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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 20-1775, Arizona versus San Francisco.

General Brnovich.

ORAL ARGUMENT OF GEN. MARK BRNOVICH

ON BEHALF OF THE PETITIONERS

MR. BRNOVICH: Mr. Chief Justice, and may it please the Court:

The Ninth Circuit's refusal to let Arizona and other states intervene to defend the public charge rule capped an unprecedented effort by the United States to unlawfully disregard a prior administration's rule.

The Department of Justice had spent more than a year successfully fighting the rule's challengers in four different circuits. Every injunction against the rule had been stayed, and this very Court had granted certiorari.

But the new Biden Administration suddenly abandoned its defense of the rule. It coordinated with the rule's challengers and dismissed the granted petition by this Court,

1 all of the pending appeals in the lower courts
2 as well, and it left one final nationwide
3 injunction against the rule in place. Based
4 only on that, the Biden Administration rescinded
5 the rule without notice-and-comment rulemaking.

6 Days -- within days of these legal
7 maneuvers, Arizona and other states tried to
8 intervene in every district -- or every circuit
9 court to defend the rule. In the case below,
10 the Ninth Circuit denied intervention without
11 any reasoning.

12 That was error. The Petitioners had
13 satisfied all four requirements for intervention
14 as a matter of right and easily cleared the bar
15 for permissive intervention. Arizona has a
16 protectable interest because the rule saved the
17 states collectively more than a billion dollars
18 per year. This case could impair those
19 interests because a decision against the rule
20 would reimpose those costs on the states.

21 Fixing this error not just for Arizona
22 but also to ensure this case does not become a
23 blueprint for evading the APA in the future, the
24 public charge rule was enacted through
25 notice-and-comment rulemaking, so, therefore,

1 notice-and-rule comma -- comment -- comment
2 rulemaking is required to rescind or replace it.

3 Making clear the states can intervene
4 in these circumstances is not only the way to
5 ensure -- is the only way to ensure future
6 administrations follow the APA.

7 I look forward to your questions.

8 JUSTICE THOMAS: Would you explain why
9 you have standing to challenge the Ninth
10 Circuit's preliminary injunction in this case?

11 MR. BRNOVICH: Well, Your Honor, the
12 states, even by -- the Department of Justice's
13 own brief acknowledges that the states are
14 impacted fiscally for -- by way of more than a
15 billion dollars.

16 But, furthermore, we know that in the
17 -- in future APA cases, the states have an
18 interest in being -- in ensuring that we have
19 the ability to comment on future rules and
20 proposed rules and not reward behavior in this
21 type of case. So our input really --

22 JUSTICE THOMAS: But did you comment
23 on the -- this rule or on the replacement rule?

24 MR. BRNOVICH: Your Honor, the
25 Department of Justice had just announced a new

1 proposed rule, and, ironically, even in that
2 proposal, they noted that the states would be
3 affected by more than a billion and a half
4 dollars.

5 We have commented on previous rules.
6 We do believe the -- the primary issue here goes
7 back to whether the states timely moved to
8 intervene, which we did, whether there is an
9 interest, which there is. Even the Respondent
10 states recognize that all of us have an
11 interest, and that interest is there.

12 JUSTICE THOMAS: But one final
13 question then. What makes this case different
14 from any other case? I mean, when
15 administrations change -- I think this is my
16 fifth administration change. And they got --
17 the -- the new administration often changes its
18 position in cases. So what's different from
19 this case in which the administration declines
20 to appeal an adverse ruling?

21 MR. BRNOVICH: Justice Thomas, this
22 was an unprecedented legal maneuver. What the
23 Department of Justice did here when the
24 administration changed is literally not only
25 dropped an appeal when this very Court had

1 granted certiorari but then simultaneously
2 dismissed four other appeals in the circuit
3 courts, that were pending before the circuit
4 courts, left in place one judgment in the
5 Northern District of Illinois, and then used
6 that district court decision to rescind a rule
7 without going through the proper notice and rule
8 comment -- commenting.

9 And so it is really unprecedented.
10 Frankly, I'm not aware of any other precedent
11 where you have this types of maneuvers.

12 JUSTICE SOTOMAYOR: Counsel --

13 MR. BRNOVICH: In fact, just last
14 year, if my recollection is correct -- correct,
15 there was a pending criminal case where the new
16 administration felt like they couldn't defend
17 that case in good faith before this Court, and
18 this Court allowed another party to represent
19 those interests. And if I recall, it was a 9-0
20 decision that ultimately the -- they prevailed.

21 So the key is -- is that the
22 administration not only changed, but it refused
23 and opposed the states intervening to protect
24 our interests.

25 JUSTICE SOTOMAYOR: Counsel --

1 CHIEF JUSTICE ROBERTS: How would you

2 --

3 JUSTICE SOTOMAYOR: -- I'm not sure
4 what your interest is.

5 First of all, the preliminary
6 injunction didn't run against you, correct? So,
7 as far as you were concerned, outside of the
8 Seventh Circuit's injunction, there was no
9 preliminary injunction against enforcement of
10 the rule in your jurisdiction, correct?

11 MR. BRNOVICH: Justice, we know that
12 the states -- during the 2019 rulemaking
13 process, there literally is an impact of
14 billions of dollars --

15 JUSTICE SOTOMAYOR: Counsel --

16 MR. BRNOVICH: -- to the states.

17 JUSTICE SOTOMAYOR: -- I agree. But
18 the injunction here was a plenary injunction,
19 not a decision on the merits, correct?

20 MR. BRNOVICH: That is correct.

21 JUSTICE SOTOMAYOR: So, if it's not a
22 decision on the merits, it's a preliminary
23 injunction that ran against other states. As
24 far as this injunction's jurisdictional scope,
25 it didn't bar the enforcement of the rule in

1 your state, correct?

2 MR. BRNOVICH: Justice, the
3 injunctions are --

4 JUSTICE SOTOMAYOR: Just answer that
5 yes or no. The injunction ran against other
6 states, correct?

7 MR. BRNOVICH: That is technically
8 correct, yes.

9 JUSTICE SOTOMAYOR: Technically and --

10 MR. BRNOVICH: Yes.

11 JUSTICE SOTOMAYOR: -- and otherwise.
12 It didn't bar the administration from enforcing
13 the rule in your state? This preliminary
14 injunction in the Ninth Circuit was -- did not
15 run against you, correct, or in your favor?

16 MR. BRNOVICH: Well, Justice
17 Sotomayor, they're preliminary now, but the
18 point is they could become permanent at some
19 point and the state --

20 JUSTICE SOTOMAYOR: How can they
21 become permanent when --

22 MR. BRNOVICH: Because you'd have --

23 JUSTICE SOTOMAYOR: -- it's -- the
24 preliminary injunction has been vacated,
25 correct?

1 MR. BRNOVICH: That is correct.

2 JUSTICE SOTOMAYOR: So there is no
3 injunction in place. The only thing that can
4 happen is if the rule is resuscitated, correct?
5 If the rule remains not in place or a new rule
6 comes in, correct?

7 MR. BRNOVICH: That is correct, but --
8 however, the --

9 JUSTICE SOTOMAYOR: So now let's go to
10 when they vacated the rule. Didn't you have the
11 right to file an APA action in the appropriate
12 D.C. court --

13 MR. BRNOVICH: Justice --

14 JUSTICE SOTOMAYOR: -- fighting the
15 fact that they had improperly rescinded the
16 rule?

17 MR. BRNOVICH: The -- if we look at
18 the timeline, Justice --

19 JUSTICE SOTOMAYOR: Just answer yes or
20 no. Did you have --

21 MR. BRNOVICH: Well, we were --

22 JUSTICE SOTOMAYOR: -- a legal
23 opportunity -- I don't remember what the statute
24 of limitations is, but I thought, when a rule
25 has been rescinded, you have a certain number of

1 days to challenge that, don't you?

2 MR. BRNOVICH: That is correct.

3 JUSTICE SOTOMAYOR: And the
4 jurisdiction for that is not in the Ninth
5 Circuit, correct?

6 MR. BRNOVICH: The -- the --

7 JUSTICE SOTOMAYOR: The jurisdiction
8 for that APA action is not in the Ninth Circuit?

9 MR. BRNOVICH: But there was pending
10 cases in the Ninth Circuit. There was --

11 JUSTICE SOTOMAYOR: Well, what does
12 that --

13 MR. BRNOVICH: -- pending cases in the
14 Seventh Circuit --

15 JUSTICE SOTOMAYOR: -- have to do with
16 --

17 MR. BRNOVICH: -- in the Fourth
18 Circuit, in the Second Circuit.

19 JUSTICE SOTOMAYOR: -- the rescission
20 of the rule? The legal harm to you is that a
21 rule that you think favors you was illegally
22 rescinded. You had another jurisdiction to
23 fight that illegal rescission, didn't you?

24 MR. BRNOVICH: On March 9th, the
25 administration --

1 JUSTICE SOTOMAYOR: Just answer the
2 question, counsel.

3 MR. BRNOVICH: -- within a day -- we
4 did -- we are. We're trying to -- we think the
5 proper vehicle --

6 JUSTICE SOTOMAYOR: You're trying to
7 do all of that, but I don't know how that issue
8 will be litigated in the Ninth Circuit.

9 MR. BRNOVICH: Because the rule is
10 being -- was being litigated in not only the
11 Ninth Circuit, in other circuits, and that's why
12 the states have an interest in -- in --

13 JUSTICE SOTOMAYOR: The issue of
14 whether the rule was illegally rescinded will
15 not be litigated in the Ninth Circuit, correct?

16 MR. BRNOVICH: It is necessary for us
17 to intervene in the Ninth Circuit, but does --
18 it doesn't mean that it's sufficient for the
19 process to be complete.

20 JUSTICE BARRETT: Can I --

21 CHIEF JUSTICE ROBERTS: Counsel, the
22 rule was rescinded on the basis of -- I don't
23 know how many sentences it was -- on the basis
24 of a judicial decision in another court, right?

25 MR. BRNOVICH: Yes, Justice Roberts.

1 CHIEF JUSTICE ROBERTS: So is the rule
2 --

3 MR. BRNOVICH: Chief Justice.

4 CHIEF JUSTICE ROBERTS: -- that you
5 can challenge the decision in the other circuit
6 as a basis for challenging the rescission of the
7 rule, or do you go back to the district court in
8 D.C. and in the D.C. Court of Appeals or
9 district court, whichever it is, you argue that
10 the judgment in the district court in Illinois
11 was erroneous, or do you go straight to the one
12 in Illinois?

13 MR. BRNOVICH: Justice Roberts, I -- I
14 believe the -- the proper approach is to allow
15 the states to intervene not only in the Ninth
16 Circuit, but, once this Court allows the states
17 to do that, I would fully anticipate that the
18 states then would intervene in the other
19 circuits, including trying to get the decision
20 overturned by the Seventh Circuit and the
21 Northern District of Illinois.

22 And, once again, it was unprecedented,
23 the legal maneuvering by the Department of
24 Justice, when you have all of these different
25 appeals going --

1 JUSTICE KAGAN: Well --

2 MR. BRNOVICH: -- through the process.
3 So it's important for the states --

4 JUSTICE BREYER: Everybody has the
5 same question, I think. The -- the -- my
6 understanding was -- I'd probably put the same
7 question in just a slightly different way --
8 there are some orders of some district courts in
9 California and in Washington, and those were the
10 orders that went to the Ninth Circuit.

11 Now my last -- well, I'm a little out
12 of date and I've seen how Los Angeles has
13 spread, but I don't think it's yet spread to
14 Arizona. And so there's nothing around that --
15 that actually says anybody has to do anything in
16 Arizona. In this case, it's -- it's in the --
17 it's in the Seventh Circuit case that you have a
18 problem, so I -- I don't see why -- why --
19 because they have a nationwide injunction.

20 So you -- you might say: Look, what
21 we want to do is we want to say that the
22 solicitor general of the former administration
23 was right, that the cases are wrong, and we're
24 going to go to the Supreme Court or we're going
25 to ask for rehearing.

1 But, if you win, you -- you've got
2 something set aside that applies only to
3 California, Eastern District of Washington.
4 Never applied to you in the first place.

5 So what we should do is wait for this
6 thing to come out of the Seventh Circuit, where
7 -- where there really is something that affects
8 you or at least could. So, see, everybody is in
9 the same box here. And I read pretty carefully
10 what you said. I have to admit I maybe didn't
11 read it carefully enough because I didn't quite
12 see how you get out of that box.

13 MR. BRNOVICH: Yeah. Justice Breyer,
14 I think we all agree that we don't want the
15 problems of Los Angeles spreading to the rest of
16 the country, so I think we can be in agreement
17 on that.

18 But, by its very nature, immigration
19 doesn't -- and this Court has recognized that --
20 it doesn't stay in one state. So what happens
21 in California once someone has that status, that
22 does then affect Arizona and the benefits and
23 those programs, those social welfare programs
24 and those safety net programs.

25 So it -- it's not something that's

1 confined to the State of California. And,
2 furthermore, we would anticipate why it's
3 important for this Court to allow the states,
4 the Petitioner states, to intervene as a matter
5 of right is because then it creates the ability
6 to not only intervene in the Ninth Circuit but
7 to intervene in the Seventh Circuit and in the
8 Fourth.

9 JUSTICE BREYER: So, yeah, I got the
10 point. Your point basically is, look, it's
11 really actually not Los Angeles, it's San
12 Francisco, we know that.

13 MR. BRNOVICH: Yes, Justice.

14 JUSTICE BREYER: So you're saying that
15 some of the immigrants under this thing affected
16 come to San Francisco and they would go to
17 Arizona. Now I'm from San Francisco, and I
18 don't know why anyone would leave San Francisco.

19 (Laughter.)

20 JUSTICE BREYER: But is there anything
21 in the record or anywhere else that gives us any
22 kind of idea that there were some people
23 affected by this or a lot or many that really
24 did go to Arizona?

25 MR. BRNOVICH: Justice Breyer, because

1 of the litigation and the lawsuits and the
2 injunctions, the rule didn't have a lot of time
3 to -- to be into place. And so we do know that
4 historically, in immigration-related cases,
5 including the Fifth Circuit in the DAPA case,
6 that courts have recognized that what goes on in
7 one state related to immigration affects other
8 states.

9 And all the State of Arizona is asking
10 here, we know this Court has said that states
11 can enforce, you know, immigration laws, so
12 we're at least allowing -- allow the states to
13 step in and defend a federal law when the
14 federal government won't.

15 JUSTICE BARRETT: Well, General --
16 General Brnovich, let me ask you about that. So
17 what do you propose that the federal government
18 should have done here? Because one
19 administration is not obliged to defend the rule
20 adopted by the prior administration.

21 The Biden Administration was entitled
22 to change positions, right? So, once the Biden
23 Administration changed positions, what do you
24 think the Biden Administration should have done
25 to effectuate that?

1 MR. BRNOVICH: Well, they could have
2 done, once this Court accepted certiorari,
3 continued to defend the rule. And if they
4 didn't want --

5 JUSTICE BARRETT: But that didn't --
6 let's posit they don't have to. So --

7 MR. BRNOVICH: Well, then --

8 JUSTICE BARRETT: -- what -- what
9 should they do?

10 MR. BRNOVICH: -- then they should not
11 have objected and they should have allowed the
12 states to step in and defend the rule when they
13 wouldn't.

14 CHIEF JUSTICE ROBERTS: I thought your
15 position was that they should have gone through
16 notice-and-comment rulemaking to repeal the
17 public charge rule, which is, for example, what
18 this Court said that the prior administration
19 had to do in the DACA case.

20 MR. BRNOVICH: Absolutely, Justice
21 Roberts --

22 JUSTICE KAGAN: Well, if that's your
23 position -- and I --

24 MR. BRNOVICH: -- Chief Justice.

25 JUSTICE KAGAN: -- I think that's a,

1 you know, very reasonable position, that -- that
2 the government here acted in a way that you
3 would not typically expect or want and that it
4 counts as an evasion of notice-and-comment.

5 But -- but, if it's an evasion of
6 notice-and-comment, I mean, you bring an APA
7 suit. It's an evasion of -- it's -- it's a
8 violation of the APA. That's the proper remedy.

9 I mean, there's a kind of mismatch
10 here between what you're saying went wrong and
11 what you're saying you want. If -- if it's an
12 evasion of notice-and-comment, bring an APA suit
13 saying it's an evasion of notice-and-comment
14 rather than, like, trying to intervene in a suit
15 that's completely dead that never applied to you
16 in the first place?

17 MR. BRNOVICH: Justice, part of the --
18 the problem is is that you have this Northern
19 District of Illinois decision that's out there
20 that the -- the administration used as their
21 basis to repeal the rule, and that ends up with
22 the rule being repealed. That essentially will
23 serve as a baseline for a future rulemaking.

24 And if, for example, there is a
25 lawsuit against the new proposed rule, the 2022

1 rule, then what will the states or what will the
2 government go back to? And so it is
3 important -- the states have that interest not
4 only to intervene because of the financial costs
5 but more broadly speaking, is we do want the
6 administration to follow the Administrative
7 Procedures Act and go through the proper --

8 JUSTICE BARRETT: Well --

9 MR. BRNOVICH: -- notice and rule --

10 JUSTICE BARRETT: -- are you saying
11 then that there would be no -- the APA could
12 some -- I mean, sorry, the administration could
13 say our hands are tied because there's this
14 vacatur of the rule --

15 MR. BRNOVICH: Yes.

16 JUSTICE BARRETT: -- that the district
17 court in the Northern District of Illinois
18 entered, so you really couldn't bring an APA
19 action? Is that your position?

20 MR. BRNOVICH: Justice, that is our --
21 that is part of the concern of the states, is
22 that the administration would use that decision
23 as the basis to say that the rule is no longer
24 in place and -- yes.

25 JUSTICE KAGAN: Well, but, I mean, I

1 think a court would be, you know, quite within
2 its rights to say something along the lines of
3 what you started with if the government said
4 that to them. It's like you -- you can't use
5 some decision out of the Northern District of
6 Illinois to circumvent notice-and-comment.
7 Wrong. You can't do that.

8 And -- and you would -- and they would
9 have said this is unprecedented. Of course,
10 governments decide not to defend rules all the
11 time when administrations change. That's not
12 problematic. But this other thing, which is
13 like dismissing everything except one suit in
14 order to say, you know, well, now we -- we get
15 rid of the rule without doing
16 notice-and-comment, that's a different thing.

17 And a court in an APA suit could say
18 exactly that. I mean, that's the -- that's the
19 mechanism for a violation of the APA, is an APA
20 suit.

21 MR. BRNOVICH: Yes, Justice Kagan, but
22 part of the concern is is that you would have
23 inconsistent results with different courts
24 making different decisions, and it would create
25 chaos and uncertainty in the law --

1 CHIEF JUSTICE ROBERTS: What would the

2 --

3 JUSTICE BARRETT: Why didn't it apply

4 --

5 CHIEF JUSTICE ROBERTS: -- what would
6 the --

7 MR. BRNOVICH: -- and I hope the
8 courts --

9 CHIEF JUSTICE ROBERTS: -- what would
10 the APA proceeding look like? You've got a -- a
11 repeal that has one sentence which is saying
12 that the Illinois court says this is no good, we
13 -- you know, we acquiesce in that. We don't
14 want to waste people's time. And so that's why
15 we're repealing this.

16 Now would the -- if you bring an APA
17 suit challenging the repeal, I guess in the
18 District of Columbia, would the District of
19 Columbia court then review the Illinois court
20 order and say, well, we don't think that's right
21 and so you can't repeal it? Or would they say
22 we think that is right, so you can repeal it?

23 MR. BRNOVICH: Well, Chief Justice,
24 I -- I'm not sure what the courts would do. I
25 learned a long time ago as a young prosecutor

1 not to predict what any judge, especially a
2 federal judge, is going to do.

3 But I do think that there is a
4 legitimate concern, is that you might have some
5 federal judge somewhere saying, well, this
6 decision's out there and they use that as a
7 basis to essentially say that -- that the rule
8 is unconstitutional without allowing the states
9 to get -- to come in and essentially defend the
10 rule.

11 JUSTICE SOTOMAYOR: Counsel --

12 JUSTICE BARRETT: So you didn't try
13 because of that judgment, the predictive
14 judgment that you might lose?

15 MR. BRNOVICH: No. It was -- Justice
16 Barrett, it was more -- more of a matter of
17 timing. Literally, on March 9th, when the
18 administration took the unprecedented step of
19 simultaneously dismissing all of the various
20 appeals and then agreeing that, you know, the
21 decision out of Illinois --

22 JUSTICE BARRETT: No, no, no, and I
23 understand why as a matter of timing you moved
24 to intervene when you did in the Ninth Circuit.
25 I'm just saying, like, you know, to Justice

1 Kagan's point, you haven't then pursued this APA
2 challenge that you could have filed in the
3 District of Columbia, and is that because you
4 think you would lose, that you said, you know,
5 it's hard to predict what a federal judge would
6 do?

7 MR. BRNOVICH: It is. We know,
8 though, that there is -- the four lawsuits are
9 going through the -- the circuit courts, and we
10 think that's the proper vehicle at this point.

11 JUSTICE SOTOMAYOR: Counsel, I'm --

12 JUSTICE ALITO: Well, in the case in
13 the --

14 JUSTICE SOTOMAYOR: -- I'm so totally
15 confused about why this suit is here and not
16 either an APA suit or simply the Seventh Circuit
17 suit.

18 If you go back and you -- we -- we
19 permit you to intervene, we say you should have
20 intervened, can you proceed with the Ninth
21 Circuit case in light of the Seventh Circuit
22 injunction?

23 MR. BRNOVICH: Well, Justice
24 Sotomayor, our -- our intention or our plan
25 would be to ask for an en banc review of the

1 entire panel of the Ninth Circuit. And if that
2 didn't work --

3 JUSTICE SOTOMAYOR: But they've
4 already vacated the preliminary injunction, so
5 there's nothing for them to review. So the en
6 banc -- there is no injunction from the Ninth
7 Circuit. There's no injunction against you.
8 There's no injunction against the three states
9 and California that are at issue because that
10 was vacated as a result of the dismissal of this
11 action. So I don't know how you can proceed
12 until the Seventh Circuit injunction is lifted.

13 MR. BRNOVICH: Justice, we -- we have
14 also moved to intervene in the Seventh Circuit.
15 This is the case time-wise --

16 JUSTICE SOTOMAYOR: No, no, no, but
17 until you get that --

18 MR. BRNOVICH: -- that the Court
19 accepted.

20 JUSTICE SOTOMAYOR: -- until you get
21 that -- until you get that lifted and until you
22 get the rescission of the rule lifted, something
23 that can't be done by the Ninth Circuit, there's
24 nothing further you could do in any other
25 circuit.

1 MR. BRNOVICH: Justice Sotomayor, we
2 -- we could -- if we are allowed to intervene
3 not only in the Ninth Circuit, we would
4 intervene and -- and move to vacate the judgment
5 from the Northern District of Illinois.

6 JUSTICE SOTOMAYOR: It's already --
7 but --

8 MR. BRNOVICH: But my --

9 JUSTICE SOTOMAYOR: -- you're
10 suggesting the Ninth Circuit could vacate the
11 Seventh Circuit's judgment?

12 MR. BRNOVICH: No, I didn't suggest
13 that, Your Honor. What I --

14 JUSTICE SOTOMAYOR: So you just said
15 to me --

16 MR. BRNOVICH: -- what I'm suggesting,
17 though, it's the --

18 JUSTICE SOTOMAYOR: -- you would --
19 you would say I would use what happened in the
20 Ninth Circuit so that I can get into the Seventh
21 Circuit?

22 MR. BRNOVICH: Yes, Justice.

23 JUSTICE SOTOMAYOR: It's an
24 interesting proposition.

25 JUSTICE BREYER: Yeah, you have an

1 interesting point. I -- I -- I mean, I've never
2 seen anything like this. I think that your
3 suggestion, which is quite -- I don't know the
4 answer.

5 You say, look, they just withdrew this
6 rule. And they're saying they're just
7 acquiescing in a court decision, so, of course,
8 we have the power to acquiesce in the court
9 decision. And you say, but, wait a minute, if
10 they want to change the rule, they should go
11 through notice-and-comment. They say, we're
12 acquiescing.

13 So you're here because you say that
14 decision that they want to acquiesce in is
15 really wrong, and we want to intervene to make
16 sure that the Supreme Court or their court en --
17 you know, en banc or something says it's wrong,
18 because, if not, we're not going to have the
19 chance to say that they could go through
20 notice -- they should go through
21 notice-and-comment when they change the rule for
22 the reason that they're just acquiescing, and we
23 want there to be nothing to acquiesce in.

24 Now that is a -- now don't -- you're
25 just going to agree because it sounds if I'm

1 agreeing with you.

2 MR. BRNOVICH: Of course. Thank you.

3 JUSTICE BREYER: But you --

4 MR. BRNOVICH: Can I sit down now,
5 Justice?

6 (Laughter.)

7 JUSTICE BREYER: Yeah. Yeah, yeah.
8 Good. I know. I know. But just don't do that
9 because later on I'd think how wrong I was, you
10 see? So --

11 MR. BRNOVICH: Yeah. No, you're
12 absolutely right.

13 JUSTICE BREYER: Yeah. Okay. Now --

14 MR. BRNOVICH: I will assure you
15 you're right. Yes.

16 JUSTICE BREYER: -- now I -- but what
17 I wonder, looked at that way, I can't think of
18 anything I ever saw like that, and -- and I'll
19 be interested if the government has. And it --
20 it is sort of a point, and -- and -- and the
21 simplest thing would be to wait for the Seventh
22 Circuit. When is that going to -- when is that
23 going to happen?

24 MR. BRNOVICH: Well, the federal
25 government -- the government dismissed all of

1 those appeals, and so the only decision that's
2 final is that Northern District of Illinois
3 decision.

4 JUSTICE BREYER: No, no, no, no, but
5 you could intervene in the Seventh Circuit, you
6 see? And you have a much --

7 MR. BRNOVICH: Yeah.

8 JUSTICE BREYER: -- better argument
9 because you get rid of that point that it
10 doesn't apply to you because that one does apply
11 to you.

12 JUSTICE BARRETT: They moved to
13 intervene.

14 MR. BRNOVICH: Yeah, we did.

15 JUSTICE BARRETT: They moved to
16 intervene in that district.

17 JUSTICE BREYER: Yeah. So what
18 happened? What's happened?

19 MR. BRNOVICH: The government objected
20 to that. I mean, part of the whole theory of
21 this case is -- fundamentally is that do the
22 states have the ability to intervene in a case
23 when -- when the federal government won't defend
24 the law?

25 JUSTICE BREYER: Mm-hmm.

1 MR. BRNOVICH: And I've addressed that
2 already.

3 JUSTICE BREYER: All right. Yeah,
4 yeah, yeah, I understand that. But, I mean, I
5 asked you, what's happening in the Seventh
6 Circuit? Because it certainly would be a
7 simpler case if we just had that Seventh Circuit
8 case. What's happening?

9 MR. BRNOVICH: Well, the -- we -- we
10 have tried to intervene in that case, Justice
11 Breyer, and the case that this Court accepted
12 was the case out of the Ninth Circuit.

13 JUSTICE BREYER: I know that --

14 MR. BRNOVICH: But the theory -- the
15 theory --

16 JUSTICE BREYER: -- but I'm asking you
17 what's --

18 MR. BRNOVICH: -- the theory --

19 JUSTICE BREYER: -- happening in the
20 Seventh Circuit.

21 MR. BRNOVICH: -- the theory still
22 applies.

23 JUSTICE BREYER: Well, please. What
24 -- do you know what's going on in the Seventh
25 Circuit? I would like -- just like to know.

1 MR. BRNOVICH: There's the --

2 JUSTICE BREYER: You may not know.

3 That's all right.

4 MR. BRNOVICH: I do. There -- there
5 -- there -- there is briefing under way, and
6 those -- there is briefing under way, and those
7 issues are on appeal. But the question, once
8 again, is do the states have allowed to --

9 JUSTICE KAGAN: Sorry. Those issues
10 on appeal are which issues in the Seventh
11 Circuit now? The -- this exact issue?

12 MR. BRNOVICH: Yes.

13 CHIEF JUSTICE ROBERTS: And -- and you
14 moved to intervene in that case?

15 MR. BRNOVICH: Yes, Chief Justice.

16 CHIEF JUSTICE ROBERTS: And what
17 happened with that motion?

18 MR. BRNOVICH: Those motions, they're
19 still pending. This court just made it to the
20 -- the Court first.

21 JUSTICE BARRETT: I thought the
22 district court denied your motion to intervene
23 in the Northern District of Illinois and you're
24 -- it's on appeal in the Seventh Circuit.

25 MR. BRNOVICH: Justice Barrett, yes,

1 that is correct.

2 JUSTICE BARRETT: How important is the
3 APA to your argument? What if this were a
4 statute?

5 MR. BRNOVICH: Justice, I think that
6 it's important because there's not only the
7 financial interests the states have at stake,
8 but rule and comment -- the rule and notice
9 commenting rulemaking is something that's very
10 important. It allows the states to express
11 their interests and to -- you know, it's a
12 complicated, sometimes --

13 JUSTICE BARRETT: But let's imagine
14 the public charge rule were a statute and not an
15 APA rule, so you're not losing the ability to
16 participate in notice-and-comment, but you would
17 presumably be suffering the same downstream
18 economic effects that you say that you're
19 suffering here. So would you be here making the
20 same arguments?

21 MR. BRNOVICH: We would in
22 relationship to Rule 24 and whether the states
23 have a right to intervene. That's just part of
24 -- it's part of the interest the states have in
25 that interest being impaired.

1 JUSTICE BARRETT: So this isn't driven
2 entirely by your inability to participate in
3 notice-and-comment and the administration's
4 circumvention of notice-and-comment in your
5 view?

6 MR. BRNOVICH: Justice, not entirely,
7 but that is part of the states' reasoning, is
8 that there's not only a financial impact but
9 that it's important, that integrity of the
10 process, so, in the future, states have the
11 ability to provide notice-and-comment on
12 rulemaking so their interests are considered.

13 JUSTICE KAGAN: But -- but, when you
14 say "not entirely," just to follow up that
15 question, do you mean that even if the APA
16 weren't involved here, that you're trying to
17 vindicate the point that when the federal
18 government decides to change course, the states
19 have the ability to come in pretty much anywhere
20 they want and -- and step into the federal
21 government's shoes?

22 MR. BRNOVICH: Justice Kagan, I think
23 the analysis is really that Rule 24 analysis,
24 was it timely filed, is there an interest, is
25 that interest being impaired, and maybe most

1 importantly, that fourth prong of are those --
2 is there adequate representation in protecting
3 those interests.

4 JUSTICE KAGAN: Yeah, so I'm -- I'm --

5 MR. BRNOVICH: So I think it --

6 JUSTICE KAGAN: -- I'm -- I'm
7 hypothesizing a world in which the federal
8 government has dropped out, and so the states
9 can say, you know, if -- if not for us, there
10 will be nobody to defend the law, that -- that
11 you're saying even put aside any APA issues that
12 there might be, whether it's a statute or -- or
13 what have you, that -- that there is -- there is
14 -- that the -- the courts should understand the
15 intervention mechanism as a way for states to
16 take the place of a departing federal
17 government.

18 MR. BRNOVICH: Yes, Justice Kagan.
19 This very Court recognized in Massachusetts
20 versus EPA that states have a special
21 solicitude. We do have special interest -- or
22 there's interests even going back to the Cascade
23 versus El Paso Natural Gas case, that economic
24 interests within a state is something that, you
25 know, this Court can consider when it looks at

1 intervention as a matter of right.

2 And I think even the Respondent states
3 agree that, you know, there -- there's interests
4 here that we have and that states should be
5 allowed to intervene when the federal government
6 won't do its job.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Justice Thomas?

10 Justice Breyer?

11 Justice Alito?

12 Justice Sotomayor?

13 JUSTICE SOTOMAYOR: No.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?

16 Justice Kavanaugh?

17 JUSTICE KAVANAUGH: Yeah. When the --
18 when a court says that a rule is unlawful and
19 the government then acquiesces in that court
20 decision, is it the usual practice that the
21 government then has to go through
22 notice-and-comment to repeal what they've just
23 accomplished through acquiescence? Or is that
24 the issue that you're -- you're raising here
25 implicitly in this case? Because I'm not aware

1 of a practice of doing that. I'm not aware of a
2 practice of not doing that either.

3 MR. BRNOVICH: Yeah, Justice
4 Kavanaugh, this is unprecedented, so, in many
5 ways, this --

6 JUSTICE KAVANAUGH: Well, it's not --
7 let me just interrupt. You've used that word a
8 lot. It's very much not unprecedented, as
9 Justice Thomas says, for the government to
10 acquiesce in an adverse judgment invalidating a
11 rule. That is not unprecedented at all.

12 So what is unprecedented here?

13 MR. BRNOVICH: Well, Justice
14 Kavanaugh, what is unprecedented is that the
15 federal government didn't let the states come
16 in. They opposed our intervention and they
17 wouldn't let us defend a rule that they no
18 longer wanted to defend.

19 So I'm not -- we're not -- our
20 position to the states is not that the
21 administration has to defend a rule that it
22 doesn't like. We -- we believe that if -- if
23 they're not going to defend the rule, then the
24 states have an interest in defending the rule.

25 And if there's a future

1 administration, it's important because, you
2 know, California and Arizona could be on -- on
3 opposite sides in the future on this issue, but,
4 as a matter of right, we do believe the states
5 have a right to intervene.

6 And we do think that using a district
7 court decision to essentially then create a
8 baseline for what a future rule would be, I
9 think --

10 JUSTICE KAGAN: May -- may I?

11 MR. BRNOVICH: -- is -- it makes it
12 more difficult --

13 JUSTICE KAVANAUGH: Please.

14 MR. BRNOVICH: -- in the future to --

15 JUSTICE KAGAN: Is that all right?

16 JUSTICE KAVANAUGH: Yeah.

17 MR. BRNOVICH: It makes it more
18 difficult in the future to promulgate or if the
19 states --

20 JUSTICE KAGAN: I mean, under that --
21 under that theory, General, there would never be
22 an effective acquiescence by the federal
23 government. I mean, there's always some state
24 out there that wants -- that has a different
25 position from the federal government's when the

1 federal government acquiesces. Whoever the
2 federal government is, there's always going to
3 be a state that thinks it's done the wrong
4 thing.

5 You're essentially saying there shall
6 be no further federal government acquiescence in
7 court decisions.

8 MR. BRNOVICH: Justice, that -- that's
9 not the state -- what the state is saying. What
10 the state is saying is is that when the federal
11 government refuses to defend a law or tries to
12 undermine a rule, the states have special
13 certitude, and especially when you go through
14 that Rule 24 analysis, you know, is there an
15 interest? Is that interest being impaired? And
16 is it adequately being protected by the
17 representation?

18 So the courts would have to do that
19 analysis. But I -- but I do think it would
20 allow the states more opportunities to defend
21 rules when the federal government won't.

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh, anything further?

24 JUSTICE KAVANAUGH: No.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 JUSTICE BARRETT: One -- one question.
3 So I'm just trying to isolate the scope of your
4 argument, and I asked you before how important
5 the APA was to it. How important to your
6 argument is it that we already had granted cert
7 on this issue? Does that matter?

8 MR. BRNOVICH: Justice Barrett, I -- I
9 think it matters in the context of the
10 unprecedented nature of what the federal
11 government did in this case.

12 JUSTICE BARRETT: But it wouldn't
13 change your argument -- if -- if this had
14 happened and you had moved for intervention
15 before we had acted to grant cert, you would
16 still be making the same argument?

17 MR. BRNOVICH: I believe so, Justice.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Mr. Fletcher.

21 ORAL ARGUMENT OF BRIAN H. FLETCHER
22 ON BEHALF OF THE FEDERAL RESPONDENTS

23 MR. FLETCHER: Thank you, Mr. Chief
24 Justice, and may it please the Court:

25 The 2019 Public Charge Rule did not

1 regulate or confer any rights on the Petitioner
2 states. Instead, Petitioners assert an indirect
3 economic interest in the rule's downstream
4 consequences. Relying on predictions that were
5 made when the rule was drafted, they say that it
6 would cause DHS to deny adjustment of status to
7 people who would be more likely to use
8 state-funded public benefits at some point in
9 the future.

10 But we now know that those predictions
11 were wrong. During the year that the 2019 rule
12 was in effect, we know that it affected only
13 about five of the approximately 50,000
14 adjustment of status applications to which it
15 was applied or about 1-100th of 1 percent.

16 The states do not have a legally
17 protectable interest in preserving that
18 negligible indirect effect, and, even if it did,
19 they could not justify intervention in appeals
20 from preliminary injunctions that do not apply
21 in Petitioners' jurisdictions and that now have
22 no effect anywhere because the 2019 rule has
23 been vacated in a separate final judgment.

24 The court of appeals did not abuse its
25 discretion in declining to allow Petitioners to

1 prolong appeals that no longer have any
2 practical consequence.

3 And Petitioners' criticisms of the
4 government's litigation conduct do not call for
5 a different result. Congress made a policy
6 choice to vest in the Department of Justice the
7 decision whether to seek further review of
8 decisions against the United States.

9 This Court has emphasized that both
10 the government and the courts benefit from that
11 policy precisely because the solicitor general
12 takes a selective approach and often decides
13 against seeking further review, and as some of
14 the questions this morning have suggested, it's
15 not at all uncommon for the solicitor general to
16 make that decision when the decision in question
17 invalidated a regulation.

18 Here, DHS had decided to issue a new
19 Public Charge Rule. The ongoing litigation
20 would have complicated that rulemaking and
21 required intrusive discovery. The 2019 rule was
22 not producing its intended effects, and the
23 rule's unintended and unwanted effects were
24 aggravated in the public health crisis.

25 Now Petitioners disagree with the

1 government's decision to dismiss its appeals
2 when faced with those circumstances, but that
3 disagreement does not allow them to revive this
4 litigation that the government had decided was
5 not in the best interests of the United States.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: Mr. Fletcher, I think
8 Petitioner was doing a little bit more than
9 simply disagreeing with the acquiescence. From
10 my understanding, they were disagreeing with the
11 government's refusal to allow them to
12 participate or to intervene at the appellate
13 level in very -- in litigation that they thought
14 would affect them significantly.

15 So how do you -- rather than simply
16 focusing on the underlying issue, would you also
17 respond to the fact that they think that
18 intervention is a normal practice in these --
19 some of these cases at the end of
20 administrations?

21 I don't recall the government opposing
22 such interventions, so would you simply address
23 that a little bit?

24 MR. FLETCHER: Of -- of course,
25 Justice Thomas. So this is a point that they

1 made in the reply brief, and they pointed to two
2 examples where they say the government did not
3 oppose intervention in analogous circumstances.

4 Actually, in both of those cases, the
5 request for intervention came long before the
6 government had decided against seeking further
7 review, so those aren't analogous examples.

8 Candidly, Justice Thomas, I'm not
9 aware of a lot of cases where this has come up,
10 where parties have sought to come in after the
11 government decided to dismiss appeals. Here,
12 the government made its decision to oppose that
13 intervention because we don't think the
14 Petitioners satisfy the requirements for
15 intervention as of right, and we don't think
16 permissive intervention is appropriate either.

17 And that's -- that's really part and
18 parcel with the judgment that we don't think
19 continued litigation of these cases in the face
20 of ongoing notice-and-comment rulemaking is in
21 the government's interest or the public
22 interest.

23 JUSTICE ALITO: Mr. Fletcher, the way
24 you have briefed this case is rather strange
25 because there's -- you focus entirely on Federal

1 Rule of Civil Procedure 24, which has no
2 application to the courts of appeals, nor does
3 it have any application to us.

4 The rules for appellate intervention
5 and intervention before this Court have to be
6 judge-made rules if intervention is going to be
7 allowed at all. So there's no reason why the
8 courts of appeals or this Court should be tied
9 to the strict letter of Rule 24.

10 And, in fact, some of what Rule 24
11 says is very difficult to -- to -- to fit with
12 considerations for appellate litigation. So why
13 have you briefed the case this way?

14 MR. FLETCHER: Well, Justice Alito,
15 this Court said in Scofield that although Rule
16 24 doesn't strictly apply in the courts of
17 appeals, it's a distillation of traditional
18 principles of intervention, so it's a helpful
19 guide.

20 That's the way the parties briefed
21 things in the Ninth Circuit, and that's
22 principally the way that the states have tried
23 to justify their intervention, is that they meet
24 the standards of Rule 24. We don't think that
25 they do. And so we've met their arguments on

1 those terms.

2 I completely take the point that Rule
3 24 doesn't apply by its terms, that intervention
4 in the courts of appeals, which is what this is
5 about, is about sort of judge-made rules about
6 courts controlling their own docket.

7 I think, if that cuts in any direction
8 in this case, though, it sort of cuts further
9 against the Petitioner states because it
10 suggests that the Court is reviewing the Ninth
11 Circuit's exercise of its own judge-made
12 authority to decide whether or not to allow
13 intervention.

14 JUSTICE ALITO: Well, why is that so?
15 If we step back and refuse to let the trees
16 obscure our view of the forest, we can take into
17 account everything that happened in this
18 situation, which seems to be quite unique.

19 I -- I congratulate whoever it is in
20 the Justice Department or the executive branch
21 who devised this strategy and was able to
22 implement it with military precision to effect
23 the removal of the issue from our docket and to
24 sidestep notice-and-comment rulemaking, but all
25 of that took place. I'm not aware of a

1 precedent where an incoming administration has
2 done anything quite like this.

3 And this was an issue that we had
4 agreed to hear before. So, if we step back and
5 recognize that we're not tied to the minutiae of
6 Rule 24, why shouldn't intervention be allowed?
7 It doesn't mean you're going to lose. It
8 doesn't mean that the old rule is sound or that
9 it's going to be entered -- that it's -- it's
10 going to be resuscitated.

11 Why shouldn't intervention be allowed?
12 Why would it be inequitable to allow
13 intervention, or, to put it the other way, why
14 doesn't equity argue in favor of allowing
15 intervention?

16 MR. FLETCHER: So, Justice Alito,
17 there's a lot packed into the question that I
18 hope we get to come back to, but I -- I want to
19 sort of get right to the point.

20 I think the first thing to think about
21 when stepping back and looking at the entirety
22 of this situation is that this is not a
23 circumvention of notice-and-comment regulation.
24 DHS is engaged in notice-and-comment rulemaking
25 that the states will be free to participate in

1 to make a new Public Charge Rule.

2 Now I -- I take the point that
3 Petitioners have said this is unprecedented, and
4 they've been pressed on what is unprecedented
5 because not seeking further review of a decision
6 against the government is not, even when it
7 involves a regulation. I think we all now agree
8 with that.

9 And they focused on the fact that the
10 case was in this Court. And I do take the
11 point. I'm not aware of another case that
12 transpired like that. But that's because
13 anything that the government did in that
14 situation would have been unprecedented if those
15 --

16 JUSTICE KAGAN: Well, to me, Mr.
17 Fletcher, the -- the -- the issue about the
18 government's behavior here is not that the case
19 was in the court. I mean, the case could have
20 been in the court, and if the administration had
21 come in and said we don't want to defend
22 anymore, I mean, the government doesn't have to
23 come up here and defend something that it no
24 longer believes in.

25 The real issue to me is the evasion of

1 notice-and-comment. And, I mean, basically, the
2 government bought itself a bunch of time where
3 the rule was not in effect. If you -- if the
4 administration had come in and said, oh, my
5 gosh, we have a notice-and-comment rule, we
6 really hate it, we have to change it, I mean, it
7 would have taken months to change it. And the
8 administration didn't have to do that.

9 Now you -- I'm sure you will tell me
10 why that way of looking at the essential problem
11 here is wrong, but I also want you to assume
12 that that is a problem and that we shouldn't be
13 green-lighting that behavior for your
14 administration or any other administration, all
15 right?

16 And -- and -- and -- and, on that
17 assumption, what should be the remedy? Because
18 it -- it just seems as though you're here and
19 saying, you know, you can just tell us to go
20 home and -- and -- and nothing is going to
21 happen to us, and everybody will just do it the
22 next time.

23 What -- what's the remedy for
24 something like this if I think that this does
25 present at least a significant APA question?

1 MR. FLETCHER: So let me take that
2 question on its terms and then, hopefully, come
3 back to some of the premises later.

4 I think, if you have that concern, the
5 solution is not changing the rules of
6 intervention. It's not letting the states come
7 in and make it impossible for the government to
8 acquiesce in adverse decisions, as you suggested
9 the other side's approach would.

10 The solution, I think, is the one that
11 Justice Gorsuch highlighted in his opinion when
12 this case -- this rule was before the Court on a
13 stay from the Second Circuit, and it is the
14 nationwide relief that the district court
15 entered here.

16 We don't think that the APA authorizes
17 district courts to enter that relief. We don't
18 think it's consistent with principles of equity
19 or with Article III. And if this Court makes
20 clear in an appropriate case that that's not
21 within the authority of district courts to
22 enter, then you don't have this problem because
23 the government -- what I take to be, everyone
24 agrees, that the government has the ability to
25 decide not to seek further review of district

1 court decisions. And if you make clear that
2 district courts do not have the authority to
3 issue this sort of relief, then the problem goes
4 away.

5 JUSTICE GORSUCH: Mr. Fletcher, that's
6 -- I think you put your finger right where I --
7 my concern has been, is I'm not familiar with
8 the APA's "set aside" language, which was
9 supposed to adopt prior practice at the time,
10 any prior practice in which a district court
11 purported to be able to do more than set aside
12 the rule with respect to the litigants in the
13 case or controversy before it. Are you?

14 MR. FLETCHER: I'm not, Your Honor.

15 JUSTICE GORSUCH: And, in fact, for
16 most of our history even after the APA's
17 adoption, I'm not aware of district courts doing
18 that until relatively recent times.

19 MR. FLETCHER: I think there's some
20 scholarly debate about exactly when, but, yes,
21 in general, correct.

22 JUSTICE GORSUCH: And so you -- you
23 agree that, therefore, the Northern District of
24 Illinois erred when it issued a nationwide
25 injunction?

1 MR. FLETCHER: We do.

2 JUSTICE GORSUCH: Okay.

3 MR. FLETCHER: Just -- just a little
4 thing. I don't think anything turns on this.
5 Technically, it wasn't an injunction. It was a
6 vacatur of the rule. But I -- we'd say exactly
7 the same thing.

8 JUSTICE KAGAN: Okay. But now you
9 present me with another issue because that has
10 not been the question in this case, and so hmm.

11 MR. FLETCHER: So I -- I take the --

12 JUSTICE KAGAN: What do I do with
13 that?

14 MR. FLETCHER: So I take the point. I
15 think, you know, one thing it -- it can do is
16 give you some comfort that there is a solution
17 to these problems to the extent that you think
18 they are a problem.

19 And I think what some of the
20 questioning so far this morning has highlighted
21 is that the solutions that are being offered up,
22 you know, by the parties in this case, where
23 they are trying to get at that concern, are
24 really overbroad because --

25 CHIEF JUSTICE ROBERTS: Is that an

1 issue that, for example, the -- your friend on
2 the other side could raise if he's successful in
3 intervening in the cases?

4 MR. FLETCHER: If he's successful in
5 intervening in the --

6 CHIEF JUSTICE ROBERTS: Yeah. It's an
7 argument. Why didn't you intervene before?
8 Well, one thing is that there shouldn't be a
9 nationwide injunction issued in Illinois or one
10 beyond the parties in the Ninth Circuit and,
11 therefore, you should vacate the injunctions?

12 MR. FLETCHER: That would be one of
13 many arguments that he could raise, yes.

14 CHIEF JUSTICE ROBERTS: Well --

15 JUSTICE BARRETT: And so --

16 CHIEF JUSTICE ROBERTS: -- but I
17 thought part of your -- your -- your briefing
18 was that, you know, this is a useless exercise,
19 why are we here? You know, everything's done.
20 Well, apparently, not everything is done.

21 MR. FLETCHER: Well, the -- the
22 "everything is done" was focused on the specific
23 circumstances of this case, where it's about a
24 preliminary injunction that don't apply in the
25 Petitioner states' jurisdictions and that don't

1 have any practical consequences so long as that
2 -- the Seventh Circuit's --

3 CHIEF JUSTICE ROBERTS: The Illinois
4 one is nationwide, right?

5 MR. FLETCHER: The Illinois one is
6 nationwide, but --

7 CHIEF JUSTICE ROBERTS: So it applies
8 to them.

9 MR. FLETCHER: But the question before
10 this Court is what -- whether they're entitled
11 to get into the --

12 JUSTICE BARRETT: But, Mr. Fletcher,
13 this --

14 CHIEF JUSTICE ROBERTS: Well, they
15 have to get rid of this one if they want to
16 proceed against the one in Illinois. Otherwise,
17 it does them no good.

18 MR. FLETCHER: Well, I -- I -- I don't
19 know that that's true. These are two
20 preliminary injunctions that don't apply in
21 their jurisdictions at all.

22 CHIEF JUSTICE ROBERTS: Well, you
23 agree, don't you, that they have standing
24 because people who are illegally or -- not
25 illegally -- they don't meet the new public

1 charge rule in the United States, they're going
2 to go throughout the United States, as people
3 do?

4 MR. FLETCHER: Justice -- Chief
5 Justice Roberts, I think it's very, very hard to
6 make that case given the record that we have
7 about the low number of adjustment of status
8 decisions that were actually affected by this
9 rule while it was in place. And the rule -- the
10 injunctions don't apply to applications by
11 residents of the Petitioner states.

12 I think, in those circumstances, it's
13 getting very, very attenuated to say that maybe
14 the rule will result in someone being granted
15 adjustment of status, maybe sometime down the
16 road they will apply for and receive benefits,
17 and maybe they will have in the interim moved
18 into one of the Petitioner states. That's --
19 that's --

20 JUSTICE BARRETT: But, Mr. Fletcher,
21 can I follow up on what the Chief just asked
22 you? You opposed intervention in the Northern
23 District of Illinois, right?

24 MR. FLETCHER: We did.

25 JUSTICE BARRETT: So the -- the

1 principle that you're arguing for really doesn't
2 turn on the fact that the Ninth Circuit's
3 preliminary injunction was not nationwide. I
4 mean, your -- you opposed their ability to enter
5 in the Seventh Circuit and challenge the scope
6 of the injunction.

7 MR. FLETCHER: That's correct, Justice
8 Barrett. We have -- I'm just highlighting that
9 we have arguments here that we -- that don't
10 apply in the Seventh Circuit case. We also have
11 arguments that apply in both cases, and there
12 are some arguments that apply in the Seventh
13 Circuit case that aren't at issue here.

14 JUSTICE BARRETT: Because you just
15 flatly think that the states shouldn't be able
16 to interdeem -- intervene, period?

17 MR. FLETCHER: That's correct, yes.

18 JUSTICE KAVANAUGH: Can I ask a --

19 JUSTICE BREYER: But suppose they --
20 what about their argument, which is, look,
21 one -- you say only five people were affected,
22 but you added change of status applicants. So
23 what they think is there may be millions of
24 people, just across different borders, who will
25 be here, you see, if -- a question of food

1 stamps, and so all those people, we don't know,
2 the record doesn't tell us whether they're in
3 Arizona or not. And they say it's a billion
4 dollars, and you say it's five people, and so
5 forth. Okay. That's one thing.

6 But then they say we have a totally
7 different ground. Our ground for intervening is
8 simply this: The decision of the courts about
9 the merits of the old rule is completely wrong.
10 And if you allow this to stand, this totally
11 wrong decision, courts of the United States,
12 what the government will do is just acquiesce.
13 And that way they avoid notice-and-comment
14 rulemaking. And that should be a ground for our
15 being able to intervene to ask for rehearing en
16 banc or maybe ask the Supreme Court.

17 Pretty similar to what we just allowed
18 in that case of the attorney general. You know,
19 it was a different party. What was it, Kentucky
20 or -- we just -- and pretty similar. See? They
21 won't defend it, but we'll defend it because
22 it's totally wrong.

23 And we -- you see what we gain? Now,
24 to me, that is a law professor's issue. My God,
25 I don't know what the answer is. And we don't

1 have to get into any of this mess if we can only
2 get the Illinois case here in front of us.

3 That's why I keep asking, what should we do?

4 MR. FLETCHER: Justice Breyer, let me
5 start with the effect of the rule because I
6 think it's important to disaggregate a couple of
7 things. The rule does apply to people seeking
8 to come into the United States, to be admitted
9 at the border, but it very, very seldom actually
10 has application there because the State
11 Department has vetted those people before they
12 come if they are coming on a visa. If they're
13 not coming on a visa, if they're coming
14 illegally, there are other grounds to deny them
15 admission. So the rule has very, very little
16 practical effect at the border.

17 Where it has effect -- and this has
18 been common ground across all of the rulemakings
19 and between the parties -- is in those
20 adjustment of status decisions, where, as I
21 explained, it has turned out to have very little
22 effect at all. So that's the practical stakes.

23 The billions of dollars, I think it's
24 important to understand, are not about the
25 intended effects of the rule. Justice Barrett

1 laid out in her dissent in the Cook County case
2 on this issue that, actually, the rule does not
3 apply to very many people at all who are
4 actually entitled to receive public benefits
5 because generally you're not entitled to receive
6 them until after you adjust status or if you're
7 in a vulnerable category, like an asylee or a
8 refugee, that's not subject to the public charge
9 bar at all.

10 The billions of dollars are about
11 people who are confused about the rule or
12 mistaken about its effects and who are dropping
13 benefits even though those benefits would not
14 affect their entitlement to come into the case.

15 JUSTICE KAVANAUGH: Can I --

16 MR. FLETCHER: And --

17 JUSTICE KAVANAUGH: Keep going. I'm
18 sorry.

19 MR. FLETCHER: I was just going to
20 say, and I think that highlights that -- that
21 it's hard for the Petitioner states to say that
22 they have a legally protectable interest and the
23 unintended consequence.

24 JUSTICE BREYER: Yeah, but the second
25 point is my real point.

1 MR. FLETCHER: So the second point is
2 about what about the Seventh Circuit case? So
3 it --

4 JUSTICE BREYER: Well, they have
5 another ground, but then, yeah, what about the
6 Seventh Circuit?

7 MR. FLETCHER: So -- right. If you're
8 -- if you're interested in the Seventh Circuit
9 case, I guess what I would say is the Seventh
10 Circuit case is not the one that's before you
11 now, and the one that's before you now has not
12 only the reasons why we think they shouldn't
13 come into the Seventh Circuit case but other
14 problems as well.

15 And you -- what you shouldn't do is do
16 what they're asking you to do, which is sort of
17 decide this case as a way of telling what -- the
18 Seventh Circuit what to do in that case, which
19 presents different issues and additional
20 arguments. So we would urge you not to sort of
21 decide this case with a view towards what the
22 right answer in the Seventh Circuit case is.

23 JUSTICE KAVANAUGH: I have a question
24 about historical practice to the extent you're
25 aware. When a notice-and-comment rule is issued

1 and then a court finds that that rule is
2 unlawful and then the government chooses to
3 acquiesce in that judgment, what then usually
4 happens?

5 I suppose one thing is
6 notice-and-comment about a new rule, but that
7 would be about the new rule. Another option is
8 notice-and-comment about the repeal of the rule,
9 even though it's an acquiescence in the
10 judgment. A third option is just nothing
11 happens, the old rule is just gone, and the
12 government keeps going without any replacement
13 rule.

14 Do you know under -- what the -- that
15 second thing, notice-and-comment about the
16 repeal after an acquiescence, I'm not sure I've
17 seen that, but I want to get your understanding
18 of historical practice.

19 MR. FLETCHER: So I can't pretend to
20 have an exhaustive understanding of this. We
21 have looked into it. I'm aware of cases in the
22 first category and the third category. We have
23 not found cases in that second category, at
24 least where what you're talking about is a
25 decision that sets aside the rule or vacates the

1 rule on a nationwide basis.

2 JUSTICE KAVANAUGH: That -- that's my
3 understanding too. I think it's odd to think
4 about notice-and-comment for repeal after an
5 acquiescence. I think there would usually be
6 notice-and-comment for the new rule, and you --
7 and that's now started up here. And I guess
8 you've looked into it and haven't found anything
9 either way, I guess.

10 MR. FLETCHER: I haven't found any
11 examples of it happening. And, you know, there
12 are -- there are court decisions from the D.C.
13 Circuit, including, I think, your opinion in the
14 EME Homer City case that say -- recognize
15 sometimes this is a thing that the government
16 does and that it is good cause to forego
17 notice-and-comment when what it's doing is
18 effectively compelled by a court decision.

19 JUSTICE KAVANAUGH: And then second
20 question, which is kind of on a different tack,
21 I think what they're trying to do here, if I'm
22 piecing it together, and this picks up on
23 Justice Sotomayor's questions a bit, is to
24 intervene here to Munsingwear these -- these
25 decisions and then to bring an APA challenge to

1 the repeal, I think, would be the next part of
2 the strategy if I'm understanding it and then to
3 win or to do better in that APA challenge
4 because the government wouldn't be able to rely
5 on the adverse decisions because they've been
6 Munsingweared. Is that --

7 MR. FLETCHER: So that -- that's about
8 my understanding of what they're trying to do as
9 well.

10 JUSTICE KAVANAUGH: Okay. So why is
11 it -- why is it wrong for them to intervene to
12 try to Munsingwear the adverse decisions?

13 MR. FLETCHER: So for a couple of
14 reasons. I think, first of all, even on that
15 account of their strategy and assuming that the
16 strategy otherwise works, that doesn't justify
17 them getting into this case because this case
18 doesn't include the judgment that was the basis
19 for the rulemaking.

20 JUSTICE KAVANAUGH: Okay. Would it
21 justify them getting into the other case?

22 MR. FLETCHER: So I -- I think not.
23 There, we wouldn't have that argument about the
24 limited scope of this appeal.

25 JUSTICE KAVANAUGH: Intervention for

1 the purpose of seeking to Munsingwear a case is
2 not good enough?

3 MR. FLETCHER: Well, I don't think so.
4 I don't think -- you know, normally, Munsingwear
5 is about relieving the parties to the case of
6 the effects of the judgment. I'm not aware of
7 any precedent for allowing new parties to come
8 into the case to seek Munsingwear vacatur.

9 JUSTICE KAVANAUGH: There's no
10 precedent either way on that question, right?

11 MR. FLETCHER: That -- that's fair
12 enough. But -- but also, you know, Munsingwear
13 is also about relieving the parties of the
14 effects of a judgment after a case has become
15 moot.

16 You know, here, the mooting event was
17 the government's decision not to seek further
18 review of that Northern District of Illinois
19 decision, and so it's a little hard to see how
20 you Munsingwear the decision that actually
21 produces the mootness in the other cases. So I
22 think that's an additional obstacle for them.

23 And then the other thing I'd just say
24 sort of stepping back a little bit more broadly
25 is -- is, you know, this is a case about

1 intervention and when they have a right to
2 intervene or when the Ninth Circuit would have
3 abused its discretion in keeping them out.

4 And there are a lot of parties that
5 might have interest in judicial precedent or in
6 the development of the law more generally.
7 That's the sort of interest that I take them to
8 be trying to vindicate with this Munsingwear
9 argument, and that's just never been recognized
10 as the sort of thing that justifies intervention
11 as of right.

12 JUSTICE SOTOMAYOR: Can we talk about
13 Munsingwear here? It's Munsingwear of what? It
14 --

15 MR. FLETCHER: So I -- I --

16 JUSTICE SOTOMAYOR: -- what --
17 assuming that they -- the equity, and that's,
18 you know, putting that on hold, what would they
19 Munsingwear? I thought the preliminary
20 injunction had dissolved once the case was
21 dismissed.

22 MR. FLETCHER: Justice Sotomayor, I
23 don't think that's right. We dismissed --

24 JUSTICE SOTOMAYOR: Okay.

25 MR. FLETCHER: -- our appeals in the

1 Ninth Circuit. The litigation in these cases is
2 still stayed in the Northern District of
3 California --

4 JUSTICE SOTOMAYOR: Ah, okay.

5 MR. FLETCHER: -- and the District of
6 Washington. The preliminary injunction is still
7 in force. It just doesn't have any practical
8 effect because of the Seventh Circuit's
9 decision -- or, I'm sorry, the Northern District
10 of Illinois vacatur of the rule.

11 JUSTICE SOTOMAYOR: So it would --

12 CHIEF JUSTICE ROBERTS: Thank you.

13 JUSTICE SOTOMAYOR: -- still have to
14 be -- it would still have to be -- you still
15 have to get the Seventh Circuit injunction
16 lifted before anything happens in the Ninth
17 Circuit?

18 MR. FLETCHER: Before the Ninth
19 Circuit decision has any practical consequence,
20 yes.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel. Just one further point.

23 What would you do -- put your itself
24 in Mr. -- General Brnovich's shoes. You think
25 it was wrong for the new administration not to

1 go through notice-and-comment rulemaking before
2 repealing the -- the order. What would you do?

3 MR. FLETCHER: Well, I suppose, if --
4 if I was in his shoes, you know, I might try to
5 intervene, but, again, there are rules about who
6 has an entitlement to intervene, and we don't
7 think the states satisfy them because --

8 CHIEF JUSTICE ROBERTS: So --

9 MR. FLETCHER: -- their disagreement
10 --

11 CHIEF JUSTICE ROBERTS: -- so what
12 would -- so there's nothing that an affected
13 state could do in your view? You would give up
14 if you were in General Brnovich's shoes because
15 you say, well, you know, I can't intervene. I
16 can't go and complain about the fact that there
17 wasn't notice-and-comment because it's a
18 judicial decision that allowed them to dispense
19 with notice-and-comment. So you think that in
20 this situation there's nothing that can be done?

21 MR. FLETCHER: I don't think so, but,
22 again, that's -- that's tied to the fact that
23 this is not a rule that gives them any rights,
24 that regulates them, that really has any effect
25 on them.

1 CHIEF JUSTICE ROBERTS: So then it's
2 really quite a license for collusive action for
3 any incoming administration to change rules that
4 were enacted pursuant to the APA and, therefore,
5 can only be repealed under the APA? It's a way
6 to avoid that burden across the board.

7 MR. FLETCHER: So I guess I just
8 disagree with that characterization, Mr. Chief
9 Justice. I mean, this is a case where the --
10 when the administration changed, the President
11 ordered a review of the rule, DHS decided it
12 wanted to issue a new rule, and then the
13 administration was confronted with the question
14 what to do about the litigation. And it had
15 sought this Court's review but had done so on
16 the premise that this was a rule that was
17 important to DHS that DHS wanted to preserve.

18 CHIEF JUSTICE ROBERTS: Right, right.
19 I'm not questioning anybody's motives. I'm --
20 I'm questioning the ease with which a decision
21 in your favor will make it for the -- an
22 incoming administration to avoid
23 notice-and-comment review, because what -- and
24 you say, well, if you were in Mr. Brnovich's
25 shoes, you would sort of take your briefcase and

1 go home, there's nothing to do. And yet
2 circumventing the APA is a pretty big deal.

3 MR. FLETCHER: Well, Mr. Chief
4 Justice, we may have a disagreement about
5 whether this is correctly characterized as
6 circumventing the APA. I -- I guess --

7 CHIEF JUSTICE ROBERTS: Well, it does
8 avoid notice-and-comment rule -- rulemaking on
9 the repeal of the rule.

10 MR. FLETCHER: So that's correct. You
11 know, in this case, of course, DHS is going
12 through notice-and-comment rulemaking.

13 CHIEF JUSTICE ROBERTS: No, that's the
14 new one --

15 MR. FLETCHER: That -- that's --

16 CHIEF JUSTICE ROBERTS: -- an entirely
17 different thing.

18 MR. FLETCHER: That -- that's correct.
19 But it does put all the same issues before them
20 and give them the opportunity to comment. You
21 know, I think, beyond that, we cite in Footnote
22 11 a bunch of decisions of DOJ deciding not to
23 seek further review of decisions vacating the
24 rule. You could call each of those
25 circumventing the APA if you wanted to because

1 they have the same effect of taking a
2 notice-and-comment rule off the books without
3 the opportunity for further notice-and-comment.

4 And I think it's -- it's hard. I
5 understand that because this is a change in
6 administration, this was a controversial case,
7 there's a temptation to view it differently, but
8 I don't think we can have different principles
9 of intervention for what Petitioners in the
10 reply brief call run-of-the-mill cases where the
11 government decides not to seek further review
12 and different rules for intervention for cases
13 that are -- have attracted a lot of controversy
14 or that states are interested in looking into.

15 CHIEF JUSTICE ROBERTS: I'm not
16 suggesting there ought to be different rules.
17 I'm suggesting that we have to think long and
18 hard before adopting a rule that allows anybody,
19 any administration, to circumvent
20 notice-and-comment rulemaking before the repeal
21 of a -- of a rule.

22 And as far as I can hear from -- from
23 you, in Mr. Brnovich's shoes, you're saying
24 there's nothing to do -- no -- nothing to be
25 done.

1 MR. FLETCHER: Well, so I would say a
2 couple of things about the consequences of a
3 decision agreeing with us in this case.

4 It wouldn't apply in cases where
5 someone actually could satisfy the requirements
6 of Rule 24(a) where their legal rights were
7 directly affected. The part of our argument
8 here is based on the fact that Arizona and the
9 other states are not actually -- do not have a
10 legally protected stake in the rule. The answer
11 might be different if you had parties before you
12 who did have such a stake.

13 The other thing I'd say is, just to go
14 back to the answer that I gave to Justice Kagan,
15 you know, I -- I -- I take it everyone agrees
16 that the government has the prerogative to
17 decline to seek further review.

18 The effect of taking the rule off the
19 books without notice-and-comment is an effect of
20 the remedial authority that the Northern
21 District of Illinois asserted in this case.

22 If this Court makes clear that that's
23 not remedial authority that district courts
24 have, then that solves that problem without
25 disrupting principles of intervention or

1 countermanding Congress's choice to put
2 decisions about further review in the hands of
3 the Department.

4 CHIEF JUSTICE ROBERTS: Thank you.
5 Justice Thomas?

6 JUSTICE THOMAS: Nothing, Chief.

7 CHIEF JUSTICE ROBERTS: Justice
8 Breyer, anything further?

9 Justice Alito?

10 JUSTICE ALITO: Has the government
11 previously argued that district courts lack the
12 power to issue nationwide injunctions in
13 situations like this?

14 MR. FLETCHER: We have pretty
15 consistently, Your Honor.

16 JUSTICE ALITO: In this Court? In
17 this Court?

18 MR. FLETCHER: In this Court? I -- I
19 -- in -- I believe we made that a feature of our
20 stay application in the DHS versus New York case
21 where Justice Gorsuch wrote the opinion that I
22 talked about.

23 Also, I believe in the contraceptive
24 coverage case that was argued in the last
25 administration.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?

3 JUSTICE SOTOMAYOR: Counsel, this is a
4 very complex issue. What I understood that the
5 prior administration had in two cases been
6 before district courts that issued injunction --
7 injunctions of rules, that the -- I think, in
8 Nevada versus U.S. Department of Labor, the
9 prior administration filed an appeal but then
10 decided to put it in abey -- abeyance and
11 decided to comply with the district court's
12 invalidation, correct? So this happens -- has
13 happened across generations, correct?

14 MR. FLETCHER: That's right. Each
15 case differs in its particulars. And, you know,
16 I think one of the things that made this case
17 different and that's important to keep in mind
18 when looking at the forest, as Justice Alito
19 said earlier, is that this was a case that the
20 government had brought into this Court and
21 gotten certiorari granted and gotten
22 extraordinary stays entered before DHS decided
23 that it wanted to replace the rule.

24 And if DHS had made the decision that
25 it wanted to engage in new rulemaking and

1 replace the rule and if it was clear that the
2 rule wasn't having its intended effect, it would
3 be very unusual for the government to come to
4 this Court and ask it to grant certiorari.

5 Now, here, those changes, those facts
6 came to light after the petitions had been
7 filed, and the decision was made after cert had
8 been granted, but it's the same sort of decision
9 not to ask this Court to review an adverse
10 decision of the government.

11 JUSTICE SOTOMAYOR: So this has
12 happened for generations then?

13 MR. FLETCHER: In different forms.
14 Again, I don't want to represent that I can
15 point to a case --

16 JUSTICE SOTOMAYOR: No, no, no. No,
17 not like this --

18 MR. FLETCHER: -- just like this
19 because --

20 JUSTICE SOTOMAYOR: -- but in
21 different --

22 MR. FLETCHER: -- the situation that
23 was presented was unprecedented, but the idea
24 that the government can choose for legal and
25 prudential reasons not to seek further review

1 has happened across administrations in a lot of
2 different circumstances.

3 JUSTICE KAGAN: Mr. Fletcher, just
4 going back to your colloquy with the Chief
5 Justice, I guess I'm a little bit surprised that
6 you didn't say something else. And, you know,
7 maybe the -- the solicitor general never stands
8 up at the podium and says somebody can bring an
9 APA action against us.

10 But isn't that the answer? Somebody
11 can bring an APA action. I mean, if there has
12 been circumvention of the APA, like, rather than
13 go through this quadruple bank shot, I mean, why
14 don't we just say, you know, you have a good
15 point about circumvention of the APA, go bring
16 an APA action?

17 MR. FLETCHER: So they could bring an
18 APA action. That's right. Candidly, we would
19 argue in that APA action --

20 JUSTICE KAGAN: You would -- you would
21 take the other side. You would say, well, they
22 don't have an APA action either. I understand
23 that. But, I mean, because you think that what
24 you did was not circumvention and -- look, I
25 understand that the government is here to defend

1 what it did, and that's perfectly appropriate.

2 But, on the assumption that the
3 government circumvented the APA, isn't the right
4 remedy an APA action?

5 MR. FLETCHER: So they can bring an
6 APA action. If they do, we'll make the argument
7 that the rescission of the rule was justified by
8 the fact that the vacatur had become final. And
9 I think we're right about that.

10 But I -- you disagree -- may disagree.
11 And so, if they want to bring that argument and
12 try to persuade a court that you're right and
13 I'm wrong, they can absolutely do that.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?

16 JUSTICE GORSUCH: Yeah, just a couple
17 questions just to follow up on Justice Kagan.

18 So the government -- I just want to
19 make sure I understand. So, if -- if a state
20 were to bring an APA action, the government's
21 position would be what?

22 MR. FLETCHER: So I think we're
23 talking about an APA action that's challenging
24 the rescission that --

25 JUSTICE GORSUCH: Yes.

1 MR. FLETCHER: -- in March of 2021.

2 JUSTICE GORSUCH: Yes.

3 MR. FLETCHER: And we would say that
4 that was valid without notice-and-comment
5 because the existence of the vacatur judgment by
6 the district court was good cause to forgo
7 notice-and-comment and that the fact that that
8 judgment had been entered, finally vacated the
9 rule, and was no longer being appealed justified
10 the rescission of the rule.

11 JUSTICE GORSUCH: Even though, on --
12 on the government's view, the -- the scope of
13 the vacatur was unlawful?

14 MR. FLETCHER: That's correct, yes.

15 JUSTICE GORSUCH: Okay. And I guess
16 that leads me to my -- kind of where I'm stuck
17 in this case, and it's sort of where the Chief
18 Justice is. Any administration coming in, of
19 course, can agree not to contest a judicial
20 opinion. That's often good practice.

21 But, in this case, the government is
22 relying on an injunction or a vacatur of
23 nationwide scope that it believes to be unlawful
24 as the basis for the rescission.

25 How do I think about that when we come

1 to the equitable considerations associated with
2 intervention, that the government's rescission
3 here is premised on what it admits to be an
4 unlawful order?

5 MR. FLETCHER: So, Justice Gorsuch, I
6 think often, when the government decides not to
7 seek further review of a decision, including a
8 decision setting aside a regulation, it may
9 disagree very strongly with the legal grounds
10 for that decision and think that the order was
11 wrong and that the judge didn't have the
12 authority to enter it but, nonetheless, decide
13 that the sort of high standards that the
14 government applies before seeking further
15 review, especially this Court's review, aren't
16 meant --

17 JUSTICE GORSUCH: I -- I -- I -- Mr.
18 Fletcher, I -- I -- I don't disagree with any of
19 that. I accept that. Of course, the government
20 often disagrees with the judges. That's --
21 that's the independence of the judiciary, and --
22 and we're all stuck with that.

23 But what -- what is kind of a little
24 different in this case is to tell a state that
25 it has no recourse through the APA, through

1 litigation, all because the government's
2 acquiescence in a judicial order that it agrees
3 is wrong and -- and is that an equitable
4 consideration that we should as judges take into
5 account when we're deciding a question of
6 intervention, noting that intervention is
7 ultimately an equitable sort of considered --
8 question?

9 MR. FLETCHER: So it is an equitable
10 question. I would hesitate to encourage courts
11 to rely on those sorts of judgments because one
12 of the themes that I've been trying to convey
13 this morning is that Congress has decided that
14 these are decisions for the government to make
15 about whether or not to seek further review.

16 JUSTICE GORSUCH: Of course.

17 MR. FLETCHER: Different story if you
18 have a party that actually has the sort of
19 intervention that justifies -- stake that
20 justifies intervention as of right. But, if
21 you're not in that world and you're talking
22 about permissive intervention, I'd warn the
23 Court away from suggesting that courts ought to
24 sort of look under the hood about whether or not
25 they agree with the government's decision-making

1 or the way that it weighed all of the competing
2 considerations.

3 JUSTICE GORSUCH: Of -- of -- of
4 course. I -- I -- I get that. I guess I'm just
5 wondering, would that be the narrowest basis of
6 decision if -- if -- if the Court were to rule
7 against you, that those are unique circumstances
8 that might justify permissive intervention at
9 least here?

10 MR. FLETCHER: So those aren't narrow
11 circumstances. I'm not sure that they're the
12 basis for an administrable rule because, of
13 course, I've just told you that we disagree
14 with district courts. Often --

15 JUSTICE GORSUCH: No, I know you -- I
16 know you --

17 MR. FLETCHER: -- often that doesn't
18 happen.

19 JUSTICE GORSUCH: -- I know you
20 disagree. But, if we were to rule against you,
21 would that be the narrowest basis, or do you
22 have another narrow one?

23 MR. FLETCHER: Another narrow way to
24 lose?

25 JUSTICE GORSUCH: Yeah.

1 (Laughter.)

2 MR. FLETCHER: I, you know --

3 JUSTICE GORSUCH: A tough question. I
4 -- I've had it presented to me.

5 MR. FLETCHER: Yeah.

6 JUSTICE GORSUCH: Nobody likes it.
7 And I'm sorry to ask it.

8 MR. FLETCHER: Well, I take that. You
9 know, I think, if -- we, of course, don't think
10 we should lose at all. We think a lot of the
11 concerns that have been addressed would be
12 addressed by adopting your view about the scope
13 of district courts' remedial authority.

14 If you're not willing to go down that
15 road and you think that the states ought to be
16 permitted to intervene, I think the narrowest
17 basis for a decision in this case, which is,
18 again, about these preliminary injunction
19 appeals, would be to say that under these
20 circumstances, because the controversy has
21 become moot because the government acquiesced in
22 a different judgment, they can come in and seek
23 Munsingwear vacatur and that's all.

24 I think that, you know, relieves them
25 of some of their concerns and doesn't create the

1 problems that we have about forcing the
2 government to continue litigating about this
3 rule that it's simultaneously trying to replace,
4 which was really a big part of the concern that
5 we had when we were approaching what to do about
6 this litigation.

7 JUSTICE GORSUCH: Thank you.

8 JUSTICE KAVANAUGH: Just want to pick
9 up right there. So intervening for the purpose
10 of Munsingwear -- seeking Munsingwear is the --
11 is the narrowest ground, you -- you suggest?

12 MR. FLETCHER: I -- I'm open to other
13 even narrower grounds.

14 (Laughter.)

15 MR. FLETCHER: But that is the
16 narrowest one that I can come up with, yes.

17 JUSTICE KAVANAUGH: And -- okay. And
18 then going back to the APA suit challenging the
19 rescission of the rule, I think that raises a
20 big question. The Chief Justice raises
21 important concerns, but I think there are
22 important concerns going both ways there because
23 it's never been the case, as I understand it and
24 our colloquy illustrated, that acquiescence in
25 adverse judgment triggers notice-and-comment

1 responsibilities for the repeal of that rule,
2 right? At least you haven't found anything.

3 MR. FLETCHER: Correct. I don't want
4 to represent that there's nothing out there, but
5 I -- I certainly haven't found anything.

6 JUSTICE KAVANAUGH: So it would be a
7 big deal, I think, to hold that all of a sudden
8 the government, when it acquiesces in a
9 judgment, also has to go through
10 notice-and-comment for the repeal, different
11 from the new rule, for the repeal. That would
12 be a big deal.

13 MR. FLETCHER: Correct, I agree. And
14 I think --

15 JUSTICE KAVANAUGH: And that would
16 hamstring new administrations, which is, you
17 know, the flip -- the Chief raises important
18 concerns. The flip side is, of course, not
19 allowing a -- a new administration to get out of
20 the starting blocks because they're -- they're
21 stuck.

22 MR. FLETCHER: I -- I agree with that,
23 and I'd just add that it's not just the
24 transition to a new administration. You know,
25 this happens even within an administration, that

1 there's a rule --

2 JUSTICE KAVANAUGH: Sure. There's a
3 new secretary who comes in, new political or
4 policy views. Yeah.

5 MR. FLETCHER: Or the government
6 decides, you know, this rule, there's too much
7 litigation risk. We might make bad law if we
8 pursue it. Or it turns out actually we don't
9 think it's such a good idea. There are all
10 sorts of reasons why the government might
11 acquiesce or decline to seek further review of
12 these decisions, and a rule saying -- a judgment
13 saying that anyone can intervene if they have
14 Article III standing and force continued
15 litigation or that there has to be
16 notice-and-comment rulemaking would be quite
17 disruptive.

18 JUSTICE KAVANAUGH: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Barrett?

21 JUSTICE BARRETT: I do have a question
22 about historical practice.

23 So, you know, as Footnote 11 in your
24 brief makes clear, lots of historical practice
25 for the government acquiescing in -- in judicial

1 decisions and not appealing.

2 What about the government opposing
3 intervention in this circumstance? Because I
4 think these are two separate threads, right? We
5 can all agree that the government has the
6 ability to acquiesce -- acquiesce in a judgment
7 in its favor.

8 But that's a distinct question from
9 whether the government should oppose or a court
10 should deny permission to a state who wants to
11 intervene at that point. What has the
12 historical practice been there?

13 MR. FLETCHER: So I don't have a lot
14 of examples of that, I think, in part, because
15 it just hasn't come up. You know, the two
16 examples that they offer in their reply brief,
17 as I explained, aren't really examples of this
18 --

19 JUSTICE BARRETT: Yeah.

20 MR. FLETCHER: -- because intervention
21 happened earlier. I guess what I'd say, though,
22 is we don't view them as being quite that
23 distinct because, when the government decides
24 not to seek further review, it's often because
25 the government has made a decision that further

1 review isn't in the government's interest
2 because it might make bad law, because it turns
3 out the agency is about to replace the policy
4 anyway, you know, for all sorts of reasons.

5 And when that happens, sort of part
6 and parcel of that decision is a judgment also
7 that we don't want other parties to step in and
8 continue the litigation, which forces us to
9 continue litigating the case, which is exactly
10 what we tried not to do by declining to seek
11 further review.

12 So I think they're two decisions that
13 are linked in our mind.

14 JUSTICE BARRETT: So the examples that
15 they come up with in their reply brief, I mean,
16 you just haven't -- nobody's been able to come
17 up with more. So, when they say that this is
18 unprecedented on the government's part, you're
19 saying it's also unprecedented on the state's
20 part to try to intervene in this circumstance.

21 MR. FLETCHER: I -- I'm saying that
22 I -- I have not looked -- you know, I haven't
23 done an exhaustive survey for this. I'm sure
24 there are cases where it has happened before.
25 It just has not happened a lot.

1 And when it does happen, the
2 government, if we thought that they were
3 entitled to intervene, that they met the Rule
4 24(a) standards, then we'd be taking a different
5 position about whether or not they're entitled
6 to intervene.

7 But if -- when we think they don't
8 meet the Rule 24(a) standards and when the
9 question is, as a permissive matter, should a
10 court allow them into a case that the government
11 has decided continued litigation is not in the
12 interest of the United States, then I don't
13 think it's surprising that we -- we'd oppose
14 that precisely because we do want to avoid
15 continued litigation.

16 JUSTICE BARRETT: Right. Okay.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Ms. Hong.

20 ORAL ARGUMENT OF HELEN H. HONG
21 ON BEHALF OF THE STATE RESPONDENTS

22 MS. HONG: Mr. Chief Justice, and may
23 it please the Court:

24 There are many ways in which we agree
25 with Petitioners about the legal standards

1 governing intervention. Those standards are
2 broad and we've relied on them ourselves to
3 intervene in cases that threaten to impair our
4 interests.

5 But those standards do impose limits.
6 And under the particular circumstances of this
7 case, Petitioners' motion to intervene in the
8 Ninth Circuit exceeded those limits. The
9 central problem with that motion is that there's
10 no practical sense in which the Ninth Circuit
11 proceedings threatened to impair Petitioners'
12 asserted interests.

13 The 2019 Public Charge Rule was
14 vacated through a final judgment in a separate
15 case in a different circuit, and there is no
16 rule left for Petitioners to defend in the
17 courts below.

18 This case can be resolved on that
19 straightforward basis alone. I welcome the
20 Court's questions.

21 JUSTICE THOMAS: Would you be just a
22 bit more -- give us a bit more detail about why
23 you oppose intervention here? You said you
24 generally agree with Petitioner that there
25 should be intervention available.

1 I think, of course, like, California
2 may have intervened in cases like Affordable
3 Care Act. How is this different? And I think
4 some of those have involved matters, perhaps not
5 exclusively, but matters that were nationwide or
6 other states, involved other states.

7 So would you just be -- give us a
8 little more detail?

9 MS. HONG: Yes, Your Honor. I think
10 it goes to the Rule 24 standards that requires
11 impairment of the Petitioners' interest. But,
12 as a more practical matter, the question is,
13 what would the courts do below if Petitioners
14 were authorized to intervene?

15 There is no rule to litigate. There's
16 nothing that the Ninth Circuit can do to restore
17 the rule. So the Petitioners' motion really
18 achieves nothing of significance.

19 That's why we think that Petitioners'
20 motion was properly denied in the court of
21 appeals here in the Ninth Circuit.

22 JUSTICE KAVANAUGH: What about
23 Munsingwear?

24 MS. HONG: Your Honor, Munsingwear
25 raises two separate issues, one that goes to the

1 scope of the Munsingwear doctrine, and the
2 second is a separate case-specific question
3 about Rule 24's requirements.

4 Munsingwear itself, I think, as -- as
5 my friend from the federal government has
6 explained, is a doctrine that was designed to
7 relieve existing parties of the consequences of
8 a judgment once a case became moot.

9 I'm not aware of an extension of
10 Munsingwear that has been sort of applied in
11 this circumstance for non-parties to intervene
12 in a moot case to seek vacatur, but even if it
13 were theoretically possible, that still raises
14 the Rule 24 question, which is, what practical
15 stake or what stake has Arizona identified to
16 seek vacatur in these circumstances?

17 And we think that's where Petitioners
18 fall short.

19 JUSTICE KAVANAUGH: But wouldn't --

20 MS. HONG: Their legal --

21 JUSTICE KAVANAUGH: -- the theory be,
22 and you've heard me say this, that they seek
23 Munsingwear of the adverse -- to get the adverse
24 decisions off the books, and they have an APA
25 suit where they challenge the repeal, and the

1 government in that is no longer able to rely on
2 the adverse judgments, which Mr. Fletcher said
3 they would certainly be relying on in any such
4 APA suits.

5 So the chain of logic seems pretty
6 straight to me of how they would use
7 intervention here if -- if I have the -- have it
8 right.

9 MS. HONG: Yeah, there -- but there's
10 no judgment here. So their concern is the Ninth
11 Circuit's decision on a preliminary injunction
12 appeal, which isn't tantamount to a decision on
13 the merits. And the decision doesn't require
14 the state to do anything or refrain from doing
15 anything. And the federal government has
16 represented that it doesn't feel encumbered by
17 the decision from reimposing the same rule in
18 the future.

19 So what this boils down to then is the
20 Petitioners' legal disagreement with the
21 reasoning of the court of appeals' decision.
22 And we don't think that's enough to give them
23 the necessary stake to intervene under the
24 standards of Rule 24 to seek vacatur in these
25 circumstances.

1 CHIEF JUSTICE ROBERTS: So you'd have
2 a different view if this were the case from the
3 Seventh Circuit?

4 MS. HONG: Your Honor, it's -- it's a
5 different question there. I think that both the
6 Rule 24 analysis is different because, of
7 course, our basis for intervene -- or opposing
8 an intervention motion here is that their
9 interests can't be impaired because of the
10 vacatur judgment.

11 That basis for opposing doesn't exist
12 in Illinois. The district court there ruled
13 solely on timeliness grounds and denied the
14 motion, concluding that the Petitioners had
15 intervened too late in that proceeding. That is
16 not a basis --

17 CHIEF JUSTICE ROBERTS: Do you
18 remember how much -- how long they waited before
19 moving to intervene in that case?

20 MS. HONG: Your Honor, the judgment --
21 the final judgment that vacated the rule was
22 issued in November of 2020. They attempted to
23 intervene on March 11 in the Seventh Circuit.
24 It was, we acknowledge, just two days after the
25 Seventh Circuit dismissed the appeal and issued

1 the mandate.

2 CHIEF JUSTICE ROBERTS: Two -- two
3 days is the answer to my question, right?

4 MS. HONG: Yes, Your Honor.

5 CHIEF JUSTICE ROBERTS: Thank you.

6 MS. HONG: But we're not pressing
7 timeliness as a ground here. And, of course, as
8 -- as we discussed earlier today, I think those
9 ongoing proceedings are subject to an appeal and
10 proceedings in the Seventh Circuit.

11 And even if Petitioners are able to
12 successfully intervene there, there are still a
13 number of steps that would have to occur before
14 there would be any prospect of live litigation
15 here in the Ninth Circuit.

16 After intervention, they would still
17 have to secure modification of the final vacatur
18 judgment and then rescission of the rescission
19 rule before the rule could spring back to life
20 and there could be any meaningful litigation in
21 the Ninth Circuit.

22 And that's primarily the basis for our
23 opposition to the motion to intervene here,
24 which is nothing in this case can restore the
25 rule and nothing then can redress the

1 Petitioners' asserted claims of injury.

2 JUSTICE SOTOMAYOR: Let's go back to
3 that equity question. And you answered to
4 Justice Kavanaugh.

5 You said the preliminary injunction
6 ruling here is not a judgment, correct?

7 MS. HONG: The preliminary injunction
8 orders are not a judgment, yes, Your Honor.

9 JUSTICE SOTOMAYOR: And so they can't
10 hurt them in terms of any arguments they have
11 elsewhere because it's not a merits decision,
12 correct?

13 MS. HONG: Correct, Your Honor.

14 JUSTICE SOTOMAYOR: It's an equity
15 balance?

16 MS. HONG: That -- the preliminary
17 injunction factors certainly included an
18 equitable balance. I -- I -- I take
19 Petitioners' arguments to be that the Ninth
20 Circuit's decision on the likelihood of success
21 is what they would like to wipe off the books.

22 JUSTICE SOTOMAYOR: Correct. So why
23 is that not an interest adequate in equity to
24 grant them intervention?

25 MS. HONG: Right. And the question is

1 whether they have a necessary stake to seek
2 that. And we don't think that Petitioners have
3 identified anything different than bare legal
4 disagreement with the reasoning of the decision.

5 Again, it doesn't require them to do
6 anything. The federal government is not
7 thwarted from reimposing the same rule. And, of
8 course, a court considering the merits would not
9 be bound by or controlled by the Ninth Circuit's
10 decision on the likelihood-of-success prong.

11 JUSTICE KAGAN: Ms. Hong, I'm -- I'm
12 curious to know what your answer would be to the
13 series of questions that both the Chief Justice
14 and I were -- were -- were asking about if one
15 thinks that there is a kind of circumvention of
16 the APA that the federal government did here,
17 this is not your problem, it's their problem,
18 but if one thinks that, and Justice Kavanaugh
19 presents some real reasons to -- to think that
20 that's a hard question, but, if one thinks that
21 and one is concerned about green-lighting that
22 kind of government conduct, what should we do in
23 this case? What should we do in some other
24 case?

25 MS. HONG: Your Honor, I think that

1 might be a basis for intervention in the
2 proceedings where the rule was actually vacated.
3 So that would be the Seventh Circuit
4 proceedings, which is an ongoing appeal.

5 Separately, I think Your Honors have
6 discussed this morning the prospect of a
7 separate lawsuit under the APA challenging the
8 federal government's reliance on the good cause
9 exception to notice-and-comment rulemaking.

10 Those -- Petitioners' concerns about
11 the federal government's evasion of the APA
12 really is a core -- at its core a concern about
13 the scope of that good cause exception. We
14 think those are two alternative fora where
15 Petitioners could try to make their case.

16 But even if the Court has concerns
17 about the federal government's conduct that led
18 to the vacatur of the rule and then the issuance
19 of the rescission rule, those concerns do
20 nothing to -- to permit the Ninth Circuit in
21 this case to restore the rule.

22 And I think Petitioners functionally
23 concede that in their reply brief when they
24 recognize there's nothing that the Ninth Circuit
25 can do while the vacatur judgment exists to get

1 them to have the rule restored in these
2 proceedings. And that's why we think the court
3 of appeal properly denied intervention both as a
4 matter of right and as a matter of permissive
5 intervention.

6 JUSTICE GORSUCH: Counsel, let's --
7 let's suppose that Arizona succeeds in the
8 Seventh Circuit just hypothetically. Would --
9 would California take the position that the
10 Ninth Circuit's preliminary injunction should
11 apply and applies nationwide or not?

12 MS. HONG: Well, the preliminary
13 injunction by its terms that issued in our case
14 is limited geographically, and, of course, the
15 Washington case injunction was narrowed by the
16 Ninth Circuit.

17 I guess, to go back to Your Honor's --
18 the premise of the question, which is, if
19 Petitioners succeed in intervention --
20 intervening in Arizona, does that mean that we
21 have a live dispute here, and that's just not
22 the case.

23 JUSTICE GORSUCH: No, my -- my
24 question was a little more specific than that.
25 What -- what would California's position be in

1 the Ninth Circuit litigation about the scope of
2 the appropriate relief?

3 MS. HONG: Your Honor, if the rule
4 were restored, then the preliminary injunctions
5 that were issued in our case are geographically
6 limited. We -- are geographically limited.

7 JUSTICE GORSUCH: I understand that
8 currently. But what would California's position
9 be as to their proper scope?

10 MS. HONG: We -- we did seek a
11 nationwide injunction in the district court. We
12 were not successful in that endeavor. And I
13 think we would have to live with both the
14 district court's conclusion that the --

15 JUSTICE GORSUCH: Are you representing
16 you wouldn't seek nationwide relief before the
17 Ninth Circuit?

18 MS. HONG: In terms of the final
19 relief, that might be different. We might seek
20 nationwide relief, but -- but that's only if the
21 rule was restored. At present, there's no rule
22 to litigate and there's no way the district
23 court, we think, could properly issue a vacatur
24 judgment in our case.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas?

3 Justice Breyer, anything further?

4 JUSTICE SOTOMAYOR: Just one question
5 following up on what Justice Gorsuch said.

6 There'd have to be a vacatur of the nationwide
7 rule -- rule in the Seventh Circuit, correct?

8 MS. HONG: Correct, Your Honor.

9 JUSTICE SOTOMAYOR: And the grounds
10 for that would inform whatever position you took
11 with respect to nationwide relief later,
12 correct?

13 MS. HONG: Potentially, Your Honor.
14 If there were a ruling from this Court in those
15 Seventh Circuit proceedings, for example, that
16 bore on what arguments we could make, then,
17 certainly, that would have a -- bear a
18 relationship to --

19 JUSTICE SOTOMAYOR: If -- if --

20 MS. HONG: -- what we could argue.

21 JUSTICE SOTOMAYOR: -- we ruled that
22 nationwide injunctions are improper, you
23 couldn't seek one then?

24 MS. HONG: Correct.

25 JUSTICE SOTOMAYOR: Okay.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?
2 Justice Gorsuch, anything further?
3 Justice Barrett?
4 Thank you, counsel.
5 General, rebuttal?

6 REBUTTAL ARGUMENT OF GEN. MARK
7 BRNOVICH ON BEHALF OF THE PETITIONERS

8 MR. BRNOVICH: Thank you, Mr. Chief
9 Justice.

10 I can't help but hearing my mom's
11 voice in my head that it's better to remain
12 quiet and be thought a fool than open your mouth
13 and remove all doubt.

14 But I do think it's important for the
15 record to emphasize that the question pending
16 before this Court today and what seemingly none
17 of us disagree with is whether the Ninth Circuit
18 erred in denying Arizona's motion to intervene.

19 The -- the answer to that question is
20 clearly yes. Nothing the Respondents have said
21 today casts any real doubt on that. It is,
22 indeed, the Solicitor's prerogative to decide
23 what rulings she may well appeal, but it is not
24 her choice and her choice alone to determine
25 whether a party or a state can intervene in a

1 case.

2 And, ultimately, if you allow the
3 actions of the Department of Justice to stand in
4 this case, it sets a dangerous precedent for
5 future administrations to essentially do an
6 end-around the APA.

7 Thank you very much.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel. The case is submitted.

10 (Whereupon, at 11:22 a.m., the case
11 was submitted.)

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Official - Subject to Final Review

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