No. 22-234

In the Supreme Court of the United States

STATE OF TEXAS, ET AL., PETITIONERS

v.

COOK COUNTY, ILLINOIS, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that an applicant for admission or adjustment of status is "inadmissible" if, "in the opinion of the [Secretary of Homeland Security] at the time of application for admission or adjustment of status," the applicant "is likely at any time to become a public charge." 8 U.S.C. 1182(a)(4)(A). In 2019, the United States Department of Homeland Security (DHS) promulgated a final rule interpreting the statutory term "public charge" and establishing a framework by which DHS personnel would assess whether an applicant was likely to become a public charge. In November 2020, the District Court for the Northern District of Illinois entered a final judgment vacating that rule. DHS dismissed its appeal of that judgment in March 2021. In September 2022, following notice and comment, DHS issued a new final rule that adopts a different definition of "public charge" and a different framework for making public-charge determinations under 8 U.S.C. 1182(a)(4)(A).

Petitioners are States that filed a motion to intervene in the District Court for the Northern District of Illinois in May 2021, along with an accompanying motion under Federal Rule of Civil Procedure 60(b) for relief from the district court's November 2020 final judgment. The questions presented are:

1. Whether the court of appeals correctly determined that the district court did not abuse its discretion in denying petitioners' motion to intervene.

2. Whether the court of appeals correctly determined that the district court did not abuse its discretion in denying petitioners' request for Rule 60(b) relief.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 37 F.4th 1335. The opinion of the district court (Pet. App. 20a-68a) is reported at 340 F.R.D. 35. An earlier opinion of the court of appeals is reported at 962 F.3d 208. Earlier opinions of the district court are reported at 498 F. Supp. 3d 999 (Pet. App. 71a-89a) and 417 F. Supp. 3d 1008.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2022. The petition for a writ of certiorari was filed on September 9, 2022. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. The 2019 Rule And The Resulting Legal Challenges

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that an applicant for admission or adjustment of status is "inadmissible" if, "in the opinion of the [Secretary of Homeland Security]," the applicant "is likely at any time to become a public charge." 8 U.S.C. 1182(a)(4)(A).[1] In August 2019, the Department of Homeland Security (DHS) adopted a rule under which DHS would treat certain applicants for admission or adjustment of status as likely to become "[p]ublic charge[s]" if the agency determined that the applicants were likely to receive specified public benefits, including Medicaid or Supplemental Nutrition Assistance Program benefits, for more than 12 months (in aggregate) within any 36-month period. 84 Fed. Reg. 41,292, 41,501 (Aug. 14, 2019) (2019 Rule). The 2019 Rule was a significant departure from the definition and standards that DHS had used for decades.

2. The 2019 Rule prompted substantial litigation.

a. Of most immediate relevance here, respondents the Illinois Coalition for Immigrant Refugee Rights (ICIRR) and Cook County (together, plaintiffs) filed suit in the United States District Court for the Northern District of Illinois, alleging that the 2019 Rule was unlawful on multiple grounds. Pet. App. 1a-2a.

In October 2019, the district court granted a preliminary injunction barring the 2019 Rule from taking effect in Illinois. 417 F. Supp. 3d 1008. The court of appeals denied the government's motion for a stay

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[1] The statute refers to the Attorney General, but Congress has transferred authority to make such determinations in the relevant circumstances to the Secretary. See 8 U.S.C. 1103; 6 U.S.C. 557; see also 6 U.S.C. 211(c)(8).

pending appeal, but this Court granted a stay in February 2020. 140 S. Ct. 681. This Court also stayed a nationwide preliminary injunction entered in the United States District Court for the Southern District of New York, *DHS* v. *New York*, 140 S. Ct. 599 (2020), and DHS began implementing the 2019 Rule nationwide in February 2020. See *New York* v. *DHS*, 969 F.3d 42, 58 (2d Cir. 2020), cert. granted, 141 S. Ct. 1370 (2021), and cert. dismissed, 141 S. Ct. 1292 (2021).

b. In June 2020, the Seventh Circuit affirmed the district court's preliminary injunction. See 962 F.3d 208.[2] The Second and Ninth Circuits also affirmed preliminary injunctions against enforcement of the 2019 Rule within those circuits. *New York*, 969 F.3d at 50, 88-89; *City & Cnty. of San Francisco* v. *USCIS*, 981 F.3d 742, 763 (9th Cir. 2020), cert. dismissed, 141 S. Ct. 1292 (2021).

The government filed petitions for writs of certiorari seeking this Court's review of all three decisions. See *DHS* v. *New York*, 141 S. Ct. 1292 (2021) (No. 20-449) (petition filed Oct. 7, 2020); *Wolf* v. *Cook Cnty.*, 141 S. Ct. 1292 (2021) (No. 20-450) (petition filed Oct. 7, 2020); *USCIS* v. *City & Cnty. of San Francisco*, 141 S. Ct. 1292 (2021) (No. 20-962) (petition submitted on Jan. 19, 2021, and docketed on Jan. 21, 2021).

c. In November 2020, the district court entered a partial final judgment in this case under Federal Rule

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[2] Then-Judge Barrett dissented. See 962 F.3d at 234-254. In her view, "the term 'public charge' is indeterminate enough to leave room for interpretation," and the interpretation reflected in the 2019 Rule was "reasonable." *Id.* at 248. But she would have remanded to the district court for further consideration of plaintiffs' other arguments, including their arguments that the 2019 Rule was arbitrary and capricious. See *id.* at 253-254.

of Civil Procedure 54(b), vacating the 2019 Rule on a nationwide basis under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.* Pet. App. 71a-89a. Relying on the court of appeals' earlier decision affirming the preliminary injunction, the district court concluded that the 2019 Rule was not a reasonable interpretation of the INA and that DHS had acted arbitrarily and capriciously in adopting it. *Id.* at 73a-76a. The district court reserved decision on ICIRR's claim that the 2019 Rule had been adopted for a discriminatory purpose, in violation of the equal-protection component of the Fifth Amendment, while ICIRR pursued discovery from senior White House advisors and others. *Id.* at 80a-86a; see D. Ct. Doc. 190, at 2 (July 24, 2020) (requiring government to designate Senior Advisor to the President Stephen Miller and former Acting White House Chief of Staff Mick Mulvaney as custodians for discovery purposes).

The court of appeals stayed the partial final judgment pending appeal and placed the appeal in abeyance pending the disposition of the government's certiorari petitions. 20-3150 C.A. Doc. 21 (Nov. 19, 2020).

3. In the meantime, discovery on ICIRR's equal-protection claim continued. Pet. App. 23a. In December 2020, the district court held that *in camera* review of certain executive branch materials was necessary to determine whether they could be withheld pursuant to the deliberative process privilege. *Ibid.*

On January 22, 2021, two days after President Biden took office, the district court entered an order seeking DHS's views about whether the discovery dispute continued to present a live controversy. Pet. App. 23a. In particular, the court directed DHS to file a status report by February 4, 2021, addressing whether DHS still

planned to pursue its Seventh Circuit appeal following the change in Administration. D. Ct. Doc. 240 (Jan. 22, 2021).

On February 2, 2021, President Biden issued an Executive Order directing DHS and other agencies to "review all agency actions related to implementation of the public charge ground of inadmissibility." Exec. Order No. 14,012, § 4, 86 Fed. Reg. 8277, 8278 (Feb. 5, 2021). The following day, DHS notified the district court that it "intend[ed] to confer with [ICIRR] over next steps in this litigation" in light of the Executive Order. D. Ct. Doc. 241, at 2 (Feb. 3, 2021).

On February 19, 2021, the parties submitted a joint status report agreeing to a short stay of discovery to "provide DHS and [the Department of Justice] with additional time to assess how they wish to proceed." D. Ct. Doc. 245, at 4 (Feb. 19, 2021). ICIRR added that it would oppose any additional stays while the government's appeals remained pending, but observed that "if the Defendants agree to end their appeal of the final judgment, allowing the vacatur to go into effect, [ICIRR] is open to talking to them about staying the equal protection claim." *Id.* at 3. DHS, meanwhile, indicated that "further developments during [the agreed-upon stay] may * * * moot [ICIRR's] equal protection claim." *Id.* at 4.

That possibility soon came to pass. On March 9, 2021, DHS announced that the government had determined that continuing to defend the 2019 Rule before this Court and in the lower courts would not be in the public interest or an efficient use of government resources. DHS, *DHS Statement on Litigation Related to the Public Charge Ground of Inadmissibility* (Mar. 9, 2021), https://go.usa.gov/xtTUY. Consistent with

that determination, on March 9, 2021, the government filed stipulations dismissing *DHS* v. *New York*, *supra* (No. 20-449); *Mayorkas* v. *Cook Cnty.*, *supra* (No. 20-450), and *USCIS* v. *City & Cnty. of San Francisco*, *supra* (No. 20-962).

The government also moved to dismiss its public-charge-related appeals in the lower courts, including the government's appeal of the district court's partial final judgment in this case vacating the 2019 Rule. 20-3150 C.A. Doc. 23 (Mar. 9, 2021). The Seventh Circuit dismissed the appeal and issued its mandate. 20-3150 C.A. Doc. 24 (Mar. 9, 2021). Because the vacatur entered by the Northern District of Illinois then became final, DHS published a rule removing the 2019 Rule from the Code of Federal Regulations. 86 Fed. Reg. 14,221, 14,221 (Mar. 15, 2021).

B. Petitioners' Intervention Motions

Petitioners are a group of States that did not participate in any of the above-described litigation or in the rulemaking that led to the 2019 Rule. Following the government's dismissal of its pending cases before this Court and its appeals in the courts of appeals, however, petitioners attempted to intervene and revive litigation over the 2019 Rule.

1. On March 11, 2021, petitioners filed a motion to recall the mandate in the Seventh Circuit to allow them to intervene and pursue an appeal of the district court's partial final judgment. 20-3150 C.A. Doc. 25 (Mar. 11, 2021). The Seventh Circuit denied the motion without noted dissent. 20-3150 C.A. Doc. 26 (Mar. 15, 2021).

Petitioners then filed an application for a stay in this Court, which this Court denied on April 26, 2021. 141 S. Ct. 2562. The Court stated that the denial was "without prejudice to the States raising" arguments about

DHS's dismissal of its appeal "before the District Court, whether in a motion for intervention or otherwise." *Ibid.*[3]

2. On May 12, 2021, petitioners filed a motion to intervene in the district court, along with a motion for relief from judgment under Federal Rule of Civil Procedure 60(b). D. Ct. Docs. 256, 257, 259, 260 (May 12, 2021). The court denied both motions. Pet. App. 20a-68a.

The district court first held that petitioners' motion to intervene was not "timely" under Federal Rule of Civil Procedure 24. Pet. App. 32a (quoting Fed. R. Civ. P. 24(a) and (b)(1)); see *id.* at 32a-60a. The court found that "[a]ny reasonable observer would have known" that "intervention had become extremely urgent for anyone who wished to ensure the Rule's continued defense" by no later than February 3, 2021, when DHS notified the court of the Executive Order and indicated that "it might influence the 'next steps in this litigation.'" *Id.* at 43a (citation omitted); see *id.* at 44a-45a (contrasting delay here with the shorter 17-day delay that this Court found unreasonable in *NAACP* v. *New York*, 413 U.S. 345 (1973)).

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[3] Meanwhile, most of the petitioner States also sought to intervene in the Ninth Circuit, which denied their motion. *City & Cnty. of San Francisco* v. *USCIS*, 992 F.3d 742 (9th Cir. 2021). This Court granted a writ of certiorari to review that decision, but ultimately dismissed the writ as improvidently granted. *Arizona* v. *City & Cnty. of San Francisco*, 142 S. Ct. 1926 (2022). In an opinion concurring in that dismissal, the Chief Justice stated that it "should not be taken as reflective of a view on * * * the appropriate resolution of other litigation, pending or future, related to the 2019 Public Charge Rule, its repeal, or its replacement by a new rule," citing this case. *Id.* at 1929.

The district court also found that petitioners' delay would prejudice the existing parties if petitioners were allowed to intervene. Pet. App. 49a-54a. The court explained that if petitioners had moved to intervene earlier, "DHS would have known of the possible need to preserve the Rule pending further review." *Id.* at 52a. Because the vacatur had already taken effect by the time petitioners moved to intervene, however, "[a]llowing intervention now could 'require DHS to again shift the public charge guidance' it issued in light of the Rule's vacatur," undermining DHS's—and the public's—"interest in the consistent and predictable implementation of federal policy." *Ibid.* (brackets and citation omitted). In addition, the court observed that ICIRR had dismissed its equal-protection claims in reliance on the dismissal of the government's appeal; if the case were reinstated, ICIRR would presumably seek to reinstate its equal-protection claims as well, "subjecting DHS once again to the risk" of "having to present former administration officials for deposition" concerning their motivations. *Id.* at 53a.

The district court found that petitioners, in contrast, would not suffer meaningful prejudice from a denial of their motion. Pet. App. 54a-59a. The court observed that they were free to participate in DHS rulemaking proceedings regarding the public-charge ground of inadmissibility, and the court stated that its vacatur of the 2019 Rule "does not preclude DHS in the future from promulgating a public charge regulation identical to the [2019] Rule." *Id.* at 59a.

The district court determined that petitioners' Rule 60(b)(6) motion likewise failed. Pet. App. 60a-68a. Even "assum[ing] for the sake of argument that [petitioners] [we]re entitled to intervene," the court found Rule

60(b)(6) relief unwarranted on three independent grounds. *Id.* at 62a. First, petitioners' request for Rule 60(b)(6) relief was itself untimely. *Id.* at 62a-64a. Second, petitioners had failed to show the "extraordinary circumstances" required by Rule 60(b)(6), given that "federal agencies regularly decide * * * to dismiss appeals of judgments invalidating regulations or to not appeal in the first place." *Id.* at 64a; see *id.* at 48a (collecting examples). Third, petitioners themselves had "'agree[d] that the Seventh Circuit's holding [in the preliminary-injunction appeal] likely establishes the law of the case for [the district c]ourt,'" effectively conceding that the district court could not actually set aside its earlier judgment because "the Seventh Circuit's decision prohibits upholding the Rule." *Id.* at 67a (quoting D. Ct. Doc. 260, at 9).

3. The court of appeals affirmed in a unanimous opinion. Pet. App. 1a-19a.

At the outset, the court of appeals observed that DHS had recently published a notice of proposed rulemaking to adopt a new public-charge regulation. Pet. App. 8a-9a (citing 87 Fed. Reg. 10,570 (Feb. 24, 2022) (NPRM)). The court stated that issuance of the NPRM, by itself, did not moot the appeal. *Id.* at 10a.

Turning to petitioners' intervention motion, the court of appeals held that the district court did not abuse its discretion in finding the motion untimely. Pet. App. 10a-18a; see *id.* at 11a n.2 (observing that abuse-of-discretion review was appropriate because "timeliness is a fact-bound question"). The court of appeals explained that timeliness is "measure[d] from when the applicant has reason to know its interests *might* be adversely affected, not from when it knows for certain that they will be." *Id.* at 12a (citation omitted). And here,

the court determined that "by the end of February 2021 the States were, without doubt, aware of the possibility that the federal government was going to abandon its defense of the 2019 Rule and seek to promulgate a new one." *Ibid.* The district court's determination that petitioners had unduly delayed was therefore reasonable. *Id.* at 13a-14a.

The court of appeals also found no error in the district court's prejudice determinations. Pet. App. 14a-16a. The court of appeals observed that "DHS may well have taken a different approach to its repeal of the 2019 Rule and its design of a replacement had the States intervened sooner," and that allowing petitioners to intervene now would "reinitiate a burdensome discovery process against the federal government." *Id.* at 14a-15a. In contrast, the court concluded that petitioners "had (and still have) other, arguably better, legal routes available to them to influence the evolving 'public charge' policy." *Id.* at 16a.

Finally, the court of appeals stated that petitioners had failed to identify any "unusual or extraordinary circumstances" that could justify their delay. Pet. App. 16a. The court explained that it is "commonplace for a new administration to take different policy positions from its predecessor, and in the course of doing so to withdraw an appeal or rule." *Id.* at 17a. Here, "the writing had long been on the wall that the federal government was likely to abandon its defense of the 2019 Rule," and the district court therefore did not abuse its discretion by denying intervention on timeliness grounds. *Ibid.* Accordingly, the court of appeals did not consider whether petitioners had satisfied the other requirements for intervention under Rule 24, including the assertion of a "'legally protectible' interest" in the

suit. *Id.* at 18a (quoting *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 315 (1985)).

The court of appeals also found no abuse of discretion in the district court's denial of petitioners' Rule 60(b) motion. The court of appeals observed that petitioners' motion faced "[a] number of hurdles." Pet. App. 18a. But the court held that it "need not reach" most of those hurdles because "relief under Rule 60(b) is available only to 'a party or its legal representatives.'" *Id.* at 18a-19a (quoting Fed. R. Civ. P. 60(b)). Because petitioners had been denied intervention, and thus were not parties to the case, they were "not entitled to pursue Rule 60(b) relief." *Ibid.*

C. DHS's Adoption Of A New Public Charge Rule

On August 26, 2022, the Secretary of Homeland Security signed a new final rule setting forth DHS's interpretation of the public-charge ground of inadmissibility. 87 Fed. Reg. 55,472, 55,639 (Sept. 9, 2022) (2022 Rule). The interpretation adopted in the 2022 Rule is similar to the interpretation DHS had used between 1999 and 2019, with "important clarifications and changes." *Id.* at 55,474.

In the preamble to the 2022 Rule, DHS responded to the 223 comments it received on the February 2022 NPRM. 87 Fed. Reg. at 55,475. DHS also analyzed the effects of the 2019 Rule at length and explained why the agency had declined to carry forward what it found to be the 2019 Rule's "complicated and unnecessarily broad definition of 'public charge.'" *Id.* at 55,473; see, *e.g.*, *id.* at 55,502-55,511. Among other things, DHS determined that the 2019 Rule had led to "undue fear and confusion" among both immigrant and U.S. citizen households with residents who were not in fact subject to the 2019 Rule at all, but who mistakenly believed that

availing themselves of public benefits would adversely affect their immigration status. *Id.* at 55,473.

As particularly relevant here, DHS also determined that the 2019 Rule had an exceedingly modest effect on the actual immigration decisions it was intended to govern: Of the 47,555 applications for adjustment of status to which the 2019 Rule was applied between February 2020 and March 2021, only *five* were denied or designated for intended denial on public-charge grounds (and all five of those applications were eventually approved). 87 Fed. Reg. at 55,473.

ARGUMENT

Petitioners contend (Pet. 20-29) that they should have been permitted to intervene in litigation over the 2019 Rule and that the district court should have granted their Rule 60(b) request to re-enter its final judgment vacating that rule to allow petitioners to pursue an appeal. In light of DHS's intervening issuance of the 2022 Rule, however, those contentions no longer implicate a live controversy. That by itself is sufficient reason to deny review.

Even if petitioners' requests to intervene and for Rule 60(b) relief were not moot, this Court's review would not be warranted. The court of appeals correctly rejected petitioners' factbound challenges to the district court's determinations that they were aware of the need to intervene by February 2021, at the latest, and that their later filings were untimely. And petitioners identify no court of appeals that would have granted relief in these circumstances.

Finally, petitioners' criticisms (Pet. 11-20) of the government's decision to forgo further litigation about the 2019 Rule provide no sound basis for this Court's review. The government is entitled to decline to seek

review of adverse decisions (whether or not it thinks they are legally correct or agrees with the scope of relief ordered). It permissibly elected to do so here. And even if this Court were otherwise inclined to consider the contention that such litigation decisions are inconsistent with the APA or justify intervention by strangers to the case, this would be a singularly poor vehicle in which to do so: The 2019 Rule that petitioners seek to defend failed to produce any of its intended effects, and DHS has now replaced the rule through full notice-and-comment rulemaking. The petition for a writ of certiorari should be denied.

A. Petitioners' Requests To Intervene And For Rule 60(b) Relief Are Moot

1. DHS's promulgation of the 2022 Rule has mooted petitioners' attempt to intervene in and revive litigation over the 2019 Rule. Even if petitioners were permitted to intervene and ultimately succeeded in obtaining reversal of the district court's judgment in this case (and even if DHS then rescinded the March 2021 rule implementing that judgment), the 2019 Rule still would not be reinstated because it was independently superseded by the 2022 Rule. Any dispute regarding the "lawfulness" of the 2019 Rule has thus become "an abstract dispute about the law, unlikely to affect" petitioners' legal rights and therefore not appropriate for resolution by an Article III tribunal. *Alvarez* v. *Smith*, 558 U.S. 87, 93 (2009).

Indeed, it is "a perfectly uncontroversial and well-settled principle of law" that "when an agency has rescinded and replaced a challenged regulation, litigation over the legality of the original regulation becomes moot." *Akiachak Native Cmty.* v. *United States Dep't of the Interior*, 827 F.3d 100, 113 (D.C. Cir. 2016)

(collecting cases); see, *e.g.*, *Franciscan Alliance, Inc.* v. *Becerra*, 47 F.4th 368, 374 (5th Cir. 2022) ("When a challenged rule is replaced with a new rule, the case is moot."); *Wyoming* v. *United States Dep't of Agr.*, 414 F.3d 1207, 1212 (10th Cir. 2005) ("[A]doption of the new rule has rendered [an APA challenge to the former rule] moot."). And that remains true even where, as here, the new regulation is "contrary" to the "legal position" of a party or potential party to the original suit. *Akiachak Native Cmty.*, 827 F.3d at 113. Such a litigant's remedy is not to seek to prolong the moot litigation, but instead to bring a new suit "challenging the regulation currently in force." *Ibid.*

2. Seeking to avoid mootness, petitioners observe (Pet. 18-19) that the 2022 Rule may be "subject to various challenges" and assert that the partial final judgment in this case might affect that future litigation. But new regulations are always subject to challenge, and petitioners cite no authority suggesting that the mere possibility that such a challenge might succeed is enough to save litigation about a superseded rule from mootness. The two effects petitioners posit are also unpersuasive even on their own terms.

First, petitioners err in asserting (Pet. 18) that the "baseline" for claims that the 2022 Rule is arbitrary and capricious "depends on whether the district court properly vacated" the 2019 Rule. The decisions on which petitioners rely simply provide that an agency that reverses a prior policy must "display awareness that it is changing position" and provide "good reasons for the new policy." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis omitted). That obligation does not turn on whether the prior policy was vacated by a district court. Here, for example, the 2022

Rule acknowledged that it reflects a "different policy than the 2019 Final Rule" and exhaustively explained the reasons for the change. 87 Fed. Reg. at 55,473; see *id.* at 55,487-55,585. DHS also included a 15-page comparison of the costs and benefits of the 2019 and 2022 Rules. *Id.* at 55,619-55,633. DHS's justification for the 2022 Rule thus did not depend on the district court's vacatur of the 2019 Rule, and that vacatur will likewise have no effect on future courts' consideration of APA challenges to the 2022 Rule.

Second, petitioners assert (Pet. 18-19) that this litigation could affect "the version of the rule that would take effect" if a challenge to the 2022 Rule succeeded. Petitioners appear to contemplate the following sequence of events: (1) that after intervening in this case, they would succeed in overturning the district court's judgment vacating the 2019 Rule; (2) that petitioners would also defeat ICIRR's equal-protection challenge to the 2019 Rule; (3) that petitioners would then challenge and invalidate DHS's March 2021 regulation formally rescinding the 2019 Rule; and (4) that a court hearing a challenge to the 2022 Rule would then issue a decision compelling DHS to resume enforcement of the 2019 Rule.

Petitioners cite no decision holding that such a contingent chain of litigation events can save a case from mootness. And several of the links in petitioners' chain are especially speculative. Petitioners have conceded, for example, that the Seventh Circuit's decision holding the 2019 Rule unlawful "likely establishes the law of the case" (as well as circuit precedent). Pet. App. 67a (citation omitted). That means that petitioners could not overturn the district court's judgment unless they obtained a decision on the legality of the 2019 Rule from

the en banc Seventh Circuit or from this Court. See *ibid.* But there is no reason to think that either the Seventh Circuit or this Court would grant discretionary review to consider the legality of a now-superseded rule.

Even if petitioners were successful in overturning the district court's judgment and reversing the March 2021 rescission of the 2019 Rule, moreover, that would not mean that the 2019 Rule would spring back to life if a court found some defect in the 2022 Rule. The remedy for such a finding would instead be up to the court that made it. And although the appropriate remedy would depend on the nature of the defect identified, there is no reason to assume that a court would compel DHS to return to the 2019 Rule.

As then-Judge Barrett explained, "the term 'public charge' is indeterminate enough to leave room for interpretation," and no one suggests that DHS was *compelled* to adopt the particular interpretation in the 2019 Rule. 962 F.3d at 248, 253 (Barrett, J., dissenting). In the preamble to the 2022 Rule, DHS explained at length why it was rejecting that interpretation—including because the 2019 Rule had generated widespread confusion and harm to people who were not even subject to the public-charge ground in the first place; had substantially increased administrative burdens for agency adjudicators; and had ultimately had vanishingly little effect on actual public-charge adjudications. See, *e.g.*, 87 Fed. Reg. at 55,473, 55,502-55,511. That explanation would amply justify DHS's decision to reject the 2019 Rule even if a reviewing court were to conclude that some aspect of the 2022 Rule's affirmative interpretation was unlawful or insufficiently explained. And DHS made clear that the various aspects of the 2022 Rule must "be treated as severable to the maximum extent

possible," *id.* at 55,502, underscoring that a defect in the 2022 Rule's affirmative interpretation would not justify vacating the portion of the rule that rejected the 2019 interpretation or enjoining DHS to resume enforcement of that interpretation.

In short, petitioners provide no reason to depart from the settled rule that the replacement of a regulation through notice-and-comment rulemaking moots litigation challenging that regulation. Petitioners' contrary approach would lead to a regime of simultaneous challenges to multiple iterations of the same regulation, miring both agencies and the courts in needless procedural complexities and raising the risk of inconsistent adjudications and conflicting remedies.

3. Petitioners briefly contend (Pet. 33) that if the Court determines no justiciable controversy remains, it should "summarily vacate the district court's judgment based on the principles underlying *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950)." That contention lacks merit for multiple reasons.

First, the district court's judgment vacating the 2019 Rule is not even properly before this Court. Petitioners did not and could not appeal that judgment, which was entered in November 2020. Pet. App. 69a-70a. Instead, petitioners appealed only the district court's August 2021 order denying their motions to intervene and for Rule 60(b) relief. *Id.* at 1a-2a, 68a. Where, as here, the lower courts have denied intervention, the putative intervenor may "seek Supreme Court review of the denial of the motion to intervene," but "cannot petition for review of any other aspect of the judgment below"—much less an earlier judgment that was not even before the court of appeals. Stephen M. Shapiro et al., *Supreme Court Practice* § 6.16(c) (11th ed. 2019) (collecting

cases); see, *e.g.*, *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 30-33 (1993) (per curiam).

Second, this Court has held that "the *Munsingwear* procedure is inapplicable" to controversies that "ended when the losing party * * * declined to pursue its appeal." *Karcher* v. *May*, 484 U.S. 72, 83 (1987). Petitioners do not even acknowledge that decision, let alone offer any justification for revisiting it.

Third, vacatur here would not serve the purposes of the *Munsingwear* doctrine. That doctrine exists to "clear[] the path for future relitigation of the issues between the parties." *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 22 (1994) (quoting *Munsingwear*, 340 U.S. at 40). Here, however, petitioners were never parties to the underlying case, and accordingly would not be bound by the district court's judgment should those issues arise again in the future. Petitioners point to no prior decision entering vacatur under *Munsingwear* at the request of a non-party, and the government is aware of none. And, in any event, the district court emphasized that its judgment vacating the 2019 Rule "does not preclude DHS in the future from promulgating a public charge regulation identical to the [2019] Rule, nor does it preclude [petitioners] from petitioning DHS to do so." Pet. App. 59a. Petitioners therefore err in asserting that allowing that final judgment to stand would somehow ensure that the approach in the 2019 Rule "'could effectively never, ever be resurrected, even by a future administration.'" Pet. 5 (citation omitted).

B. Further Review Would Be Unwarranted Even If Petitioners' Requests Were Not Moot

Even if the petition for a writ of certiorari implicated a live controversy, no further review would be warranted. The court of appeals correctly rejected petitioners' intervention and Rule 60(b) arguments, and its decision does not conflict with any decision of this Court or another court of appeals.

1. The court of appeals' intervention holding does not warrant review

a. Rule 24 requires that a motion to intervene, whether as of right or by permission, be "timely." Fed. R. Civ. P. 24(a) and (b)(1). "Timeliness is to be determined from all the circumstances * * * by the [district] court in the exercise of its sound discretion." *NAACP* v. *New York*, 413 U.S. 345, 366 (1973); see *Cameron* v. *EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1012 (2022).

Petitioners do not appear to challenge the legal standard the lower courts applied in holding their motion to intervene untimely, and they also do not contend that the court of appeals' decision conflicts with any decision of another court of appeals. Instead, petitioners simply object (Pet. 21-22) to the lower courts' determination that their motion was untimely in light of the particular—and highly unusual—circumstances of this case. Those factbound objections provide no sound basis for this Court's review. See Sup. Ct. R. 10.

In any event, petitioners' objections lack merit. Petitioners contend (Pet. 21-22) that the government "continued to represent in signed filings that it was either uncertain of its next steps or actively defending the [2019] Rule until March," and that even if petitioners "should have known that the new administration

intended to rescind the [2019] Rule, they still had no notice of a need to intervene" because they could not have known that the government would "dismiss[] litigation against [the] prior regulation[]." But the question is not whether petitioners knew with certainty what the government was going to do: This Court has made clear, for example, that a putative intervenor's motion may be deemed untimely if it failed to act in the face of a "strong likelihood" that the existing parties would cease representing its interests. *NAACP*, 413 U.S. at 367. And as the district court found, "[a]ny reasonable observer would have known" that "intervention had become extremely urgent" by no later than February 3, 2021, when DHS notified the court of the possibility that the President's Executive Order directing reconsideration of the 2019 Rule could "influence the 'next steps in this litigation.'" Pet. App. 43a (citation omitted).

Indeed, the district court itself recognized the issue even earlier, expressly raising in its January 22, 2021 order the possibility that DHS might dismiss the pending appeal. See D. Ct. Doc. 240. And in the parties' February 19, 2021 joint filing, DHS represented that "further developments" in the ensuing weeks could "moot [ICIRR's] equal protection claim," while ICIRR made clear that it was pressing DHS "to end [DHS's] appeal of the final judgment." D. Ct. Doc. 245, at 3-4. Petitioners do not meaningfully address those facts, which amply support the district court's determination that they should have known of the significant possibility of dismissal—and moved to intervene—by February 2021, at the latest.

Petitioners contend (Pet. 11) that it was reasonable for them to assume that if the federal government did not wish to pursue its appeal, it would put this case in

abeyance rather than dismissing its appeal. But they ignore the contrary findings of the lower courts, which observed that "federal agencies regularly choose to forego appeal, or to dismiss their appeals, of district court judgments that invalidate regulations," Pet. App. 48a, and that it is "commonplace for a new administration to take different policy positions from its predecessor, and in the course of doing so to withdraw an appeal or rule," *id.* at 17a. Members of this Court have likewise recognized that "[i]t's very much not unprecedented" for "the government to acquiesce in an adverse judgment invalidating a rule." Transcript of oral argument at 36, *Arizona* v. *City & Cnty. of San Francisco*, 142 S. Ct. 1926 (2022) (per curiam) (No. 20-1775) (Feb. 23, 2022) (Kavanaugh, J.); see *id.* at 83 (Barrett, J.) (noting that the government's brief had "ma[de] clear" that there is "lots of historical practice for the government acquiescing in * * * judicial decisions and not appealing"); Gov't Br. at 38 n.11, *Arizona*, *supra* (No. 20-1775) (collecting examples).[4]

Moreover, even after DHS announced on March 9, 2021, that the government would no longer defend the 2019 Rule, petitioners did not promptly seek intervention

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[4] Petitioners err in asserting (Pet. 5, 11, 14-15, 22) that the government's counsel acknowledged in the *Arizona* oral argument that the dismissals of its appeals in cases about the 2019 Rule were unprecedented. In fact, counsel explained that although the particular situation the government faced here was unique, the government had declined to seek further review of decisions invalidating regulations "across administrations in a lot of different circumstances." Transcript of oral argument at 73, *Arizona*, *supra* (No. 20-1775). And in the other portions of the transcript petitioners cite, counsel explained that he was aware of no examples analogous to *the States' attempts* to intervene *after* the federal government's appeals had already been dismissed. *Id.* at 43, 84-85.

in the district court. Pet. App. 7a. Instead, they waited until May 12, 2021. D. Ct. Docs. 256, 257, 259, 260; see Pet. App. 12a-14a (discussing additional delay). Petitioners argue (Pet. 22-23) that waiting that long to file anything in the district court was excusable because they had filed a motion to intervene and to recall the mandate in the court of appeals on March 11, 2021. But the court of appeals denied that motion on March 15, 2021, Pet. App. 7a, and because the court of appeals had already issued its mandate, the "court that most recently had jurisdiction over the matter," Pet. 24, was not the court of appeals, but the district court. Petitioners provide no justification for waiting two additional months to seek to intervene in that court.

Petitioners contend (Pet. 24) that the lower courts' findings that their intervention motion was untimely are irreconcilable with this Court's purported "hint" to petitioners to file a motion to intervene in the district court. That contention lacks merit. This Court simply stated that its decision denying petitioners' request to intervene in this Court and for a stay of the district court's final judgment was "without prejudice" to the States' ability to seek other relief in district court. 141 S. Ct. at 2562. The Court did not have before it any arguments about the timeliness of a potential district-court filing, and did not purport to anticipatorily resolve that question one way or the other.

b. The court of appeals also correctly determined that the district court did not abuse its discretion in finding that allowing petitioners to intervene would prejudice the parties.

Before dismissing its appeal, the federal government had engaged in a weeks-long evaluation of its litigation options, which necessarily took into account the absence

of intervenors. During that time, the federal government concluded that continued litigation in "defense of the [2019] Rule was 'neither in the public interest nor an efficient use of government resources.'" Pet. App. 51a (citation omitted). In addition, the government's dismissal of its appeal prompted ICIRR to agree to dismiss its equal-protection claim, thus sparing the government the need to litigate discovery disputes potentially implicating executive privilege and to defend depositions of high-ranking officials from the prior Administration regarding their motives for adopting the 2019 Rule. *Id.* at 53a.

Had petitioners moved to intervene more promptly, the government could have taken their participation into account and potentially formulated a different course. See Pet. App. 14a-15a. Moreover, allowing petitioners to intervene and potentially revive the case after the district court's vacatur had already taken effect—and after DHS had taken the further step of effectuating the vacatur by formally rescinding the 2019 Rule—would have generated unnecessary public confusion about the status of the rule, frustrating the agency's, and the public's, "interest in the consistent and predictable implementation of federal policy." *Id.* at 52a.

The court of appeals therefore correctly determined that the district court did not abuse its discretion in concluding that allowing petitioners to intervene in May 2021 or later would have wasted the parties' efforts to reach an end to the litigation, subjected the parties to renewed discovery disputes, and injected renewed uncertainty into guidance regarding DHS's implementation of the public-charge statute—a "back-and-forth that

could have been avoided" if petitioners had acted more promptly. Pet. App. 52a; see *id.* at 14a-15a.

The court of appeals also properly held that the district court did not abuse its discretion in determining that the substantial prejudice to the parties would outweigh any prejudice to petitioners from the denial of intervention. Pet. App. 15a-16a. Petitioners assert (Pet. 27) that the 2019 Rule benefited them financially because it resulted in some number of noncitizens being denied adjustment of status, meaning that those noncitizens would not be eligible for state-funded public benefits in the future. But petitioners do not dispute that the 2019 Rule had only negligible impact, affecting just 0.01% of the applications for adjustment of status to which it was applied between February 2020 and March 2021. Pet. App. 15a n.3. Such a statistically insignificant impact is not even sufficient to establish Article III standing or the legally protectible interest required by Rule 24(a)—let alone to show material prejudice.

Petitioners additionally contend (Pet. 27) that intervention is necessary to protect their right to comment on changes in the federal government's approach to the public-charge ground of inadmissibility. But DHS afforded (and petitioners took) that opportunity in connection with the 2022 Rule. In that notice-and-comment rulemaking process, DHS carefully considered petitioners' arguments in favor of the 2019 Rule, but explained that it was choosing not to follow their preferred path because it had determined that the interpretation of "public charge" embodied in the 2019 Rule had created substantial burdens for the public and the agency, as well as widespread indirect effects with respect to disenrollment or forgone enrollment from health, nutrition, or other public-benefit programs by persons who

were not subject to the 2019 Rule in the first place—all while having virtually no effect on immigration outcomes. See pp. 11-12, *supra*. And petitioners do not explain how their opportunity to participate in the rulemaking process that culminated in the 2022 Rule was meaningfully different from the opportunity they would have received if the government had instead—as they would have preferred (Pet. 22)—"abey[ed] litigation, promulgat[ed] a new regulation, and then dismiss[ed] litigation against" the 2019 Rule.

c. Finally, petitioners are wrong to contend (Pet. 28-29) that they satisfy the other requirements for mandatory or permissive intervention.

As an initial matter, the timeliness findings of the courts below made it unnecessary to reach those issues, see Pet. App. 18a, and petitioners offer no reason for this Court to depart from its usual practice by addressing them in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (observing that this Court is "a court of review, not of first view").

In any event, petitioners' assertions lack merit. Intervention as of right under Rule 24(a) is limited to entities that "claim[] an interest relating to the property or transaction that is the subject of the action, and [are] so situated that disposing of the action may as a practical matter impair or impede [their] ability to protect [their] interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). That text refers to a direct, legally protectable interest related to the "property" or "transaction" that "is the subject" of the action. *Ibid.* It does not encompass merely indirect interests of the sort petitioners assert here (Pet. 26-27), such as the possibility of speculative, downstream economic effects from the resolution of the parties' claims.

See, *e.g.*, *Donaldson* v. *United States*, 400 U.S. 517, 531 (1971) (finding that an individual's interest in the downstream practical consequences of responses to administrative summonses for records with information about him was not the type of "significant[] protectable interest" necessary to support mandatory intervention). And that is particularly true where, as here, those downstream economic effects have proved to be negligible.

Nor are petitioners correct in contending in the alternative (Pet. 29) that they are entitled to permissive intervention under Rule 24(b). Even if petitioners had a plausible argument that their intervention motion was technically timely, the district court and court of appeals would have been well within their discretion to deny intervention based on petitioners' delay and the prejudice to the parties, particularly in light of the highly attenuated nature of petitioners' alleged interest in this case. See Fed. R. Civ. P. 24(b)(3) (requiring courts to consider "delay or prejudice" to existing parties in deciding whether to grant permissive intervention).

2. The court of appeals' Rule 60(b) holding does not warrant review

"Federal Rule of Civil Procedure 60(b) permits 'a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances.'" *Kemp* v. *United States*, 142 S. Ct. 1856, 1861 (2022) (quoting *Gonzalez* v. *Crosby*, 545 U.S. 524, 528 (2005)). Petitioners were not a "party" to the litigation, and under a straightforward application of the text of Rule 60(b), they were therefore not entitled to seek post-judgment relief. See Fed. R. Civ. P. 60(b); Pet.

App. 19a ("The limitation to parties or legal representatives appears in the text of Rule 60(b).").

Petitioners briefly assert that the court of appeals' conclusion that they could not seek Rule 60(b) relief as nonparties conflicts with the decisions of other courts of appeals, which have held that a nonparty may seek Rule 60(b)(6) relief "where its interests were directly or strongly affected by the judgment." Pet. 31 (quoting *Bridgeport Music, Inc.* v. *Smith*, 714 F.3d 932, 940 (6th Cir. 2013)). But for the reasons discussed above, see pp. 24-26, *supra*, petitioners' interests were neither directly nor strongly affected by the district court's partial final judgment. And petitioners cite no decision from any court allowing nonparties to seek Rule 60(b) relief in circumstances like those present here.

Moreover, even if petitioners could show that they were entitled to *seek* Rule 60(b)(6) relief notwithstanding the Rule's textual limitation to parties, the district court did not abuse its discretion in finding that petitioners were not entitled to *receive* such relief for multiple independent reasons. Pet. App. 63a-68a; see *id.* at 18a (court of appeals' decision finding it unnecessary to reach those additional grounds for affirmance).

First, petitioners' motion for Rule 60(b)(6) relief was untimely, for all of the reasons discussed above in connection with the motion to intervene. See pp. 19-25, *supra*; Pet. App. 62a-64a.

Second, Rule 60(b)(6) applies only where "extraordinary circumstances" justify relief from the judgment. *Kemp*, 142 S. Ct. at 1861 (citation omitted). Here, the only allegedly extraordinary circumstance that petitioners identify (Pet. 30) is the government's decision to dismiss its appeal of the district court's final judgment. But as the lower courts recognized in addressing the

motion to intervene, there was nothing extraordinary about the federal government's decision not to pursue an appeal of the district court's judgment: "[F]ederal agencies regularly choose to forego appeal, or to dismiss their appeals, of district court judgments that invalidate regulations." Pet. App. 48a; see *id.* at 17a; see also pp. 20-21, *supra*.[5]

Finally, the relief that petitioners sought was not even genuine Rule 60(b)(6) relief. That rule allows a district court, where appropriate, to "relieve [the movant] from a final judgment." Fed. R. Civ. P. 60(b)(6). But as the district court observed, petitioners "'agree[d] that the Seventh Circuit's holding likely establishes the law of the case,'" and thus they did not dispute that *the district court* lacked authority to "hold, whether on a Rule 60(b) motion or otherwise, that the [2019] Rule complies with the APA." Pet. App. 67a (citation omitted). Petitioners were accordingly not asking the district court to grant them "relie[f] * * * from a final judgment," Fed. R. Civ. P. 60(b), but instead were asking the district court to "simply re-enter [the final judgment] in identical form so that they [could] appeal," Pet.

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[5] In arguing otherwise, petitioners invoke cases where "the Executive asks lower courts to abey litigation regarding administrative actions it no longer supports until it can rescind or otherwise terminate those actions." Pet. 5; see Pet. 5-6 & nn.3-4. The government does sometimes pursue that path. But most of the examples cited by petitioners and the secondary source on which they rely involved circumstances where an agency opted to reconsider a challenged rule *before* the reviewing court had passed on its legality. See Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 Minn. L. Rev. 1, 27-29 & nn.126-130 (2019). Such cases simply do not present the question the government faced here—whether to appeal (or continue appealing) a judicial decision vacating a rule.

App. 67a. Nothing in Rule 60(b) authorizes a district court to grant such relief.

C. Petitioners' Criticisms Of The Government's Litigation Decisions Provide No Basis For Review

Petitioners contend (Pet. 10-15) that the government acted improperly or violated the APA by dismissing its appeal of the district court's decision vacating the 2019 Rule and then implementing that vacatur by rescinding the rule without notice and comment. Even if those issues otherwise warranted this Court's consideration, this case would not be an appropriate vehicle in which to consider them—particularly now that DHS has completed the notice-and-comment rulemaking process for the 2022 Rule and thus satisfied the very requirement petitioners accuse it of circumventing. In any event, petitioners' criticisms of the government's conduct are mistaken on their own terms.

1. In *Arizona* v. *City & Cnty. of San Francisco*, 142 U.S. 1926 (2022), the Chief Justice stated that litigation and administrative decisions resulting in the March 2021 rescission of the 2019 Rule raised "important questions," including whether "the Government's actions, all told, comport with the principles of administrative law." *Id.* at 1928 (Roberts, C.J., concurring). But the Chief Justice concurred in dismissing the writ of certiorari as improvidently granted because a host of procedural complications made the case a poor vehicle for considering that question. The same logic applies with even greater force in this case, which presents many of the same procedural complications—and which is now moot. See pp. 13-17, *supra*.

The 2022 Rule also makes this case a poor vehicle for an additional reason: Petitioners' fundamental complaint is that the government improperly evaded the

APA's notice-and-comment requirement, but DHS has now completed full notice-and-comment rulemaking. Petitioners insist (Pet. 4-5) that the government should have waited to dismiss its appeals until after that process was complete, but they offer no sound basis for requiring the government to resume litigation over a superseded rule now that the government has indisputably complied with the APA's procedures.

Finally, petitioners err in asserting that this case would be a "[g]ood [v]ehicle," Pet. 16, for resolving "'how the APA's procedural requirements apply in this unusual circumstance,'" Pet. 19 (quoting *Arizona*, 142 S. Ct. at 1928 (Roberts, C.J., concurring)). As the district court observed, petitioners conceded below that it would not "be technically correct to say that [DHS is] violating the APA." Pet. App. 56a (quoting D. Ct. Doc. 282, at 33 (Aug. 5, 2021)); see *id.* at 64a. And the appropriate vehicle for petitioners' APA arguments would have been an APA challenge to the March 2021 rescission of the 2019 Rule, not a motion to intervene in defense of a different agency action.

2. In any event, petitioners are quite wrong to assert that the government's longstanding practice of not pursuing an appeal of *every* decision declaring a federal regulation invalid amounts to "circumvent[ion]" of the APA. Pet. 12 (citation omitted). The APA itself provides for judicial review of final agency actions. 5 U.S.C. 702-703. And when a district court or court of appeals exercises the judicial power, complying with its judgment does not overthrow the APA's design or "undermine[] the judicial process," Pet. 13, but rather is consistent with it. The government is of course free to seek, and often does seek, review of such decisions. But

nothing in the APA or any other source of law requires that the government do so invariably.

As petitioners observe (Pet. 13), the government has long argued—and continues to maintain—that the APA does not authorize district courts to vacate regulations on a nationwide basis. See, *e.g.*, Gov't Br. at 40-44 & n.6, *United States* v. *Texas*, cert. granted, No. 22-58 (July 21, 2022); Gov't Br. at 48-50, *Trump* v. *Pennsylvania*, 140 S. Ct. 2367 (2020) (No. 19-454). But lower courts have nonetheless asserted the authority to enter nationwide vacaturs, as the Northern District of Illinois did here (over the government's objection). Unless and until this Court clarifies that district courts may not grant such universal relief, the government's authority to decline to seek review of adverse district-court decisions will necessarily include the authority to decline to seek review of decisions vacating rules nationwide.

Here, DHS chose to devote its resources to promulgating a new rule rather than continuing to defend a rule that imposed substantial burdens and a wide array of detrimental indirect effects without producing its anticipated benefits. That choice was entirely reasonable, and it provides no persuasive basis for review by this Court of the lower courts' unanimous, factbound decisions regarding the timeliness of petitioners' motions to intervene and to seek relief under Rule 60(b)(6).

3. Petitioners' disagreement with the government's litigation choices also provides no basis to authorize intervention by third parties. As this Court has previously recognized, the decision to give the Attorney General and Solicitor General authority to determine not just *how* but *whether* to pursue appellate review "represents a policy choice by Congress." *Federal Election Comm'n* v. *NRA Political Victory Fund*, 513 U.S. 88, 96

(1994). "Whether review of a decision adverse to the Government * * * should be sought depends on a number of factors which do not lend themselves to easy categorization." *Ibid.* The Solicitor General has a "broad[] view of litigation in which the Government is involved throughout the state and federal court systems" and is therefore better positioned to evaluate the overall costs and benefits of pursuing a particular appeal than are others with more "parochial view[s]" of a given case. *Ibid.* The Court has acknowledged that the Court itself "is well served by such a practice" and that "the practice also serves the Government well." *Ibid.*; see *United States* v. *Mendoza*, 464 U.S. 154, 161, 163 (1984) (holding that non-mutual offensive collateral estoppel does not apply against the government, thus preserving the Executive's "exercise of discretion in seeking to review judgments unfavorable to [the government]," including the ability of "successive administrations of the Executive Branch to take different positions with respect to the resolution of a particular issue").

Petitioners urge this Court to adopt an approach to intervention in litigation involving the federal government that is squarely at odds with that "policy choice by Congress." *NRA Political Victory Fund*, 513 U.S. at 96. Congress determined that decisions about whether to pursue further review in such cases are best "concentrated in a single official." *Ibid.* But petitioners instead propose that, in effect, whenever the federal officer designated by Congress decides that the United States should not pursue further litigation over an invalidated regulation, her role can then be taken over by anyone with even an indirect interest in the regulation, who can then carry forward the litigation as he sees fit. Nothing in Rule 24 or broader principles of intervention

warrants overruling the judgment of Congress and the Executive Branch in that fashion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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