provided that the individual is in valid T nonimmigrant status at the time the benefit request is properly filed with USCIS and at the time the benefit request is adjudicated;

(19) Except as provided in § 212.23(b),

(i) A petitioner for nonimmigrant status under section 101(a)(15)(U) of the Act, in accordance with section 212(a)(4)(E)(ii) of the Act; or

(ii) An individual who is granted nonimmigrant status under section 101(a)(15)(U) of the Act in accordance with section 212(a)(4)(E)(ii) of the Act, who is seeking an immigration benefit for which admissibility is required, including, but not limited to, adjustment of status under section 245(a) of the Act, provided that the individual is in valid U nonimmigrant status at the time the benefit request is properly filed with USCIS and at the time the benefit request is adjudicated.

(20) Except as provided in section 212.23(b), any alien who is a VAWA self-petitioner under section 212(a)(4)(E)(i) of the Act;

(21) Except as provided in section 212.23(b), a qualified alien described in section 431(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. 1641(c), under section 212(a)(4)(E)(iii) of the Act;

(22) Applicants adjusting status who qualify for a benefit under section 1703 of the National Defense Authorization Act, Public Law 108–136, 117 Stat. 1392 (Nov. 24, 2003), 8 U.S.C. 1151 note (posthumous benefits to surviving spouses, children, and parents);

(23) American Indians born in Canada determined to fall under section 289 of the Act;

(24) Texas Band of Kickapoo Indians of the Kickapoo Tribe of Oklahoma, Public Law 97–429 (Jan. 8, 1983);

(25) Nationals of Vietnam, Cambodia, and Laos applying for adjustment of status under section 586 of Public Law 106–429 under 8 CFR 245.21;

(26) Polish and Hungarian Parolees who were paroled into the United States from November 1, 1989 to December 31, 1991 under section 646(b) of the IIRIRA, Public Law 104–208, Div. C, Title VI, Subtitle D (Sept. 30, 1996), 8 U.S.C. 1255 note; and

(27) Any other categories of aliens exempt under any other law from the public charge ground of inadmissibility provisions under section 212(a)(4) of the Act.

(b) *Limited Exemption.* Aliens described in §§ 212.23(a)(18) through (21) must submit an affidavit of support as described in section 213A of the Act if they are applying for adjustment of status based on an employment-based petition that requires such an affidavit of support as described in section 212(a)(4)(D) of the Act.

(c) *Waivers.* A waiver for the public charge ground of inadmissibility may be authorized based on statutory or regulatory authority, for the following categories of aliens:

(1) Applicants for admission as nonimmigrants under 101(a)(15)(S) of the Act;

(2) Nonimmigrants admitted under section 101(a)(15)(S) of the Act applying for adjustment of status under section 245(j) of the Act (witnesses or informants); and

(3) Any other waiver of the public charge ground of inadmissibility that is authorized by law or regulation.

PART 213—PUBLIC CHARGE BONDS

■ 7. The authority citation for part 213 is revised to read as follows:

Authority: 8 U.S.C. 1103; 1183; 8 CFR part 2.

■ 8. Revise the part heading to read as set forth above.

■ 9. Revise § 213.1 to read as follows:

§ 213.1 Adjustment of status of aliens on submission of a public charge bond.

(a) *Inadmissible aliens.* In accordance with section 213 of the Act, after an alien seeking adjustment of status has been found inadmissible as likely at any time in the future to become a public charge under section 212(a)(4) of the Act, DHS may allow the alien to submit a public charge bond, if the alien is otherwise admissible, in accordance with the requirements of 8 CFR 103.6 and this section. The public charge

bond must meet the conditions set forth in 8 CFR 103.6 and this section.

(b) *Discretion.* The decision to allow an alien inadmissible under section 212(a)(4) of the Act to submit a public charge bond is in DHS's discretion. If an alien has one or more heavily weighted negative factors as defined in 8 CFR 212.22 in his or her case, DHS generally will not favorably exercise discretion to allow submission of a public charge bond.

(c) *Public Charge Bonds.* (1) *Types.* DHS may require an alien to submit a surety bond, as listed in 8 CFR 103.6, or cash or any cash equivalents specified by DHS. DHS will notify the alien of the type of bond that may be submitted. All surety, cash, or cash equivalent bonds must be executed on a form designated by DHS and in accordance with form instructions. When a surety bond is accepted, the bond must comply with requirements applicable to surety bonds in 8 CFR 103.6 and this section. If cash or a cash equivalent, is being provided to secure a bond, DHS must issue a receipt on a form designated by DHS.

(2) *Amount.* Any public charge bond must be in an amount decided by DHS, not less than $8,100, annually adjusted for inflation based on the Consumer Price Index for All Urban Consumers (CPI–U), and rounded up to the nearest dollar. The bond amount decided by DHS may not be appealed by the alien or the bond obligor.

(d) *Conditions of the bond.* A public charge bond must remain in effect until USCIS grants a request to cancel the bond in accordance with paragraph (g) of this section, whereby the alien naturalizes or otherwise obtains U.S. citizenship, permanently departs the United States, dies, the alien has reached his or her 5-year anniversary since becoming a lawful permanent resident, or the alien changes immigration status to one not subject to public charge ground of inadmissibility. An alien on whose behalf a public charge bond has been submitted may not receive any public benefits, as defined in 8 CFR 212.21(b), for more than 12 months in the aggregate within any 364month period (such that, for instance, receipt of two benefits in one month counts as two months, after the alien's adjustment of status to that of a lawful permanent resident, until the bond is cancelled in accordance with paragraph (g) of this section. An alien must also comply with any other conditions imposed as part of the bond.

(e) *Submission.* A public charge bond may be submitted on the alien's behalf only after DHS notifies the alien and the alien's representative, if any, that a bond may be submitted. The bond must be submitted to DHS in accordance with the instructions of the form designated by DHS for this purpose, with the fee prescribed in 8 CFR 103.7(b), and any procedures contained in the DHS notification to the alien. DHS will specify the bond amount and any other conditions, as appropriate for the alien and the immigration benefit being sought. USCIS will notify the alien and the alien's representative, if any, that the bond has been accepted, and will provide a copy to the alien and the alien's representative, if any, of any communication between the obligor and the U.S. government. An obligor must notify DHS within 30 days of any change in the obligor's or the alien's physical and mailing address.

(f) *Substitution.* (1) *Substitution Process.* Either the obligor of the bond previously submitted to DHS or a new obligor may submit a substitute bond on the alien's behalf. The substitute bond must specify an effective date. The substitute bond must meet all of the requirements applicable to the initial bond as required by this section and 8 CFR 103.6, and if the obligor is different from the original obligor, the new obligor must assume all liabilities of the initial obligor. The substitute bond must also cover any breach of the bond conditions which occurred before DHS accepted the substitute bond, in the event DHS did not learn of the breach until after DHS accepted the substitute bond.

(2) *Acceptance.* Upon submission of the substitute bond, DHS will review the substitute bond for sufficiency as set forth in this section. If the substitute bond is sufficient DHS will cancel the bond previously submitted to DHS, and replace it with the substitute bond. If the substitute bond is insufficient, DHS will notify the obligor of the substitute bond to correct the deficiency within the timeframe specified in the notice. If the deficiency is not corrected within the timeframe specified, the previously submitted bond will remain in effect.

(g) *Cancellation of the Public Charge Bond.* (1) An alien or obligor may request that DHS cancel a public charge bond if the alien:

(i) Naturalized or otherwise obtained United States citizenship;

(ii) Permanently departed the United States;

(iii) Died;

(iv) Reached his or her 5-year anniversary since becoming a lawful permanent resident; or

(v) Obtained a different immigration status not subject to public charge inadmissibility, as listed in 8 CFR 212.23, following the grant of lawful permanent resident status associated with the public charge bond.

(2) *Permanent Departure Defined.* For purposes of this section, permanent departure means that the alien lost or abandoned his or her lawful permanent resident status, whether by operation of law or voluntarily, and physically departed the United States. An alien is only deemed to have voluntarily lost lawful permanent resident status when the alien has submitted a record of abandonment of lawful permanent resident status, on the form prescribed by DHS, from outside the United States, and in accordance with the form's instructions.

(3) *Cancellation Request.* A request to cancel a public charge bond must be made by submitting a form designated by DHS, in accordance with that form's instructions and the fee prescribed in 8 CFR 103.7(b). If a request for cancellation of a public charge bond is not filed, the bond shall remain in effect until the form is filed, reviewed, and a decision is rendered. DHS may in its discretion cancel a public charge bond if it determines that an alien otherwise meets the eligibility requirements of paragraphs (g)(1) of this section.

(4) *Adjudication and Burden of Proof.* The alien and the obligor have the burden to establish, by a preponderance of the evidence, that one of the conditions for cancellation of the public charge bond listed in paragraph (g)(1) of this section has been met. If DHS determines that the information included in the cancellation request is insufficient to determine whether cancellation is appropriate, DHS may request additional information as outlined in 8 CFR 103.2(b)(8). DHS must cancel a public charge bond if DHS determines that the conditions of the bond have been met, and that the bond was not breached, in accordance with paragraph (h) of this section. For cancellations under paragraph (g)(1)(iv) of this section, the alien or the obligor must establish that the public charge bond has not been breached during the 5-year period preceding the alien's fifth anniversary of becoming a lawful permanent resident.

(5) *Decision.* DHS will notify the obligor, the alien, and the alien's representative, if any, of its decision regarding the request to cancel the public charge bond. When the public charge bond is cancelled, the obligor is released from liability. If the public charge bond has been secured by a cash deposit or a cash equivalent, DHS will refund the cash deposit and any interest earned to the obligor consistent with 8 U.S.C. 1363 and 8 CFR 293.1. If DHS denies the request to cancel the bond,

DHS will notify the obligor and the alien, and the alien's representative, if any, of the reasons why, and of the right of the obligor to appeal in accordance with the requirements of 8 CFR part 103, subpart A. An obligor may file a motion pursuant to 8 CFR 103.5 after an unfavorable decision on appeal.

(h) *Breach.* (1) *Breach and Claim in Favor of the United States.* An administratively final determination that a bond has been breached creates a claim in favor of the United States. Such claim may not be released or discharged by an immigration officer. A breach determination is administratively final when the time to file an appeal with the Administrative Appeals Office (AAO) pursuant to 8 CFR part 103, subpart A, has expired or when the appeal is dismissed or rejected.

(2) *Breach of Bond Conditions.* (i) The conditions of the bond are breached if the alien has received public benefits, as defined in 8 CFR 212.21(b), 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), after the alien's adjustment of status to that of a lawful permanent resident and before the bond is cancelled under paragraph (g) of this section. DHS will not consider any public benefits, as defined in 8 CFR 212.21(b), received by the alien during periods while an alien was present in the United States in a category that is exempt from the public charge ground of inadmissibility or for which the alien received a waiver of public charge inadmissibility, as set forth in 8 CFR 212.21(b) and 8 CFR 212.23, and public benefits received after the alien obtained U.S. citizenship, when determining whether the conditions of the bond have been breached. DHS will not consider any public benefits, as defined in 8 CFR 212.21 (b)(1) through (b)(3), received by an alien who, at the time of receipt filing, adjudication or bond breach or cancellation determination, is enlisted in the U.S. Armed Forces under the authority of 10 U.S.C. 504(b)(1)(B) or 10 U.S.C. 504(b)(2), serving in active duty or in the Ready Reserve component of the U.S. Armed Forces, or if received by such an individual's spouse or child as defined in section 101(b) of the Act; or

(ii) The conditions of the bond otherwise imposed by DHS as part of the public charge bond are breached.

(3) *Adjudication.* DHS will determine whether the conditions of the bond have been breached. If DHS determines that it has insufficient information from the benefit-granting agency to determine whether a breach occurred, DHS may request additional information from the benefit-granting agency. If DHS determines that it has insufficient information from the alien or the obligor, it may request additional information as outlined in 8 CFR part 103 before making a breach determination. If DHS intends to declare a bond breached based on information that is not otherwise protected from disclosure to the obligor, DHS will disclose such information to the obligor to the extent permitted by law, and provide the obligor with an opportunity to respond and submit rebuttal evidence, including specifying a deadline for a response. DHS will send a copy of this notification to the alien and the alien's representative, if any. After the obligor's response, or after the specified deadline has passed, DHS will make a breach determination.

(4) *Decision.* DHS will notify the obligor and the alien, and the alien's representative, if any, of the breach determination. If DHS determines that a bond has been breached, DHS will inform the obligor of the right to appeal in accordance with the requirements of 8 CFR part 103, subpart A. With respect to a breach determination for a surety bond, the alien or the alien's representative, if any, may not appeal the breach determination or file a motion.

(5) *Demand for Payment.* Demands for amounts due under the terms of the bond will be sent to the obligor and any agent/co-obligor after a declaration of breach becomes administratively final.

(6) *Amount of Bond Breach and Effect on Bond.* The bond must be considered breached in the full amount of the bond.

(i) *Exhaustion of administrative remedies.* Unless an administrative appeal is precluded by regulation, a party has not exhausted the administrative remedies available with respect to a public charge bond under this section until the party has obtained a final decision in an administrative appeal under 8 CFR part 103, subpart A.

(ii) [Reserved]

PART 214—NONIMMIGRANT CLASSES

■ 10. The authority citation for part 214 continues to read as follows:

Authority: 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305 and 1372; sec. 643, Pub. L. 104–208, 110 Stat. 3009–708; Public Law 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2.

■ 11. Section 214.1 is amended by:

■ a. Adding paragraph (a)(3)(iv),

■ b. Removing the term, ''and'' in paragraph (c)(4)(iii);

The additions read as follows:

§ 214.1 Requirements for admission, extension, and maintenance of status.

(a) * * *

(3) * * *

(iv) Except where the nonimmigrant classification for which the alien seeks to extend is exempt from section 212(a)(4) of the Act or that section has been waived, as a condition for approval of extension of status, the alien must demonstrate that he or she has not received since obtaining the nonimmigrant status he or she seeks to extend one or more public benefits as defined in 8 CFR 212.21(b), 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). For the purposes of this determination, DHS will only consider public benefits received on or after October 15, 2019 for petitions or applications postmarked (or, if applicable, submitted electronically) on or after that date.

* * * * *

PART 245—ADJUSTMENT OF STATUS TO THAT OF A PERSON ADMITTED FOR PERMANENT RESIDENCE

■ 12. The authority citation for part 245 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1255; Pub. L. 105–100, section 202, 111 Stat. 2160, 2193; Pub. L. 105–277, section 902, 112 Stat. 2681; Pub. L. 110–229, tit. VII, 122 Stat. 754; 8 CFR part 2.

■ 13. Amend § 245.4 by redesignating the undesignated text as paragraph (a) and adding paragraph (b) to read as follows:

§ 245.4 Documentary requirements.

* * * * *

(b) For purposes of public charge determinations under section 212(a)(4) of the Act and 8 CFR 212.22, an alien who is seeking adjustment of status under this part must submit a declaration of self-sufficiency on a form designated by DHS, in accordance with form instructions.

■ 14. In § 245.23, revise paragraph (c)(3) to read as follows:

§ 245.23 Adjustment of aliens in T nonimmigrant classification.

* * * * *

(c) * * *

(3) The alien is inadmissible under any applicable provisions of section 212(a) of the Act and has not obtained a waiver of inadmissibility in accordance with 8 CFR 212.18 or

214.11(j). Where the alien establishes that the victimization was a central reason for the applicant's unlawful presence in the United States, section 212(a)(9)(B)(iii) of the Act is not applicable, and the applicant need not obtain a waiver of that ground of inadmissibility. The alien, however, must submit with the Form I–485 evidence sufficient to demonstrate that the victimization suffered was a central reason for the unlawful presence in the United States. To qualify for this exception, the victimization need not be the sole reason for the unlawful presence but the nexus between the victimization and the unlawful presence must be more than tangential, incidental, or superficial.

PART 248—CHANGE OF NONIMMIGRANT CLASSIFICATION

■ 15. The authority citation for part 248 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1184, 1258; 8 CFR part 2.

■ 16. Section 248.1 is amended by:

■ a. Revising paragraph (a);

■ b. Redesignating paragraphs (b) through (e) as paragraphs (c) through (f), respectively; and

■ c. Adding a new paragraph (b); and

■ d. Revising newly redesignated paragraph (c)(4).

The revisions and additions read as follows:

§ 248.1 Eligibility.

(a) *General.* Except for those classes enumerated in § 248.2 of this part, any alien lawfully admitted to the United States as a nonimmigrant, including an alien who acquired such status in accordance with section 247 of the Act who is continuing to maintain his or her nonimmigrant status, may apply to have his or her nonimmigrant classification changed to any nonimmigrant classification other than that of a spouse or fiance(e), or the child of such alien, under section 101(a)(15)(K) of the Act or as an alien in transit under section 101(a)(15)(C) of the Act. Except where the nonimmigrant classification to which the alien seeks to change is exempted by law or regulation from section 212(a)(4) of the Act, as a condition for approval of a change of nonimmigrant status, the alien must demonstrate that he or she has not received since obtaining the nonimmigrant status from which he or she seeks to change, public benefits, as described in 8 CFR 212.21(b), 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). DHS will only consider public benefits received on or after October 15, 2019 for petitions or applications postmarked (or, if applicable, submitted electronically) on or after that date . An alien defined by section 101(a)(15)(V) or 101(a)(15)(U) of the Act may be accorded nonimmigrant status in the United States by following the procedures set forth in 8 CFR 214.15(f) and 214.14, respectively.

(b) *Decision in change of status proceedings.* Where an applicant or petitioner demonstrates eligibility for a requested change of status, it may be granted at the discretion of DHS. There is no appeal from the denial of an application for change of status.

(c) * * *

(4) As a condition for approval, an alien seeking to change nonimmigrant classification must demonstrate that he or she has not received, since obtaining the nonimmigrant status from which he or she seeks to change, one or more public benefits, as defined in 8 CFR 212.21(b), 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). For purposes of this determination, DHS will only consider public benefits received on or after October 15, 2019 for petitions or applications postmarked (or, if applicable, submitted electronically) on or after that date. This provision does not apply to classes of nonimmigrants who are explicitly exempt by law or regulation from section 212(a)(4) of the Act.

* * * * *

Kevin K. McAleenan,

Acting Secretary of Homeland Security.

[FR Doc. 2019–17142 Filed 8–12–19; 8:45 am]

BILLING CODE 9111–97–P

8 U.S.C. § 1182

§ 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States: . . .

(4) Public charge

(A) In general

Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.

(B) Factors to be taken into account

(i) In determining whether an alien is inadmissible under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's—

(I) age;

(II) health;

(III) family status;

(IV) assets, resources, and financial status; and

(V) education and skills.

(ii) In addition to the factors under clause (i), the consular officer or the Attorney General may also consider any affidavit of support under section 1183a of this title for purposes of exclusion under this paragraph.

(C) Family-sponsored immigrants

Any alien who seeks admission or adjustment of status under a visa number issued under section 1151(b)(2) or 1153(a) of this title is inadmissible under this paragraph unless—

(i) the alien has obtained—

(I) status as a spouse or a child of a United States citizen pursuant to clause (ii), (iii), or (iv) of section 1154(a)(1)(A) of this title;

(II) classification pursuant to clause (ii) or (iii) of section 1154(a)(1)(B) of this title; or

(III) classification or status as a VAWA self-petitioner; or

(ii) the person petitioning for the alien's admission (and any additional sponsor required under section 1183a(f) of this title or any alternative sponsor permitted under paragraph (5)(B) of such section) has executed an affidavit of support described in section 1183a of this title with respect to such alien.

(D) Certain employment-based immigrants

Any alien who seeks admission or adjustment of status under a visa number issued under section 1153(b) of this title by virtue of a classification petition filed by a relative of the alien (or by an entity in which such relative has a significant ownership interest) is inadmissible under this paragraph unless such relative has executed an affidavit of support described in section 1183a of this title with respect to such alien.

(E) Special rule for qualified alien victims

Subparagraphs (A), (B), and (C) shall not apply to an alien who—

(i) is a VAWA self-petitioner;

(ii) is an applicant for, or is granted, nonimmigrant status under section 1101(a)(15)(U) of this title; or

(iii) is a qualified alien described in section 1641(c) of this title. . . .

(s) Consideration of benefits received as battered alien in determination of **inadmissibility as likely to become public charge**

In determining whether an alien described in subsection (a)(4)(C)(i) is inadmissible under subsection (a)(4) or ineligible to receive an immigrant visa or otherwise to adjust to the status of permanent resident by reason of subsection (a)(4), the consular officer or the Attorney General shall not consider any benefits the alien may have received that were authorized under section 1641(c) of this title.

8 U.S.C. § 1183a

§ 1183a. Requirements for sponsor's affidavit of support

(a) Enforceability

(1) Terms of affidavit

No affidavit of support may be accepted by the Attorney General or by any consular officer to establish that an alien is not excludable as a public charge under section 1182(a)(4) of this title unless such affidavit is executed by a sponsor of the alien as a contract—

(A) in which the sponsor agrees to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line during the period in which the affidavit is enforceable;

(B) that is legally enforceable against the sponsor by the sponsored alien, the Federal Government, any State (or any political subdivision of such State), or by any other entity that provides any means-tested public benefit (as defined in subsection (e)1), consistent with the provisions of this section; and

(C) in which the sponsor agrees to submit to the jurisdiction of any Federal or State court for the purpose of actions brought under subsection (b)(2).

(2) Period of enforceability

An affidavit of support shall be enforceable with respect to benefits provided for an alien before the date the alien is naturalized as a citizen of the United States, or, if earlier, the termination date provided under paragraph (3).

(3) Termination of period of enforceability upon completion of required period of employment, etc.

(A) In general

An affidavit of support is not enforceable after such time as the alien (i) has worked 40 qualifying quarters of coverage as defined under title II of the Social Security Act [42 U.S.C.A § 401 et seq.] or can be credited with such qualifying quarters as provided under subparagraph (B), and (ii) in the case of any such

qualifying quarter creditable for any period beginning after December 31, 1996, did not receive any Federal means-tested public benefit (as provided under section 1613 of this title) during any such period.

(B) Qualifying quarters

For purposes of this section, in determining the number of qualifying quarters of coverage under title II of the Social Security Act [42 U.S.C.A. § 401 et seq.] an alien shall be credited with—

(i) all of the qualifying quarters of coverage as defined under title II of the Social Security Act worked by a parent of such alien while the alien was under age 18, and

(ii) all of the qualifying quarters worked by a spouse of such alien during their marriage and the alien remains married to such spouse or such spouse is deceased.

No such qualifying quarter of coverage that is creditable under title II of the Social Security Act for any period beginning after December 31, 1996, may be credited to an alien under clause (i) or (ii) if the parent or spouse (as the case may be) of such alien received any Federal means-tested public benefit (as provided under section 1613 of this title) during the period for which such qualifying quarter of coverage is so credited.

(C) Provision of information to save system

The Attorney General shall ensure that appropriate information regarding the application of this paragraph is provided to the system for alien verification of eligibility (SAVE) described in section 1137(d)(3) of the Social Security Act.

(b) Reimbursement of government expenses

(1) Request for reimbursement

(A) Requirement

Upon notification that a sponsored alien has received any means-tested public benefit, the appropriate nongovernmental entity which provided such benefit or the appropriate entity of the Federal Government, a State, or any political subdivision of a State shall

request reimbursement by the sponsor in an amount which is equal to the unreimbursed costs of such benefit.

(B) Regulations

The Attorney General, in consultation with the heads of other appropriate Federal agencies, shall prescribe such regulations as may be necessary to carry out subparagraph (A).

(2) Actions to compel reimbursement

(A) In case of nonresponse

If within 45 days after a request for reimbursement under paragraph (1)(A), the appropriate entity has not received a response from the sponsor indicating a willingness to commence payment an action may be brought against the sponsor pursuant to the affidavit of support.

(B) In case of failure to pay

If the sponsor fails to abide by the repayment terms established by the appropriate entity, the entity may bring an action against the sponsor pursuant to the affidavit of support.

(C) Limitation on actions

No cause of action may be brought under this paragraph later than 10 years after the date on which the sponsored alien last received any means-tested public benefit to which the affidavit of support applies.

(3) Use of collection agencies

If the appropriate entity under paragraph (1)(A) requests reimbursement from the sponsor or brings an action against the sponsor pursuant to the affidavit of support, the appropriate entity may appoint or hire an individual or other person to act on behalf of such entity acting under the authority of law for purposes of collecting any amounts owed.

(c) Remedies

Remedies available to enforce an affidavit of support under this section include any or all of the remedies described in section 3201, 3203, 3204, or 3205 of Title 28, as well as an order for specific performance and payment of legal fees and other costs of collection, and include corresponding remedies available under

State law. A Federal agency may seek to collect amounts owed under this section in accordance with the provisions of subchapter II of chapter 37 of Title 31.

(d) Notification of change of address

(1) General requirement

The sponsor shall notify the Attorney General and the State in which the sponsored alien is currently a resident within 30 days of any change of address of the sponsor during the period in which an affidavit of support is enforceable.

(2) Penalty

Any person subject to the requirement of paragraph (1) who fails to satisfy such requirement shall, after notice and opportunity to be heard, be subject to a civil penalty of—

(A) not less than $250 or more than $2,000, or

(B) if such failure occurs with knowledge that the sponsored alien has received any means-tested public benefits (other than benefits described in section 1611(b), 1613(c)(2), or 1621(b) of this title) not less than $2,000 or more than $5,000.

The Attorney General shall enforce this paragraph under appropriate regulations.

(e) Jurisdiction

An action to enforce an affidavit of support executed under subsection (a) may be brought against the sponsor in any appropriate court—

(1) by a sponsored alien, with respect to financial support; or

(2) by the appropriate entity of the Federal Government, a State or any political subdivision of a State, or by any other nongovernmental entity under subsection (b)(2), with respect to reimbursement.

(f) “Sponsor” defined

(1) In general

For purposes of this section the term “sponsor” in relation to a sponsored alien means an individual who executes an affidavit of support with respect to the sponsored alien and who—

(A) is a citizen or national of the United States or an alien who is lawfully admitted to the United States for permanent residence;

(B) is at least 18 years of age;

(C) is domiciled in any of the several States of the United States, the District of Columbia, or any territory or possession of the United States;

(D) is petitioning for the admission of the alien under section 1154 of this title; and

(E) demonstrates (as provided in paragraph (6)) the means to maintain an annual income equal to at least 125 percent of the Federal poverty line.

(2) Income requirement case

Such term also includes an individual who does not meet the requirement of paragraph (1)(E) but accepts joint and several liability together with an individual under paragraph (5)(A).

(3) Active duty armed services case

Such term also includes an individual who does not meet the requirement of paragraph (1)(E) but is on active duty (other than active duty for training) in the Armed Forces of the United States, is petitioning for the admission of the alien under section 1154 of this title as the spouse or child of the individual, and demonstrates (as provided in paragraph (6)) the means to maintain an annual income equal to at least 100 percent of the Federal poverty line.

(4) Certain employment-based immigrants case

Such term also includes an individual—

(A) who does not meet the requirement of paragraph (1)(D), but is the relative of the sponsored alien who filed a classification petition for the sponsored alien as an employment-based immigrant under section 1153(b) of this title or who has asignificant ownership interest in the entity that filed such a petition; and

(B)

(i) who demonstrates (as provided under paragraph (6)) the means to maintain an annual income equal to at least 125 percent of the Federal poverty line, or

(ii) does not meet the requirement of paragraph (1)(E) but accepts joint and several liability together with an individual under paragraph (5)(A).

(5) Non-petitioning cases

Such term also includes an individual who does not meet the requirement of paragraph (1)(D) but who—

(A) accepts joint and several liability with a petitioning sponsor under paragraph (2) or relative of an employment-based immigrant under paragraph (4) and who demonstrates (as provided under paragraph (6)) the means to maintain an annual income equal to at least 125 percent of the Federal poverty line; or

(B) is a spouse, parent, mother-in-law, father-in-law, sibling, child (if at least 18 years of age), son, daughter, son-in-law, daughter-in-law, sister-in-law, brother-in-law, grandparent, or grandchild of a sponsored alien or a legal guardian of a sponsored alien, meets the requirements of paragraph (1) (other than subparagraph (D)), and executes an affidavit of support with respect to such alien in a case in which—

(i) the individual petitioning under section 1154 of this title for the classification of such alien died after the approval of such petition, and the Secretary of Homeland Security has determined for humanitarian reasons that revocation of such petition under section 1155 of this title would be inappropriate; or

(ii) the alien's petition is being adjudicated pursuant to section 1154(l) of this title (surviving relative consideration).

(6) Demonstration of means to maintain income

(A) In general

(i) Method of demonstration

For purposes of this section, a demonstration of the means to maintain income shall include provision of a certified copy of the individual's Federal income tax return for the individual's 3 most recent taxable years and a written statement, executed under oath or as permitted under penalty of perjury under section 1746 of Title 28, that the copies are certified copies of such returns.

(ii) Flexibility

For purposes of this section, aliens may demonstrate the means to maintain income through demonstration of significant assets of the sponsored alien or of the sponsor, if such assets are available for the support of the sponsored alien.

(iii) Percent of poverty

For purposes of this section, a reference to an annual income equal to at least a particular percentage of the Federal poverty line means an annual income equal to at least such percentage of the Federal poverty line for a family unit of a size equal to the number of members of the sponsor's household (including family and non-family dependents) plus the total number of other dependents and aliens sponsored by that sponsor.

(B) Limitation

The Secretary of State, or the Attorney General in the case of adjustment of status, may provide that the demonstration under subparagraph (A) applies only to the most recent taxable year.

(h) "Federal poverty line" defined

For purposes of this section, the term "Federal poverty line" means the level of income equal to the official poverty line (as defined by the Director of the Office of Management and Budget, as revised annually by the Secretary of Health and Human Services, in accordance with section 9902(2) of Title 42) that is applicable to a family of the size involved.

(i) Sponsor's social security account number required to be provided

(1) An affidavit of support shall include the social security account number of each sponsor.

(2) The Attorney General shall develop an automated system to maintain the social security account number data provided under paragraph (1).

(3) The Attorney General shall submit an annual report to the Committees on the Judiciary of the House of Representatives and the Senate setting forth—

(A) for the most recent fiscal year for which data are available the number of sponsors under this section and the number of sponsors in compliance with the financial obligations of this section; and

(B) a comparison of such numbers with the numbers of such sponsors for the preceding fiscal year.

8 U.S.C. § 1601

§ 1601. Statements of national policy concerning welfare and immigration

The Congress makes the following statements concerning national policy with respect to welfare and immigration:

(1) Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes.

(2) It continues to be the immigration policy of the United States that—

(A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and

(B) the availability of public benefits not constitute an incentive for immigration to the United States.

(3) Despite the principle of self-sufficiency, aliens have been applying for and receiving public benefits from Federal, State, and local governments at increasing rates.

(4) Current eligibility rules for public assistance and unenforceable financial support agreements have proved wholly incapable of assuring that individual aliens not burden the public benefits system.

(5) It is a compelling government interest to enact new rules for eligibility and sponsorship agreements in order to assure that aliens be self-reliant in accordance with national immigration policy.

(6) It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.

(7) With respect to the State authority to make determinations concerning the eligibility of qualified aliens for public benefits in this chapter, a State that chooses to follow the Federal classification in determining the eligibility of such aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy.

Short Appendix

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COOK COUNTY, ILLINOIS, an Illinois governmental entity, and ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS, INC.,	)	19 C 6334
Plaintiffs,	)	Judge Gary Feinerman
vs.	)	
ALEJANDRO MAYORKAS, in his official capacity as Secretary of U.S. Department of Homeland Security, U.S. DEPARTMENT OF HOMELAND SECURITY, a federal agency, UR M. JADDOU, in her official capacity as Director of U.S. Citizenship and Immigration Services, and U.S. CITIZENSHIP AND IMMIGRATION SERVICES, a federal agency,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Cook County and Illinois Coalition for Immigrant and Refugee Rights, Inc. ("ICIRR") alleged in this suit that the Department of Homeland Security's ("DHS") final rule, *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019) ("Final Rule" or "Rule"), was unlawful under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq*., and the equal protection component of the Fifth Amendment's Due Process Clause. Doc. 1. In November 2020, after over a year of proceedings (detailed below) at all three levels of the judiciary, this court entered a partial final judgment under Civil Rule 54(b) vacating the Rule under the APA while allowing ICIRR's equal protection claim to proceed. Docs. 221-223 (reported at 498 F. Supp. 3d 999 (N.D. Ill. 2020)). DHS appealed the judgment, Doc. 224, but then dismissed its appeal, Docs. 249-250, and on March 11, 2021, the parties stipulated to the dismissal of the equal protection claim, Doc. 253, ending the case, Doc. 254.

Two months later, after stops at the Seventh Circuit and the Supreme Court, the States of Texas, Alabama, Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, and West Virginia (collectively, "States") appeared in this court and moved to intervene under Rule 24 and for relief from the judgment under Rule 60(b)(6). Docs. 255-256, 259. Their motions are denied.

Background

Cook County and ICIRR claimed that the Final Rule violated the APA, and ICIRR alone brought an equal protection claim. Doc. 1 at ¶¶ 140-188. On October 14, 2019, this court issued a preliminary injunction, limited to the State of Illinois, enjoining DHS from enforcing the Rule on the ground that it likely violated the APA by interpreting the term "public charge" in the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(4)(A), in a manner incompatible with its statutory meaning. Docs. 85, 87, 106 (reported at 417 F. Supp. 3d 1008 (N.D. Ill. 2019)).

DHS appealed. Doc. 96. The Seventh Circuit denied DHS's motion to stay the preliminary injunction pending appeal, No. 19-3169 (7th Cir.), ECF No. 41 (Dec. 23, 2019), but the Supreme Court issued a stay, 140 S. Ct. 681 (2020) (mem.). This court then denied DHS's motion to dismiss Plaintiffs' claims and granted ICIRR's request for extra-record discovery on its equal protection claim, which alleged that racial animus toward nonwhite immigrants motivated the Rule's promulgation. Docs. 149-150 (reported at 461 F. Supp. 3d 779 (N.D. Ill. 2020)). Shortly thereafter, the Seventh Circuit affirmed the preliminary injunction, reasoning that the Rule likely violated the APA, though on grounds different from those articulated by this court. 962 F.3d 208 (7th Cir. 2020). DHS filed a petition for a writ of certiorari at the Supreme Court. No. 20-450 (U.S. filed Oct. 7, 2020).

Meanwhile, Plaintiffs moved for summary judgment on their APA claims. Doc. 200. In its opposition brief, DHS conceded that the Seventh Circuit's opinion in the preliminary injunction appeal effectively required this court to grant Plaintiffs' motion. Doc. 209 at 7 ("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."); Doc. 219 at 1 ("Plaintiffs have argued, and Defendants do not dispute, that the Court may grant Plaintiffs' pending [summary judgment motion] in light of the Seventh Circuit's decision affirming the Court's preliminary injunction order."). On November 2, 2020, this court granted Plaintiffs' motion, entering a partial final judgment under Rule 54(b) that vacated the Rule under the APA and allowing ICIRR's equal protection claim to proceed. 498 F. Supp. 3d at 1007-10.

DHS appealed the judgment that day. Doc. 224. The Seventh Circuit stayed the judgment pending appeal, and it stayed briefing on the appeal pending the Supreme Court's resolution of DHS's petition for certiorari challenging its affirmance of the preliminary injunction. No. 20-3150 (7th Cir.), ECF No. 21 (Nov. 19, 2020).

Discovery continued in this court on ICIRR's equal protection claim. Docs. 232, 236, 238. DHS asserted the deliberative process privilege as to certain documents, and ICIRR countered that the privilege did not apply. Doc. 214 at 2-13; Doc. 232 at 3. In December 2020, the court held that *in camera* review was necessary to resolve the privilege dispute. Docs. 234-235 (reported at 2020 WL 7353408 (N.D. Ill. Dec. 15, 2020)). On January 22, 2021, days after the change in presidential administration, the court sought DHS's views as to whether a live dispute remained concerning the documents. Doc. 240. In particular, the court asked DHS to file a status report by February 4 addressing whether it planned to pursue its appeal before the

Seventh Circuit and its certiorari petition before the Supreme Court, and whether it would continue to assert the deliberative process privilege. *Ibid*.

On February 2, President Biden issued an Executive Order that, among other things, directed DHS to review the Final 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. 8277 (Feb. 5, 2021). Section 1 of the Order declared:

> Consistent with our character as a Nation of opportunity and of welcome, it is essential to ensure that our laws and policies encourage full participation by immigrants, including refugees, in our civic life; 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 8277. Section 4, titled "Immediate Review of Agency Actions on Public Charge Inadmissibility," directed the Secretary of DHS and other officials to "consider and evaluate the current effects of [the Final Rule] and the implications of [its] continued implementation in light of the policy set forth in [S]ection 1 of this order." *Id*. at 8278.

The next day, DHS notified the court that, in light of the Executive Order, it "intend[ed] to confer with [ICIRR] over next steps in this litigation," and that it "continue[d] to assert the deliberative process privilege over the documents submitted to the Court for in camera review." Doc. 241 at 2 & n.1. DHS sought an extension of time to file its status report, *id*. at 2, which the court granted, Doc. 244. On February 19, in a joint status report, ICIRR objected to a stay of proceedings on its equal protection claim, arguing that it should be allowed to continue probing through discovery the motivations behind the Final Rule. Doc. 245 at 3. ICIRR and DHS agreed, however, to a two-week stay to "provide DHS and DOJ with additional time to assess how they wish to proceed." *Id*. at 3-4. DHS stated that "further developments during that time period may … moot [ICIRR's] equal protection claim." *Id*. at 4. In a March 5 joint status report,

ICIRR objected to any further stay because DHS at that point was continuing to seek reversal of the judgment vacating the Rule under the APA. Doc. 247 at 2.

Four days later, on March 9, 2021, DHS moved to voluntarily dismiss its appeal of this court's judgment, and the Seventh Circuit promptly granted the motion and issued its mandate, thereby dissolving the stay it had imposed on this court's vacatur of the Rule. No. 20-3150 (7th Cir.), ECF Nos. 23-24 (Mar. 9, 2021). Also that day, the parties filed a joint stipulation dismissing DHS's petition for certiorari before the Supreme Court, and the petition was dismissed. Joint Stipulation to Dismiss, No. 20-450 (U.S. Mar. 9, 2021). 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) (reproduced at Doc. 252-1). DHS also announced that, in compliance with this 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) (reproduced at Doc. 252-2).

DHS notified this court of those developments the next day. Doc. 252. On March 11, the parties filed a joint stipulation dismissing ICIRR's equal protection claim with prejudice under Rule 41(a)(1)(A)(ii). Doc. 253. Because "a Rule 41(a)(1)(A) notice of dismissal is self-executing and effective without further action from the court," *Kuznar v. Kuznar*, 775 F.3d 892, 896 (7th Cir. 2015), the court simply noted the stipulation and closed the case, Doc. 254.

On March 15, DHS promulgated a direct final rule, without notice and comment, striking the Final 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)

("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. In support, 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)(B).

Meanwhile, on March 11, two days after the Seventh Circuit dismissed DHS's appeal and issued the mandate and hours after the parties stipulated to the dismissal with prejudice of ICIRR's equal protection claim, the States filed motions in the Seventh Circuit to recall the mandate, to reconsider its order dismissing the appeal, and for leave to intervene as defendants to support the lawfulness of the Final Rule. No. 20-3150 (7th Cir.), ECF No. 25. On March 15, the Seventh Circuit denied the motions in a one-sentence order. *Id*., ECF No. 26.

On March 19, the States applied to the Supreme Court for a stay of this court's judgment pending their filing of a certiorari petition or, in the alternative, for summary reversal of the Seventh Circuit'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 Cnty.*, No. 20A150 (U.S. filed Mar. 19, 2021). In support, the States argued that DHS had violated the APA by dismissing its appeal of this court's judgment and issuing the Vacatur Rule without engaging in notice-and-comment rulemaking, reasoning that "[b]ecause the Rule was made through formal notice-and-comment procedures, it can only be unmade the same way." *Id*. at 21. The Supreme Court denied the States' application without prejudice. *Texas v. Cook Cnty.*, __ S. Ct. __, 2021 WL 1602614 (U.S. Apr. 26, 2021) (mem.). The Court's order expressly noted the States' argument that DHS's actions violated the APA:

> In 2019, the Department of Homeland Security promulgated through notice and comment a rule defining the term "public charge." The District Court in this case vacated the rule nationwide, but that judgment was stayed pending DHS's appeal to the United States Court of Appeals for the Seventh Circuit. On March 9, 2021, following the change in presidential administration, DHS voluntarily dismissed that appeal, thereby dissolving the stay of the District Court's judgment. And on March 15, DHS relied on the District Court's now-effective judgment to remove the challenged rule from the Code of Federal Regulations without going through notice and comment rulemaking. Shortly after DHS had voluntarily dismissed its appeal, a group of States sought leave to intervene in the Court of Appeals. When that request was denied, the States filed an application for leave to intervene in this Court and for a stay of the District Court's judgment. The States argue that DHS has prevented enforcement of the rule while insulating the District Court's judgment from review. The States also contend that DHS has rescinded the rule without following the requirements of the Administrative Procedure Act. We deny the application, without prejudice to the States raising this and other arguments before the District Court, whether in a motion for intervention or otherwise. After 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. at *1.

On May 12, the States appeared in this court, represented by the Attorney General of Texas. Doc. 255. They move to intervene under Rule 24 and for relief from judgment under Rule 60(b)(6). Docs. 256, 259. Plaintiffs and DHS oppose the motions. Docs. 267, 269. In the course of litigating the motions, the States abandoned their argument that DHS violated the APA by dismissing its appeal and rescinding the Final Rule without undertaking notice-and-comment rulemaking. Doc. 282 at 33:3-6 ("THE COURT: … So, are you saying that the federal government violated the APA by doing what it did in this case? [STATES]: No, your Honor, but we do not think we have to prove … that.").

Discussion

I. Standing

Plaintiffs and DHS argue that the States lack Article III standing and therefore cannot intervene. Doc. 267 at 9-11; Doc. 269 at 8-9, 22-25; Doc. 279 at 1-4. The court addresses that

argument first. *See Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016) (holding that, where the original defendant does not appeal but intervenors seek to appeal, a court "cannot decide the merits of this case unless the intervenor[s] … have standing"); *Bond v. Utreras*, 585 F.3d 1061, 1071 (7th Cir. 2009) ("[I]ntervenors must show standing if there is otherwise no live case or controversy in existence."). The States acknowledge that, although they seek to intervene as defendants, they "need to show … that at least one of them has standing" to pursue their motions. Doc. 278 at 3.

"[T]he 'irreducible constitutional minimum' of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citation omitted) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id*. at 1548 (quoting *Lujan*, 504 U.S. at 560). The States argue that the Final Rule's vacatur will increase the fiscal burden imposed on their budgets by Medicaid and other public benefits programs because more noncitizens will be allowed to remain in the United States, either as noncitizens or new citizens, and use public benefits while here. Doc. 257 at 8-9; Doc. 260 at 15; Doc. 278 at 4-5. Plaintiffs respond that the States' claimed injury is "an attenuated, speculative, non-obvious harm, which is insufficient to support standing." Doc. 267 at 10. DHS contends that the conjectural nature of the States' claimed injuries is demonstrated by evidence showing that the United States Citizenship and Immigration Services ("USCIS") denied only three status adjustment applications based solely on the Rule. Doc. 269 at 22-23 (citing Doc. 269-1 at ¶ 8).

DHS's evidence supports rather than negates the States' standing. A measurable financial cost, even a minor one, qualifies as an injury in fact under Article III. *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) ("For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'"). DHS admits that the Final Rule caused some status adjustment applications to be denied, and it is not speculative that at least one such applicant (now granted status because of the Rule's vacatur) will use public benefits in one of the States. Indeed, the Rule's fiscal *costs* were precisely the injuries that conferred standing on Cook County to challenge it. Cook County argued that noncitizens would forgo Medicaid coverage out of fear of being deemed a public charge, ultimately requiring its public hospital to pay for uncompensated health care costs. Doc. 27 at 34-35. This court held that the County showed standing on that basis, 417 F. Supp. 3d at 1017, and the Seventh Circuit affirmed, 962 F.3d at 218-19. Cook County and the States point to different financial costs and benefits of the Rule, respectively, but both qualify as injuries in fact.

As for traceability and redressability, the Rule's vacatur causes the States' injuries, and restoring the Rule would redress them. DHS admits that, without the Rule, some number of additional noncitizens will become eligible for public benefits by achieving lawful permanent resident status. Doc. 269 at 22-23. A predictable consequence of that eligibility is that those noncitizens will obtain public benefits. *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019) (holding that there is traceability where "third parties will likely react in predictable ways" to a legal change). Indeed, the States' asserted causal link between denials of status under the Rule, on the one hand, and benefits to their treasuries, on the other, may be as direct as the County's asserted causal link between the Rule's chilling effect on noncitizens' willingness to seek public health benefits, on the one hand, and fiscal costs to the County, on the other.

The clear link between denials of status under the Rule and fiscal benefits to the States distinguishes this case from *California v. Texas*, 141 S. Ct. 2104 (2021). There, the Supreme Court held that certain States challenging the constitutionality of the minimum essential coverage provision, 26 U.S.C. § 5000A(a), of the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), failed to show an injury traceable to that provision. As the Court explained, Congress had eliminated the penalty for non-compliance with the provision, 141 S. Ct at 2112, and "the States [had] not demonstrated that an unenforceable mandate will cause their residents to enroll in valuable benefits programs that they would otherwise forgo," *id*. at 2119. The Court thus concluded that the States lacked standing because the causal link between the challenged provision and any injury to them "rest[ed] on a 'highly attenuated chain of possibilities.'" *Ibid*. (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)). The link here is far more direct, warranting a different result.

II. Motion to Intervene

With standing secure, the court may consider the States' motion to intervene. The States seek intervention as a matter of right under Rule 24(a)(2) and by permission under Rule 24(b)(1)(B). Doc. 257 at 5. A motion under either subsection must be "timely." Fed. R. Civ. P. 24(a), (b)(1); *see NAACP v. New York*, 413 U.S. 345, 365 (1973) ("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.'"). Timeliness is "determined from all the circumstances," *NAACP*, 413 U.S. at 366, and that determination is "committed to the sound discretion of the district judge," *South v. Rowe*, 759 F.2d 610, 612 (7th Cir. 1985).

Four factors govern whether an intervention motion is timely: "(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." *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 945, 949 (7th Cir. 2000); *see also Illinois v. City of Chicago*, 912 F.3d 979, 984 (7th Cir. 2019) (same). That four-part standard, first articulated by the Fifth Circuit in *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-66 (5th Cir. 1977), was adopted by the Seventh Circuit in *United States v. Kemper Money Market Fund, Inc.*, 704 F.2d 389, 391 (7th Cir. 1983). Many other circuits have adopted the *Stallworth* standard. *See Culbreath v. Dukakis*, 630 F.2d 15, 20 (1st Cir. 1980); *United States v. New York*, 820 F.2d 554, 557 (2d Cir. 1987); *Mich. Ass'n for Retarded Citizens v. Smith*, 657 F.2d 102, 105 (6th Cir. 1981); *Sanguine, Ltd. v. Dep't of Interior*, 736 F.2d 1416, 1418 (10th Cir. 1984); *United States v. Jefferson Cnty.*, 720 F.2d 1511, 1516 (11th Cir. 1983). The standards articulated by other circuits employ slightly different language, but like *Stallworth*, they focus attention on the length of the proposed intervenor's delay in seeking intervention, the prejudice to existing parties of the delay, and any mitigating reasons for the delay. *See Wallach v. Eaton Corp.*, 837 F.3d 356, 371 (3d Cir. 2016); *Alt v. EPA*, 758 F.3d 588, 591 (4th Cir. 2014); *In re Wholesale Grocery Prods. Antitrust Litig.*, 849 F.3d 761, 767 (8th Cir. 2017); *Smith v. L.A. Unified Sch. Dist.*, 830 F.3d 843, 854 (9th Cir. 2016); *Amador Cnty. v. Dep't of Interior*, 772 F.3d 901, 903 (D.C. Cir. 2014). The result here, denial of intervention on timeliness grounds, would be the same regardless of which circuit's standard is used.

A. Length of the Delay

The first factor directs attention to the delay between the time the States should have known of their interest in this case and the time they moved to intervene. *See Sokaogon Chippewa*, 214 F.3d at 949. This factor requires a would-be intervenor to "move promptly to intervene as soon as it *knows or has reason to know* that its interests *might be adversely affected* by the outcome of the litigation." *Heartwood, Inc. v. U.S. Forest Serv.*, 316 F.3d 694, 701 (7th Cir. 2003) (emphases added).

The emphasized language conveys two important points. First, the phrase "knows or has reason to know" imposes an objective "reasonableness standard," asking whether potential intervenors were "reasonably diligent in learning of a suit." *Nissei Sangyo Am., Ltd. v. United States*, 31 F.3d 435, 438 (7th Cir. 1994). This means that potential intervenors cannot claim subjective ignorance of a case's effect on their interests if ordinary diligence would have alerted them of the need to intervene. *See Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 798 (7th Cir. 2013) (denying intervention where the potential intervenor "could have missed the implications for his [interests] only if he was willfully blind to them"). Second, the phrase "might be adversely affected"—and, in particular, the word "might"—requires prompt intervention when the reasonable possibility, not just a certainty, of an adverse effect on the proposed intervenor's interests arises. The Seventh Circuit has emphasized that point time and again. *See Illinois v. Chicago*, 912 F.3d at 985 ("[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); *Heartwood*, 316 F.3d at 701 ("A prospective intervenor must move promptly to intervene as soon as it knows or has reason to know that its interests might be adversely affected by the outcome of the litigation."); *Sokaogon Chippewa*, 214 F.3d at 949 ("As soon as a prospective intervenor knows or has reason to know that his interests might be adversely affected by the outcome of the litigation he must move promptly to intervene.") (citation omitted); *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995) ("[W]e determine timeliness from the time the potential intervenors learn that their interest might be impaired."); *City of Bloomington v. Westinghouse Elec. Corp.*, 824 F.2d 531, 535 (7th Cir. 1987) (holding that a motion to intervene was untimely because the movant "had knowledge that its interests could be affected more than 11 months prior to the time it sought intervention").

As noted, the States' claimed interest in this litigation is that the Final Rule reduced their spending on public benefits programs and that the Rule's demise will increase that spending. Doc. 257 at 8-9. The States thus had reason to know that their interests "might be adversely affected by the outcome of the litigation," *Heartwood*, 316 F.3d at 701, from the moment this suit was filed in September 2019. That said, the outset of this suit almost certainly would have been an *in*appropriate time for the States to seek intervention, as there was no prospect at that point, or for the first ten-plus months of 2020, that DHS would cease defending the Rule. *See Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019) ("Where the prospective intervenor and the named party have the same goal … there is a rebuttable presumption of adequate representation that requires a showing of some conflict to warrant intervention.") (internal quotation marks omitted). The pertinent question, then, concerns when the States had reason to know that DHS might abandon its defense of the Rule and thus no longer adequately represent their interests. *See Illinois v. Chicago*, 912 F.3d at 985 ("[I]ntervention may be timely where the movant promptly seeks intervention upon learning that a party is not representing its interests.").

In December 2019, during the presidential campaign, then-candidate Joe Biden publicly committed 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." The Biden Plan for Securing Our Values as a Nation of Immigrants (Dec. 12, 2019), https://web.archive.org/web/20191212040308/https://joebiden.com/immigration. That promise remained on candidate Biden's website throughout the campaign. *See* The Biden Plan for Securing Our Values as a Nation of Immigrants (Nov. 3, 2020), https://web.archive.org/web/20201103023048/https://joebiden.com/immigration. Plaintiffs

argue that candidate Biden's promise put the States on clear notice that, should he be elected, they could no longer rely on DHS to defend the Rule. Doc. 267 at 12-13.

Plaintiffs garner support for their position from an unlikely ally: the State of Texas. In June 2020, a coalition of States led by Pennsylvania filed suit to challenge a certain Department of Education ("DOE") regulation. *Pennsylvania v. DeVos*, No. 20-cv-1468 (D.D.C. filed June 4, 2020). On January 19, 2021, the day before Inauguration Day, Texas moved to intervene to defend the DOE regulation. *Id.*, ECF No. 130 (reproduced at Doc. 267-2). In support, Texas cited President-elect Biden's condemnation of the DOE regulation on his campaign website—the same website that condemned the Final Rule—and another campaign statement expressing opposition to the regulation. Doc. 267-2 at 10, 12, 21 & n.8. Texas argued that, given the President-elect's views, it could "no longer rely on [DOE] to adequately represent its interests in defending [the DOE regulation]," and it predicted that DOE's position would shift "when the President-elect is inaugurated into office." *Id*. at 10-11. 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*. at 21. Texas added that its motion was "timely because it was filed close in time to the change in circumstances requiring intervention: President-elect Biden's inauguration on January 20." *Id*. at 13. As Texas ably summed up the situation it faced and the reasons its motion was timely:

> During the [current administration], Texas had no reason to intervene. Like Texas, the [current] administration defended the [challenged DOE regulation] … . The President-elect, however, has expressed open and adamant hostility to the [regulation], necessitating Texas' intervention if it is to protect its interests. [DOE] will cease adequately representing Texas' interests only after January 20, 2021 when the new administration takes over and begins implementing its own policies. This is not an occasion where a non-party sat on its rights. Texas has actively monitored the present action from the beginning and exhibited proper diligence in bringing its motion.

Id. at 14 (citations omitted).

That reasoning was perfectly sensible: Under the administration that soon would leave office, Texas could count on DOE to defend the challenged regulation; candidate Biden expressed strong opposition to the regulation during the campaign; so, because candidate Biden had won the election and soon would become President, Texas must be allowed to intervene to ensure the regulation's continued defense. Texas faced the same situation here: From the inception of this suit through much of 2020, Texas could count on DHS to continue to defend the Rule; candidate Biden expressed strong opposition to the Rule during the campaign, promising to "[r]everse" it "[i]n the first 100 days" of his administration; so, because candidate Biden had won the election and soon would become President, Texas needed to take action to ensure the Rule's continued defense, both in this court (as to ICIRR's equal protection claim) and in the Seventh Circuit (as to the appeal of this court's judgment).

But Texas did not follow here the course it took in *Pennsylvania v. DeVos*, and the excuses it offers for not doing so are diametrically opposed to its submissions in that case. Here, Texas argues that it would be "absurd" to "look back to … statements made by then-candidate Biden" to evaluate its interest in intervening and the timeliness of its intervention motion. Doc. 278 at 8. And here, Texas argues that the States could not possibly have known of the need to intervene until March 9, when DHS dismissed its appeal of this court's judgment. Doc. 257 at 7; Doc. 278 at 8-9. Those arguments cannot be reconciled, on any level, with the position it took in *Pennsylvania v. DeVos*.

At the motion hearing, this court engaged with Texas about the conflict between its position in *Pennsylvania v. DeVos* and its position here. Doc. 282 at 46:4-52:9. In an effort to justify not pursuing here the course it took in *Pennsylvania v. DeVos*, Texas stated that it had been "denied relief in that case." *Id*. at 47:5-6. In fact, the court in that case granted Texas's

motion to intervene. *See Pennsylvania v. DeVos*, No. 20-cv-1468 (D.D.C. Feb. 4, 2021). After this court reminded Texas of that fact, Texas observed that it had been denied intervention in a different case challenging the same DOE regulation, *Victim Rights Law Center v. DeVos*, No. 20-cv-11104 (D. Mass filed June 10, 2020). Doc. 282 at 50:1-5. But that ruling is unsurprising, for Texas moved to intervene in *Victim Rights* on April 30, 2021, months after it had moved in *Pennsylvania v. DeVos*. *See* Texas' Motion to Intervene as Defendant, *Victim Rights*, ECF No. 164. And, indeed, Texas's motion in *Victim Rights* was denied as untimely. *Id*., ECF No. 170 (May 12, 2021). Finally, when this court asked Texas whether it would "stand by all the arguments that it made in its intervention motion in" *Pennsylvania v. DeVos*, Texas responded that it was "not prepared to say whether we stand behind them or not." Doc. 282 at 51:19-52:2.

Granted, Texas does attempt in a footnote to distinguish the situation it faced in *Pennsylvania v. DeVos* from the situation it (and the other States) faced here, observing that this case had proceeded to final judgment when they sought intervention while *Pennsylvania v. DeVos* was at an earlier stage when Texas sought intervention. Doc. 278 at 9 n.2. But 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 *Pennsylvania v. DeVos*. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-96 (1977) (holding that the "critical inquiry" on a motion for "post-judgment intervention for the purpose of appeal" is "whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment"); *Bond*, 585 F.3d at 1071 ("[I]ntervention postjudgment—which necessarily disturbs the final adjudication of the parties' rights—should generally be disfavored.").

Accordingly, as it pertains to timeliness of intervention, Texas was right in *Pennsylvania v. DeVos* and is wrong here. Under settled precedent, Texas and the other States were required to intervene when a reasonable possibility arose of an adverse effect on their interests. *See Illinois v. Chicago*, 912 F.3d at 985; *Heartwood*, 316 F.3d at 701. It became not just a reasonable possibility, but likely, that the States' and DHS's respective interests in the Final Rule would diverge—and that DHS would cease its defense of the Rule—when it became likely that candidate Biden would become President Biden. That puts front and center the question of when after the election it became reasonably possible, if not likely, that there would be a change in presidential administration.

The best answer to that question is November 7, 2020, a few days after the election, when all creditable news organizations declared candidate Biden the winner. *See*, *e.g.*, Jonathan Lemire *et al.*, *Biden defeats Trump for White House*, Associated Press (Nov. 7, 2020), https://apnews.com/article/joe-biden-wins-white-house-ap-fd58df73aa677acb74fce2a69adb71f9; Paul Steinhauser *et al.*, *Biden wins presidency*, Fox News (Nov. 7, 2020), https://www.foxnews.com/politics/biden-wins-presidency-trump-fox-news-projects. At the motion hearing, Texas resisted that proposition, stating that "there was significant amounts of litigation" to come after November 7. Doc. 282 at 49:19-24.

True enough, several dozen lawsuits concerning the presidential election were brought in state and federal courts across the country, among the more prominent being Texas's effort to pursue an original action in the Supreme Court against Georgia, Michigan, Pennsylvania, and Wisconsin. *See* Motion for Leave to File Bill of Complaint, *Texas v. Pennsylvania*, No. 22O155 (U.S. filed Dec. 7, 2020). Regardless of whether Texas knew or should have known with certainty the fate that would befall its suit and the others, Texas surely knew or should have

known from the exceptionally able lawyers on its Attorney General's staff, most particularly its then-Solicitor General and his staff, that it was reasonably possible, if not likely, that the suits would fail and that candidate Biden would become President Biden. *See*, *e.g.*, *Trump v. Wis. Elections Comm'n*, 506 F. Supp. 3d 620 (E.D. Wis. 2020), *aff'd*, 983 F.3d 919 (7th Cir. 2020); *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899 (M.D. Pa. 2020), *aff'd sub nom. Donald J. Trump for President, Inc. v. Sec'y of Penn.*, 830 F. App'x 377 (3d Cir. 2020). At the very latest, Texas knew or should have known that fact by December 11, 2020, when the Supreme Court rejected its suit in a one-paragraph order. *See Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (mem.). Texas acknowledged as much at the motion hearing. Doc. 282 at 49:23-50:1 ("Your Honor, there was significant amounts of litigation, but yes, I will generally agree that by December, there was certainty about that candidate Biden would be elected.").

By November 7, 2020, the States thus knew or should have known of the need to intervene in this case, based on the impending inauguration of a presidential candidate who was widely acknowledged to have won the election and who had promised to reverse the Final Rule in the first 100 days of his administration. At the very latest, the States knew or should have known by December 11, 2020, of their need to intervene. And had the States intervened at any point during the several weeks preceding January 4, 2021, they could have joined this suit in time to file a timely notice of appeal of the judgment vacating the Rule, without having to seek intervention directly in the Seventh Circuit. *See* Fed. R. App. P. 4(a)(1)(B) ("The notice of appeal may be filed by any party within 60 days after the entry of the judgment or order appealed from if one of the parties is … a United States agency [or] a United States officer or employee sued in an official capacity … ."); Fed. R. App. P. 26(a) (rules for computing time); *Anderson v. Dep't of Agric.*, 604 F. App'x 513, 516-17 (7th Cir. 2015) (holding that a private litigant "had 60

days to file his notice [of appeal after the district court entered judgment] because a United States agency is a party") (citing Fed. R. App. P. 4(a)(1)(B)); *Satkar Hosp., Inc. v. Fox Television Holdings*, 767 F.3d 701, 706 (7th Cir. 2014) (holding that the deadlines set by Appellate Rule 4(a)(1) apply to Civil Rule 54(b) judgments).

The discussion could stop there, but it bears mention that the Executive Order issued by President Biden on February 2, 2021 confirmed (or should have confirmed) for the States their need to quickly intervene. As noted, the Executive Order directed DHS to review the Final Rule and condemned its basic premises in clear terms. 86 Fed. Reg. at 8277 (declaring that immigrants should be encouraged to "access[] government services available to them"); *id*. at 8278 (directing DHS to review the Rule in light of that policy). On February 3, DHS notified this court of the Executive Order and that it might influence the "next steps in this litigation." Doc. 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 here and in the Seventh Circuit. Had the States intervened in this court in February, they would have been unable to file a timely notice of appeal of the judgment vacating the Rule, but they would have had a much stronger claim to intervene in the Seventh Circuit, well before DHS dismissed the appeal and the Seventh Circuit issued the mandate. *See Sierra Club, Inc. v. EPA*, 358 F.3d 516, 517-18 (7th Cir. 2004) (applying Civil Rule 24 in deciding whether to allow a non-party to intervene on appeal).

Yet the States did not move to intervene until March 11, 2021—in the Seventh Circuit, not here. No. 20-3150 (7th Cir.), ECF No. 25. 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.

There is no simple formula for determining how long a delay is too long. In *NAACP v. New York*, the Supreme Court held that a 17-day delay—from March 21, 1972, when the proposed intervenors learned of the suit, to April 7, when they moved to intervene—rendered untimely their intervention motion. 413 U.S. at 360-61, 367. The Court reasoned that the plaintiff's summary judgment motion had been pending on March 21, and that the defendant had consented to the entry of judgment before April 7. *Id*. at 360, 367-68. In such circumstances, the Court explained, the potential intervenors needed "to take immediate affirmative steps to protect their interests," *id*. at 367, but failed to do so. That said, the Seventh Circuit has held that a three-month delay did not render a motion untimely where the intervenor was from Hong Kong and had to retain a United States lawyer before it could move to intervene. *See Nissei*, 31 F.3d at 439. That seventeen days could be too long in some circumstances, and three months timely in others, reflects that "intervention cases are highly fact specific and tend to resist comparison to prior cases," with the ultimate determination "essentially one of reasonableness." *ABC/York-Estes Corp.*, 64 F.3d at 321.

The States' delay in seeking intervention was plainly unreasonable under the circumstances of this case. This suit concerned a major immigration regulation and was subject to significant media and other attention; indeed, the States do not dispute that they were aware of their interests in the Final Rule during "the previous Administration." Doc. 257 at 7; *see NAACP v. New York*, 413 U.S. at 366 (observing that the potential intervenors "knew or should have known of the pendency" of the suit in light of news coverage and "public comment by community leaders"). Likewise, the events that imperiled the States' interests were common knowledge: then-candidate Biden's criticism of and promise to jettison the Rule, the wide recognition of his success in the election and the failure of Texas's suit in the Supreme Court,

and (placing a cherry atop an already iced cake) President Biden's issuance of the Executive Order. The States were perfectly capable of seeking intervention in reaction to those events, as demonstrated by the fact that Texas did so in *Pennsylvania v. DeVos*. Given all this, and with a judgment vacating the Rule already having been entered, four months, three months, or even five weeks was too long for the States to wait to seek intervention.

Opposing this conclusion, the States rely heavily on *Flying J, Inc. v. Van Hollen*, 578 F.3d 569 (7th Cir. 2009), which held that a motion to intervene filed less than thirty days after the entry of judgment, during the window to file a notice of appeal, was timely. *Id*. at 570-72; *see* Doc. 257 at 6-7; Doc. 278 at 9-10. *Flying J* has some surface similarities to this case: The district court invalidated a Wisconsin statute, the Attorney General of Wisconsin declined to appeal, and a trade association sought to intervene so that it could pursue an appeal in the Attorney General's stead. 578 F.3d at 570-71. *Flying J* illustrates the principle, disputed by no party here, that an intervention motion can be timely even after entry of judgment. *See United Airlines*, 432 U.S. at 395-96 (holding that prompt intervention after judgment can be timely).

Flying J is easily distinguished from this case, however, because the trade association there had no prior notice that the Attorney General of Wisconsin planned to forgo an appeal; as the Seventh Circuit observed, "there was *nothing* to indicate that the attorney general was planning to throw the case—until he did so by failing to appeal." 578 F.3d at 572 (emphasis added). The trade association in *Flying J* thus took prompt action at the earliest possible moment. Here, by contrast, 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. The States failed to act on that knowledge with the promptness required by Rule 24.

Finally, the States argue that they reasonably believed that DHS would seek to reverse the Final Rule through notice-and-comment rulemaking, not by dismissing its appeal, and therefore that they understandably did not realize until March 9 that intervention was necessary. Doc. 278 at 8-9. This argument sounds in a different register, as it concedes that President-elect Biden, upon taking office, would fulfill his promise to jettison the Rule, and focuses solely on the mechanism by which he would do so. To support their point, the States rely exclusively on a dissent from the Ninth Circuit's denial of a motion to intervene that they (except for Kentucky and Ohio) filed in consolidated appeals challenging preliminary injunctions entered by district courts in California and Washington against enforcing the Rule. *City & Cnty. of San Francisco v. USCIS*, 992 F.3d 742, 743-55 (9th Cir. 2021) (VanDyke, J., dissenting). Specifically, the dissent asserted that DHS's dismissal of its appeal of this court's judgment was "quite extraordinary," allowing DHS "to dodge the pesky requirements of the APA" and "deliberately evad[e] the administrative process," when it should have pursued the "traditional route" of "asking the courts to hold the public charge cases in abeyance … and then promulgating a new rule through notice and comment." *Id*. at 743, 749, 751. The dissent further asserted that "every administration before" "the current administration" would have followed that abeyance and notice-and-comment approach. *Id*. at 754.

The dissent did not favor those assertions with citation to any legal authority. In fact, although the States argued in March to the Supreme Court that "[b]ecause the Rule was made through formal notice-and-comment procedures, it can only be unmade the same way," Application for Leave to Intervene and for a Stay, at 21, *Texas v. Cook Cnty.*, No. 20A150 (U.S.), the States now admit that the APA does *not* prohibit an agency from taking the course that DHS took here, Doc. 282 at 33:3-6 ("THE COURT: … So, are you saying that the federal

government violated the APA by doing what it did in this case? [STATES]: No, your Honor, but we do not think we have to prove … that."). Moreover, as DHS observes, Doc. 269 at 19; Doc. 282 at 58:22-59:8, federal agencies regularly choose to forego appeal, or to dismiss their appeals, of district court judgments that invalidate regulations. *See*, *e.g.*, *Ctr. for Sci. in the Pub. Int. v. Perdue*, 438 F. Supp. 3d 546, 572 (D. Md. 2020) ("*CSPI*") (invalidating a Department of Agriculture rule) (no appeal taken); *Burt Lake Band of Ottawa & Chippewa Indians v. Bernhardt*, __ F. Supp. 3d __, 2020 WL 1451566, at *12 (D.D.C. Mar. 25, 2020) (remanding a Department of Interior rulemaking to the agency), *appeal dismissed*, 2020 WL 3635122 (D.C. Cir. June 29, 2020); *Nat'l Educ. Ass'n v. DeVos*, 379 F. Supp. 3d 1001, 1033 (N.D. Cal. 2019) (vacating a DOE rule), *appeal dismissed*, 2019 WL 4656199 (9th Cir. Aug. 13, 2019); *Council of Parent Att'ys & Advocs., Inc. v. DeVos*, 365 F. Supp. 3d 28, 56 (D.D.C. 2019) (vacating a DOE rule), *appeal dismissed*, 2019 WL 4565514 (D.C. Cir. Sept. 18, 2019); *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 10 (D.D.C. 2020) (setting aside two USCIS directives), *judgment entered*, 2020 WL 1905063 (D.D.C. Apr. 16, 2020), *appeal dismissed*, 2020 WL 5358686 (D.C. Cir. Aug. 25, 2020). This should not be news to the States, as five of them (including Texas) were *amici curiae* in one of those cases. *See CSPI v. Perdue*, No. 19-cv-1004 (D. Md.), ECF Nos. 40 (Sept. 6, 2019), 58 (Apr. 13, 2020).

Thus, it was far from unprecedented, and in fact was entirely foreseeable, particularly given candidate Biden's promise to reverse the Final Rule during the first 100 days of his administration, that DHS would dismiss its appeal of the judgment vacating the Rule. The States were required to react promptly to that reasonable possibility, even if they could not predict with certainty that DHS would take that course or precisely when. *See Illinois v. Chicago*, 912 F.3d at

985; *Heartwood*, 316 F.3d at 701. It follows that the first factor of the timeliness analysis, length of the delay, weighs heavily against the States.

B. Prejudice to Plaintiffs and DHS of the States' Delay

The second timeliness factor is the prejudice caused to the original parties by the potential intervenor's delay in seeking intervention. *See Sokaogon Chippewa*, 214 F.3d at 949. As the Seventh Circuit has observed, "'the mere lapse of time by itself does not make an application untimely,' [but] instead the [district court] 'must weigh the lapse of time in the light of all the circumstances of the case.'" *Crowe ex rel. Crowe v. Zeigler Coal Co.*, 646 F.3d 435, 444 (7th Cir. 2011) (quoting 7C Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 1916 (3d ed. 2010)).

One type of prejudice that Plaintiffs identify concerns the harms the Final Rule itself inflicted on them and the risk of confusion among the immigrants that ICIRR serves should the Rule be reinstated. Doc. 267 at 16-18. Those are not relevant considerations under Rule 24. As the Fifth Circuit explained in *Stallworth*, "the prejudice to the original parties to the litigation that is relevant to the question of timeliness is only that prejudice which would result from the would-be intervenor's failure to request intervention as soon as he knew or reasonably should have known about his interest in the action." 558 F.2d at 265; *see also Lopez-Aguilar v. Marion Cnty. Sheriff's Dep't*, 924 F.3d 375, 390 (7th Cir. 2019) (holding that no prejudice arose from a delay in filing the motion to intervene where "the burden to the parties of reopening the litigation … would have been the same" no matter the motion's timing). The effects of the Rule, should it be reinstated, would flow not from the States' delay in seeking intervention, but from the mere fact of intervention, which does not factor in the timeliness inquiry.

That said, Plaintiffs and DHS did incur reliance costs due to the States' delay that would not have accrued had the States timely sought intervention. First, DHS expended resources

reformulating national policy to reflect the new administration's views long after the States had notice of the need to intervene. The States had such notice by November 7, 2020, when the presidential candidate who had promised to jettison the Final Rule was widely recognized as the winner—and surely by December 11, 2020, when the Supreme Court rejected Texas's suit—well before the time to appeal the judgment ran on January 4, 2021. And then, shortly after he took office, President Biden directed DHS in the Executive Order to re-examine the Rule. 86 Fed. Reg. at 8278. As described by the parties' February 2021 status reports, DHS had undertaken by that time a process to evaluate its next steps regarding the Rule and this litigation—a process clearly premised on all the circumstances, including that no other party had appealed or taken any steps to intervene to defend the Rule. Doc. 241 at 2 (Feb. 3, 2021) (explaining that DHS had been ordered "to review agency actions related to implementation of the public charge ground of inadmissibility" and that it would "confer with [ICIRR] over next steps in this litigation"); Doc. 245 at 3 (Feb. 19, 2021) ("DHS is currently reviewing the … Rule, and the Department of Justice ('DOJ') is likewise assessing how to proceed with its appeals in relevant litigations in light of the aforementioned Executive Order."). DHS's 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." Doc. 252-1 at 2.

Federal agencies like DHS have a vital interest in conserving government resources, including by conducting litigation efficiently. *See Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009) ("Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government."); *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (noting "the Government's interest, and hence that of the public, in

conserving scarce fiscal and administrative resources"). Allowing the States to intervene at this point would squander the resources that DHS invested, during the critical period when the States knew of their need to seek intervention yet did not do so, in deciding how to proceed with the Final Rule and this case. If the States had sought intervention before the time to appeal elapsed, or at least immediately after the Executive Order issued, DHS could have taken the States' involvement into account in its deliberations as to the best and most efficient course.

The States' delay also impacted DHS's decision to cease enforcing the Final Rule on March 9, when it dismissed its appeal, and all the reliance costs thereby accrued. When this court's judgment went into effect that day with the lifting of the Seventh Circuit's stay, DHS announced that it was no longer enforcing the Rule in accordance with the judgment, Doc. 252-2, and days later the Vacatur Rule formalized that change, 86 Fed. Reg. 14,221. Had the States moved to intervene in time to appeal this court's judgment—or had they done so after January 4, either here, in the Seventh Circuit, or both—DHS would have known of the possible need to preserve the Rule pending further review and might have taken a different approach. Allowing intervention now could "require DHS to again shift [the] public charge guidance" it issued in light of the Rule's vacatur, Doc. 269 at 28, a back-and-forth that could have been avoided if the States had acted promptly. Agencies and the public have an interest in the consistent and predictable implementation of federal policy. *See Wis. Elec. Power Co. v. Costle*, 715 F.2d 323, 327 (7th Cir. 1983) (holding that "the benefits of a stable, consistent administrative policy" counseled against considering post-decision information on judicial review of agency action); *Reyes-Arias v. INS*, 866 F.2d 500, 503 (D.C. Cir. 1989) (observing that "agencies in the modern administrative state" have "a keen interest in securing the orderly disposition of the numerous claims" under their purview).

A third type of reliance cost arises from the *de facto* settlement that Plaintiffs and DHS reached during the period of the States' delay. From July 2020 through the stipulated dismissal in March 2021, the parties were engaged in discovery disputes concerning ICIRR's equal protection claim. In July 2020, DHS opposed including any White House officials as document custodians, Doc. 181 at 6, 8-9, and the court resolved that dispute in part in ICIRR's favor, Doc. 190 at 2-3. The court then ordered the parties to meet and confer about deponents and the timing of depositions. Doc. 192. The parties also disputed whether DHS could withhold certain documents from production under the deliberative process privilege, a disagreement that persisted even after the Executive Order issued in February 2021. Docs. 214, 232, 236, 238, 245, 247; *see* Doc. 241 at 2 n.1 (confirming that DHS "will currently continue to assert the deliberative process privilege"). After DHS dismissed its appeal, ICIRR agreed to dismiss its equal protection claim, Doc. 253, thereby eliminating the risks to DHS that it would lose the privilege battle and that former high-ranking officials would be deposed. Doc. 269 at 14 (DHS observing that discovery was "likely [to] include depositions of former, high ranking Government officials").

Although not a formal settlement, that series of events plainly reflected a negotiated compromise to end the litigation. If the States were allowed to intervene, ICIRR would move to revive its equal protection claim, Doc. 282 at 17:20-18:3, a motion that likely would be granted, subjecting DHS once again to the risk of losing the privilege battles and having to present former administration officials for deposition. Unraveling the parties' compromise by allowing the States to intervene would thus greatly prejudice the parties, particularly DHS, providing further reason to deny intervention. *See 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."); *Bloomington*, 824 F.2d at 535 ("[I]ntervention at this time would render worthless all of the parties' painstaking negotiations because negotiations would have to begin again and [the potential intervenor] would have to agree to any proposed consent decree.").

C. Prejudice to the States of Denying Intervention

The States argue that denying intervention would prejudice them for the very reasons they support the Final Rule: They spend "billions of dollars on Medicaid services and other public benefits," and "the Rule would have helped to reduce such expenditures." Doc. 257 at 7-8. This argument is unpersuasive because the States have a readily available path to demand that DHS re-promulgate the Rule: a petition for rulemaking. *See* 5 U.S.C. § 553(e) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."). The States may submit a petition at any time, and if DHS denies it, the denial would be reviewable in court. *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.").

It follows that 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. If allowed to intervene as defendants in this court and appellants in the Seventh Circuit, the States would enjoy the benefit of defending an already-promulgated regulation, which under current precedent receives deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In contrast, a potential future decision by DHS to deny a petition by the States to re-promulgate the Rule would be reviewed

"under the deferential arbitrary-and-capricious standard." *Hadson Gas Sys., Inc. v. FERC*, 75 F.3d 680, 684 (D.C. Cir. 1996).

The States therefore must be understood as claiming an interest in preserving for themselves a favorable legal standard, and thus in improving their chances of achieving the Rule's reinstatement. Different legal standards of course can affect litigation. But it would be odd for a court to apply the label of "prejudice" to the petition right that Congress conferred in 5 U.S.C. § 553(e), or to recognize a cognizable interest in application of the *Chevron* doctrine. Litigants have no right to the best possible forum in which to present their claims. *Cf. Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 821 (7th Cir. 2015) (rejecting a plaintiff's asserted "right to forum shop").

The D.C. Circuit's decision in *Hadson Gas* illustrates the point. A gas company argued that FERC had to undertake notice-and-comment procedures before vacating a certain regulation. 75 F.3d at 681. There was no question that FERC had the legal authority to forgo notice and comment, as Congress had repealed the regulation's enabling statute. *Id*. at 683. But the company argued that certain collateral consequences of the regulation's vacatur made notice-and-comment procedures necessary. *Id*. at 684. The D.C. Circuit held that the company's remedy lay instead in a petition under § 553(e), even though judicial review of any FERC denial of such a petition would be deferential. *Ibid*.

The situation here is analogous, although no statutory amendment is involved. The States no longer argue that the APA prohibited DHS from dismissing its appeal and implementing the Vacatur Rule without undertaking notice-and-comment procedures, but they protest the effects of DHS's actions on them. Doc. 282 at 33:10-15 ("I don't think it would be technically correct to say that [DHS is] violating the APA. What I would say, however, is that their actions have

impinged upon the procedural rights that we would have under the APA … .”). But the APA already provides a route to vindicate the States’ rights—a petition for rulemaking under § 553(e)—and it does not prejudice the States to require them to follow that route.

The States suggested at one point that they had a procedural right under the APA for DHS to proceed via notice-and-comment rulemaking before vacating the Final Rule. Doc. 257 at 9; Doc. 278 at 5-6, 11-12; Doc. 260 at 16. That argument is now waived because, as noted, when asked whether DHS violated the APA by dismissing its appeal, the States conceded that it had not. Doc. 282 at 33:3-15. In any event, the Vacatur Rule was itself premised on DHS’s view that it was excused from notice-and-comment procedures by this court’s judgment. *See* 86 Fed. Reg. at 14,221 (citing 5 U.S.C. § 553(b)(B)). The States easily could have presented their APA argument through a court challenge to the Vacatur Rule. *See* 5 U.S.C. § 702 (providing for judicial review of all “agency action”); *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 92-95 (D.C. Cir. 2012) (vacating an interim rule promulgated without notice-and-comment procedures, reasoning that § 553(b)(B) did not apply). With that avenue having been available, no prejudice can be said to result from denying the States the ability to intervene and make the same argument here.

Finally, the States argue that this court’s judgment vacating the Final Rule will cast a “shadow” over future rulemakings concerning the INA’s public charge provision and, in fact, will “preclude the next Administration from re-adopting the Rule *even with* notice-and-comment rulemaking.” Doc. 260 at 16. To support their argument, the States rely on assertions in the above-referenced Ninth Circuit dissent that DHS’s dismissal of its appeal of the judgment would “ensur[e] not only that the [R]ule was gone faster than toilet paper in a pandemic, but [also] that it could effectively never, ever be resurrected, even by a future administration.” *San Francisco*, 992 F.3d at 743 (VanDyke, J., dissenting); *see also id*. at 749 (asserting that DHS’s dismissal of

its appeal "ensure[s] that it will be very difficult for any future administration to promulgate another rule like the 2019 rule"); *id*. at 753 ("They really have smashed Humpty Dumpty into pieces spread across the nation, and there isn't a single court (or future administration) that can do much about it."). As with its assertion that APA notice-and-comment rulemaking is required when an agency decides not to pursue an appeal of a judgment vacating a regulation, the dissent did not favor its assertions with any citation to legal authority—unless overwrought metaphors invoking nursery rhymes and global pandemics can now be said to qualify as legal authority.

In an effort to fill the gap left by the dissent, the States cite *National Cable and Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 982-83 (2005). Doc. 260 at 16. The States do not explain how *Brand X* justifies their fears about the supposed shadow cast by this court's judgment on future rulemakings, but the portion of the opinion they cite reads:

> The better rule is to hold judicial interpretations [of the statute underlying the challenged regulation] contained in precedents to the same demanding *Chevron* step one standard that applies if the court is reviewing the agency's construction on a blank slate: Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gaps for the agency to fill, displaces a conflicting agency construction.

545 U.S. at 982-83. *Brand X* does not apply here for two independent reasons. First, a district court decision does not qualify as precedent. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case."); *Matheny v. United States*, 469 F.3d 1093, 1097 (7th Cir. 2006) ("[D]istrict court opinions do not have precedential authority."); *see also Am. Tunaboat Ass'n v. Ross*, 391 F. Supp. 3d 98, 115 (D.D.C. 2019) (holding that an agency was free to continue applying its preferred interpretation of a regulation despite an adverse district court ruling). Second, this court's holding that the

Rule violated the APA rests exclusively on the Seventh Circuit's opinion affirming the preliminary injunction, 498 F. Supp. 3d at 1004-05, and the Seventh Circuit grounded its analysis in *Chevron* step two, not step one, 962 F.3d at 226-29. *See Rush Univ. Med. Ctr. v. Burwell*, 763 F.3d 754, 759 (7th Cir. 2014) ("*Brand X* thus directs us to return to our [earlier] decision to determine whether it was, in essence, a *Chevron* step-one decision.").

Accordingly, this court's vacatur of the Final Rule does not preclude DHS in the future from promulgating a public charge regulation identical to the Rule, nor does it preclude the States from petitioning DHS to do so. The States will suffer no prejudice for Rule 24 purposes if their motion to intervene is denied.

D. Other Unusual Circumstances

Finally, the court must consider any other unusual circumstances relevant to the timeliness inquiry. *See Sokaogon Chippewa*, 214 F.3d at 949. For example, "a convincing justification for [the potential intervenor's] tardiness" might permit intervention where it would otherwise be untimely. *Stallworth*, 558 F.2d at 266. As to this factor, the States reiterate their view that it was unprecedented and improper for DHS to cease defending the Final Rule, and therefore that it was reasonable for them to rely on DHS's continued defense until the moment it dismissed its appeal. Doc. 257 at 7. That argument fails for the reasons set forth above. And it again bears mention that the States themselves knew from *CSPI v. Perdue* 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 intervention before a successful presidential candidate who expressed deep hostility to a regulation assumes office.

* * *

Considering all the pertinent circumstances, the States' motion to intervene is untimely. The States inexplicably delayed filing their motion for months after it had become not just

reasonably possible, by highly likely, that candidate Biden, who had promised to reverse the Final Rule within the first 100 days of his administration, would become President Biden—and, at an absolute minimum, for five weeks after President Biden issued the Executive Order. The States' unreasonable delay in seeking intervention would cause substantial prejudice to the original parties, particularly DHS, and denying intervention causes no cognizable prejudice to the States because they have alternative forums in which to assert their interests. Because the States' motion to intervene is untimely, there is no need to consider Rule 24's other requirements. *See Illinois v. Chicago*, 912 F.3d at 989 (affirming denial of a motion to intervene solely on the ground that it was untimely).

III. Motion for Relief from the Judgment

The States also move for relief from judgment under Rule 60(b)(6). Doc. 260 at 8, 11. The States are correct that only a successful Rule 60(b) motion could resuscitate this case. The deadline for appealing the judgment vacating the Final Rule—January 4, 2021—had long since passed when they filed their motion. Nor is a Rule 59(e) motion to alter the judgment an option, as such a motion had to be filed even sooner, "no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e).

But because the States are not parties, they cannot seek Rule 60(b)(6) relief. Rule 60(b) permits a court to "relieve *a party or its legal representative* from a final judgment." Fed. R. Civ. P. 60(b) (emphasis added). The natural reading of the Rule's text, and the one adopted by the Seventh Circuit, is that only parties or their privies can file Rule 60(b) motions. *See 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"); *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)). The States note that some circuits have been more permissive, allowing Rule 60(b) motions by non-parties whose "interests were directly or strongly affected by the judgment." Doc. 260 at 8 (quoting *Bridgeport Music, Inc. v. Smith*, 714 F.3d 932, 940 (6th Cir. 2013)); Doc. 278 at 14. But this court must follow Seventh Circuit precedent. So, the States cannot seek Rule 60(b) relief, as "intervention is the requisite method for a nonparty to become a party to a lawsuit," *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009), and their intervention motion has been denied.

To evaluate the States' Rule 60(b)(6) motion on the merits, then, the court will assume for the sake of argument that they are entitled to intervene. *See Bunge Agribusiness Sing. Pte. Ltd. v. Dalian Hualiang Enter. Grp. Co.*, 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."). And granting the States that assumption, their Rule 60(b)(6) motion is denied.

Rule 60(b) enumerates five specific reasons for relief from a judgment, *see* Fed. R. Civ. P. 60(b)(1)-(5), none of which applies here. So the States are left to invoke the catch-all category in Rule 60(b)(6): "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). "[R]elief under Rule 60(b)(6) requires the movant 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) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005)). "In determining whether extraordinary circumstances are present, a court may consider a wide range of factors. These may include, in an appropriate case, 'the risk of injustice to the parties' and 'the risk of

undermining the public's confidence in the judicial process.'" *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988)).

The States' Rule 60(b)(6) motion faces insurmountable obstacles analogous to those that defeated their motion to intervene. As for timing, "[a] motion under Rule 60(b) must be made within a reasonable time." Fed. R. Civ. P. 60(c)(1). Much like the Rule 24 timeliness inquiry, "what constitutes 'reasonable time' for a 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). The pertinent timeliness factors for a Rule 60(b) motion include "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, if any, to other parties." *Ibid*. (quoting *Kagan v. Caterpillar Tractor Co.*, 795 F.2d 601, 610 (7th Cir. 1986)).

Those factors weigh heavily against the States. 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. Reopening 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. The States' Rule 60(b)(6) motion accordingly is untimely. *See Diaz v. Tr. Territory of the Pac. Islands*, 876 F.2d 1401, 1405 n.1 (9th Cir. 1989) (noting the parallel between the timeliness inquiries under Rules 24 and 60(b)(6)); *Bunge Agribusiness Sing. Pte. Ltd. v. Dalian Hualiang Enter. Grp. Co.*, 2013 WL 3274218, at *2 (N.D. Ill. June 27, 2013) (finding that a filing was untimely if construed as a Rule 24 motion and not made within a reasonable time if construed as a Rule 60(b) motion), *aff'd in part, appeal dismissed in part*, 581 F. App'x 548 (7th Cir. 2014). Denial of the States' Rule 60(b) motion is warranted on this ground alone. *See Kagan*, 795 F.2d at 610-11 (holding

that a Rule 60(b) motion filed "nearly six months after the court's dismissal of the case" and "more than three months after the plaintiff … learned of the dismissal" was not filed within a reasonable time and thus was correctly denied).

In addition, the "extraordinary circumstances" for Rule 60(b)(6) relief asserted by the States strongly resemble their failed arguments for intervention. The States contend that they had "no notice" that DHS might dismiss its appeal, that the dismissal improperly evaded the APA's notice-and-comment procedures, and that this supposedly unexpected turn "warrants relief under Rule 60(b)(6)." Doc. 260 at 10-11. As explained above, 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. They admit that "by December [2020], there was certainty … that candidate Biden would be elected," Doc. 282 at 49:24-50:1, after he had promised to jettison the Rule. The States also now admit that DHS did not violate the APA by dismissing its appeal of this court's judgment without first engaging notice-and-comment procedures. *Id*. at 33:3-12. As noted, 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. It is not this court's 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. *See 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"); Auth. of the U.S. to Enter Settlements Limiting the Future Exercise of Exec. Branch Discretion, 23 Op. O.L.C. 126, 135 (1999) ("The [Attorney General's] settlement power is sweeping, but the Attorney General must still exercise her discretion in conformity with her obligation to enforce the Acts of Congress.") (quotation marks omitted).

And the States can live to fight another day by pressing for reinstatement of the Rule, or a regulation like it, using the mechanisms described above.

The States' Rule 60(b)(6) motion is therefore denied on two independent grounds: it is untimely, and there are no extraordinary circumstances to justify upsetting this court's judgment.

It bears mention that yet another reason for denial is that granting Rule 60(b)(6) relief would improperly allow the States to use Rule 60(b) as a substitute for a timely appeal. *See Browder v. Dir., Dep't of Corr. of Ill.*, 434 U.S. 257, 263 n.7 (1978) ("[A]n appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review."); *Mendez v. Republic Bank*, 725 F.3d 651, 659 (7th Cir. 2013) ("Rule 60(b) relief is appropriately denied when a party fails to file a timely appeal and the relief sought could have been attained on appeal."); *Stoller v. Pure Fishing Inc.*, 528 F.3d 478, 480 (7th Cir. 2008) ("A Rule 60(b) motion is not a substitute for appeal … ."); *Instrumentalist Co. v. Marine Corps League*, 694 F.2d 145, 154 (7th Cir. 1982) ("Rule 60(b) is clearly *not* a substitute for appeal and must be considered with the obvious need for the finality of judgments.") (quotation marks omitted). Arguments that could and should have been made against a judgment through a timely appeal are not fodder for a Rule 60(b) motion. *See Banks v. Chi. Bd. of Educ.*, 750 F.3d 663, 668 (7th Cir. 2014) ("Far from presenting any 'extraordinary circumstances' that might warrant relief under Rule 60(b)(6), [the plaintiff] presented only arguments suitable for a direct appeal for which we do not have jurisdiction … ."); *Gleash v. Yuswak*, 308 F.3d 758, 761 (7th Cir. 2002) ("A contention that the judge erred with respect to the materials in the record is not within Rule 60(b)'s scope, else it would be impossible to enforce time limits for appeal."). 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. *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."); *Gleash*, 308 F.3d at 761 ("[Rule 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.").

The States point to nothing unknown or unnoticed at the time judgment was entered that undermines the judgment's integrity. The APA claims were decided based on a closed administrative record and turned largely on the application of legal principles to that record. 498 F. Supp. 3d at 1004. As DHS acknowledged even before the change of presidential administration, this court had no choice but to rule in Plaintiffs' favor under the APA because of the Seventh Circuit's ruling in the preliminary injunction appeal. *Id*. at 1005 ("Given [the Seventh Circuit's] holdings, DHS is right to acknowledge that this court should grant summary judgment to Plaintiffs on their APA claims."). The States in fact "agree that the Seventh Circuit's holding likely establishes the law of the case for this Court." Doc. 260 at 9. (It is circuit precedent as well.) As no one disputes, this court cannot hold, whether on a Rule 60(b) motion or otherwise, that the Final Rule complies with the APA.

So what exactly are the States seeking through their Rule 60(b) motion? They "ask this Court to vacate its judgment to allow the State Intervenors to defend the Rule, as the United States previously did on appeal." Doc. 260 at 9. But the States cannot be asking this court to vacate its judgment and then *uphold* the Rule, because nothing has changed and because the Seventh Circuit's decision prohibits upholding the Rule. Although they do not say it outright, the States must want the court to vacate the judgment and then simply re-enter it in identical form so that they can appeal. That 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." *Bell v. Eastman Kodak Co.*, 214 F.3d 798, 801 (7th Cir. 2000). In *Flying J*, by contrast, the trade association sought to intervene *before* the time for appeal had run, 578 F.3d at 570-71, so there was no need for a Potemkin relief from judgment meant solely to reset the appeal clock. The States do not identify a single case where a district court used Rule 60(b) in that artificial manner, and they offer no good reason why this court should be the first.

But, no matter, even putting that point aside, the States' Rule 60(b)(6) motion fails because it is untimely and because there are no extraordinary circumstances warranting relief from this court's judgment.

Conclusion

The States' Rule 24 motion to intervene and Rule 60(b)(6) motion for relief from judgment are denied. This case remains closed.

August 17, 2021

United States District Judge