No. 22-234

IN THE

Supreme Court of the United States

STATE OF TEXAS ET AL.,

Petitioners,

v.

COOK COUNTY, ILLINOIS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals was correct that the district court did not abuse its discretion in holding that the States were not entitled to intervene under Federal Rule of Civil Procedure 24, where the court found both that the States had ample notice of their need to intervene but waited too long to act, and that intervention would prejudice the original parties.
2. Whether the court of appeals was correct that the district court did not abuse its discretion in holding that under a plain reading of Federal Rule of Civil Procedure 60(b)(6), the States as nonparties were not entitled to pursue relief, and even if they were, they would be denied on the merits.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are the State of Texas, State of Alabama, State of Arizona, State of Arkansas, State of Indiana, State of Kansas, State of Kentucky, State of Louisiana, State of Mississippi, State of Montana, State of Ohio, State of Oklahoma, State of South Carolina, and State of West Virginia. Respondents-Plaintiffs are Cook County, Illinois and the Illinois Coalition for Immigrant and Refugee Rights, Inc. Respondents-Defendants are Alejandro Mayorkas, in his official capacity as Secretary of Homeland Security; the United States Department of Homeland Security; the United States Citizenship and Immigration Services, an agency within the United States Department of Homeland Security; and Ur M. Jaddou, in her official capacity as Director of the United States Citizenship and Immigration Services. No party is a corporation.

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The threshold question presented is "[w]hether petitioners were entitled to intervene." Pet. I. If—as the district court and Seventh Circuit held—the States were not entitled to intervene, then no other arguments come before the Court. As non-parties, the States are not entitled to Rule 60(b) relief (the subject of their second question presented), because that rule on its face makes relief available only to "a party or its legal representative." Fed. R. Civ. P. 60(b). And the pages of ink spilled on the States' other "cornucopia of issues," Pet. App. 10a—such as their views of the public charge rule, "the rule of law during presidential transitions," and the executive's supposedly "unprecedented tactics," Pet. 2, 5, 10–11—are beside the point.

The threshold question of intervention does not warrant this Court's attention. The district court found, in a fact-bound exercise of discretion, that the States' motion to intervene was untimely. Pet. App. 33a–60a. The Seventh Circuit unanimously affirmed. *Id.* at 18a. The States have identified no split of authority on timeliness of an intervention motion, much less one implicated by the lower courts' rulings here.

Beyond all this, on September 9, 2022, DHS promulgated a new public charge regulation after formal notice-and-comment rulemaking. Public Charge Ground of Inadmissibility, 87 Fed. Reg. 55,472 (Sept. 9, 2022) ("Final Rule"). The States had the opportunity to participate in that process, and at least one did. Pet. 18 n.7. The Final Rule will become effective on December 23, 2022, and the States' procedural objections have now been assuaged.

The petition should be denied.

COUNTERSTATEMENT OF THE CASE

A. The 2019 Public Charge Rule

The Immigration and Nationality Act (INA) allows the federal government to deny admission or adjustment of immigration status to any non-citizen "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). For decades, the term was understood by agencies and courts—including this Court—to refer to a noncitizen who is "primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense." Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689, 28,689 (May 26, 1999) ("1999 Field Guidance"); *see also Gegiow v. Uhl*, 239 U.S. 3, 10 (1915) ("The persons enumerated [as a public charge] … are to be excluded on the ground of *permanent* personal objections accompanying them irrespective of local conditions …." (emphasis added)).

In August 2019, DHS introduced the Inadmissibility on Public Charge Grounds Rule. 84 Fed. Reg. 41, 292–508 (Aug. 14, 2019) ("the 2019 Rule"). The 2019 Rule materially "redefine[d] the term 'public charge' to mean an alien who receives one or more designated public benefits for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months)." *Id.* at 41,295.

B. Public Charge Litigation

In September 2019, Plaintiffs Cook County, Illinois ("Cook County") and the Illinois Coalition for Immigrant and Refugee Rights, Inc. ("ICIRR") moved to preliminarily enjoin enforcement of the 2019 Rule

within the state of Illinois. Both Plaintiffs brought claims under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and sought the preliminary injunction on that basis. In addition, ICIRR claimed that the 2019 Rule violated the Equal Protection Clause because it was motivated by racial animus toward nonwhite immigrants. Dist. Ct. ECF No. 1 ¶¶ 166, 170–188.

In October 2019, the district court held that Plaintiffs were likely to succeed on the merits of their APA claims and enjoined the rule in Illinois. Dist. Ct. ECF Nos. 86, 87. This Court stayed the Illinois-specific injunction, *Wolf v. Cook County*, 140 S. Ct. 681 (2020) (mem.), and the 2019 Rule went into effect while litigation continued.

Subsequently, the district court denied DHS's motion to dismiss ICIRR's equal protection claim and granted ICIRR's motion for extra-record discovery on that claim. Dist. Ct. ECF Nos. 149, 150. In doing so, the district court found—based in part on emails from senior White House officials who were the architects of the Rule—that ICIRR "ma[de] a strong showing that the [2019] Rule was developed and promulgated 'at least in part because of' a substantial and impermissible reason not reflected in the administrative record: the Rule's disproportionate 'adverse effects upon' nonwhite immigrants." Dist. Ct. ECF No. 150 at 27.

In June 2020, the Seventh Circuit affirmed the preliminary injunction barring enforcement of the 2019 Rule in Illinois. The court held that "it does violence to the English language and the statutory context to say that ['public charge'] covers a person who receives only *de minimis* benefits for a *de minimis* period of time," as the 2019 Rule did. *Cook County v. Wolf*, 962 F.3d 208, 229 (7th Cir. 2020), *cert. dismissed*, 141 S.

Ct. 1292 (2021). The Seventh Circuit further held that the 2019 Rule was arbitrary and capricious because DHS "failed adequately to grapple with" the Rule's chilling effects or to "offer any justification for its extreme view" of self-sufficiency. *Id.* at 229–33.

After the Seventh Circuit's ruling, Plaintiffs moved for summary judgment on their APA claims. On November 2, 2020, the district court granted Plaintiffs' motion and entered partial final judgment. Pet. App. 71a–89a. Applying the text of the APA—which states that a court "shall … set aside" an invalid agency rule, 5 U.S.C. § 706(2)(A)—the court ordered the 2019 Rule vacated. Pet. App. 76a–80a. DHS appealed, and the Seventh Circuit stayed the judgment pending resolution of DHS's petition for certiorari in *Wolf v. Cook County*, No. 20-450 (U.S. Oct. 7, 2020), which asked this Court to review the preliminary injunction ruling. *Cook County v. Wolf*, No. 20-3150 (7th Cir. Nov. 3, 2020), ECF No. 21.

In the meantime, extra-record discovery proceeded on an expedited basis for ICIRR's equal protection claim. The district court required the federal government to produce emails and other documentary evidence from White House officials who had been involved in formulating the 2019 Rule, including former Senior Advisor to the President Stephen Miller and former Acting White House Chief of Staff Mick Mulvaney. Dist. Ct. ECF No. 190 at 2. DHS made rolling document productions, the parties agreed to meet and confer about depositions, and the parties litigated discovery disputes such as whether DHS could withhold certain documents under deliberative process privilege or executive privilege. Dist. Ct. ECF Nos. 192, 214, 232, 235, 236, 238, 245, 247.

In addition to this case, the 2019 Rule was challenged in other cases across the nation. By the end of

2020, every other court of appeals to have evaluated the 2019 Rule agreed with the Seventh Circuit's determination that the 2019 Rule likely violated the APA. *See City & County of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 981 F.3d 742, 756–62 (9th Cir. 2020), *cert. dismissed*, 141 S. Ct. 1292 (2021); *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42, 63–86 (2d Cir. 2020), *cert. dismissed*, 141 S. Ct. 1292 (2021).[1]

C. Public Statements Indicating That DHS Did Not Intend to Persist in Its As-Yet Unsuccessful Appeals

Also in November 2020, President Biden was elected. During the campaign, then-candidate Biden had stated unequivocally that his administration would "[r]everse [the] public charge rule" at issue in this litigation within its first 100 days. *See* DNC, *The Biden Plan for Securing Our Values as a Nation of Immigrants,* https://joebiden.com/immigration/ (last visited Nov. 1, 2022). These statements did not go unnoticed by the litigants here. Indeed, Plaintiffs ICIRR and Cook County highlighted the Biden campaign's statements in their Brief in Opposition to DHS's petition for certiorari seeking review of the Seventh Circuit's preliminary injunction decision, filed on December 9, 2020. Br. in Opp. at 5, *Wolf v. Cook County*, No. 20-450 (U.S. Dec. 9, 2020). And counsel for the States acknowledged that the States were contempo-

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[1] A panel of the Fourth Circuit reversed a preliminary injunction barring enforcement of the 2019 Rule, but that court subsequently granted *en banc* rehearing, *Casa de Md., Inc. v. Trump*, 981 F.3d 311 (4th Cir. 2020) (mem.), thereby vacating the panel's decision, *see* 4th Cir. R. 35(c). The case was dismissed as moot before the *en banc* court issued an opinion. *See* Order, *Casa de Md., Inc v. Biden*, No. 19-2222 (4th Cir. Mar. 11, 2021), ECF No. 211.

raneously aware of both the statements of the Biden campaign and the filings in this litigation. Dist. Ct. ECF No. 267-1 at 11–12.

Following his inauguration, President Biden acted promptly. On February 2, 2021, the President issued an Executive Order condemning the 2019 Rule. *See* Exec. Order No. 14,012, Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans, 86 Fed. Reg. 8,277 (Feb. 2, 2021) (the "Executive Order"). The Executive Order called upon federal agencies to "address concerns about the current public charge policies[]" and submit a report to the President within 60 days. *Id.* at 8,278.

Again, the advent of a new administration, with a publicly different view of the public charge rule, did not go unnoticed in this litigation. On January 22, 2021, two days after President Biden's inauguration, the district court directed DHS to file a status report addressing "whether they plan to pursue their appeal." Dist. Ct. ECF No. 240. In its ensuing publicly filed status reports, DHS very clearly did not answer that question "yes."

Instead, DHS advised the district court that it was reevaluating its approach because "the Executive Order directs action on issues pertinent to this case," which might influence the "next steps in this litigation." Dist. Ct. ECF No. 241 at 2. A few weeks later, DHS explained that it was "currently reviewing the Public Charge Rule, and the Department of Justice ('DOJ') is likewise assessing how to proceed with its appeals in relevant litigations in light of the … Executive Order." Dist. Ct. ECF No. 245 at 3.

DHS then all but told the States that their interests were at stake: DHS requested a time-limited

stay, which it said "may spare the parties and the Court from the burdens associated with briefing and resolving the merits of the equal protection claim … all of which may *ultimately prove unnecessary*." *Id.* (emphasis added). DHS reiterated that a time-limited stay "would provide DHS and DOJ with additional time to assess how they wish to proceed, and further developments during that time period may either *moot Plaintiffs' equal protection claim* or ultimately lead Plaintiffs to agree that a more lengthy stay (or a voluntary dismissal) is appropriate." *Id.* at 4 (emphasis added). Quite obviously, DHS and DOJ believed that ICIRR's equal protection challenge to the 2019 Rule could be "mooted" (or abandoned) if DHS dropped its appeal, such that the Seventh Circuit's stay no longer applied and the district court's vacatur of the Rule went into effect.

On March 8, 2021, the district court instructed the parties that, at the March 12, 2021 status hearing, the district court would "ask Defendants 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." Dist. Ct. ECF No. 248. The court informed the parties that "Defendants' answer will bear heavily on whether discovery will resume and whether a ruling on the deliberative process privilege will issue." *Id.*

The next day, on March 9, 2021, DHS filed an unopposed motion to voluntarily dismiss its appeal of the district court's order granting partial final judgment to Plaintiffs on their APA claims. Unopposed Motion to Voluntarily Dismiss Appeal, *Cook County v. Mayorkas,* No. 20-3150 (7th Cir. Mar. 9, 2021), ECF No. 23. The Seventh Circuit granted the motion and issued the mandate immediately as required by 7th Cir. Rule 41. Order, *id.*, ECF No. 24-1; Notice of

Issuance of Mandate, *id.*, ECF No. 24-2. The same day, the parties filed a joint stipulation dismissing DHS's petition for a writ of certiorari before the Supreme Court, and the petition was dismissed. Joint Stipulation to Dismiss, *Mayorkas v. Cook County*, 141 S. Ct. 1292 (U.S. Mar. 9, 2021) (No. 20-450).

On March 11, the parties filed a joint stipulation dismissing ICIRR's equal protection claim with prejudice. Dist. Ct. ECF No. 253. ICIRR's decision to voluntarily dismiss the equal protection claim was made expressly in reliance on the dismissal of DHS's appeal. *Id.* at 1 (voluntarily dismissing equal protection claim "[i]n light of Defendants' decision to voluntarily dismiss its appeal of this Court's final judgment … and because the Rule challenged in this lawsuit is therefore no longer in effect.").

D. The States' Belated Motion to Intervene in the District Court

Though the States later conceded to the district court that they "ha[d] been aware of their interests in the Rule for some time," Dist. Ct. ECF No. 257 at 5, they did not submit an amicus brief or otherwise manifest any interest in the case until after it was over. Not until the evening of March 11, 2021 did the States finally move to intervene. 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. As the district court observed, that was "over five weeks past February 2," the date of the Executive Order, "in a case where judgment had already been entered." Pet. App. 44a.

And even then, the States did not move to intervene in the district court, notwithstanding that jurisdiction had transferred to that court upon issuance of the Seventh Circuit's mandate on March 9. Instead,

the States made a tactical choice to seek intervention in the court of appeals—which necessitated that they seek additional, extraordinary relief: a recall of the court's mandate and rehearing of the court's dismissal of DHS's appeal.[2] When the Seventh Circuit promptly denied the States' motions, Order, *Cook County v. Wolf*, No. 20-3150 (7th Cir. Mar. 15, 2021), ECF No. 26, the States extended the proceedings even further by pursuing relief in this Court—which likewise denied relief, and directed that the proper forum in which to seek intervention was the district court. *Texas v. Cook County*, 141 S. Ct. 2562 (2021) (mem.).

Even after this two-month appellate detour, the States *still* did not seek intervention in the district court until May 12. Thus, only after the States waited more than three months after President Biden had issued the Executive Order and nearly six months after the partial final judgment that vacated the Rule was entered, did they for the first time appear in the district court.

The district court denied the States' motions on August 17, 2021. Pet. App. B. The court held that the States failed to satisfy the timeliness requirement of Rule 24 because their inexcusable delay was "plainly unreasonable," and reviving the case notwithstanding that delay would cause prejudice to the original parties. Pet. App. 45a. The court concluded that, at the very least, as of February 2021, "[a]ny reasonable observer would have known … that intervention had

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

become extremely urgent." *Id.* at 43a. Nonetheless, the States took no action whatsoever for an additional month, and the district court held that their "inexplicab[le] delay," particularly in a case where judgment had already been entered, precluded intervention. *Id.* at 60a. The district court also determined that (1) the States' motion would substantially prejudice the original parties due to "reliance costs … that would not have accrued had the States timely sought intervention," *id.* at 50a–54a; (2) the States were not prejudiced by denial of their motion since the APA provided them with several routes to vindicate their rights, *id.* at 54a–59a; and (3) no unusual circumstances justified relief, *id.* at 59a–60a. Because the States could not intervene and were not parties to the case, they also could not seek relief under Rule 60(b). *Id.* at 61a.

The Seventh Circuit unanimously affirmed the district court's decision. Pet. App. A. The Seventh Circuit held that the district court acted well within its discretion to find the States' motions untimely on the basis of the facts on the record, and there also was "nothing on this record" to establish unusual or extraordinary circumstances that justified the States' delay. *Id.* at 16a–17a.

E. New Rule

As the States admit, a "significant event[]" occurred after they moved to intervene: on September 9, 2022, DHS promulgated a new public charge regulation. Pet. 8 & n.3. That regulation will become effective December 23, 2022. 87 Fed. Reg. at 55,472.

REASONS FOR DENYING THE PETITION

I. THERE IS NO REASON FOR THIS COURT TO REVIEW WHETHER THE STATES' MOTION TO INTERVENE WAS TIMELY.

As they did below, the States raise a "cornucopia of issues," but only one of them "must be resolved in order to dispose" of the petition. Pet. App. 10a. And that is the States' first question presented: whether they were entitled to intervene. Pet. I. Unless the States can persuade this Court to review the timeliness of their intervention motion, find that the district court abused its discretion, and reverse the district court's ruling, then they have no basis for using *this lawsuit* to pursue the myriad other topics featured in their petition.

The ruling on the timeliness of the States' intervention motion is a fact-bound, discretionary application of long-settled law that does not merit this Court's attention. Sup. Ct. R. 10.

A. There Is No Split of Authority on Timeliness of Intervention Motions.

The States do not suggest any disagreement on the standard for evaluating timeliness. To the contrary, the States' recitation of "the elements by which courts typically assess timeliness" matches exactly the elements that the district court considered. *Compare* Pet. 20 *with* Pet. App. 33a. This is settled law that does not warrant review.

B. The District Court Did Not Abuse Its Discretion.

Unable to identify a certworthy legal question, the States focus exclusively on the facts. *See* Pet. 20–28 (arguing that "Petitioners' motion to intervene meets each of the elements" for timeliness). Timeliness is

"determined from all the circumstances" and left to the "sound discretion" of the district court. *NAACP v. New York*, 413 U.S. 345, 366 (1973). Whether the district court correctly evaluated the relevant facts when exercising its discretion is not the stuff of certiorari.

Regardless, the States can identify no error in the lower courts' analysis.

The States' Delay. The district court found that the States' significant delay in this litigation, despite public filings and their own admitted knowledge of the progress of the case, was "plainly unreasonable" and "weigh[ed] heavily" against intervention. Pet. App. 45a, 49a. Indeed, not only had President Biden issued the Executive Order directing DHS to review the Rule on February 2, *see* Exec. Order. No. 14,012, 86 Fed. Reg. 8,277, but DHS *repeatedly* in this case also submitted filings declaring that it was considering ceasing its defense of the Rule, *see supra* at 6–7.

The States contend that DHS's statements in these joint status reports indicated "it was either uncertain of its next steps or actively defending the Rule until March." Pet. 21. This characterization is contradicted by the record. In the February 19 joint status report, for example, Plaintiff ICIRR stated that it intended to push forward with discovery on its equal protection claim—which provided a "distinct path" to a judgment blocking the 2019 Rule—unless "the Defendants agree to end their appeal of the final judgment" on Plaintiffs' APA claim, "allowing the vacatur to go into effect." Dist. Ct. ECF No. 245 at 3. In response, DHS requested a two-week stay, and stated that "further developments during that time period may either *moot Plaintiffs' equal protection claim* or ultimately lead Plaintiffs to agree that a more lengthy stay (or a voluntary dismissal) is appropriate." *Id.* at 4 (emphasis added). In other words, DHS stated ex-

plicitly by February 19 that *within the next two weeks*, it might take action that would *moot ICIRR's equal protection claim*—which could be nothing other than dropping the appeal and allowing the district court's previously entered vacatur to go into effect. Thus, as of mid-February, it was indisputably apparent that intervention had become "extremely urgent." Pet. App. 43a. Yet, even though the States were concededly following the case, Dist. Ct. ECF No. 267-1 at 11, they did nothing for another month.

The States also assert that they could not have guessed that DHS would drop its appeal rather than "abeying [the] litigation, promulgating a new regulation, and then dismissing litigation against [the] prior regulation[.]" Pet. 22 (internal quotation marks omitted). This, too, is baseless. The States omit reference to DHS's explicit statement that it was considering action that would "moot [ICIRR's] equal protection claim"—which the States' preferred abeyance procedure would not have done. The States thus had ample notice no later than February 19, 2021 that DHS was contemplating the specific action of dropping its appeal within the ensuing two weeks. "The States were required to react promptly to that reasonable possibility, even if they could not predict with absolute certainty that DHS would take that course or precisely when." Pet. App. 48a–49a (citing authorities).

Finally, the States contend that the Seventh Circuit erred in "discount[ing] petitioners' March and April efforts to intervene both before that court and in this Court." Pet. 23–24. Instead, the States say, it was proper for them to seek to intervene in the Seventh Circuit on March 11, 2021—and delay moving to intervene in the district court two more months until May 12—because the Seventh Circuit was "the court

that most recently had jurisdiction" and the only court that "could recall its mandate" and "reinstate" the stay it had previously entered. *Id.* at 24. What the States fail to explain is why they did not move to intervene in the court that *actually had jurisdiction* on March 11—rather than a court that had held jurisdiction "recently," but no longer did. Had the States initially moved to intervene in the district court, as this Court later advised them to,[3] *Texas*, 141 S. Ct. at 2562, they could have avoided the need to seek recall of the mandate or rehearing, and could simply have requested a stay of the judgment from that court. The States' choice to proceed in the courts of review, and bypass the district court, was theirs alone—and the further delay this choice generated was properly considered by the lower courts in evaluating the States' delay.

In any event, the States easily could have sought intervention much earlier, as Texas did in *Pennsylvania v. Devos*, No. 1:20-cv-01468-CJN (D.D.C), rather than wait until after the lawsuit's conclusion. In

[3] The States also imply that this Court's denial of their application for emergency relief comprised an unstated finding of timeliness. Pet. 24. This is incorrect. Not only is it axiomatic that this Court's stay orders do not constitute rulings on the merits, *Ind. State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 960 (2009) (per curiam), but also timeliness was not even an issue raised in this Court, *see* Application for Leave to Intervene and for a Stay of the Judgment Issued by the U.S. Dist. Ct. for the N. Dist. of Ill., *Texas v. Cook County*, No. 20A150 (U.S. Mar. 11, 2021); Response to Application from Respondents ICIRR and Cook County, *Texas v. Cook County*, No. 20A150 (U.S. Apr. 9, 2021); Response to Application from Federal Respondents, *Texas v. Cook County*, No. 20A150 (U.S. Apr. 9, 2021); Reply in Support of Application for Leave to Intervene and for a Stay of the Judgment Issued by the U.S. Dist. Ct. for the N. Dist. of Ill., *Texas v. Cook County*, No. 20A150 (U.S. Apr. 13, 2021).

Devos, Texas moved to intervene before President Biden's inauguration to defend a Department of Education regulation that then-President-elect Biden had condemned during the campaign. *See* Pet. App. 37a. "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.* (quoting Texas's filings in the *Devos* litigation). Texas's motion to intervene in *Devos* was granted. *Id.* at 39a (citing order). So even on March 11, the district court "reasonably could have concluded that it was too late to create an entirely new lawsuit through the intervention of fourteen States." *Id.* at 14a.

Prejudice. The States' delay occurred at a critical moment in this lawsuit. The district court had authorized ICIRR to pursue expedited discovery, including depositions of White House officials, in support of its equal protection claim. Dist. Ct. ECF No. 150. And, as of February 19, 2021, ICIRR was explicit that it would actively pursue that discovery unless DHS took steps to allow the district court's vacatur of the 2019 Rule to go into effect. Dist. Ct. ECF No. 245 at 2–3. The only thing preventing that discovery was the district court's issuance of a series of short stays—over ICIRR's objection—to see if some other, more efficient resolution could be had. *See* Dist. Ct. ECF Nos. 244, 246 (orders granting stays); Dist. Ct. ECF Nos. 245 at 2, 247 at 2 (joint status reports noting ICIRR's objection). Had the States promptly intervened at that time, and had they succeeded in delaying dismissal of DHS's appeal, ICIRR's discovery efforts would have continued promptly and unabated.

But instead, the States waited. On March 11, DHS dismissed its appeal, allowing the vacatur to go into effect. With the 2019 Rule vacated through a final judgment, and in express reliance on that vacatur, ICIRR voluntarily dismissed its equal protection claim and walked away from its opportunity to pursue discovery in support of it. *See* Dist. Ct. ECF No. 253 (stipulating to dismissal of equal protection claim "[i]n light of Defendants' decision to voluntarily dismiss [their] appeal of this Court's judgment vacating the Rule, and because the Rule challenged in this lawsuit is therefore no longer in effect" (citations omitted)).

Allowing the States to intervene at this late stage not only would disrupt the parties' *de facto* settlement, but also would severely prejudice ICIRR's ability to litigate its equal protection claim. ICIRR would have to seek leave to revive the dismissed claim, and then would be compelled to restart discovery after the passage of years during which ICIRR could have uncovered documents from the government and third parties, and taken depositions while memories were still fresh. That is more than enough "to demonstrate the risk of prejudice to the original parties if this late intervention were to be approved." Pet. App. 15a.

Remarkably—although both lower courts pointed to ICIRR's dismissal of its equal protection claim and cessation of discovery efforts in concluding that the States' delay would create prejudice to the parties, Pet. App. 15a, 52a–54a—the States' petition omits the topic entirely.

For their part, the States are not prejudiced by the denial of intervention. "As a number of Justices observed during the oral arguments in the *Arizona* case, the States could have brought a separate case under the APA to challenge the process by which DHS re-

pealed the 2019 Rule." Pet. App. 16a. In addition, the States were free to participate in the notice-and-comment process with respect to the new Final Rule promulgated in September 2022 (and at least one did). *Id.*; *see* Pet. 18 n.7. And they are free to challenge the new Final Rule under the APA if they find that grounds exist.

Unusual Circumstances. Finally, no unusual circumstances support this Court's reweighing the applicable timeliness facts. Contrary to the petition, it is "commonplace for a new administration to take different policy positions from its predecessor, and in the course of doing so to withdraw an appeal or rule." Pet. App. 17a; *see also id.* at 48a (collecting examples). DHS's decision to forgo further appeals was especially unsurprising here, where the 2019 Rule had been deemed invalid by all the federal courts of appeals to have reviewed it. *Supra* pp. 4–5. Moreover, here, the new administration "wasted no time in signaling that it might take advantage of that prerogative." Pet. App. 17a. The States moved to intervene in the district court in May of 2021, but the "writing had [] been on the wall" long before then. *Id.*

Whatever the States may think of nationwide relief,[4] this case does not provide a vehicle to review the issue. This case involved a final vacatur permitted by the text of the APA to be granted on a nationwide basis. As this Court has recognized, vacatur of an agency decision is a "less drastic remedy" than an injunction, which amounts to "extraordinary relief." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010). Indeed, the APA's text demands vacatur

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[4] The States are no strangers to seeking nationwide injunctions in their own favor. *See, e.g.*, *Biden v. Texas*, 142 S. Ct. 2528 (2022).

when an agency rule is determined to be invalid: a "reviewing court *shall* ... hold unlawful and *set aside* agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2) (emphasis added); *see, e.g.*, *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1901 (2020) (holding that DHS's rescission of the Deferred Action for Childhood Arrivals program "must be vacated" due to agency's violation of the APA). What this case *does* address is the universally accepted rule that would-be intervenors must be timely. The States were not parties with standing to challenge the district court's vacatur order, and their failure to timely intervene precludes them from becoming parties now.

C. A New Final Rule Has Been Promulgated Following Notice and Comment.

Yet another reason why this Court need not review the district court's timeliness ruling is that allowing the States to intervene to defend the 2019 Rule would be a purely academic exercise. As discussed above, DHS initiated a formal notice-and-comment rulemaking procedure to replace the 2019 Rule, at least one of the States participated in the notice-and-comment process, Pet. 18 n.7, and on September 9, 2022, DHS promulgated a new public charge regulation, which will become effective on December 23, 2022. Public Charge Ground of Inadmissibility, 87 Fed. Reg. at 55,472. Whatever dispute the States had with the vacatur, or DHS's supposedly "unprecedented tactics," no longer has any force.

II. THERE IS NO REASON FOR THIS COURT TO REVIEW THE LOWER COURTS' ROUTINE APPLICATION OF RULE 60(b).

The States' second question presented asks this Court to consider whether they are entitled to relief under Rule 60(b). Pet. I. There is no call for this Court's intervention, as the relief the States seek under Rule 60(b) is facially unavailable to them—and there is no disagreement in the lower courts as to whether Rule 60(b) means what it says.

Relief under Rule 60(b) is available only to "*a party* or its legal representative." Fed. R. Civ. P. 60(b) (emphasis added). As the Seventh Circuit explained, this plain text has long been interpreted by lower courts to allow relief under Rule 60(b) only to parties and those in privity with them. Pet. App. 19a. And this limitation "makes sense: if Rule 60(b) rights were extended beyond parties and their privies to anyone who disliked the outcome of a case, finality would be exceedingly hard to achieve." *Id.* (citing Wright & Miller, 11 Fed. Prac. & Proc. Civ. § 2865 (3d ed. 2012)). The States briefly contend that the Seventh Circuit "split[] from the view of other circuits that have permitted a nonparty to seek Rule 60(b)(6) relief," Pet. 31, but none of the cases the States cite would extend Rule 60(b) relief to an untimely would-be intervenor who wishes a case had turned out differently.[5] Accordingly, none of them would support a different outcome here.

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[5] The Sixth Circuit in *Bridgeport Music, Inc. v. Smith* rejected relief for a non-party under Rule 60(b), 714 F.3d 932, 940 (6th Cir. 2013), and each of the other cited cases involved a Rule 60(b) movant who was technically not a party but was *directly*, *immediately*, and *tangibly* impacted by the judgment. *See Grace v. Bank Leumi Tr. Co. of N.Y.*, 443 F.3d 180, 180–89 (2d Cir. 2006) ("plaintiffs enter[ed] into a settlement agreement with a

Finally, even if the States could somehow obtain relief in this lawsuit to which they are strangers, the law still does not support their request for equitable vacatur. Pet. 33. In *United States v. Munsingwear*, 340 U.S. 36 (1950), the Court explained that when a civil case becomes moot pending appeal, rendering the lower court judgment "unreviewable," appellate courts should vacate the judgment below and remand with directions to dismiss. *Id.* at 39–41. Critically, though, the *Munsingwear* doctrine applies only "when mootness occurs through happenstance—circumstances not attributable to the parties." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997); *see also U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 29 (1994) ("Mootness by reason of settlement does not justify vacatur of a judgment under review.").

This Court's opinion in *Karcher v. May*, 484 U.S. 72 (1987) is directly on point. There, two New Jersey politicians litigating in their official capacities appealed a district court holding that a state statute was unconstitutional. *Id.* at 75–76. After the two individuals lost their posts as presiding legislative officers, the new leadership decided to withdraw the legislature's appeal. *Id.* at 76. This Court rejected the argument to vacate the lower court's judgment under *Mun-*

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judgment-proof, pro se defendant with the intent at the time of the settlement to collect from a third party that allegedly received fraudulent conveyances"); *Binker v. Pennsylvania*, 977 F.2d 738, 745 (3d Cir. 1992) ("the nonparties participated in the settlement agreement" and had a "stake in the settlement proceeds"); *Dunlop v. Pan Am. World Airways, Inc.*, 672 F.2d 1044, 1051 (2d Cir. 1982) (non-parties were prevented from bringing their own action based on a prior judgment to which they were not a party); *Eyak Native Vill. v. Exxon Corp.*, 25 F.3d 773, 777 (9th Cir. 1994) (movants "were more than in privity with the [party]; they were identical" and bound by the judgment).

singwear, holding that the case "did not become unreviewable" when the prior leadership "left office." *Id.* at 83. Rather, the authority to "pursue the appeal on behalf of the legislature passed to their successors in office." *Id.* So "the controversy did not become moot due to circumstances unattributable to any of the parties," but instead, "[t]he controversy ended when the losing party—the New Jersey Legislature—declined to pursue its appeal." *Id.* For that reason, "the *Munsingwear* procedure [was] inapplicable." *Id.* So too here.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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