SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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ARIZONA, ET AL.,   )

         Petitioners,   )

            v.   ) No. 20-1775

CITY AND COUNTY OF SAN FRANCISCO,)

CALIFORNIA, ET AL.,   )

         Respondents.   )

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Pages: 1 through 100

Place: Washington, D.C.

Date: February 23, 2022

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11   Washington, D.C.

12   Wednesday, February 23, 2022

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14   The above-entitled matter came on for

15   oral argument before the Supreme Court of the

16   United States at 10:00 a.m.

17

18   APPEARANCES:

19   GEN. MARK BRNOVICH, Attorney General, Phoenix,

20   Arizona; on behalf of the Petitioners.

21   BRIAN H. FLETCHER, Principal Deputy Solicitor General,

22   Department of Justice, Washington, D.C.; on behalf

23   of the Federal Respondents.

24   HELEN H. HONG, Deputy Solicitor General, San Diego,

25   California; on behalf of the State Respondents.

1   C O N T E N T S

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1   P R O C E E D I N G S

2   (10:00 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4   argument this morning in Case 20-1775, Arizona

5   versus San Francisco.

6   General Brnovich.

7   ORAL ARGUMENT OF GEN. MARK BRNOVICH

8   ON BEHALF OF THE PETITIONERS

9   MR. BRNOVICH: Mr. Chief Justice, and

10   may it please the Court:

11   The Ninth Circuit's refusal to let

12   Arizona and other states intervene to defend the

13   public charge rule capped an unprecedented

14   effort by the United States to unlawfully

15   disregard a prior administration's rule.

16   The Department of Justice had spent

17   more than a year successfully fighting the

18   rule's challengers in four different circuits.

19   Every injunction against the rule had been

20   stayed, and this very Court had granted

21   certiorari.

22   But the new Biden Administration

23   suddenly abandoned its defense of the rule. It

24   coordinated with the rule's challengers and

25   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     4   only on that, the Biden Administration rescinded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,

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 1    notice-and-rule comma -- comment -- commenting

 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 the states are impacted

14    fiscally for -- by way of more than a billion

15    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
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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 apparent.

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 difference 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 I -- if I recall, it was a

20   9-0 decision that ultimately the -- they

21   prevailed.

22   So the key is -- is that the -- the

23   administration not only changed, but it refused

24   and opposed the states intervening to protect

25   our interests.

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 1              JUSTICE SOTOMAYOR:  Counsel --

 2              CHIEF JUSTICE ROBERTS:  How would you

 3      --

 4              JUSTICE SOTOMAYOR:  -- I'm not sure

 5      what your interest is.

 6              First of all, the preliminary

 7      injunction didn't run against you, correct?  So,

 8      as far as you were concerned, outside of the

 9      Seventh Circuit's injunction, there was no

10      preliminary injunction against enforcement of

11      the rule in your jurisdiction, correct?

12              MR. BRNOVICH:  Justice, we know that

13      the states -- during the 2019 rulemaking

14      process, there literally is an impact of

15      billions of dollars --

16              JUSTICE SOTOMAYOR:  Counsel --

17              MR. BRNOVICH:  -- to the states.

18              JUSTICE SOTOMAYOR:  -- I agree.  But

19      the injunction here was a plenary injunction,

20      not a decision on the merits, correct?

21              MR. BRNOVICH:  That is correct.

22              JUSTICE SOTOMAYOR:  So, if it's not a

23      decision on the merits, it's a preliminary

24      injunction that ran against other states.  As

25      far as this injunction's jurisdictional scope,
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1   it didn't bar the enforcement of the rule in

2   your state, correct?

3   MR. BRNOVICH: Justice, the

4   injunctions are --

5   JUSTICE SOTOMAYOR: Just answer that

6   yes or no. The injunction ran against other

7   states, correct?

8   MR. BRNOVICH: That is technically

9   correct, yes.

10   JUSTICE SOTOMAYOR: Technically and --

11   MR. BRNOVICH: Yes.

12   JUSTICE SOTOMAYOR: -- and otherwise.

13   It didn't bar the administration from enforcing

14   the rule in your state? This preliminary

15   injunction in the Ninth Circuit wasn't -- did

16   not run against you, correct, or in your favor?

17   MR. BRNOVICH: Well, Justice

18   Sotomayor, they're preliminary now, but the

19   point is they could become permanent at some

20   point and the state --

21   JUSTICE SOTOMAYOR: How can they

22   become permanent when --

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

24   JUSTICE SOTOMAYOR: -- it's -- the

25   preliminary injunction has been vacated,

1   correct?

2   MR. BRNOVICH: That is correct.

3   JUSTICE SOTOMAYOR: So there is no

4   injunction in place. The only thing that can

5   happen is if the rule is resuscitated, correct?

6   If the rule remains not in place or a new rule

7   comes in, correct?

8   MR. BRNOVICH: That is correct, but --

9   however, the --

10   JUSTICE SOTOMAYOR: So now let's go to

11   when they vacated the rule. Didn't you have the

12   right to file an APA action in the appropriate

13   D.C. court --

14   MR. BRNOVICH: Justice --

15   JUSTICE SOTOMAYOR: -- fighting the

16   fact that they had improperly rescinded the

17   rule?

18   MR. BRNOVICH: The -- if we look at

19   the timeline, Justice --

20   JUSTICE SOTOMAYOR: Just answer yes or

21   no. Did you have --

22   MR. BRNOVICH: Well, we were --

23   JUSTICE SOTOMAYOR: -- an -- a legal

24   opportunity -- I don't remember what the statute

25   of limitations is, but I thought, when a rule

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1    has been rescinded, you have a certain number of

2    days to challenge that, don't you?

3              MR. BRNOVICH:  That is correct.

4              JUSTICE SOTOMAYOR:  And the

5    jurisdiction for that is not in the Ninth

6    Circuit, correct?

7              MR. BRNOVICH:  The -- the --

8              JUSTICE SOTOMAYOR:  The jurisdiction

9    for that APA action is not in the Ninth Circuit?

10             MR. BRNOVICH:  But there was pending

11   cases in the Ninth Circuit.  There was --

12             JUSTICE SOTOMAYOR:  Well, what does

13   that --

14             MR. BRNOVICH:  -- pending cases in the

15   Seventh Circuit --

16             JUSTICE SOTOMAYOR:  -- have to do with

17   --

18             MR. BRNOVICH: -- in the Fourth

19   Circuit, in the Second Circuit.

20             JUSTICE SOTOMAYOR:  -- the rescission

21   of the rule?  The legal harm to you is that a

22   rule that you think favors you was illegally

23   rescinded.  You had another jurisdiction to

24   fight that illegal rescission, didn't you?

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

          2   JUSTICE SOTOMAYOR: Just answer the

          3   question, counsel.

          4   MR. BRNOVICH: -- within a day -- we

          5   did -- we are. We're trying to -- we think the

          6   proper vehicle --

          7   JUSTICE SOTOMAYOR: You're trying to

          8   do all of that, but I don't know how that issue

          9   will be litigated in the Ninth Circuit.

         10   MR. BRNOVICH: Because the rule is

         11   being -- was being litigated in not only the

         12   Ninth Circuit, in other circuits, and that's why

         13   the states have an interest in -- in --

         14   JUSTICE SOTOMAYOR: The issue of

         15   whether the rule was illegally rescinded will

         16   not be litigated in the Ninth Circuit, correct?

         17   MR. BRNOVICH: It is necessary for us

         18   to intervene in the Ninth Circuit, but does --

         19   it doesn't mean that it's sufficient for the

         20   process to be complete.

         21   JUSTICE BARRETT: General Brnovich --

         22   CHIEF JUSTICE ROBERTS: Counsel, the

         23   rule was rescinded on the basis of -- I don't

         24   know how many sentences it was when -- on the

         25   basis of a judicial decision in another court,

1   right?

2   MR. BRNOVICH: Yes, Justice Roberts.

3   CHIEF JUSTICE ROBERTS: So is the rule

4   --

5   MR. BRNOVICH: Chief Justice.

6   CHIEF JUSTICE ROBERTS: -- that you

7   can challenge the decision in the other circuit

8   as a basis for challenging the rescission of the

9   rule, or do you go back to the District Court in

10   D.C. and in the D.C. Court of Appeals or

11   District Court, whichever it is, you argue that

12   the judgment in the district court in Illinois

13   was erroneous, or do you go straight to the one

14   in Illinois?

15   MR. BRNOVICH: Justice Roberts, I -- I

16   believe the -- the proper approach is to allow

17   the states to intervene not only in the Ninth

18   Circuit, but, once this Court allows the states

19   to do that, I would fully anticipate that the

20   states then would intervene in the other

21   circuits, including trying to get the decision

22   overturned by the Seventh Circuit and the

23   Northern District of Illinois.

24   And, once again, it was unprecedented,

25   the legal maneuvering by the Department of

1   Justice, when you have all of these different

2   appeals going --

3   JUSTICE KAGAN: Well --

4   MR. BRNOVICH: -- through the process.

5   So it's important for the states --

6   JUSTICE BREYER: Everybody has the

7   same question, I think. The -- my -- my

8   understanding was -- I'd probably put the same

9   question in just a slightly different way --

10   there are some orders of some district courts in

11   California and in Washington, and those were the

12   orders that went to the Ninth Circuit.

13   Now my last -- well, I'm a little out

14   of date and I've seen how Los Angeles has

15   spread, but I don't think it's yet spread to

16   Arizona. And so there's nothing around that --

17   that actually says anybody has to do anything in

18   Arizona. In this case, it's -- it's in the --

19   it's in the Seventh Circuit case that you have a

20   problem, so I -- I don't see why -- why --

21   because they have a nationwide injunction.

22   So you -- you might say: Look, what

23   we want to do is we want to say that the

24   solicitor general of the former administration

25   was right, that the cases are wrong, and we're

 1   going to go to the Supreme Court or we're going

 2   to ask for rehearing.

 3   But, if you win, you -- you've got

 4   something set aside that applies only to

 5   California, Eastern District of Washington.

 6   Never applied to you in the first place.

 7   So what we should do is wait for this

 8   thing to come out of the Seventh Circuit, where

 9   -- where there really is something that affects

10   you or at least could. So, you see, everybody

11   is in the same box here. And I read pretty

12   carefully what you said. I have to admit I

13   maybe didn't read it carefully enough because I

14   didn't quite see how you get out of that box.

15   MR. BRNOVICH: Yeah. Justice Breyer,

16   I think we all agree that we don't want the

17   problems of Los Angeles spreading to the rest of

18   the country, so I think we can be in agreement

19   on that.

20   But, by its very nature, immigration

21   doesn't -- and this Court has recognized that --

22   it -- it doesn't stay in one state. So what

23   happens in California once someone has that

24   status, that does then affect Arizona and the

25   benefits and those programs, those social

 1   welfare programs and those safety net programs.

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

 3   confined to the State of California. And,

 4   furthermore, we would anticipate why it's

 5   important for this Court to allow the states,

 6   the Petitioner states, to intervene as a matter

 7   of right is because then it creates the ability

 8   to not only intervene in the Ninth Circuit but

 9   to intervene in the Seventh Circuit and the

10   Fourth.

11   JUSTICE BREYER: Okay, so, yeah, yeah,

12   I got the point. Your point basically is, look,

13   it's really actually not Los Angeles, it's San

14   Francisco, we know that.

15   MR. BRNOVICH: Yes, Justice.

16   JUSTICE BREYER: So you're saying that

17   some of the immigrants under this thing affected

18   come to San Francisco and they would go to

19   Arizona. Now I'm from San Francisco, and I

20   don't know why anyone would leave San Francisco.

21   (Laughter.)

22   JUSTICE BREYER: But is there anything

23   in the record or anywhere else that gives us any

24   kind of idea that there were some people

25   affected by this or a lot or many that really

1   did go to Arizona?

2   MR. BRNOVICH: Justice Breyer, because

3   of the litigation and the lawsuits and the

4   injunctions, the rule didn't have a lot of time

5   to -- to be into place. And so we do know that

6   historically, in immigration-related cases,

7   including the Fifth Circuit in the DAPA case,

8   that courts have recognized that what goes on in

9   one state related to immigration affects other

10   states.

11   And all the State of Arizona is asking

12   here, we know this Court has said that states

13   can enforce, you know, immigration laws, so

14   we're at least allowing -- allow the states to

15   step in and defend a federal law when the

16   federal government won't.

17   JUSTICE BARRETT: Well, General --

18   General Brnovich, let me ask you about that. So

19   what do you propose that the federal government

20   should have done here? Because one

21   administration is not obliged to defend the rule

22   adopted by the prior administration.

23   The Biden Administration was entitled

24   to change positions, right? So, once the Biden

25   Administration changed positions, what do you

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 1    think the Biden Administration should have done

 2    to effectuate that?

 3              MR. BRNOVICH:  Well, they could have

 4    done, once this Court accepted certiorari,

 5    continued to defend the rule.  And if they

 6    didn't want --

 7              JUSTICE BARRETT:  But that didn't --

 8    let's posit they don't have to.  So --

 9              MR. BRNOVICH:  Well, then --

10              JUSTICE BARRETT:  -- what -- what

11    should they do?

12              MR. BRNOVICH:  -- then they should not

13    have objected and they should have allowed the

14    states to step in and defend the rule when they

15    wouldn't.

16              CHIEF JUSTICE ROBERTS:  I thought your

17    position was that they should have gone through

18    notice-and-comment rulemaking to repeal the

19    public charge rule, which is, for example, what

20    this Court said that the prior administration

21    had to do in the DACA case.

22              MR. BRNOVICH:  Absolutely, Justice

23    Roberts --

24              JUSTICE KAGAN:  Well, if that's your

25    position -- and I --
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1   MR. BRNOVICH: -- Chief Justice.

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

3   you know, very reasonable position, that -- that

4   the government here acted in a way that you

5   would not typically expect or want and that it

6   counts as an evasion of notice-and-comment.

7   But -- but, if it's an evasion of

8   notice-and-comment, I mean, you bring an APA

9   suit. It's an evasion of -- it's -- it's a

10   violation of the APA. That's the proper remedy.

11   I -- I mean, there's a kind of

12   mismatch here between what you're saying went

13   wrong and what you're saying you want. If -- if

14   it's an evasion of notice-and-comment, bring an

15   APA suit saying it's an evasion of

16   notice-and-comment rather than, like, trying to

17   intervene in a suit that's completely dead that

18   never applied to you in the first place?

19   MR. BRNOVICH: Justice, part of the --

20   the problem is is that you have this Northern

21   District of Illinois decisions out there that

22   the -- the administration used as their basis to

23   repeal the rule, and that ends up with the rule

24   being repealed. That essentially will serve as

25   a baseline for a future rulemaking.

          1   And if, for example, there is a

          2   lawsuit against the new proposed rule, the 2022

          3   rule, then what will the states or what will the

          4   government go back to? And so it is

          5   important -- the states have that interest not

          6   only to intervene because of the financial costs

          7   but more broadly speaking, is we do want the

          8   administration to follow the Administrative

          9   Procedures Act and go through the proper --

         10   JUSTICE BARRETT: Well --

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

         12   JUSTICE BARRETT: -- are you saying

         13   then that there would be no -- the APA could

         14   some -- I mean, sorry, the administration could

         15   say our hands are tied because there's this

         16   vacatur of the rule --

         17   MR. BRNOVICH: Yes.

         18   JUSTICE BARRETT: -- that the district

         19   court in the Northern District of Illinois

         20   entered, so you really couldn't bring an APA

         21   action? Is that your position?

         22   MR. BRNOVICH: Justice, that is our --

         23   that is part of the concern of the states, is

         24   that the administration would use that decision

         25   as the basis to say that the rule is no longer

 1   in place and -- yes.

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

 3   think a court would be, you know, quite within

 4   its rights to say something along the lines of

 5   what you started with if the government said

 6   that to them. It's like you -- you can't use

 7   some decision out of the Northern District of

 8   Illinois to circumvent notice-and-comment.

 9   Wrong. You can't do that.

10   And -- and you would -- and they would

11   have said this is unprecedented. Of course,

12   governments decide not to defend rules all the

13   time when administrations change. That's not

14   problematic. But this other thing, which is

15   like dismissing everything except one suit in

16   order to say, you know, well, now we -- we get

17   rid of the rule without doing

18   notice-and-comment, that's a different thing.

19   And a court in an APA suit could say

20   exactly that. I mean, that's the -- that's the

21   mechanism for a violation of the APA, is an APA

22   suit.

23   MR. BRNOVICH: Yes, Justice Kagan, but

24   part of the concern is is that you would have

25   inconsistent results with different courts

 1   making different decisions, and it would create

 2   chaos and uncertainty in the law --

 3   CHIEF JUSTICE ROBERTS: What would the

 4   --

 5   JUSTICE BARRETT: Why didn't it apply

 6   --

 7   CHIEF JUSTICE ROBERTS: -- what would

 8   the --

 9   MR. BRNOVICH: -- and I hope the

10   courts --

11   CHIEF JUSTICE ROBERTS: -- what would

12   the APA proceeding look like? You've got a -- a

13   repeal that has one sentence which is saying the

14   Illinois court says this is no good, we -- you

15   know, we acquiesce in that. We don't want to

16   waste people's time. And so that's why we're

17   repealing this.

18   Now would the -- if you bring an APA

19   suit challenging the repeal, I guess in the

20   District of Columbia, would the District of

21   Columbia court then review the Illinois court

22   order and say, well, we don't think that's right

23   and so you can't repeal it? Or would they say

24   we think that is right, so you can repeal it?

25   MR. BRNOVICH: Well, Chief Justice,

 1   I -- I'm not sure what the courts would do. I

 2   learned a long time ago as a young prosecutor

 3   not to predict what any judge, especially a

 4   federal judge, is going to do.

 5   But I do think that there is a

 6   legitimate concern, is that you might have a --

 7   some federal judge somewhere saying, well, this

 8   decision's out there and they use that as a

 9   basis to essentially say that -- that the rule

10   is unconstitutional without allowing the states

11   to get -- to come in and essentially defend the

12   rule.

13   JUSTICE SOTOMAYOR: Counsel --

14   JUSTICE BARRETT: So you didn't try

15   because of that judgment, the predictive

16   judgment that you might lose?

17   MR. BRNOVICH: No. It -- it was --

18   Justice Barrett, it was more -- a more of a

19   matter of timing. Literally, on March 9th, when

20   the administration took the unprecedented step

21   of simultaneously dismissing all of the various

22   appeals and then agreeing that, you know, the --

23   that decision --

24   JUSTICE BARRETT: No, no, no, and I

25   understand why as a matter of timing you moved

1   to intervene when you did in the Ninth Circuit.

2   I'm just saying, like, you know, to Justice

3   Kagan's point, you haven't then pursued this APA

4   challenge that you could have filed in the

5   District of Columbia, and is that because you

6   think you would lose, that you said, you know,

7   it's hard to predict what a federal judge would

8   do?

9   MR. BRNOVICH: It is. We know,

10   though, that there is -- the four lawsuits are

11   going through the -- the circuit courts, and we

12   think that's the proper vehicle at this point.

13   JUSTICE SOTOMAYOR: Counsel, I'm --

14   JUSTICE ALITO: Well, in the case in

15   the --

16   JUSTICE SOTOMAYOR: -- I'm so totally

17   confused about why this suit is here and not

18   either an APA suit or simply the Seventh Circuit

19   suit.

20   If you go back and you -- we -- we

21   permit you to intervene, we say you should have

22   intervened, can you proceed with the Ninth

23   Circuit case in light of the Seventh Circuit

24   injunction?

25   MR. BRNOVICH: Well, Justice

1 Sotomayor, our -- our intention or our plan

2 would be to ask for an en banc review of the --

3 the entire panel of the Ninth Circuit. And if

4 that didn't work --

5 JUSTICE SOTOMAYOR: But they've

6 already vacated the preliminary injunction, so

7 there's nothing for them to review. So the en

8 banc -- there is no injunction from the Ninth

9 Circuit. There's no injunction against you.

10 There's no injunction against the three states

11 and California that are at issue because that

12 was vacated as a result of the dismissal of this

13 action. So I don't know how you can proceed

14 until the Seventh Circuit injunction is lifted.

15 MR. BRNOVICH: Justice, we -- we have

16 also moved to intervene in the Seventh Circuit.

17 This is the case time-wise --

18 JUSTICE SOTOMAYOR: No, no, no, but

19 until you get that --

20 MR. BRNOVICH: -- that the Court

21 accepted.

22 JUSTICE SOTOMAYOR: -- until you get

23 that -- until you get that lifted and until you

24 get the rescission of the rule lifted, something

25 that can't be done by the Ninth Circuit, there's

1   nothing further you could do in any other

2   circuit.

3   MR. BRNOVICH: Justice Sotomayor, we

4   -- we could -- if we are allowed to intervene

5   not only in the Ninth Circuit, we would

6   intervene and -- and move to vacate the judgment

7   from the Northern District of Illinois.

8   JUSTICE SOTOMAYOR: It's already --

9   but --

10   MR. BRNOVICH: But the --

11   JUSTICE SOTOMAYOR: -- you're

12   suggesting the Ninth Circuit could vacate the

13   Seventh Circuit's judgment?

14   MR. BRNOVICH: No, I didn't suggest

15   that, Your Honor. What I --

16   JUSTICE SOTOMAYOR: So you just said

17   to me --

18   MR. BRNOVICH: -- what I'm suggesting,

19   though, it -- it's the --

20   JUSTICE SOTOMAYOR: -- you would --

21   you would say I would use what happened in the

22   Ninth Circuit so that I can get into the Seventh

23   Circuit?

24   MR. BRNOVICH: Yes, Justice.

25   JUSTICE SOTOMAYOR: It's an

1   interesting proposition.

2   JUSTICE BREYER: Yeah, you have an

3   interesting point. I -- I -- I mean, I've never

4   seen anything like this. I think that your

5   suggestion, which is quite -- I don't know the

6   answer.

7   You say, look, they just withdrew this

8   rule. And they're saying they're just

9   acquiescing in a court decision, so, of course,

10   we have the power to acquiesce in the court

11   decision. And you say, but, wait a minute, if

12   they want to change the rule, they should go

13   through notice-and-comment. They say, we're

14   acquiescing.

15   So you're here because you say that

16   decision that they want to acquiesce in is

17   really wrong, and we want to intervene to make

18   sure that the Supreme Court or their court en --

19   you know, en banc or something says it's wrong,

20   because, if not, we're not going to have the

21   chance to say that they could go through

22   notice -- they should go through

23   notice-and-comment when they change the rule for

24   the reason that they're just acquiescing, and we

25   want there to be nothing to acquiesce in.

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 1              Now that is a -- now don't -- you're

 2     just going to agree because it sounds if I'm

 3     agreeing with you.

 4              MR. BRNOVICH:  Of course.  Thank you.

 5              JUSTICE BREYER:  But you --

 6              MR. BRNOVICH:  Can I sit down now,

 7     Justice?

 8              (Laughter.)

 9              JUSTICE BREYER:  Yeah.  Yeah, yeah.

10     Good.  I know.  I know.  But just don't do that

11     because later on I'd think how wrong I was, you

12     see?  So --

13              MR. BRNOVICH:  Yeah.  No, you're

14     absolutely right.

15              JUSTICE BREYER:  Yeah.  Okay.  Now --

16              MR. BRNOVICH:  I will assure you

17     you're right.  Yes.

18              JUSTICE BREYER:  -- now I -- but what

19     I wonder, looked at that way, I can't think of

20     anything I ever saw like that, and -- and I'll

21     be interested if the government has.  And it --

22     it is sort of a point, and -- and -- and the

23     simplest thing would be to wait for the Seventh

24     Circuit.  When is that going to -- when is that

25     going to happen?
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1   MR. BRNOVICH: Well, the federal

2 government -- the government dismissed all of

3 those appeals, and so the only decision that's

4 final is that Northern District of Illinois

5 decision. So --

6   JUSTICE BREYER: No, no, no, no, but

7 you could intervene in the Seventh Circuit, you

8 see? And you have a much --

9   MR. BRNOVICH: Yeah.

10   JUSTICE BREYER: -- better argument

11 because you get rid of that point that it

12 doesn't apply to you because that one does apply

13 to you.

14   JUSTICE BARRETT: You moved to

15 intervene.

16   MR. BRNOVICH: Yeah, we did.

17   JUSTICE BARRETT: You moved to

18 intervene in that district.

19   JUSTICE BREYER: Yeah. Yeah. So what

20 happened? What's happening?

21   MR. BRNOVICH: We did, and the

22 government objected to that. I mean, part of

23 the whole theory of this case is --

24 fundamentally is that do the states have the

25 ability to intervene in a case when -- when the

1   federal government won't defend the law?

2   JUSTICE BREYER: Mm-hmm.

3   MR. BRNOVICH: And I've addressed that

4   already.

5   JUSTICE BREYER: All right. Yeah,

6   yeah, yeah, I understand that. But, I mean, I'd

7   asked you, what's happening in the Seventh

8   Circuit? Because it certainly would be a

9   simpler case if we just had that Seventh Circuit

10   case. What's happening?

11   MR. BRNOVICH: Well, the -- we -- we

12   have tried to intervene in that case, Justice

13   Breyer, and the -- the case that this Court

14   accepted was the case out of the Ninth Circuit.

15   JUSTICE BREYER: I know that --

16   MR. BRNOVICH: But the theory -- the

17   theory --

18   JUSTICE BREYER: -- but I'm asking you

19   what's --

20   MR. BRNOVICH: -- the theory --

21   JUSTICE BREYER: -- happening in the

22   Seventh Circuit.

23   MR. BRNOVICH: -- the -- the -- the

24   theory still applies.

25   JUSTICE BREYER: Well, please. What

1　　　　-- do you know what's going on in the Seventh

2　　Circuit?　I would like -- just like to know.

3　　　　　　MR. BRNOVICH:　There's the --

4　　　　　　JUSTICE BREYER:　You may not know.

5　　That's all right.

6　　　　　　MR. BRNOVICH:　I do.　There -- there

7　　-- there -- there is briefing under way, and

8　　those -- there is briefing under way, and those

9　　issues are on appeal.　But the question, once

10　　again, is do the states have allowed to --

11　　　　　　JUSTICE KAGAN:　Sorry.　Those issues

12　　on appeal are which issues in the Seventh

13　　Circuit now?　The -- this exact issue?

14　　　　　　MR. BRNOVICH:　Yes.

15　　　　　　CHIEF JUSTICE ROBERTS:　And -- and you

16　　moved to intervene in that case?

17　　　　　　MR. BRNOVICH:　Yes, Chief Justice.

18　　　　　　CHIEF JUSTICE ROBERTS:　And what

19　　happened with that motion?

20　　　　　　MR. BRNOVICH:　Those motions, they're

21　　still pending.　This court just made it to the

22　　-- the Court first.

23　　　　　　JUSTICE BARRETT:　I thought the

24　　district court denied your motion to intervene

25　　in the Northern District of Illinois and you're

         1   -- it's on appeal in the Seventh Circuit.

         2   MR. BRNOVICH: Justice Barrett, yes,

         3   that is correct.

         4   JUSTICE BARRETT: How important is the

         5   APA to your argument? What if this were a

         6   statute?

         7   MR. BRNOVICH: Justice, I think that

         8   it's important because there's not only the

         9   financial interests the states have at stake,

        10   but rule and comment -- the rule and notice

        11   commenting rulemaking is something that's very

        12   important. It allows the states to express

        13   their interests and to -- you know, it's -- it's

        14   a complicated, sometimes --

        15   JUSTICE BARRETT: But -- but let's

        16   imagine the public charge rule were a statute

        17   and not an APA rule, so you're not losing the

        18   ability to participate in notice-and-comment,

        19   but you would presumably be suffering the same

        20   downstream economic effects that you say that

        21   you're suffering here. So would you be here

        22   making the same arguments?

        23   MR. BRNOVICH: We would in

        24   relationship to Rule 24 and whether the states

        25   have a right to intervene. That's just part of

 1   -- it's part of the interest the states have in

 2   that interest being impaired.

 3   JUSTICE BARRETT: So this isn't driven

 4   entirely by your inability to participate in

 5   notice-and-comment and the administration's

 6   circumvention of notice-and-comment in your

 7   view?

 8   MR. BRNOVICH: Justice, not entirely,

 9   but that is part of the states' reasoning, is

10   that there's not only a financial impact but

11   that it's important, that integrity of the

12   process, so, in the future, states have the

13   ability to provide notice-and-comment on

14   rulemaking so their interests are considered.

15   JUSTICE KAGAN: But -- but, when you

16   say "not entirely," just to follow up that

17   question, do you mean that even if the APA

18   weren't involved here, that you're trying to

19   vindicate the point that when the federal

20   government decides to change course, the states

21   have the ability to come in pretty much anywhere

22   they want and -- and step into the federal

23   government's shoes?

24   MR. BRNOVICH: Justice Kagan, I think

25   the analysis is really that Rule 24 analysis,

 1   was it timely filed, is there an interest, is

 2   that interest being impaired, and maybe most

 3   importantly, that fourth prong of are those --

 4   is there adequate representation in protecting

 5   those interests.

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

 7   MR. BRNOVICH: So there -- there --

 8   JUSTICE KAGAN: -- I'm -- I'm

 9   hypothesizing a world in which the federal

10   government has dropped out, and so the states

11   can say, you know, if it -- if not for us, there

12   will be nobody to defend the law, that -- that

13   you're saying even put aside any APA issues that

14   there might be, whether it's a statute or -- or

15   what have you, that -- that there is -- there is

16   -- that the -- the courts should understand the

17   intervention mechanism as a way for states to

18   take the place of a departing federal

19   government.

20   MR. BRNOVICH: Yes, Justice Kagan.

21   This very Court recognized in Massachusetts

22   versus EPA that states have a special

23   solicitude. We do have special interest -- or

24   there's interests even going back to the Cascade

25   versus El Paso Natural Gas case, that economic

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1    interests within a state is something that, you
2    know, this Court can consider when it looks at
3    intervention as a matter of right.
4              And I think even the Respondent states
5    agree that, you know, there -- there's interests
6    here that we have and that states should be
7    allowed to intervene when the federal government
8    won't do its job.
9              CHIEF JUSTICE ROBERTS:  Thank you,
10   counsel.
11             Justice Thomas?
12             Justice Breyer?
13             Justice Alito?
14             Justice Sotomayor?
15             JUSTICE SOTOMAYOR:  No.
16             CHIEF JUSTICE ROBERTS:  Justice
17   Gorsuch?
18             Justice Kavanaugh?
19             JUSTICE KAVANAUGH:  Yeah.  When the --
20   when a court says that a rule is unlawful and
21   the government then acquiesces in that court
22   decision, is it the usual practice that the
23   government then has to go through
24   notice-and-comment to repeal what they've just
25   accomplished through acquiescence?  Or is that
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 1   the issue that you're -- you're raising here

 2   implicitly in this case? Because I -- I'm not

 3   aware of a practice of doing that. I'm not

 4   aware of a practice of not doing that either.

 5   MR. BRNOVICH: Yeah, Justice

 6   Kavanaugh, the -- this is unprecedented, so, in

 7   -- in many ways, this --

 8   JUSTICE KAVANAUGH: Well, it's not --

 9   let me just interrupt. You've used that word a

10   lot. It's very much not unprecedented, as

11   Justice Thomas says, for the government to

12   acquiesce in an adverse judgment invalidating a

13   rule. That is not unprecedented at all.

14   So what is unprecedented here?

15   MR. BRNOVICH: Well, Justice

16   Kavanaugh, what is unprecedented is that the

17   federal government didn't let the states come

18   in. They opposed our intervention and they

19   wouldn't let us defend a rule that they no

20   longer wanted to defend.

21   So I'm not -- we're not -- our

22   position to the states is not that the

23   administration has to defend a rule that it

24   doesn't like. We -- we believe that if -- if

25   they're not going to defend the rule, then the

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1    states have an interest in defending the rule.
2              And if there's a future
3    administration, it's important because, you
4    know, California and Arizona could be on -- on
5    opposite sides in the future on this issue, but,
6    as a matter of right, we do believe the states
7    have a right to intervene.
8              And we do think that using a district
9    court decision to essentially then recreate a
10   baseline for what a future rule would be, I
11   think --
12             JUSTICE KAGAN:  May -- may I?
13             MR. BRNOVICH:  -- is -- it makes it
14   more difficult --
15             JUSTICE KAVANAUGH:  Please.
16             MR. BRNOVICH:  -- in the future to --
17             JUSTICE KAGAN:  Is that all right?
18             JUSTICE KAVANAUGH:  Yeah.
19             MR. BRNOVICH:  It makes it more
20   difficult in the future to promulgate or if the
21   states --
22             JUSTICE KAGAN:  I mean, under that --
23   under that theory, General, there would never be
24   an effective acquiescence by the federal
25   government.  I mean, there's always some state
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  1   out there that wants -- that has a different

  2   position from the federal government's when the

  3   federal government acquiesces. Whoever the

  4   federal government is, there's always going to

  5   be a state that thinks it's done the wrong

  6   thing.

  7   You're essentially saying there shall

  8   be no further federal government acquiescence in

  9   court decisions.

 10   MR. BRNOVICH: Justice, that -- that's

 11   not the state -- what the state is saying. What

 12   the state is saying is is that when the federal

 13   government refuses to defend a law or tries to

 14   undermine a rule, the states have special

 15   certitude, and especially when you go through

 16   that Rule 24 analysis, you know, is there an

 17   interest? Is that interest being impaired? And

 18   is it adequately being protected by the

 19   representation?

 20   So the courts would have to do that

 21   analysis. But I -- but I do think it would

 22   allow the states more opportunities to defend

 23   rules when the federal government won't.

 24   CHIEF JUSTICE ROBERTS: Justice

 25   Kavanaugh, anything further?

1   JUSTICE KAVANAUGH: No.

2   CHIEF JUSTICE ROBERTS: Justice

3   Barrett?

4   JUSTICE BARRETT: One -- one question.

5   So I'm just trying to isolate the scope of your

6   argument, and I asked you before how important

7   the APA was to it. How important to your

8   argument is it that we already had granted cert

9   on this issue? Does that matter?

10   MR. BRNOVICH: Justice Barrett, I -- I

11   think it matters in the context of the

12   unprecedented nature of what the federal

13   government did in this case.

14   JUSTICE BARRETT: But it wouldn't

15   change your argument -- if -- if this had

16   happened and you had moved for intervention

17   before we had acted to grant cert, you would

18   still be making the same argument?

19   MR. BRNOVICH: I believe so, Justice.

20   CHIEF JUSTICE ROBERTS: Thank you,

21   counsel.

22   Mr. Fletcher.

23   ORAL ARGUMENT OF BRIAN H. FLETCHER

24   ON BEHALF OF THE FEDERAL RESPONDENTS

25   MR. FLETCHER: Thank you, Mr. Chief

1   Justice, and may it please the Court:

2   The 2019 Public Charge Rule did not

3   regulate or confer any rights on the Petitioner

4   states. Instead, Petitioners assert an indirect

5   economic interest in the rule's downstream

6   consequences. Relying on predictions that were

7   made when the rule was drafted, they say that it

8   would cause DHS to deny adjustment of status to

9   people who would be more likely to use

10   state-funded public benefits at some point in

11   the future.

12   But we now know that those predictions

13   were wrong. During the year that the 2019 rule

14   was in effect, we know that it affected only

15   about five of the approximately 50,000

16   adjustment of status applications to which it

17   was applied or about 1-100th of 1 percent.

18   The states do not have a legally

19   protectable interest in preserving that

20   negligible indirect effect, and, even if it did,

21   they could not justify intervention in appeals

22   from preliminary injunctions that do not apply

23   in Petitioners' jurisdictions and that now have

24   no effect anywhere because the 2019 rule has

25   been vacated in a separate final judgment.

1   The court of appeals did not abuse its

2   discretion in declining to allow Petitioners to

3   prolong appeals that no longer have any

4   practical consequence.

5   And Petitioners' criticisms of the

6   government's litigation conduct do not call for

7   a different result. Congress made a policy

8   choice to vest in the Department of Justice the

9   decision whether to seek further review of

10   decisions against the United States.

11   This Court has emphasized that both

12   the government and the courts benefit from that

13   policy precisely because the solicitor general

14   takes a selective approach and often decides

15   against seeking further review, and as some of

16   the questions this morning have suggested, it's

17   not at all uncommon for the solicitor general to

18   make that decision when the decision in question

19   invalidated a regulation.

20   Here, DHS had decided to issue a new

21   Public Charge Rule. The ongoing litigation

22   would have complicated that rulemaking and

23   required intrusive discovery. The 2019 rule was

24   not producing its intended effects, and the

25   rule's unintended and unwanted effects were

 1   aggravating a public health crisis.

 2   Now Petitioners disagree with the

 3   government's decision to dismiss its appeals

 4   when faced with those circumstances, but that

 5   disagreement does not allow them to revive this

 6   litigation that the government had decided was

 7   not in the best interests of the United States.

 8   I welcome the Court's questions.

 9   JUSTICE THOMAS: Mr. Fletcher, I think

10   Petitioner was doing a little bit more than

11   simply disagreeing with the acquiescence. From

12   my understanding, they were disagreeing with the

13   government's refusal to allow them to

14   participate or to intervene at the appellate

15   level in very -- in litigation that they thought

16   would affect them significantly.

17   So how do you -- rather than simply

18   focusing on the underlying issue, would you also

19   respond to the fact that they think that

20   intervention is a normal practice in these --

21   some of these cases at the end of

22   administrations?

23   I don't recall the government opposing

24   such interventions, so would you simply address

25   that a little bit?

1   MR. FLETCHER: Of -- of course,

2   Justice Thomas. So this is a point that they

3   made in the reply brief, and they pointed to two

4   examples where they say the government did not

5   oppose intervention in analogous circumstances.

6   Actually, in both of those cases, the

7   request for intervention came long before the

8   government had decided against seeking further

9   review, so those aren't analogous examples.

10   Candidly, Justice Thomas, I'm not

11   aware of a lot of cases where this has come up,

12   where parties have sought to come in after the

13   government decided to dismiss appeals. Here,

14   the government made its decision to oppose that

15   intervention because we don't think the

16   Petitioners satisfy the requirements for

17   intervention as of right, and we don't think

18   permissive intervention is appropriate either.

19   And that's -- that's really part and

20   parcel with the judgment that we don't think

21   continued litigation of these cases in the face

22   of ongoing notice-and-comment rulemaking is in

23   the government's interest or the public

24   interest.

25   JUSTICE ALITO: Mr. Fletcher, the way

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 1    you have briefed this case is rather strange

 2    because there's -- you focus entirely on Federal

 3    Rule of Civil Procedure 24, which has no

 4    application to the courts of appeals, nor does

 5    it have any application to us.

 6              The rules for appellate intervention

 7    and intervention before this Court have to be

 8    judge-made rules if intervention is going to be

 9    allowed at all.  So there's no reason why the

10    courts of appeals or this Court should be tied

11    to the strict letter of Rule 24.

12              And, in fact, some of what Rule 24

13    says is very difficult to -- to -- to fit with

14    considerations for appellate litigation.  So why

15    have you briefed the case this way?

16              MR. FLETCHER:  Well, Justice Alito,

17    this Court said in Scofield that although Rule

18    24 doesn't strictly apply in the courts of

19    appeals, it's a distillation of traditional

20    principles of intervention, so it's a helpful

21    guide.

22              That's the way the parties briefed

23    things in the Ninth Circuit, and that's

24    principally the way that the states have tried

25    to justify their intervention, is that they meet
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1   the standards of Rule 24. We don't think that

2   they do. And so we've met their arguments on

3   those terms.

4   I completely take the point that Rule

5   24 doesn't apply by its terms, that intervention

6   in the courts of appeals, which is what this is

7   about, is about sort of judge-made rules about

8   courts controlling their own docket.

9   I think, if that cuts in any direction

10   in this case, though, it sort of cuts further

11   against the Petitioner states because it

12   suggests that the Court is reviewing the Ninth

13   Circuit's exercise of its own judge-made

14   authority to decide whether or not to allow

15   intervention.

16   JUSTICE ALITO: Well, why is that so?

17   If we step back and refuse to let the trees

18   obscure our view of the forest, we can take into

19   account everything that happened in this

20   situation, which seems to be quite unique.

21   I -- I congratulate whoever it is in

22   the Justice Department or the executive branch

23   who devised this strategy and was able to

24   implement it with military precision to effect

25   the removal of the issue from our docket and to

 1   sidestep notice-and-comment rulemaking, but all

 2   of that took place. I'm not aware of a

 3   precedent where an incoming administration has

 4   done anything quite like this.

 5   And this was an issue that we had

 6   agreed to hear before. So, if we step back and

 7   recognize that we're not tied to the minutia of

 8   Rule 24, why shouldn't intervention be allowed?

 9   It may -- it doesn't mean you're going to lose.

10   It doesn't mean that the old rule is sound or

11   that it's going to be -- that it's -- it's going

12   to be resuscitated.

13   Why shouldn't intervention be allowed?

14   Why would it be inequitable to allow

15   intervention, or, to put it the other way, why

16   doesn't equity argue in favor of allowing

17   intervention?

18   MR. FLETCHER: So, Justice Alito,

19   there's a lot packed into the question that I

20   hope we get to come back to, but I -- I want to

21   sort of get right to the point.

22   I think the first thing to think about

23   when stepping back and looking at the entirety

24   of this situation is that this is not a

25   circumvention of notice-and-comment regulation.

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 1    DHS is engaged in notice-and-comment rulemaking
 2    that the states will be free to participate in
 3    to make a new Public Charge Rule.
 4           Now I -- I take the point that
 5    Petitioners have said this is unprecedented, and
 6    they've been pressed on what is unprecedented
 7    because not seeking further review of a decision
 8    against the government is not, even when it
 9    involves a regulation.  I think we all now agree
10    with that.
11           And they focused on the fact that the
12    case was in this Court.  And I do take the
13    point.  I'm not aware of another case that
14    transpired like that.  But that's because
15    anything that the government did in that
16    situation would have been unprecedented if those
17    --
18           JUSTICE KAGAN:  Well, to -- to me, Mr.
19    Fletcher, the -- the -- the issue about the
20    government's behavior here is not that the case
21    was in the court.  I mean, the case could have
22    been in the court, and if the administration had
23    come in and said we don't want to defend
24    anymore, I mean, the government doesn't have to
25    come up here and defend something that it no
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 1   longer believes in.

 2   The real issue to me is the evasion of

 3   notice-and-comment. And, I mean, basically, the

 4   government bought itself a bunch of time where

 5   the rule was not in effect. If you -- if the

 6   administration had come in and said, oh, my

 7   gosh, we have a notice-and-comment rule, we

 8   really hate it, we have to change it, I mean, it

 9   would have taken months to change it. And the

10   administration didn't have to do that.

11   Now you -- I'm sure you will tell me

12   why that way of looking at the essential problem

13   here is wrong, but I also want you to assume

14   that that is a problem and that we shouldn't be

15   green-lighting that behavior for your

16   administration or any other administration, all

17   right?

18   And -- and -- and -- and it -- on that

19   assumption, what should be the remedy? Because

20   it -- it just seems as though you're here and

21   saying, you know, you can just tell us to go

22   home and -- and -- and nothing is going to

23   happen to us, and everybody will just do it the

24   next time.

25   What -- what's the remedy for

 1   something like this if I think that this does

 2   present at least a significant APA question?

 3   MR. FLETCHER: So let me take that

 4   question on its terms and then, hopefully, come

 5   back to some of the premises later.

 6   I think, if you have that concern, the

 7   solution is not changing the rules of

 8   intervention. It's not letting the states come

 9   in and make it impossible for the government to

10   acquiesce in adverse decisions, as you suggested

11   the other side's approach would.

12   The solution, I think, is the one that

13   Justice Gorsuch highlighted in his opinion when

14   this case -- this rule was before the Court on a

15   stay from the Second Circuit, and it is the

16   nationwide relief that the district court

17   entered here.

18   We don't think that the APA authorizes

19   district courts to enter that relief. We don't

20   think it's consistent with principles of equity

21   or with Article III. And if this Court makes

22   clear in an appropriate case that that's not

23   within the authority of district courts to

24   enter, then you don't have this problem because

25   the government's -- what I take to be, everyone

 1   agrees, that the government has the ability to

 2   decide not to seek further review of district

 3   court decisions. And if you make clear that

 4   district courts do not have the authority to

 5   issue this sort of relief, then the problem goes

 6   away.

 7   JUSTICE GORSUCH: Mr. Fletcher, that's

 8   -- I think you put your finger right where I --

 9   my -- my concern has been, is I -- I'm not

10   familiar with the APA's "set aside" language,

11   which was supposed to adopt prior practice at

12   the time, any prior practice in which a district

13   court purported to be able to do more than set

14   aside the rule with respect to the litigants in

15   the case or controversy before it. Are you?

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

17   JUSTICE GORSUCH: And, in fact, for

18   most of our history even after the APA's

19   adoption, I'm not aware of district courts doing

20   that until relatively recent times.

21   MR. FLETCHER: I think there's some

22   scholarly debate about exactly when, but, yes,

23   in general, correct.

24   JUSTICE GORSUCH: And so you -- you

25   agree that, therefore, the Northern District of

1   Illinois erred when it issued a nationwide

2   injunction?

3   MR. FLETCHER: We do.

4   JUSTICE GORSUCH: Okay.

5   MR. FLETCHER: Just -- just a little

6   thing. I don't think anything turns on this.

7   Technically, it wasn't an injunction. It was a

8   vacatur of the rule. But I -- the -- we'd say

9   exactly the same thing.

10   JUSTICE KAGAN: Okay. But now you

11   present me with another issue because that has

12   not been the question in this case, and so hmm.

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

14   JUSTICE KAGAN: What do I do with

15   that?

16   MR. FLETCHER: So I take the point. I

17   think, you know, one thing it -- it can do is

18   give you some comfort that there is a solution

19   to these problems to the extent that you think

20   they are a problem.

21   And I think what some of the

22   questioning so far this morning has highlighted

23   is that the solutions that are being offered up,

24   you know, by the parties in this case, where

25   they are trying to get at that concern, are

 1   really overbroad because --

 2   CHIEF JUSTICE ROBERTS: Is that an

 3   issue that, for example, the -- your friend on

 4   the other side could raise if he's successful in

 5   intervening in the cases?

 6   MR. FLETCHER: If he's successful in

 7   intervening in the --

 8   CHIEF JUSTICE ROBERTS: Yeah. It's an

 9   argument. Why didn't you intervene before?

10   Well, one thing is that there shouldn't be a

11   nationwide injunction issued in Illinois or one

12   beyond the parties in the Ninth Circuit and,

13   therefore, you should vacate the injunctions?

14   MR. FLETCHER: That would be one of

15   many arguments that he could raise, yes.

16   CHIEF JUSTICE ROBERTS: Well --

17   JUSTICE BARRETT: But to a --

18   CHIEF JUSTICE ROBERTS: -- but I

19   thought part of your -- your -- your briefing

20   was that, you know, this is a useless exercise,

21   why are we here? You know, everything's done.

22   Well, apparently, not everything is done.

23   MR. FLETCHER: Well, the -- the

24   "everything is done" was focused on the specific

25   circumstances of this case, where it's about a

1   preliminary injunction that don't apply in the

2   Petitioner states' jurisdictions and that don't

3   have any practical consequences so as long as

4   that Seventh Circuit's injunction stays in place

5   --

6   CHIEF JUSTICE ROBERTS: The Illinois

7   one is nationwide, right?

8   MR. FLETCHER: The Illinois one is

9   nationwide, but --

10   CHIEF JUSTICE ROBERTS: So it applies

11   to them.

12   MR. FLETCHER: But the question before

13   this course is what -- whether they're entitled

14   to get into the --

15   JUSTICE BARRETT: But, Mr. Fletcher,

16   this --

17   CHIEF JUSTICE ROBERTS: Well, they

18   have to get rid of this one if they want to

19   proceed against the one in Illinois. Otherwise,

20   it does them no good.

21   MR. FLETCHER: Well, I -- I -- I don't

22   know that that's true. These are two

23   preliminary injunctions that don't apply in

24   their jurisdictions at all.

25   CHIEF JUSTICE ROBERTS: Well, you

1   agree, don't you, that they have standing

2   because people who are illegally or --

3   "illegally" -- they don't meet the new public

4   charge rule in the United States -- they're

5   going to go throughout the United States, as

6   people do?

7   MR. FLETCHER: Chief Justice Roberts,

8   I think it's very, very hard to make that case

9   given the record that we have about the low

10   number of adjustment of status decisions that

11   were actually affected by this rule while it was

12   in place. And the rule -- the injunctions don't

13   apply to applications by residents of the

14   Petitioner states.

15   I think, in those circumstances, it's

16   getting very, very attenuated to say that maybe

17   the rule will result in someone being granted

18   adjustment of status, maybe sometime down the

19   road they will apply for and receive benefits,

20   and maybe they will have in the interim moved

21   into one of the Petitioner states. That's --

22   that's --

23   JUSTICE BARRETT: But, Mr. Fletcher,

24   can I follow up on what the Chief just asked

25   you? You opposed intervention in the Northern

 1   District of Illinois, right?

 2   MR. FLETCHER: We did.

 3   JUSTICE BARRETT: So the -- the

 4   principle that you're arguing for really doesn't

 5   turn on the fact that the Ninth Circuit's

 6   preliminary injunction was not nationwide. I

 7   mean, your -- you opposed their ability to enter

 8   in the Seventh Circuit and challenge the scope

 9   of the injunction.

10   MR. FLETCHER: That's correct, Justice

11   Barrett. We have -- I'm just highlighting that

12   we have arguments here that we -- that don't

13   apply in the Seventh Circuit case. We also have

14   arguments that apply in both cases, and there

15   are some arguments that apply in the Seventh

16   Circuit case that aren't at issue here.

17   JUSTICE BARRETT: Because you just

18   flatly think that the states shouldn't be able

19   to intervene, period?

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

21   JUSTICE KAVANAUGH: Can I ask a --

22   JUSTICE BREYER: Suppose they -- what

23   about their argument, which is, look, one -- you

24   say only five people were affected, but you

25   added change of status applicants. So what they

1 think is there may be millions of people, just

2 across different borders, who will be here, you

3 see, if -- a question of food stamps, and so all

4 those people, we don't know, the record doesn't

5 tell us whether they're in Arizona or not. And

6 they say it's a billion dollars, and you say

7 it's five people, and so forth. Okay. That's

8 one thing.

9 But then they say we have a totally

10 different ground. Our ground for intervening is

11 simply this: The decision of the courts about

12 the merits of the old rule is completely wrong.

13 And if you allow this to stand, this totally

14 wrong decision, courts of the United States,

15 what the government will do is just acquiesce.

16 And that way they avoid notice-and-comment

17 rulemaking. And that should be a ground for our

18 being able to intervene to ask for rehearing en

19 banc or maybe ask the Supreme Court.

20 Pretty similar to what we just allowed

21 in that case of the attorney general. You know,

22 it was a different party. What was it, Kentucky

23 or -- we just -- and pretty similar. See? They

24 won't defend it, but we'll defend it because

25 it's totally wrong.

1   And we -- you see what we gain? Now,

2   to me, that is a law professor's issue. My God,

3   I don't know what the answer is. And we don't

4   have to get into any of this mess if we can only

5   get the Illinois case here in front of us.

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

7   MR. FLETCHER: Justice Breyer, let me

8   start with the effect of the rule because I

9   think it's important to disaggregate a couple of

10   things. The rule does apply to people seeking

11   to come into the United States, to be admitted

12   at the border, but it very, very seldom actually

13   has application there because the State

14   Department has vetted those people before they

15   come if they are coming on a visa. If they're

16   not coming on a visa, if they're coming

17   illegally, there are other grounds to deny them

18   admission. So the rule has very, very little

19   practical effect at the border.

20   Where it has effect -- and this had

21   been common ground across all of the rulemakings

22   and between the parties -- is in those

23   adjustment of status decisions, where, as I

24   explained, it has turned out to have very little

25   effect at all. So that's the practical stakes.

 1   The billions of dollars, I think it's

 2   important to understand, are not about the

 3   intended effects of the rule. Justice Barrett

 4   laid out in her dissent in the Cook County case

 5   on this issue that, actually, the rule does not

 6   apply to very many people at all who are

 7   actually entitled to receive public benefits

 8   because generally you're not entitled to receive

 9   them until after you adjust status or if you're

10   in a vulnerable category, like an asylee or a

11   refugee, that's not subject to the public charge

12   bar at all.

13   The billions of dollars are about

14   people who are confused about the rule or

15   mistaken about its effects and who are dropping

16   benefits even though those benefits would not

17   affect their entitlement to come into the case.

18   JUSTICE KAVANAUGH: Can I -- keep

19   going. I'm sorry.

20   MR. FLETCHER: I was just going to

21   say, and I think that highlights that -- that

22   it's hard for the Petitioner states to say that

23   they have a legally protectable interest in the

24   unintended effects of the case.

25   JUSTICE BREYER: Yeah, but the second

 1   point is my real point.

 2   MR. FLETCHER: So the second point is

 3   about what about the Seventh Circuit case? So

 4   it --

 5   JUSTICE BREYER: Well, they have

 6   another ground, but then, yeah, what about the

 7   Seventh Circuit?

 8   MR. FLETCHER: So -- right. If you're

 9   -- if you're interested in the Seventh Circuit

10   case, I guess what I would say is the Seventh

11   Circuit case is not the one that's before you

12   now, and the one that's before you now has not

13   only the reasons why we think they shouldn't

14   come into the Seventh Circuit case but other

15   problems as well.

16   And you -- what you shouldn't do is do

17   what they're asking you to do, which is sort of

18   decide this case as a way of telling what -- the

19   Seventh Circuit what to do in that case, which

20   presents different issues and additional

21   arguments. So we would urge you not to sort of

22   decide this case with a view towards what the

23   right answer in the Seventh Circuit case is.

24   JUSTICE KAVANAUGH: I have a question

25   about historical practice to the extent you're

1   aware. When a notice-and-comment rule is issued

2   and then a court finds that that rule is

3   unlawful and then the government chooses to

4   acquiesce in that judgment, what then usually

5   happens?

6   I suppose one thing is

7   notice-and-comment about a new rule, but that

8   would be about the new rule. Another option is

9   notice-and-comment about the repeal of the rule,

10   even though it's an acquiescence in the

11   judgment. A third option is just nothing

12   happens, the old rule is just gone, and the

13   government keeps going without any replacement

14   rule.

15   Do you know under -- what the -- that

16   second thing, notice-and-comment about the

17   repeal after an acquiescence, I'm not sure I've

18   seen that, but I want to get your understanding

19   of historical practice.

20   MR. FLETCHER: So I can't pretend to

21   have an exhaustive understanding of this. We

22   have looked into it. I -- I'm aware of cases in

23   the first category and the third category. We

24   have not found cases in that second category, at

25   least where what you're talking about is a

 1   decision that sets aside the rule or vacates the

 2   rule on a nationwide basis.

 3   JUSTICE KAVANAUGH: That -- that's my

 4   understanding too. I -- I think it's odd to

 5   think about notice-and-comment for repeal after

 6   an acquiescence. I think there would usually be

 7   notice-and-comment for the new rule, and you --

 8   and that's now started up here. And I guess

 9   you've looked into it and haven't found anything

10   either way, I guess.

11   MR. FLETCHER: I haven't found any

12   examples of it happening. And, you know, there

13   are -- there are court decisions from the D.C.

14   Circuit, including, I think, your opinion in the

15   EME Homer City case that say -- recognize

16   sometimes this is a thing that the government

17   does and that it is good cause to forego

18   notice-and-comment when what it's doing is

19   effectively compelled by a court decision.

20   JUSTICE ALITO: It says the --

21   JUSTICE KAVANAUGH: And then second

22   question, which is kind of on a different tack,

23   I think what they're trying to do here, if I'm

24   piecing it together, and this picks up on

25   Justice Sotomayor's questions a bit, is to

 1   intervene here to Munsingwear these -- these

 2   decisions and then to bring an APA challenge to

 3   the repeal, I think, would be the next part of

 4   the strategy if I'm understanding it and then to

 5   win or to do better in that APA challenge

 6   because the government wouldn't be able to rely

 7   on the adverse decisions because they've been

 8   Munsingweared. Is that --

 9   MR. FLETCHER: So that -- that's about

10   my understanding of what they're trying to do as

11   well. I --

12   JUSTICE KAVANAUGH: Okay. So why

13   isn't it -- why is it wrong for them to

14   intervene to try to Munsingwear the adverse

15   decisions?

16   MR. FLETCHER: So for a couple of

17   reasons. I think, first of all, even on that

18   account of their strategy and assuming that the

19   strategy otherwise works, that doesn't justify

20   them getting into this case because this case

21   doesn't include the judgment that was the basis

22   for the rulemaking.

23   JUSTICE KAVANAUGH: Okay. Would it

24   justify them getting into the other case?

25   MR. FLETCHER: So I -- I think not.

 1   There, we wouldn't have that argument about the

 2   limited scope of this appeal.

 3   JUSTICE KAVANAUGH: Intervention for

 4   the purpose of seeking to Munsingwear a case is

 5   not good enough?

 6   MR. FLETCHER: Well, I don't think so.

 7   I don't think -- you know, normally, Munsingwear

 8   is about relieving the parties to the case of

 9   the effects of the judgment. I'm not aware of

10   any precedent for allowing new parties to come

11   into the case to seek Munsingwear vacatur.

12   JUSTICE KAVANAUGH: There's no

13   precedent either way on that question, right?

14   MR. FLETCHER: That -- that's fair

15   enough. But -- but also, you know, Munsingwear

16   is also about relieving the parties of the

17   effects of a judgment after a case has become

18   moot.

19   You know, here, the mooting event was

20   the government's decision not to seek further

21   review of that Northern District of Illinois

22   decision, and so it's a little hard to see how

23   you Munsingwear the decision that actually

24   produces the mootness in the other cases. So I

25   think that's an additional obstacle for them.

1   And then the other thing I'd just say

2   sort of stepping back a little bit more broadly

3   is -- is, you know, this is a case about

4   intervention and when they have a right to

5   intervene or when the Ninth Circuit would have

6   abused its discretion in keeping them out.

7   And there are a lot of parties that

8   might have interest in judicial precedent or in

9   the development of the law more generally.

10   That's the sort of interest that I take them to

11   be trying to vindicate with this Munsingwear

12   argument, and that's just never been recognized

13   as the sort of thing that justifies intervention

14   as of right.

15   JUSTICE SOTOMAYOR: Can we talk about

16   the Munsingwear here? It's Munsingwear of what?

17   It --

18   MR. FLETCHER: So I -- I --

19   JUSTICE SOTOMAYOR: -- what --

20   assuming that they -- the equity, and that's,

21   you know, putting that on hold, what would they

22   Munsingwear? I thought the preliminary

23   injunction had dissolved once the case was

24   dismissed.

25   MR. FLETCHER: Justice Sotomayor, I

 1   don't think that's right. We dismissed --

 2   JUSTICE SOTOMAYOR: Okay.

 3   MR. FLETCHER: -- our appeals in the

 4   Ninth Circuit. The litigation in these cases is

 5   still stayed in the Northern District of

 6   California --

 7   JUSTICE SOTOMAYOR: Ah, okay.

 8   MR. FLETCHER: -- and the District of

 9   Washington. The preliminary injunction is still

10   in force. It just doesn't have any practical

11   effect because of the Seventh Circuit's

12   decision -- or, I'm sorry, the Northern District

13   of Illinois vacatur of the rule.

14   JUSTICE SOTOMAYOR: So it would --

15   CHIEF JUSTICE ROBERTS: Thank you.

16   JUSTICE SOTOMAYOR: -- still have to

17   be -- it would still have to be -- you still

18   have to get the Seventh Circuit injunction

19   lifted before anything happens in the Ninth

20   Circuit?

21   MR. FLETCHER: Before the Ninth

22   Circuit decision has any practical consequence,

23   yes.

24   CHIEF JUSTICE ROBERTS: Thank you,

25   counsel. Just one further point.

1   What would you do -- put your itself

2   in Mr. -- General Brnovich's shoes. You think

3   it was wrong for the new administration not to

4   go through notice-and-comment rulemaking before

5   repealing the -- the order. What would you do?

6   MR. FLETCHER: Well, I suppose, if it

7   -- if I was in his shoes, you know, I might try

8   to intervene, but, again, there are rules about

9   who has an entitlement to intervene, and we

10   don't think the states satisfy them because --

11   CHIEF JUSTICE ROBERTS: So --

12   MR. FLETCHER: -- their disagreement

13   --

14   CHIEF JUSTICE ROBERTS: -- so what

15   would -- so there's nothing that an affected

16   state could do in your view? You would give up

17   if you were in General Brnovich's shoes because

18   you say, well, you know, I can't intervene. I

19   can't go and complain about the fact that there

20   wasn't notice-and-comment because it's a

21   judicial decision that allowed them to dispense

22   with notice-and-comment. So you think that in

23   this situation there's nothing that can be done?

24   MR. FLETCHER: I don't think so, but,

25   again, that's -- that's tied to the fact that

 1   this is not a rule that gives them any rights,

 2   that regulates them, that really has any effect

 3   on them.

 4   CHIEF JUSTICE ROBERTS: So then it's

 5   really quite a license for collusive action for

 6   any incoming administration to change rules that

 7   were enacted pursuant to the APA and, therefore,

 8   can only be repealed under the APA? It's a way

 9   to avoid that burden across the board.

10   MR. FLETCHER: So I guess I just

11   disagree with that characterization, Mr. Chief

12   Justice. I mean, this is a case where the --

13   when the administration changed, the President

14   ordered a review of the rule, DHS decided it

15   wanted to issue a new rule, and then the

16   administration was confronted with the question

17   what to do about the litigation. And it had

18   sought this Court's review but had done so on

19   the premise that this was a rule that was

20   important to DHS that DHS wanted to preserve.

21   CHIEF JUSTICE ROBERTS: Right, right.

22   I'm not questioning anybody's motives. I'm --

23   I'm questioning the ease with which a decision

24   in your favor will make it for the -- an

25   incoming administration to avoid

 1   notice-and-comment review, because what -- and

 2   you say, well, if you were in Mr. Brnovich's

 3   shoes, you would sort of take your briefcase and

 4   go home, there's nothing to do. And yet

 5   circumventing the APA is a pretty big deal.

 6   MR. FLETCHER: Well, Mr. Chief

 7   Justice, we may have a disagreement about

 8   whether this is correctly characterized as

 9   circumventing the APA. I -- I guess --

10   CHIEF JUSTICE ROBERTS: Well, it does

11   avoid notice-and-comment rule -- rulemaking on

12   the repeal of the rule.

13   MR. FLETCHER: So that's correct. You

14   know, in this case, of course, DHS is going

15   through notice-and-comment rulemaking.

16   CHIEF JUSTICE ROBERTS: No, that's the

17   new one --

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

19   CHIEF JUSTICE ROBERTS: -- that's an

20   entirely different thing.

21   MR. FLETCHER: That -- that's correct.

22   But it does put all the same issues before them

23   and give them the opportunity to comment. You

24   know, I think, beyond that, we cite in Footnote

25   11 a bunch of decisions of DOJ deciding not to

1   seek further review of decisions vacating the

2   rule. You could call each of those

3   circumventing the APA if you wanted to because

4   they have the same effect of taking a

5   notice-and-comment rule off the books without

6   the opportunity for further notice-and-comment.

7   And I think it's -- it's hard. I

8   understand that because this is a change in

9   administration, this was a controversial case,

10   there's a temptation to view it differently, but

11   I don't think we can have different principles

12   of intervention for what Petitioners in the

13   reply brief call run-of-the-mill cases where the

14   government decides not to seek further review

15   and different rules for intervention for cases

16   that are -- have attracted a lot of controversy

17   or that states are interested in looking into.

18   CHIEF JUSTICE ROBERTS: I'm not

19   suggesting there ought to be different rules.

20   I'm suggesting that we have to think long and

21   hard before adopting a rule that allows anybody,

22   any administration, to circumvent

23   notice-and-comment rulemaking before the repeal

24   of a -- of a rule.

25   And as far as I can hear from -- from

 1   you, in Mr. Brnovich's shoes, you're saying

 2   there's nothing to do -- no -- nothing to be

 3   done.

 4   MR. FLETCHER: Well, so I would say a

 5   couple of things about the consequences of a

 6   decision agreeing with us in this case.

 7   It wouldn't apply in cases where

 8   someone actually could satisfy the requirements

 9   of Rule 24(a) where their legal rights were

10   directly affected. The part of our argument

11   here is based on the fact that Arizona and the

12   other states are not actually -- do not have a

13   legally protected stake in the rule. The answer

14   might be different if you had parties before you

15   who did have such a stake.

16   The other thing I'd say is, just to go

17   back to the answer that I gave to Justice Kagan,

18   you know, I -- I -- I take it everyone agrees

19   that the government has the prerogative to

20   decline to seek further review.

21   The effect of taking the rule off the

22   books without notice-and-comment is an effect of

23   the remedial authority that the Northern

24   District of Illinois asserted in this case.

25   If this Court makes clear that that's

1 not remedial authority that district courts

2 have, then that solves that problem without

3 disrupting principles of intervention or

4 countermanding Congress's choice to put

5 decisions about further review in the hands of

6 the Department.

7   CHIEF JUSTICE ROBERTS: Thank you.

8   Justice Thomas?

9   JUSTICE THOMAS: Nothing, Chief.

10   CHIEF JUSTICE ROBERTS: Justice

11 Breyer, anything further?

12   Justice Alito?

13   JUSTICE ALITO: Has the government

14 previously argued that district courts lack the

15 power to issue nationwide injunctions in

16 situations like this?

17   MR. FLETCHER: We have pretty

18 consistently, Your Honor.

19   JUSTICE ALITO: In this Court? In

20 this Court?

21   MR. FLETCHER: In this Court? I -- I

22 -- in -- I believe we made that a feature of our

23 stay application in the DHS versus New York case

24 where Justice Gorsuch wrote the opinion that I

25 talked about.

 1   Also, I believe in the contraceptive

 2   coverage case that was argued in the last

 3   administration.

 4   CHIEF JUSTICE ROBERTS: Justice

 5   Sotomayor?

 6   JUSTICE SOTOMAYOR: Counsel, I -- I --

 7   I -- this is a very complex issue. What I

 8   understood that the prior administration had in

 9   two cases been before district courts that

10   issued injunction -- injunctions of rules, that

11   the -- I think, in Nevada versus U.S. Department

12   of Labor, the prior administration filed an

13   appeal but then decided to put it in abeyance

14   and decided to comply with the district court's

15   invalidation, correct? So this happens -- has

16   happened across generations, correct?

17   MR. FLETCHER: That's right. Each

18   case differs in its particulars. And, you know,

19   I think one of the things that made this case

20   different and that's important to keep in mind

21   when looking at the forest, as Justice Alito

22   said earlier, is that this was a case that the

23   government had brought into this Court and

24   gotten certiorari granted and gotten

25   extraordinary stays entered before DHS decided

1   that it wanted to replace the rule.

2   And if DHS had made the decision that

3   it wanted to engage in new rulemaking and

4   replace the rule and if it was clear that the

5   rule wasn't having its intended effect, it would

6   be very unusual for the government to come to

7   this Court and ask it to grant certiorari.

8   Now, here, those changes, those facts

9   came to light after the petitions had been

10   filed, and the decision was made after cert had

11   been granted, but it's the same sort of decision

12   not to ask this Court to review an adverse

13   decision against the government.

14   JUSTICE SOTOMAYOR: So this has

15   happened for generations then?

16   MR. FLETCHER: In different forms.

17   Again, I don't want to represent that I can

18   point to a case --

19   JUSTICE SOTOMAYOR: No, no, no. No,

20   not like this --

21   MR. FLETCHER: -- just like this

22   because --

23   JUSTICE SOTOMAYOR: -- but in

24   different --

25   MR. FLETCHER: -- the situation that

         1   was presented was unprecedented, but the idea

         2   that the government can choose for legal and

         3   prudential reasons not to seek further review

         4   has happened across administrations in a lot of

         5   different circumstances.

         6   JUSTICE KAGAN: Mr. Fletcher, just

         7   going back to your colloquy with the Chief

         8   Justice, I guess I'm a little bit surprised that

         9   you didn't say something else. And, you know,

        10   maybe the -- the solicitor general never stands

        11   up at the podium and says somebody can bring an

        12   APA action against us.

        13   But isn't that the answer? Somebody

        14   could bring an APA action. I mean, if there has

        15   been circumvention of the APA, like, rather than

        16   go through this quadruple bank shot, I mean, why

        17   don't we just say, you know, you have a good

        18   point about circumvention of the APA, go bring

        19   an APA action?

        20   MR. FLETCHER: So they could bring an

        21   APA action. That's right. Candidly, we would

        22   argue in that APA action --

        23   JUSTICE KAGAN: You would -- you would

        24   take the other side. You would say, well, they

        25   don't have an APA action either. I understand

1   that. But, I mean, because you think that what

2   you did was not circumvention and -- look, I

3   understand that the government is here to defend

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

5   But, on the assumption that the

6   government circumvented the APA, isn't the right

7   remedy an APA action?

8   MR. FLETCHER: So they can bring an

9   APA action. If they do, we'll make the argument

10   that the rescission of the rule was justified by

11   the fact that the vacatur had become final. And

12   I think we're right about that.

13   But I -- you disagree -- may disagree.

14   And so, if they want to bring that argument and

15   try to persuade a court that you're right and

16   I'm wrong, they can absolutely do that.

17   CHIEF JUSTICE ROBERTS: Justice

18   Gorsuch?

19   JUSTICE GORSUCH: Yeah, just a couple

20   questions just to follow up on Justice Kagan's.

21   So the government -- I just want to

22   make sure I understand. So, if -- if a state

23   were to bring an APA action, the government's

24   position would be what?

25   MR. FLETCHER: So I think we're

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1    talking about an APA action that's challenging
2    the rescission that --
3           JUSTICE GORSUCH:  Yes.
4           MR. FLETCHER:  -- in March of 2021.
5           JUSTICE GORSUCH:  Yes.
6           MR. FLETCHER:  And we would say that
7    that was valid without notice-and-comment
8    because the existence of the vacatur judgment by
9    the district court was good cause to forgo
10   notice-and-comment and that the fact that that
11   judgment had been entered, finally vacated the
12   rule, and was no longer being appealed justified
13   the rescission of the rule.
14          JUSTICE GORSUCH:  Even though, on --
15   on the government's view, the -- the scope of
16   the vacatur was unlawful?
17          MR. FLETCHER:  That's correct, yes.
18          JUSTICE GORSUCH:  Okay.  And I guess
19   that leads me to my -- kind of where I'm stuck
20   in this case, and it's sort of where the Chief
21   Justice is.  Any administration coming in, of
22   course, can agree not to contest a judicial
23   opinion.  That's often good practice.
24          But, in this case, the government is
25   relying on an injunction or a vacatur of
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 1   nationwide scope that it believes to be unlawful

 2   as the basis for the rescission.

 3   How do I think about that when we come

 4   to the equitable considerations associated with

 5   intervention, that the government's rescission

 6   here is premised on what it admits to be an

 7   unlawful order?

 8   MR. FLETCHER: So, Justice Gorsuch, I

 9   think often, when the government decides not to

10   seek further review of a decision, including a

11   decision setting aside a regulation, it may

12   disagree very strongly with the legal grounds

13   for that decision and think that the order was

14   wrong and that the judge didn't have the

15   authority to enter it but, nonetheless, decide

16   that the sort of high standards that the

17   government applies before seeking further

18   review, especially this Court's review, aren't

19   meant --

20   JUSTICE GORSUCH: I -- I -- I -- Mr.

21   Fletcher, I -- I -- I don't disagree with any of

22   that. I accept that. Of course, the government

23   often disagrees with the judges. That's --

24   that's the independence of the judiciary, and --

25   and we're all stuck with that.

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 1              But what -- what is kind of a little

 2    different in this case is to tell a state that

 3    it has no recourse through the APA, through

 4    litigation, all because the government's

 5    acquiescence in a judicial order that it agrees

 6    is wrong and -- and is -- is that an equitable

 7    consideration that we should as judges take into

 8    account when we're deciding a question of

 9    intervention, noting that intervention is

10    ultimately an equitable sort of considered --

11    question?

12              MR. FLETCHER:  So it is an equitable

13    question.  I would hesitate to encourage courts

14    to rely on those sorts of judgments because one

15    of the themes that I've been trying to convey

16    this morning is that Congress has decided that

17    these are decisions for the government to make

18    about whether or not to seek further review.

19              JUSTICE GORSUCH:  Of course.

20              MR. FLETCHER:  Different story if you

21    have a party that actually has the sort of

22    intervention that justifies -- stake that

23    justifies intervention as of right.  But, if

24    you're not in that world and you're talking

25    about permissive intervention, I'd warn the
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 1   Court away from suggesting that courts ought to

 2   sort of look under the hood about whether or not

 3   they agree with the government's decision-making

 4   or the way that it weighed all of the competing

 5   considerations.

 6   JUSTICE GORSUCH: Of -- of -- of

 7   course. I -- I -- I get that. I guess I'm just

 8   wondering, would that be the narrowest basis of

 9   decision if -- if -- if the Court were to rule

10   against you, that those are unique circumstances

11   that might justify permissive intervention at

12   least here?

13   MR. FLETCHER: So those aren't narrow

14   circumstances. I'm not sure that they're the

15   basis for an administrable rule because, of

16   course, I've just told you that we disagree

17   with district courts. Often --

18   JUSTICE GORSUCH: No, I know you -- I

19   know you --

20   MR. FLETCHER: -- often that doesn't

21   happen.

22   JUSTICE GORSUCH: -- I know you

23   disagree. But, if we were to rule against you,

24   would that be the narrowest basis, or do you

25   have another narrow one?

1   MR. FLETCHER: Another narrow way to

2   lose?

3   JUSTICE GORSUCH: Yeah.

4   (Laughter.)

5   MR. FLETCHER: I, you know --

6   JUSTICE GORSUCH: A tough question. I

7   -- I've had it presented to me.

8   MR. FLETCHER: Yeah.

9   JUSTICE GORSUCH: Nobody likes it.

10   And I'm sorry to ask it.

11   MR. FLETCHER: Well, I take that. You

12   know, I think, if -- we, of course, don't think

13   we should lose at all. We think a lot of the

14   concerns that have been addressed would be

15   addressed by adopting your view about the scope

16   of district courts' remedial authority.

17   If you're not willing to go down that

18   road and you think that the states ought to be

19   permitted to intervene, you know, I think the

20   narrowest basis for a decision in this case,

21   which is, again, about these preliminary

22   injunction appeals, would be to say that under

23   these circumstances, because the controversy has

24   become moot because the government acquiesced in

25   a different judgment, they can come in and seek

         1   Munsingwear vacatur and that's all.

         2   I think that, you know, relieves them

         3   of some of their concerns and doesn't create the

         4   problems that we have about forcing the

         5   government to continue litigating about this

         6   rule that it's simultaneously trying to replace,

         7   which was really a big part of the concern that

         8   we had when we were approaching what to do about

         9   this litigation.

        10   JUSTICE GORSUCH: Thank you.

        11   JUSTICE KAVANAUGH: Just want to pick

        12   up right there. So intervening for the purpose

        13   of Munsingwear -- seeking Munsingwear is the --

        14   is the narrowest ground, you -- you suggest?

        15   MR. FLETCHER: I -- I'm open to other

        16   even narrower grounds.

        17   (Laughter.)

        18   MR. FLETCHER: But -- but that is the

        19   narrowest one that I can come up with, yes.

        20   JUSTICE KAVANAUGH: And -- okay. And

        21   then going back to the APA suit challenging the

        22   rescission of the rule, I think that raises a

        23   big question. The Chief Justice raises

        24   important concerns, but I think there are

        25   important concerns going both ways there because

 1   it's never been the case, as I understand it and

 2   our colloquy illustrated, that acquiescence in

 3   adverse judgment triggers notice-and-comment

 4   responsibilities for the repeal of that rule,

 5   right? At least the -- you haven't found

 6   anything.

 7   MR. FLETCHER: Correct. I don't want

 8   to represent that there's nothing out there, but

 9   I -- I certainly haven't found anything.

10   JUSTICE KAVANAUGH: So it would be a

11   big deal, I think, to hold that all of a sudden

12   the government, when it acquiesces in a

13   judgment, also has to go through

14   notice-and-comment for the repeal, different

15   from the new rule, for the repeal. That would

16   be a big deal.

17   MR. FLETCHER: Correct, I agree. And

18   I think --

19   JUSTICE KAVANAUGH: And that would

20   hamstring new administrations, which is, you

21   know, the flip -- the Chief raises important

22   concerns. The flip side is, of course, not

23   allowing a new administration to get out of the

24   starting blocks because they're -- they're

25   stuck.

 1   MR. FLETCHER: I -- I agree with that,

 2   and I'd just add that it's not just the

 3   transition to a new administration. You know,

 4   this happens even within an administration, that

 5   there's a rule --

 6   JUSTICE KAVANAUGH: Sure. There's a

 7   new secretary who comes in, new political or

 8   policy views. Yeah.

 9   MR. FLETCHER: Or the government

10   decides, you know, this rule, there's too much

11   litigation risk. We might make bad law if we

12   pursue it. Or it turns out actually we don't

13   think it's such a good idea. There are all

14   sorts of reasons why the government might

15   acquiesce or decline to seek further review of

16   these decisions, and a rule saying -- a -- a

17   judgment saying that anyone can intervene if

18   they have Article III standing and force

19   continued litigation or that there has to be

20   notice-and-comment rulemaking would be quite

21   disruptive.

22   JUSTICE KAVANAUGH: Thank you.

23   CHIEF JUSTICE ROBERTS: Justice

24   Barrett?

25   JUSTICE BARRETT: I do have a question

1   about historical practice.

2   So, you know, as Footnote 11 in your

3   brief makes clear, lots of historical practice

4   for the government acquiescing in -- in judicial

5   decisions and not appealing.

6   What about the government opposing

7   intervention in this circumstance? Because I

8   think these are two separate threads, right? We

9   can all agree that the government has the

10   ability to acquiesce -- acquiesce in a judgment

11   in its favor.

12   But that's a distinct question from

13   whether the government should oppose or a court

14   should deny permission to a state who wants to

15   intervene at that point. What has the

16   historical practice been there?

17   MR. FLETCHER: So I don't have a lot

18   of examples of that, I think, in part, because

19   it just hasn't come up. You know, the two

20   examples that they offer in their reply brief,

21   as I explained, aren't really examples of this

22   --

23   JUSTICE BARRETT: Yeah.

24   MR. FLETCHER: -- because intervention

25   happened earlier. I guess what I'd say, though,

1   is we don't view them as being quite that

2   distinct because, when the government decides

3   not to seek further review, it's often because

4   the government has made a decision that further

5   review isn't in the government's interest

6   because it might make bad law, because it turns

7   out the agency is about to replace the policy

8   anyway, you know, for all sorts of reasons.

9   And when that happens, sort of part

10   and parcel of that decision is a judgment also

11   that we don't want other parties to step in and

12   continue the litigation, which forces us to

13   continue litigating the case, which is exactly

14   what we tried not to do by declining to seek

15   further review.

16   So I -- I think they're two decisions

17   that are linked in our mind.

18   JUSTICE BARRETT: So the examples that

19   they come up with in their reply brief, I mean,

20   you just haven't -- nobody's been able to come

21   up with more. So, when they say that this is

22   unprecedented on the government's part, you're

23   saying it's also unprecedented on the state's

24   part to try to intervene in this circumstance.

25   MR. FLETCHER: I -- I'm saying that

1   I -- I have not looked -- you know, I haven't

2   done an exhaustive survey for this. I'm sure

3   there are cases where it has happened before.

4   It just has not happened a lot.

5   And when it does happen, the

6   government, if we thought that they were

7   entitled to intervene, that they met the Rule

8   24(a) standards, then we'd be taking a different

9   position about whether or not they're entitled

10   to intervene.

11   But if -- when we think they don't

12   meet the Rule 24(a) standards and when the

13   question is, as a permissive matter, should a

14   court allow them into a case that the government

15   has decided continued litigation is not in the

16   interest of the United States, then I don't

17   think it's surprising that we -- we'd oppose

18   that precisely because we do want to avoid

19   continued litigation.

20   JUSTICE BARRETT: Right. Okay.

21   CHIEF JUSTICE ROBERTS: Thank you,

22   counsel.

23   Ms. Hong.

24

25

1   ORAL ARGUMENT OF HELEN H. HONG

2   ON BEHALF OF THE STATE RESPONDENTS

3   MS. HONG: Mr. Chief Justice, and may

4   it please the Court:

5   There are many ways in which we agree

6   with Petitioners about the legal standards

7   governing intervention. Those standards are

8   broad and we've relied on them ourselves to

9   intervene in cases that threaten to impair our

10   interests.

11   But those standards do impose limits.

12   And under the particular circumstances of this

13   case, Petitioners' motion to intervene in the

14   Ninth Circuit exceeded those limits. The

15   central problem with that motion is that there's

16   no practical sense in which the Ninth Circuit

17   proceedings threatened to impair Petitioners'

18   asserted interests.

19   The 2019 Public Charge Rule was

20   vacated through a final judgment in a separate

21   case in a different circuit, and there is no

22   rule left for Petitioners to defend in the

23   courts below.

24   This case can be resolved on that

25   straightforward basis alone. I welcome the

1   Court's questions.

2   JUSTICE THOMAS: Would you be just a

3   bit more -- give us a bit more detail about why

4   you oppose intervention here? You said you

5   generally agree with Petitioner that there

6   should be intervention available.

7   I think, of course, like, California

8   may have intervened in cases like Affordable

9   Care Act. How is this different? And I think

10   some of those have involved matters, perhaps not

11   exclusively, but matters that were nationwide or

12   other states, involved other states.

13   So would you just be -- give us a

14   little more detail?

15   MS. HONG: Yes, Your Honor. I think

16   it goes to the Rule 24 standards that requires

17   impairment of the Petitioners' interest. But,

18   as a more practical matter, the question is,

19   what would the courts do below if Petitioners

20   were authorized to intervene?

21   There is no rule to litigate. There's

22   nothing that the Ninth Circuit can do to restore

23   the rule. So the Petitioners' motion really

24   achieves nothing of significance.

25   That's why we think that Petitioners'

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 1    motion was properly denied in the court of
 2    appeals here in the Ninth Circuit.
 3              JUSTICE KAVANAUGH:  What about
 4    Munsingwear?
 5              MS. HONG:  Your Honor, Munsingwear
 6    raises two separate issues, one that goes to the
 7    scope of the Munsingwear doctrine, and the
 8    second is a separate case-specific question
 9    about Rule 24's requirements.
10              Munsingwear itself, I think, as -- as
11    my friend from the federal government has
12    explained, is a doctrine that was designed to
13    relieve existing parties of the consequences of
14    a judgment once a case became moot.
15              I'm not aware of an extension of
16    Munsingwear that has been sort of applied in
17    this circumstance for non-parties to intervene
18    in a moot case to seek vacatur, but even if it
19    were theoretically possible, that still raises
20    the Rule 24 question, which is, what practical
21    stake or what stake has Arizona identified to
22    seek vacatur in these circumstances?
23              And we think that's where Petitioners
24    fall short.
25              JUSTICE KAVANAUGH:  But wouldn't --
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1   MS. HONG: Their legal --

2   JUSTICE KAVANAUGH: -- the theory be,

3   and you've heard me say this, but they seek

4   Munsingwear of the adverse -- to get the adverse

5   decisions off the books, and they have an APA

6   suit where they challenge the repeal, and the

7   government in that is no longer able to rely on

8   the adverse judgments, which Mr. Fletcher said

9   they would certainly be relying on in any such

10   APA suits.

11   So the chain of logic seems pretty

12   straight to me of how they would use

13   intervention here if -- if I have the -- have it

14   right.

15   MS. HONG: Yeah, there's -- but

16   there's no judgment here. So their concern is

17   the Ninth Circuit's decision on a preliminary

18   injunction appeal, which isn't tantamount to a

19   decision on the merits. And the decision

20   doesn't require the state to do anything or

21   refrain from doing anything. And the federal

22   government has represented that it doesn't feel

23   encumbered by the decision from reimposing the

24   same rule in the future.

25   So what this boils down to then is the

1   Petitioners' legal disagreement with the

2   reasoning of the court of appeals' decision.

3   And we don't think that's enough to give them

4   the necessary stake to intervene under the

5   standards of Rule 24 to seek vacatur in these

6   circumstances.

7   CHIEF JUSTICE ROBERTS: So you'd have

8   a different view if this were the case from the

9   Seventh Circuit?

10   MS. HONG: Your Honor, it's -- it's a

11   different question there. I think the -- both

12   the Rule 24 analysis is different because, of

13   course, our basis for intervene -- or opposing

14   an intervention motion here is that their

15   interests can't be impaired because of the

16   vacatur judgment.

17   That basis for opposing doesn't exist

18   in Illinois. The district court there ruled

19   solely on timeliness grounds and denied the

20   motion, concluding that the Petitioners had

21   intervened too late in that proceeding. That is

22   not a basis --

23   CHIEF JUSTICE ROBERTS: Do you

24   remember how -- how long they waited before

25   moving to intervene in that case?

1   MS. HONG: Your Honor, the judgment --

2   the final judgment that vacated the rule was

3   issued in November of 2020. They attempted to

4   intervene on March 11 in the Seventh Circuit.

5   It was, we acknowledge, just two days after the

6   Seventh Circuit dismissed the appeal and issued

7   the mandate.

8   CHIEF JUSTICE ROBERTS: Two -- two

9   days is the answer to my question, right?

10   MS. HONG: Yes, Your Honor.

11   CHIEF JUSTICE ROBERTS: Thank you.

12   MS. HONG: But we're not pressing

13   timeliness as a ground here. And, of course, as

14   -- as we discussed earlier today, I think those

15   ongoing proceedings are subject to an appeal and

16   proceedings in the Seventh Circuit.

17   And even if Petitioners are able to

18   successfully intervene there, there are still a

19   number of steps that would have to occur before

20   there would be any prospect of live litigation

21   here in the Ninth Circuit.

22   After intervention, they would still

23   have to secure modification of the final vacatur

24   judgment and then rescission of the rescission

25   rule before the rule could spring back to life

 1   and there could be any meaningful litigation in

 2   the Ninth Circuit.

 3   And that's primarily the basis for our

 4   opposition to the motion to intervene here,

 5   which is nothing in this case can restore the

 6   rule and nothing then can redress the

 7   Petitioners' asserted claims of injury.

 8   JUSTICE SOTOMAYOR: Let's go back to

 9   that equity question. And you answered to

10   Justice Kavanaugh.

11   You said the preliminary injunction

12   ruling here is not a judgment, correct?

13   MS. HONG: The preliminary injunction

14   orders are not a judgment, yes, Your Honor.

15   JUSTICE SOTOMAYOR: And so they can't

16   hurt them in terms of any arguments they have

17   elsewhere because it's not a merits decision,

18   correct?

19   MS. HONG: Correct, Your Honor.

20   JUSTICE SOTOMAYOR: It's an equity

21   balance?

22   MS. HONG: The -- the preliminary

23   injunction factors certainly included an

24   equitable balance. I -- I -- I take

25   Petitioners' arguments to be that the Ninth

1   Circuit's decision on the likelihood of success

2   is what they would like to wipe off the books.

3   JUSTICE SOTOMAYOR: Correct. So why

4   is that not an interest adequate in equity to

5   grant them intervention?

6   MS. HONG: Right. And the question is

7   whether they have a necessary stake to seek

8   that. And we don't think that Petitioners have

9   identified anything different than bare legal

10   disagreement with the reasoning of the decision.

11   Again, it doesn't require them to do

12   anything. The federal government is not

13   thwarted from reimposing the same rule. And, of

14   course, a court considering the merits would not

15   be bound by or controlled by the Ninth Circuit's

16   decision on the likelihood-of-success prong.

17   JUSTICE KAGAN: Ms. Hong, I'm -- I'm

18   curious to know what your answer would be to the

19   series of questions that both the Chief Justice

20   and I were -- were -- were asking about if one

21   thinks that there is a kind of circumvention of

22   the APA that the federal government did here,

23   this is not your problem, it's their problem,

24   but if one thinks that, and Justice Kavanaugh

25   presents some real reasons to -- to think that

 1   that's a hard question, but, if one thinks that

 2   and one is concerned about green-lighting that

 3   kind of government conduct, what should we do in

 4   this case? What should we do in some other

 5   case?

 6   MS. HONG: Your Honor, I think that

 7   might be a basis for intervention in the

 8   proceedings where the rule was actually vacated.

 9   So that would be the Seventh Circuit

10   proceedings, which is an ongoing appeal.

11   Separately, I think Your Honors have

12   discussed this morning the prospect of a

13   separate lawsuit under the APA challenging the

14   federal government's reliance on the good cause

15   exception to notice-and-comment rulemaking.

16   Those -- Petitioners' concerns about

17   the federal government's evasion of the APA

18   really is a core -- at its core a concern about

19   the scope of that good cause exception. We

20   think those are two alternative fora where

21   Petitioners could try to make their case.

22   But even if the Court has concerns

23   about the federal government's conduct that led

24   to the vacatur of the rule and then the issuance

25   of the rescission rule, those concerns do

 1   nothing to -- to permit the Ninth Circuit in

 2   this case to restore the rule.

 3   And I think Petitioners functionally

 4   concede that in their reply brief when they

 5   recognize there's nothing that the Ninth Circuit

 6   can do while the vacatur judgment exists to get

 7   them to have the rule restored in these

 8   proceedings. And that's why we think the court

 9   of appeal properly denied intervention both as a

10   matter of right and as a matter of permissive

11   intervention.

12   JUSTICE GORSUCH: Counsel, let's --

13   let's suppose that Arizona succeeds in the

14   Seventh Circuit just hypothetically. Would --

15   would California take the position that the

16   Ninth Circuit's preliminary injunction should

17   apply and applies nationwide or not?

18   MS. HONG: Well, the preliminary

19   injunction by its terms that was issued in our

20   case is limited geographically, and, of course,

21   the Washington case injunction was narrowed by

22   the Ninth Circuit.

23   I guess, to go back to Your Honor's --

24   the premise of the question, which is, if

25   Petitioners succeed in intervention --

 1   intervening in Arizona, does that mean that we

 2   have a live dispute here, and that's just not

 3   the case.

 4   JUSTICE GORSUCH: No, my -- my

 5   question was a little more specific than that.

 6   What -- what would California's position be in

 7   the Ninth Circuit litigation about the scope of

 8   the appropriate relief?

 9   MS. HONG: Your Honor, if the rule

10   were restored, then the preliminary injunctions

11   that were issued in our case are geographically

12   limited. We -- are -- are geographically

13   limited.

14   JUSTICE GORSUCH: I understand that

15   currently. But what would California's position

16   be as to their proper scope?

17   MS. HONG: We -- we did seek a

18   nationwide injunction in the district court. We

19   were not successful in that endeavor. And I

20   think we would have to live with both the

21   district court's conclusion that the --

22   JUSTICE GORSUCH: Are you representing

23   you wouldn't seek a nationwide relief before the

24   Ninth Circuit?

25   MS. HONG: In terms of the final

1   relief, that might be different. We might seek

2   nationwide relief, but -- but that's only if the

3   rule is restored. At present, there's no rule

4   to litigate and there's no way the district

5   court, we think, could properly issue a vacatur

6   judgment in our case.

7   CHIEF JUSTICE ROBERTS: Thank you,

8   counsel.

9   Justice Thomas?

10   Justice Breyer, anything further?

11   JUSTICE SOTOMAYOR: Just one question

12   following up on what Justice Gorsuch said.

13   There'd have to be a vacatur of the nationwide

14   rule -- rule in the Seventh Circuit, correct?

15   MS. HONG: Correct, Your Honor.

16   JUSTICE SOTOMAYOR: And the grounds

17   for that would inform whatever position you took

18   with respect to nationwide relief later,

19   correct?

20   MS. HONG: Potentially, Your Honor.

21   If there were a ruling from this Court in those

22   Seventh Circuit proceedings, for example, that

23   bore on what arguments we could make, then,

24   certainly, that would have a -- bear a

25   relationship to --

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 1            JUSTICE SOTOMAYOR:  If -- if --
 2            MS. HONG:  -- what we could argue.
 3            JUSTICE SOTOMAYOR:  -- we ruled that
 4    nationwide injunctions are improper, you
 5    couldn't seek one then?
 6            MS. HONG:  Correct.
 7            JUSTICE SOTOMAYOR:  Okay.
 8            CHIEF JUSTICE ROBERTS:  Justice Kagan?
 9            Justice Gorsuch, anything further?
10            Justice Barrett?
11            Thank you, counsel.
12            General, rebuttal?
13            REBUTTAL ARGUMENT OF GEN. MARK
14       BRNOVICH ON BEHALF OF THE PETITIONERS
15            MR. BRNOVICH:  Thank you, Mr. Chief
16    Justice.
17            I can't help but hearing my mom's
18    voice in my head that it's better to remain
19    quiet and be thought of a fool than open your
20    mouth and remove all doubt.
21            But I do think it's important for the
22    record to emphasize that the question pending
23    before this Court today and what seemingly none
24    of us disagree with is whether the Ninth Circuit
25    erred in denying Arizona's motion to intervene.
```

1   The -- the answer to that question is

2   clearly yes. Nothing the Respondents have said

3   today casts any real doubt on that. It is,

4   indeed, the Solicitor's prerogative to decide

5   what rulings she may well appeal, but it is not

6   her choice and her choice alone to determine

7   whether a party or a state can intervene in a

8   case.

9   And, ultimately, if you allow the

10   actions of the Department of Justice to stand in

11   this case, it sets a dangerous precedent for

12   future administrations to essentially do an

13   end-around the APA.

14   Thank you very much.

15   CHIEF JUSTICE ROBERTS: Thank you,

16   counsel. The case is submitted.

17   (Whereupon, at 11:22 a.m., the case

18   was submitted.)

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