No. 22-234

In the Supreme Court of the United States

STATE OF TEXAS, ET AL., PETITIONERS

v.

COOK COUNTY, ILLINOIS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Consistent with decades of practice by the Department of Justice, federal respondents initially defended DHS's 2019 Rule as binding federal law—notwithstanding their policy disagreement with the Rule and the administration that promulgated it.* Yet, on March 9, 2021, without prior notice, they reversed course and acquiesced in a district court's nationwide vacatur of the Rule, a remedy that federal respondents elsewhere claim the APA has never permitted. *E.g.*, Brief for Petitioners 40-44, *United States v. Texas*, No. 22-58 (U.S. Sept. 12, 2022). Just two days later, petitioners unsuccessfully sought to intervene—first in the Seventh Circuit, where the case had been pending, and then here. This Court directed petitioners to seek to intervene in the district court, which petitioners did. Over the objection of both the federal government and the ICIRR, petitioners also sought Rule 60(b) relief to defend the now-abandoned Rule. The lower courts again denied relief.

That denial was wrong, and it is worthy of this Court's correction. Pet. 20-32. But more fundamentally, this Court should grant further review because of the profound impact that respondents' scheme, if allowed to stand, will have on the rule of law. Although they label it a "litigation choice[]," Fed.BIO 31, respondents do not dispute that they deliberately sought to eliminate the Rule without statutorily mandated notice and comment. Whether a new administration may engage in such repeal by capitulation raises profound administrative-law questions, as four members of this Court have already recognized. Pet. 10. Those questions are not moot merely

* All defined terms are given the same meaning as in the Petition.

because respondents' tactics allowed DHS to publish a new regulation without having to address the extensive factual findings that underlay the old one. *Contra* Fed.BIO 13-17. Moreover, as the administration is already demonstrating, these tactics will recur absent this Court's intercession. Pet. 15-20.

ARGUMENT

I. Petitioners' Entitlement to Intervention and Rule 60(b) Relief Merits Review.

The Rule is now before this Court for a third time because federal respondents agreed to "implement[] a plan to instantly terminate the [R]ule with extreme prejudice—ensuring not only that the [R]ule was gone," but "that it could effectively never, ever be resurrected, even by a future administration." *City & County of San Francisco v. USCIS*, 992 F.3d 742, 743 (9th Cir. 2021) (VanDyke, J., dissenting). Citing an "immediate need to implement the now-effective final judgment," DHS then claimed that the APA's notice-and-comment process to rescind the Rule was "unnecessary, impracticable, and contrary to the public interest." *Inadmissibility on Public Charge Grounds; Implementation of Vacatur*, 86 Fed. Reg. 14,221, 14,221 (Mar. 15, 2021). As the United States acknowledged to this Court, its conduct was unprecedented. Transcript of Oral Argument 73:23, *Arizona v. City & County of San Francisco*, 142 S. Ct. 1926 (U.S. Feb. 23, 2022) (No. 20-1775) (Tr.). And as petitioners have explained (at 20-29), the lower courts' refusal to permit intervention in these circumstances was unjustified.

A. Intervention

The Seventh Circuit wrongly rejected petitioners' motion to intervene as untimely. Rather than provide

potentially interested parties with notice and an opportunity to intervene, federal respondents capitulated. *San Francisco*, 992 F.3d at 750. Petitioners nevertheless sought intervention as soon as they became aware of respondents' intentions. They sought intervention in the Seventh Circuit just two days after federal respondents abandoned their defense of federal law and in this Court just four days after the Seventh Circuit denied relief. Pet. 7. When this Court sent petitioners to district court, they sought intervention within about two weeks. *Id.*

Respondents make two arguments regarding why this was inadequate dispatch. Each fails.

First, respondents argue that petitioners should have intervened *before* federal respondents dismissed their appeal based on filings in January and February 2021 hinting at a possible change of position, Fed.BIO 20; ICIRR.BIO 12-14. This ignores a *March* filing in which all parties represented to the district court that the federal government continued to defend the Rule. *See* Pet. 5 (discussing these three filings).

Second, federal respondents insist (at 22) that there is "no justification" for not seeking district-court intervention after the Seventh Circuit denied petitioners' March 2021 motions. Fed.BIO 22. This ignores that this Court, rather than the district court, typically provides recourse following an erroneous decision by a court of appeals. And petitioners sought review here just four days after the Seventh Circuit denied relief. *See* Pet. 7. Federal respondents also fail to explain why this Court would have explicitly preserved petitioners' ability to "rais[e] . . . arguments before the District Court" if the window had already closed for such litigation. *Texas v. Cook County*, 141 S. Ct. 2562, 2562 (2021).

B. Rule 60(b)

For the reasons petitioners have explained (at 29-32), the Seventh Circuit also wrongly rejected petitioners' Rule 60(b) motion, given the "extraordinary circumstances" of the case. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988). Respondents do not address many of petitioners' arguments about why Rule 60(b) relief was appropriate, and they cannot dispute that other circuits have split from the Seventh Circuit by holding that nonparties may seek Rule 60(b) relief. *See* Pet. 31; Fed.BIO 27; ICIRR.BIO 19 & n.5. Respondents thus effectively concede that this Court's review is necessary to clarify the meaning of both Rule 60(b) and the public-charge statute.

II. These Important Issues Are Likely to Recur, and There Is No Obstacle to Review.

As federal respondents all but concede (at 29), the questions presented together implicate the "fundamental" and "important question[]" of "whether the Government's actions" regarding the Rule "comport with the principles of administrative law." *Arizona v. City & County of San Francisco*, 142 S. Ct. 1926, 1928 (2022) (Roberts, C.J., concurring). That fundamental question is not just likely to recur—it is recurring. And the specific questions presented did not become moot (or become laden with other vehicle problems) just because DHS leveraged the outcome as an excuse to avoid the very statutory requirements respondents' scheme was designed to evade.

A. As petitioners have explained (at 11), the Executive adopted its scheme to evade the APA's notice-and-comment procedures for rescinding the Rule. And the Court recognized the need to address the legality of this scheme by explicitly preserving petitioners' ability to

seek intervention in the district court and certiorari here, *Texas*, 141 S. Ct. at 2562, and by granting certiorari on fundamentally the same issue, *Arizona*, 142 S. Ct. at 1928 (Roberts, C.J., concurring). *Arizona* was ultimately dismissed, but for reasons not implicated by this petition. *See* Pet. 16-19.

Nonetheless, respondents suggest that certiorari is inappropriate because petitioners' arguments are "fact-bound objections" unworthy of review. Fed.BIO 19; *see also* ICIRR.BIO 11. Federal respondents also insist (at 19) that the "circumstances of this case" were "particular" and "highly unusual." But that statement only highlights why intervention should have been allowed, Pet. 11-13—and therefore why further review is warranted. Moreover, because "[t]imeliness is to be determined from all the circumstances," *NAACP v. New York*, 413 U.S. 345, 366 (1973), timeliness inquiries necessarily turn on facts. That has not prevented this Court from reviewing timeliness determinations before. *See, e.g.*, *Cameron v. EMW Women's Surgical Ctr.*, 142 S. Ct. 1002, 1012-13 (2022). And it presents no barrier here, especially because the facts are undisputed.

To the contrary, further review is needed now because, if the Court condones them, the tactics used here will be used again, raising the same fundamental question regarding the rule of law. This eventuality is hardly "academic." ICIRR.BIO 18. Indeed, even respondents concede that regulatory changes following a transition in presidential administrations are commonplace. Fed.BIO 21; ICIRR.BIO 17. And just this month, the Executive attempted to replicate its tactic to do away with a disfavored COVID-related Title 42 regulation, *see Huisha-Huisha v. Mayorkas*, No. 21-cv-100, 2022 WL 16948610, at *16 (D.D.C. Nov. 15, 2022), after a different court

invalidated an effort to do away with the same regulation under the APA, *Louisiana v. CDC*, No. 22-cv-885, 2022 WL 1604901, at *21-23 (W.D. La. May 20, 2022).

If the Executive may lawfully proceed in this manner, no future administration will suffer the APA's process for rescinding a disfavored rule. Thus, any party whose interests that rule serves will need to bring a protective intervention motion lest they be found to have slept on their rights. That outcome serves neither the efficient operation of the federal courts nor the orderly transition of federal power.

B. There is no vehicle complication—jurisdictional or otherwise—that prevents this Court from reaching the questions presented here.

1. As an initial matter, the new public-charge regulation cannot presently render this case moot, as it will not even take effect *at the earliest* until late December 2022. *Public Charge Ground of Inadmissibility*, 87 Fed. Reg. 55,472, 55,472 (Sept. 9, 2022). And it is far from clear that it will take effect then: as federal respondents acknowledge, the new regulation may be "subject to challenge," which "might succeed." Fed.BIO at 14. Indeed, the new regulation may *never* take effect; the APA permits a district court to delay a rule's effective date pending further review. 5 U.S.C. § 705.

2. In any event, there is a live controversy over whether the Executive's novel rescission strategy complies with the APA because the validity of DHS's new rule depends in part on whether the prior Rule was properly rescinded. Pet. 18-19.

The 2022 Rule could be written on a blank slate only because respondents acceded to the district court's judgment and dismissed all of their appeals in a coordinated fashion. Had the 2019 Rule remained intact, DHS would

have, at a minimum, had to reasonably explain why it had changed positions on a variety of factual and legal issues. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-15 (2009)); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 4344 (1983). Given the extensive findings included in the 2019 Rule, DHS's ability to simply ignore that the Rule ever existed placed the agency in a more favorable posture for rescission, without the need to "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221-22 (2016) (quoting *Fox*, 556 U.S. at 515).

The Rule's recission thus did not require DHS to "display awareness that it *is* changing position," "show that there are good reasons for the new policy," or "take[] into account" any "serious reliance interests." *Fox*, 556 U.S. at 515. Instead, the explanation given for rescinding the Rule was that a judgment required DHS to do so. 86 Fed. Reg. at 14221. If that judgment is reopened, DHS's failure to comply with the APA regarding the 2019 Rule will lack a legal basis. *SEC v. Chenery Corp.*, 332 U.S. 194, 201 (1947). So will DHS's failure to grapple with the 2019 Rule and the agency's shifting factual and legal positions.

Moreover, if the replacement rule were successfully challenged, there would still be a live controversy over what version of the Rule was in effect. Pet. 18-19. A "case 'becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). Respondents do not deny that a court could require DHS to "return to the 2019 Rule." Fed.BIO 16. Whether a court would do so speaks to the merits, not mootness. *Id.* At a minimum, this case "remains justiciable," *West Virginia*

v. EPA, 142 S. Ct. 2587, 2607 (2022), based on that possibility.

3. Federal respondents nonetheless make two arguments about why the case is moot. Neither has merit.

First, federal respondents argue (at 13) that a challenge to a regulation becomes moot whenever a "regulation no longer exists" due to promulgation of a replacement regulation, *Akiachak Native Cmty. v. USDOI*, 827 F.3d 100, 106 (D.C. Cir. 2016). But this rule applies to the "voluntary repeal of a regulation" due to policy changes. *Id.* at 106. That is not what happened here. Unlike in *Akiachak*, where the federal government insisted that "the district court's judgment is not the basis for the Department's decision to eliminate" the challenged provisions, *id.* at 112 (cleaned up), here, DHS justified its rescission based on the district court's vacatur, 86 Fed. Reg. at 14,221.

Second, federal respondents suggest (at 15) that DHS's new rule is justified by a "different policy" that "did not depend on the district court's vacatur of the 2019 Rule." This is contrary to what DHS said, *see* 86 Fed. Reg. at 14,221, and federal respondents are not free to make up new administrative-law justifications after the fact. *Chenery Corp.*, 332 U.S. at 201. Under ordinary principles of administrative law, federal respondents' litigation assertion here is irrelevant to whether DHS in fact had a "blank slate." *Fox*, 556 U.S. at 515.

This latest justification for the 2022 Rule also contradicts federal respondents' assertions to this Court in *Arizona* that interested parties like petitioners likely had no APA claim against the 2019 Rule's rescission because "the rescission of the [R]ule was justified" when the district court's "vacatur had become final." Tr. at 74:18-75:8. Indeed, when asked by the Chief Justice if "there's

nothing that an affected state could do in [the Executive's] view" to challenge its regulation-by-capitulation strategy, counsel for the United States answered that he "d[id]n't think so." *Id.* at 66:12-13, 21.

4. Even if the federal government's scheme somehow rendered this dispute no longer live, the appropriate remedy would be equitable vacatur, not denial of the petition. Pet. 33. Respondents do not dispute that, when the district court's judgment became final, the case between the parties lacked the fundamental Article III requirement of adverse litigants. *Id.* Nothing here forecloses the exercise of federal courts' "equity power," *Freeman v. Pitts*, 503 U.S. 467, 487 (1992), including equitable vacatur under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). As *Munsingwear* illustrates, challengers ought not be forced to acquiesce in a judgment when a regulatory change moots a case pending appeal. *Id.* at 37.

Respondents argue that equitable vacatur is unavailable, analogizing this case to the turnover in officials comprising a state legislature. Fed.BIO 18; ICIRR.BIO 20-21 (citing *Karcher v. May*, 484 U.S. 72, 75-83 (1987)). But *Karcher* is inapposite. Equitable vacatur failed in *Karcher* because it was not a party change that mooted the case; rather, "[t]he controversy ended when the losing party—the New Jersey Legislature—declined to pursue its appeal." 484 U.S. at 83. Here, by contrast, if this case became moot, it was because of the Executive's "tactic of 'rulemaking-by-collective-acquiescence,'" where defendants did not merely decline to appeal. *Arizona*, 142 S. Ct. at 1928 (Roberts, C.J., concurring). Rather, the new presidential administration did so only after colluding with aligned parties to obtain a "now-consent judgment" vacating the Rule, then "immediately repeal[ing]" the Rule without notice and comment, and

then "successfully oppos[ing] efforts" by petitioners to intervene to defend the Rule. *Id.* Indeed, this argument against equitable vacatur only underscores the importance of the question presented here regarding the interaction between respondents' maneuvers and their APA obligations. Pet. 33. But, at minimum, those maneuvers justify equitable vacatur.

C. Like their claims of mootness, the five additional putative vehicle problems respondents identify pose no obstacle to this Court's review.

1. Federal respondents recite (at 29) the vehicle problems addressed by the Chief Justice in his *Arizona* concurrence. Petitioners, however, have already addressed each of those issues and explained why they present no obstacle to further review here. *See* Pet. 16-20. Respondents do not directly refute these arguments.

2. Respondents contend that the promulgation of the 2022 Rule makes this case a poor vehicle for review of the underlying intervention question. Fed.BIO 29-30; ICIRR.BIO 17-18. But this merely restates respondents' erroneous mootness argument refuted above. It is no more meritorious the second time around.

3. Federal respondents assert (at 30) that the appropriate vehicle for petitioners' APA arguments would have been an APA challenge to the March 2021 rescission of the 2019 Rule, not a motion to intervene. But that ignores (as federal respondents' own counsel conceded, *supra* pp. 8-9) that such a challenge would have been foreclosed by the Illinois district court's judgment. And, even if it were not, the injunction would have remained in place, preventing enforcement of the 2019 Rule. Thus, the States could not have vindicated their interests in the enforcement of the 2019 Rule through collateral proceedings.

4. Federal respondents assert (at 30-31) that the government need not appeal every adverse ruling and that DHS simply decided here to focus its resources on promulgating a new rule that it found more congenial. But that is an argument on the merits, not a vehicle problem. *See* Brief for Federal Respondents 37-38, *Arizona v. City & County for San Francisco*, 142 S. Ct. 1926 (U.S. Jan. 12, 2022) (No. 20-1775) (raising the same argument on the merits). It also ignores that federal respondents previously represented to this Court that their course of action here was unprecedented, Tr. at 73:22-23, and that DHS rescinded the Rule because of the district court's vacatur, 86 Fed. Reg. 14,221, not because DHS found it insalubrious, *supra* p. 8. That the government may decline to pursue an appeal in the mine-run case says little about whether it may pursue the unprecedented strategy deployed here.

5. Finally, federal respondents make the related objection (at 31-32) that allowing intervention would displace the U.S. Solicitor General's judgment as to whether the federal government should pursue an appeal. But as petitioners explained, there are well understood routes for the U.S. Solicitor General to exercise that judgment: abate ongoing litigation to allow repeal of a disfavored rule, Pet. 11-12, or allow interested parties to intervene under Federal Rule of Civil Procedure 24, *id.* at 28-29. That interested parties may take advantage of the latter option does nothing to displace the U.S. Solicitor General's judgment whether the federal government should continue to litigate its own appeal.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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