# **SUPREME COURT OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES
ARIZONA, ET AL.,
Petitioners,
v.
No. 20-1775
CITY AND COUNTY OF SAN FRANCISCO,
CALIFORNIA, ET AL.,
Respondents.
)

Pages: 1 through 100
Place: Washington, D.C.
Date: February 23, 2022

# HERITAGE REPORTING CORPORATION

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1 IN THE SUPREME COURT OF THE UNITED STATES 2 \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ 3 ARIZONA, ET AL., ) 4 Petitioners, ) 5 ) No. 20-1775 v. 6 CITY AND COUNTY OF SAN FRANCISCO, ) 7 CALIFORNIA, ET AL., ) Respondents. ) 8 9 \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ - - - - - - - - -10 11 Washington, D.C. 12 Wednesday, February 23, 2022 13 14 The above-entitled matter came on for 15 oral argument before the Supreme Court of the United States at 10:00 a.m. 16 17 18 **APPEARANCES:** 19 GEN. MARK BRNOVICH, Attorney General, Phoenix, 20 Arizona; on behalf of the Petitioners. BRIAN H. FLETCHER, Principal Deputy Solicitor General, 21 22 Department of Justice, Washington, D.C.; on behalf 23 of the Federal Respondents. 24 HELEN H. HONG, Deputy Solicitor General, San Diego, California; on behalf of the State Respondents. 25

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1 PROCEEDINGS 2 (10:00 a.m.) 3 CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 20-1775, Arizona 4 versus San Francisco. 5 General Brnovich. 6 ORAL ARGUMENT OF GEN. MARK BRNOVICH 7 ON BEHALF OF THE PETITIONERS 8 MR. BRNOVICH: Mr. Chief Justice, and 9 may it please the Court: 10 11 The Ninth Circuit's refusal to let 12 Arizona and other states intervene to defend the public charge rule capped an unprecedented 13 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 stayed, and this very Court had granted 20 21 certiorari. 2.2 But the new Biden Administration 23 suddenly abandoned its defense of the rule. It coordinated with the rule's challengers and 24 25 dismissed the granted petition by this Court,

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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4	only on that, the Biden Administration rescinded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 dollars. 4 We have commented on previous rules. 5 6 We do believe the -- the primary issue here goes 7 back to whether the states timely moved to intervene, which we did, whether there is an 8 9 interest, which there is. Even the Respondent states recognize that all of us have an 10 11 interest, and that interest is apparent. 12 JUSTICE THOMAS: But one final question then. What makes this case different 13 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 2.2 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 courts, that were pending before the circuit 3 courts, left in place one judgment in the 4 Northern District of Illinois, and then used 5 that district court decision to rescind a rule 6 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 --MR. BRNOVICH: In fact, just last 13 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. 2.2 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,

1 it didn't bar the enforcement of the rule in 2 your state, correct? 3 MR. BRNOVICH: Justice, the 4 injunctions are --JUSTICE SOTOMAYOR: Just answer that 5 6 yes or no. The injunction ran against other 7 states, correct? MR. BRNOVICH: That is technically 8 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? MR. BRNOVICH: That is correct, but --8 however, the --9 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 --JUSTICE SOTOMAYOR: Just answer yes or 20 21 no. Did you have --2.2 MR. BRNOVICH: Well, we were --23 JUSTICE SOTOMAYOR: -- an -- a legal opportunity -- I don't remember what the statute 24 25 of limitations is, but I thought, when a rule

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     has been rescinded, you have a certain number of
 2
     days to challenge that, don't you?
 3
               MR. BRNOVICH: That is correct.
               JUSTICE SOTOMAYOR: And the
 4
      jurisdiction for that is not in the Ninth
 5
 6
     Circuit, correct?
 7
               MR. BRNOVICH: The -- the --
               JUSTICE SOTOMAYOR: The jurisdiction
 8
      for that APA action is not in the Ninth Circuit?
 9
10
               MR. BRNOVICH: But there was pending
     cases in the Ninth Circuit. There was --
11
12
               JUSTICE SOTOMAYOR: Well, what does
13
      that --
               MR. BRNOVICH: -- pending cases in the
14
15
      Seventh Circuit --
16
               JUSTICE SOTOMAYOR: -- have to do with
17
               MR. BRNOVICH: -- in the Fourth
18
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. MR. BRNOVICH: -- within a day -- we 4 did -- we are. We're trying to -- we think the 5 6 proper vehicle --7 JUSTICE SOTOMAYOR: You're trying to do all of that, but I don't know how that issue 8 will be litigated in the Ninth Circuit. 9 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 --JUSTICE SOTOMAYOR: The issue of 14 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 --2.2 CHIEF JUSTICE ROBERTS: Counsel, the rule was rescinded on the basis of -- I don't 23 know how many sentences it was when -- on the 24 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 MR. BRNOVICH: Chief Justice. 5 CHIEF JUSTICE ROBERTS: -- that you 6 7 can challenge the decision in the other circuit as a basis for challenging the rescission of the 8 9 rule, or do you go back to the District Court in D.C. and in the D.C. Court of Appeals or 10 11 District Court, whichever it is, you argue that 12 the judgment in the district court in Illinois was erroneous, or do you go straight to the one 13 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 to do that, I would fully anticipate that the 19 20 states then would intervene in the other 21 circuits, including trying to get the decision 2.2 overturned by the Seventh Circuit and the Northern District of Illinois. 23 24 And, once again, it was unprecedented, 25 the legal maneuvering by the Department of

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1 Justice, when you have all of these different 2 appeals going --3 JUSTICE KAGAN: Well --MR. BRNOVICH: -- through the process. 4 So it's important for the states --5 6 JUSTICE BREYER: Everybody has the 7 same question, I think. The -- my -- my understanding was -- I'd probably put the same 8 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 In this case, it's -- it's in the --Arizona. 19 it's in the Seventh Circuit case that you have a problem, so I -- I don't see why -- why --20 21 because they have a nationwide injunction. 2.2 So you -- you might say: Look, what 23 we want to do is we want to say that the solicitor general of the former administration 24 25 was right, that the cases are wrong, and we're

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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 something set aside that applies only to 4 California, Eastern District of Washington. 5 6 Never applied to you in the first place. 7 So what we should do is wait for this thing to come out of the Seventh Circuit, where 8 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. But, by its very nature, immigration 20 doesn't -- and this Court has recognized that --21 2.2 it -- it doesn't stay in one state. So what 23 happens in California once someone has that status, that does then affect Arizona and the 24 25 benefits and those programs, those social

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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

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1 did go to Arizona? MR. BRNOVICH: Justice Breyer, because 2 3 of the litigation and the lawsuits and the injunctions, the rule didn't have a lot of time 4 to -- to be into place. And so we do know that 5 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 can enforce, you know, immigration laws, so 13 we're at least allowing -- allow the states to 14 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 should have done here? Because one 20 21 administration is not obliged to defend the rule 2.2 adopted by the prior administration. The Biden Administration was entitled 23 to change positions, right? So, once the Biden 24 25 Administration changed positions, what do you

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think the Biden Administration should have done 1 2 to effectuate that? 3 MR. BRNOVICH: Well, they could have done, once this Court accepted certiorari, 4 continued to defend the rule. And if they 5 didn't want --6 7 JUSTICE BARRETT: But that didn't -let's posit they don't have to. So --8 MR. BRNOVICH: Well, then --9 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 this Court said that the prior administration 20 21 had to do in the DACA case. 2.2 MR. BRNOVICH: Absolutely, Justice 23 Roberts --JUSTICE KAGAN: Well, if that's your 24 25 position -- and I --

19

MR. BRNOVICH: -- Chief Justice. 1 JUSTICE KAGAN: -- I think that's a, 2 3 you know, very reasonable position, that -- that the government here acted in a way that you 4 would not typically expect or want and that it 5 counts as an evasion of notice-and-comment. 6 7 But -- but, if it's an evasion of notice-and-comment, I mean, you bring an APA 8 suit. It's an evasion of -- it's -- it's a 9 violation of the APA. That's the proper remedy. 10 I -- I mean, there's a kind of 11 12 mismatch here between what you're saying went 13 wrong and what you're saying you want. If -- if it's an evasion of notice-and-comment, bring an 14 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 never applied to you in the first place? 18 19 MR. BRNOVICH: Justice, part of the -the problem is is that you have this Northern 20 21 District of Illinois decisions out there that 2.2 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
б	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. JUSTICE KAGAN: Well, but, I mean, I 2 3 think a court would be, you know, quite within its rights to say something along the lines of 4 what you started with if the government said 5 that to them. It's like you -- you can't use 6 7 some decision out of the Northern District of Illinois to circumvent notice-and-comment. 8 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 time when administrations change. That's not 13 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 exactly that. I mean, that's the -- that's the 20 21 mechanism for a violation of the APA, is an APA 2.2 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 \_ \_ JUSTICE BARRETT: Why didn't it apply 5 6 \_ \_ 7 CHIEF JUSTICE ROBERTS: -- what would the --8 MR. BRNOVICH: -- and I hope the 9 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 suit challenging the repeal, I guess in the 19 District of Columbia, would the District of 20 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,

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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. But I do think that there is a 5 6 legitimate concern, is that you might have a --7 some federal judge somewhere saying, well, this decision's out there and they use that as a 8 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 2.2 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

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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

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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 --JUSTICE SOTOMAYOR: But they've 5 6 already vacated the preliminary injunction, so 7 there's nothing for them to review. So the en banc -- there is no injunction from the Ninth 8 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, but 19 until you get that --20 MR. BRNOVICH: -- that the Court 21 accepted. 2.2 JUSTICE SOTOMAYOR: -- until you get 23 that -- until you get that lifted and until you 24 get the rescission of the rule lifted, something that can't be done by the Ninth Circuit, there's 25

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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 from the Northern District of Illinois. 7 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 Seventh Circuit's judgment? 13 MR. BRNOVICH: No, I didn't suggest 14 15 that, Your Honor. What I --16 JUSTICE SOTOMAYOR: So you just said 17 to me --18 MR. BRNOVICH: -- what I'm suggesting, though, it -- it's the --19 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 Circuit? 23 MR. BRNOVICH: Yes, Justice. 24 25 JUSTICE SOTOMAYOR: It's an

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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 rule. And they're saying they're just 8 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 through notice-and-comment. They say, we're 13 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, because, if not, we're not going to have the 20 21 chance to say that they could go through 2.2 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.

1 Now that is a -- now don't -- you're just going to agree because it sounds if I'm 2 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 I wonder, looked at that way, I can't think of 19 20 anything I ever saw like that, and -- and I'll 21 be interested if the government has. And it -it is sort of a point, and -- and -- and the 22 23 simplest thing would be to wait for the Seventh Circuit. When is that going to -- when is that 24 25 going to happen?

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
б	JUSTICE BREYER: 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

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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 Circuit? Because it certainly would be a 8 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 Breyer, and the -- the case that this Court 13 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 2.2 Seventh Circuit. MR. BRNOVICH: -- the -- the -- the 23 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 --JUSTICE BREYER: You may not know. 4 That's all right. 5 MR. BRNOVICH: I do. There -- there 6 7 -- there -- there is briefing under way, and those -- there is briefing under way, and those 8 9 issues are on appeal. But the question, once again, is do the states have allowed to --10 11 JUSTICE KAGAN: Sorry. Those issues 12 on appeal are which issues in the Seventh Circuit now? The -- this exact issue? 13 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 still pending. This court just made it to the 21 2.2 -- the Court first. 23 JUSTICE BARRETT: I thought the district court denied your motion to intervene 24 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. JUSTICE BARRETT: How important is the 4 APA to your argument? What if this were a 5 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, but rule and comment -- the rule and notice 10 11 commenting rulemaking is something that's very 12 important. It allows the states to express their interests and to -- you know, it's -- it's 13 14 a complicated, sometimes --15 JUSTICE BARRETT: But -- but let's imagine the public charge rule were a statute 16 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 2.2 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. JUSTICE BARRETT: So this isn't driven 3 entirely by your inability to participate in 4 notice-and-comment and the administration's 5 circumvention of notice-and-comment in your 6 7 view? MR. BRNOVICH: Justice, not entirely, 8 9 but that is part of the states' reasoning, is that there's not only a financial impact but 10 that it's important, that integrity of the 11 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 2.2 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 importantly, that fourth prong of are those --3 is there adequate representation in protecting 4 5 those interests. JUSTICE KAGAN: Yeah, so I'm -- I'm --6 7 MR. BRNOVICH: So there -- there --JUSTICE KAGAN: -- I'm -- I'm 8 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. MR. BRNOVICH: Yes, Justice Kagan. 20 21 This very Court recognized in Massachusetts 2.2 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

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 aware of a practice of not doing that either. 4 MR. BRNOVICH: Yeah, Justice 5 6 Kavanaugh, the -- this is unprecedented, so, in 7 -- in many ways, this --JUSTICE KAVANAUGH: Well, it's not --8 9 let me just interrupt. You've used that word a 10 lot. It's very much not unprecedented, as Justice Thomas says, for the government to 11 12 acquiesce in an adverse judgment invalidating a rule. That is not unprecedented at all. 13 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 They opposed our intervention and they in. 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 2.2 position to the states is not that the administration has to defend a rule that it 23 doesn't like. We -- we believe that if -- if 24 25 they're not going to defend the rule, then the

1 states have an interest in defending the rule. 2 And if there's a future 3 administration, it's important because, you know, California and Arizona could be on -- on 4 opposite sides in the future on this issue, but, 5 6 as a matter of right, we do believe the states 7 have a right to intervene. And we do think that using a district 8 9 court decision to essentially then recreate a baseline for what a future rule would be, I 10 11 think --12 JUSTICE KAGAN: May -- may I? MR. BRNOVICH: -- is -- it makes it 13 more difficult --14 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 --2.2 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

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.

You're essentially saying there shall
be no further federal government acquiescence in
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 government refuses to defend a law or tries to 13 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?

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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 argument is it that we already had granted cert 8 on this issue? Does that matter? 9 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. 2.2 Mr. Fletcher. 23 ORAL ARGUMENT OF BRIAN H. FLETCHER 24 ON BEHALF OF THE FEDERAL RESPONDENTS 25 MR. FLETCHER: Thank you, Mr. Chief

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1 Justice, and may it please the Court: The 2019 Public Charge Rule did not 2 3 regulate or confer any rights on the Petitioner Instead, Petitioners assert an indirect 4 states. economic interest in the rule's downstream 5 6 consequences. Relying on predictions that were 7 made when the rule was drafted, they say that it would cause DHS to deny adjustment of status to 8 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 negligible indirect effect, and, even if it did, 20 21 they could not justify intervention in appeals 2.2 from preliminary injunctions that do not apply 23 in Petitioners' jurisdictions and that now have no effect anywhere because the 2019 rule has 24 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 prolong appeals that no longer have any 3 practical consequence. 4 And Petitioners' criticisms of the 5 government's litigation conduct do not call for 6 7 a different result. Congress made a policy choice to vest in the Department of Justice the 8 decision whether to seek further review of 9 10 decisions against the United States. 11 This Court has emphasized that both 12 the government and the courts benefit from that policy precisely because the solicitor general 13 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 Public Charge Rule. The ongoing litigation 21 2.2 would have complicated that rulemaking and 23 required intrusive discovery. The 2019 rule was not producing its intended effects, and the 24 25 rule's unintended and unwanted effects were

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1 aggravating a public health crisis. 2 Now Petitioners disagree with the 3 government's decision to dismiss its appeals when faced with those circumstances, but that 4 disagreement does not allow them to revive this 5 litigation that the government had decided was 6 7 not in the best interests of the United States. I welcome the Court's questions. 8 9 JUSTICE THOMAS: Mr. Fletcher, I think Petitioner was doing a little bit more than 10 11 simply disagreeing with the acquiescence. From 12 my understanding, they were disagreeing with the government's refusal to allow them to 13 participate or to intervene at the appellate 14 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 intervention is a normal practice in these --20 21 some of these cases at the end of 2.2 administrations? 23 I don't recall the government opposing such interventions, so would you simply address 24 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.
б	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

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 application to the courts of appeals, nor does 4 it have any application to us. 5 The rules for appellate intervention 6 and intervention before this Court have to be 7 judge-made rules if intervention is going to be 8 allowed at all. So there's no reason why the 9 courts of appeals or this Court should be tied 10 11 to the strict letter of Rule 24. 12 And, in fact, some of what Rule 24 says is very difficult to -- to -- to fit with 13 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 principles of intervention, so it's a helpful 20 21 guide. 2.2 That's the way the parties briefed 23 things in the Ninth Circuit, and that's principally the way that the states have tried 24 25 to justify their intervention, is that they meet

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. I completely take the point that Rule 4 24 doesn't apply by its terms, that intervention 5 6 in the courts of appeals, which is what this is 7 about, is about sort of judge-made rules about courts controlling their own docket. 8 9 I think, if that cuts in any direction in this case, though, it sort of cuts further 10 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 2.2 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 done anything quite like this. 4 And this was an issue that we had 5 agreed to hear before. So, if we step back and 6 7 recognize that we're not tied to the minutia of Rule 24, why shouldn't intervention be allowed? 8 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. Why shouldn't intervention be allowed? 13 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 hope we get to come back to, but I -- I want to 20 21 sort of get right to the point. 2.2 I think the first thing to think about 23 when stepping back and looking at the entirety of this situation is that this is not a 24 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 to make a new Public Charge Rule. 3 Now I -- I take the point that 4 Petitioners have said this is unprecedented, and 5 6 they've been pressed on what is unprecedented because not seeking further review of a decision 7 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 point. I'm not aware of another case that 13 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 been in the court, and if the administration had 2.2 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

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

something like this if I think that this does 1 2 present at least a significant APA question? 3 MR. FLETCHER: So let me take that question on its terms and then, hopefully, come 4 back to some of the premises later. 5 I think, if you have that concern, the 6 7 solution is not changing the rules of intervention. It's not letting the states come 8 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 think it's consistent with principles of equity 20 21 or with Article III. And if this Court makes 2.2 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

agrees, that the government has the ability to decide not to seek further review of district court decisions. And if you make clear that district courts do not have the authority to issue this sort of relief, then the problem goes away.

7 JUSTICE GORSUCH: Mr. Fletcher, that's -- I think you put your finger right where I --8 my -- my concern has been, is I -- I'm not 9 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 court purported to be able to do more than set 13 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 that until relatively recent times. 20 21 MR. FLETCHER: I think there's some 2.2 scholarly debate about exactly when, but, yes, in general, correct. 23 24 JUSTICE GORSUCH: And so you -- you 25 agree that, therefore, the Northern District of

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1 Illinois erred when it issued a nationwide 2 injunction? 3 MR. FLETCHER: We do. JUSTICE GORSUCH: Okay. 4 MR. FLETCHER: Just -- just a little 5 6 I don't think anything turns on this. thing. 7 Technically, it wasn't an injunction. It was a vacatur of the rule. But I -- the -- we'd say 8 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 to these problems to the extent that you think 19 20 they are a problem. 21 And I think what some of the 2.2 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

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1 really overbroad because --2 CHIEF JUSTICE ROBERTS: Is that an 3 issue that, for example, the -- your friend on the other side could raise if he's successful in 4 intervening in the cases? 5 6 MR. FLETCHER: If he's successful in 7 intervening in the --CHIEF JUSTICE ROBERTS: Yeah. It's an 8 9 argument. Why didn't you intervene before? Well, one thing is that there shouldn't be a 10 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. 2.2 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 Petitioner states' jurisdictions and that don't 2 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? MR. FLETCHER: The Illinois one is 8 nationwide, but --9 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 proceed against the one in Illinois. Otherwise, 19 20 it does them no good. MR. FLETCHER: Well, I -- I -- I don't 21 2.2 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

agree, don't you, that they have standing because people who are illegally or --"illegally" -- they don't meet the new public charge rule in the United States -- they're going to go throughout the United States, as people do?

7 MR. FLETCHER: Chief Justice Roberts, I think it's very, very hard to make that case 8 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 apply to applications by residents of the 13 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, and maybe they will have in the interim moved 20 21 into one of the Petitioner states. That's --2.2 that's --

JUSTICE BARRETT: But, Mr. Fletcher,
can I follow up on what the Chief just asked
you? You opposed intervention in the Northern

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1 District of Illinois, right? 2 MR. FLETCHER: We did. 3 JUSTICE BARRETT: So the -- the principle that you're arguing for really doesn't 4 turn on the fact that the Ninth Circuit's 5 preliminary injunction was not nationwide. 6 Т 7 mean, your -- you opposed their ability to enter in the Seventh Circuit and challenge the scope 8 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 to intervene, period? 19 20 MR. FLETCHER: That's correct, yes. 21 JUSTICE KAVANAUGH: Can I ask a --2.2 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

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1 think is there may be millions of people, just 2 across different borders, who will be here, you see, if -- a question of food stamps, and so all 3 those people, we don't know, the record doesn't 4 tell us whether they're in Arizona or not. And 5 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 different ground. Our ground for intervening is 10 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 have to get into any of this mess if we can only 4 get the Illinois case here in front of us. 5 That's why I keep asking, what should we do? 6 7 MR. FLETCHER: Justice Breyer, let me start with the effect of the rule because I 8 9 think it's important to disaggregate a couple of 10 The rule does apply to people seeking things. to come into the United States, to be admitted 11 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 2.2 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 intended effects of the rule. Justice Barrett 3 laid out in her dissent in the Cook County case 4 on this issue that, actually, the rule does not 5 6 apply to very many people at all who are 7 actually entitled to receive public benefits because generally you're not entitled to receive 8 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 I'm sorry. qoing. 20 MR. FLETCHER: I was just going to say, and I think that highlights that -- that 21 2.2 it's hard for the Petitioner states to say that 23 they have a legally protectable interest in the unintended effects of the case. 24 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 it. --4 JUSTICE BREYER: Well, they have 5 another ground, but then, yeah, what about the 6 7 Seventh Circuit? MR. FLETCHER: So -- right. If you're 8 -- if you're interested in the Seventh Circuit 9 case, I guess what I would say is the Seventh 10 11 Circuit case is not the one that's before you 12 now, and the one that's before you now has not only the reasons why we think they shouldn't 13 come into the Seventh Circuit case but other 14 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 presents different issues and additional 20 21 arguments. So we would urge you not to sort of 2.2 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

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1 aware. When a notice-and-comment rule is issued 2 and then a court finds that that rule is unlawful and then the government chooses to 3 acquiesce in that judgment, what then usually 4 5 happens? 6 I suppose one thing is 7 notice-and-comment about a new rule, but that would be about the new rule. Another option is 8 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 2.2 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

rule on a nationwide basis.

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decision that sets aside the rule or vacates the

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3 JUSTICE KAVANAUGH: That -- that's my understanding too. I -- I think it's odd to 4 think about notice-and-comment for repeal after 5 6 an acquiescence. I think there would usually be 7 notice-and-comment for the new rule, and you -and that's now started up here. And I quess 8 9 you've looked into it and haven't found anything either way, I guess. 10 11 MR. FLETCHER: I haven't found any 12 examples of it happening. And, you know, there are -- there are court decisions from the D.C. 13 Circuit, including, I think, your opinion in the 14 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 2.2 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

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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.

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1 There, we wouldn't have that argument about the limited scope of this appeal. 2 3 JUSTICE KAVANAUGH: Intervention for the purpose of seeking to Munsingwear a case is 4 not good enough? 5 MR. FLETCHER: Well, I don't think so. 6 7 I don't think -- you know, normally, Munsingwear is about relieving the parties to the case of 8 9 the effects of the judgment. I'm not aware of any precedent for allowing new parties to come 10 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 decision, and so it's a little hard to see how 2.2 you Munsingwear the decision that actually 23 produces the mootness in the other cases. 24 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 Sotomavor, I

25 MR. FLETCHER: Justice Sotomayor, I

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1 don't think that's right. We dismissed --2 JUSTICE SOTOMAYOR: Okay. 3 MR. FLETCHER: -- our appeals in the Ninth Circuit. The litigation in these cases is 4 still stayed in the Northern District of 5 California --6 7 JUSTICE SOTOMAYOR: Ah, okay. MR. FLETCHER: -- and the District of 8 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 decision -- or, I'm sorry, the Northern District 12 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 have to get the Seventh Circuit injunction 18 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

this is not a rule that gives them any rights,
 that regulates them, that really has any effect
 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 -when the administration changed, the President 13 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. 2.2 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

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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

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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
б	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

you, in Mr. Brnovich's shoes, you're saying
 there's nothing to do -- no -- nothing to be
 done.

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

7 It wouldn't apply in cases where someone actually could satisfy the requirements 8 9 of Rule 24(a) where their legal rights were directly affected. The part of our argument 10 11 here is based on the fact that Arizona and the 12 other states are not actually -- do not have a legally protected stake in the rule. 13 The answer might be different if you had parties before you 14 15 who did have such a stake.

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

The effect of taking the rule off the books without notice-and-comment is an effect of the remedial authority that the Northern District of Illinois asserted in this case. If this Court makes clear that that's

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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 administration. 3 CHIEF JUSTICE ROBERTS: Justice 4 5 Sotomayor? JUSTICE SOTOMAYOR: Counsel, I -- I --6 7 I -- this is a very complex issue. What I understood that the prior administration had in 8 two cases been before district courts that 9 issued injunction -- injunctions of rules, that 10 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 when looking at the forest, as Justice Alito 21 2.2 said earlier, is that this was a case that the 23 government had brought into this Court and gotten certiorari granted and gotten 24 25 extraordinary stays entered before DHS decided

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1 that it wanted to replace the rule. 2 And if DHS had made the decision that it wanted to engage in new rulemaking and 3 replace the rule and if it was clear that the 4 rule wasn't having its intended effect, it would 5 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 filed, and the decision was made after cert had 10 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, not like this --20 21 MR. FLETCHER: -- just like this 2.2 because --23 JUSTICE SOTOMAYOR: -- but in 24 different --25 MR. FLETCHER: -- the situation that

was presented was unprecedented, but the idea
 that the government can choose for legal and
 prudential reasons not to seek further review
 has happened across administrations in a lot of
 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.

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

JUSTICE KAGAN: You would -- you would take the other side. You would say, well, they don't have an APA action either. I understand

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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 what it did, and that's perfectly appropriate. 4 But, on the assumption that the 5 6 government circumvented the APA, isn't the right 7 remedy an APA action? MR. FLETCHER: So they can bring an 8 APA action. If they do, we'll make the argument 9 that the rescission of the rule was justified by 10 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 2.2 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

1 talking about an APA action that's challenging 2 the rescission that --3 JUSTICE GORSUCH: Yes. MR. FLETCHER: -- in March of 2021. 4 JUSTICE GORSUCH: Yes. 5 MR. FLETCHER: And we would say that 6 7 that was valid without notice-and-comment because the existence of the vacatur judgment by 8 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 that leads me to my -- kind of where I'm stuck 19 in this case, and it's sort of where the Chief 20 21 Justice is. Any administration coming in, of 2.2 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

nationwide scope that it believes to be unlawful
 as the basis for the rescission.

How do I think about that when we come to the equitable considerations associated with intervention, that the government's rescission here is premised on what it admits to be an unlawful order?

MR. FLETCHER: So, Justice Gorsuch, I 8 9 think often, when the government decides not to seek further review of a decision, including a 10 11 decision setting aside a regulation, it may 12 disagree very strongly with the legal grounds for that decision and think that the order was 13 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 review, especially this Court's review, aren't 18 19 meant --

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

1 But what -- what is kind of a little different in this case is to tell a state that 2 3 it has no recourse through the APA, through litigation, all because the government's 4 acquiescence in a judicial order that it agrees 5 is wrong and -- and is -- is that an equitable 6 7 consideration that we should as judges take into account when we're deciding a question of 8 intervention, noting that intervention is 9 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 2.2 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

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. JUSTICE GORSUCH: Of -- of -- of 6 7 course. I -- I -- I get that. I guess I'm just wondering, would that be the narrowest basis of 8 decision if -- if -- if the Court were to rule 9 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. 2.2 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?

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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

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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 problems that we have about forcing the 4 government to continue litigating about this 5 6 rule that it's simultaneously trying to replace, 7 which was really a big part of the concern that we had when we were approaching what to do about 8 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 2.2 rescission of the rule, I think that raises a 23 big question. The Chief Justice raises important concerns, but I think there are 24 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 responsibilities for the repeal of that rule, 4 right? At least the -- you haven't found 5 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 2.2 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 policy views. Yeah. 8 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. 2.2 JUSTICE KAVANAUGH: Thank you. 23 CHIEF JUSTICE ROBERTS: Justice 24 Barrett? 25 JUSTICE BARRETT: I do have a question

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1 about historical practice. 2 So, you know, as Footnote 11 in your 3 brief makes clear, lots of historical practice for the government acquiescing in -- in judicial 4 decisions and not appealing. 5 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 ability to acquiesce -- acquiesce in a judgment 10 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 it just hasn't come up. You know, the two 19 20 examples that they offer in their reply brief, as I explained, aren't really examples of this 21 2.2 \_ \_ 23 JUSTICE BARRETT: Yeah. MR. FLETCHER: -- because intervention 24 25 happened earlier. I guess what I'd say, though,

1 is we don't view them as being guite that 2 distinct because, when the government decides 3 not to seek further review, it's often because the government has made a decision that further 4 review isn't in the government's interest 5 6 because it might make bad law, because it turns 7 out the agency is about to replace the policy anyway, you know, for all sorts of reasons. 8 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 2.2 unprecedented on the government's part, you're

part to try to intervene in this circumstance. MR. FLETCHER: I -- I'm saying that

saying it's also unprecedented on the state's

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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 it please the Court: 4 There are many ways in which we agree 5 with Petitioners about the legal standards 6 7 governing intervention. Those standards are broad and we've relied on them ourselves to 8 intervene in cases that threaten to impair our 9 10 interests. 11 But those standards do impose limits. 12 And under the particular circumstances of this case, Petitioners' motion to intervene in the 13 Ninth Circuit exceeded those limits. 14 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 case in a different circuit, and there is no 21 2.2 rule left for Petitioners to defend in the 23 courts below. This case can be resolved on that 24 25 straightforward basis alone. I welcome the

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1 Court's questions. 2 JUSTICE THOMAS: Would you be just a bit more -- give us a bit more detail about why 3 you oppose intervention here? You said you 4 generally agree with Petitioner that there 5 should be intervention available. 6 7 I think, of course, like, California may have intervened in cases like Affordable 8 Care Act. How is this different? And I think 9 some of those have involved matters, perhaps not 10 11 exclusively, but matters that were nationwide or 12 other states, involved other states. 13 So would you just be -- give us a little more detail? 14 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 were authorized to intervene? 20 21 There is no rule to litigate. There's 2.2 nothing that the Ninth Circuit can do to restore 23 the rule. So the Petitioners' motion really achieves nothing of significance. 24 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

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

25 So what this boils down to then is the

1 Petitioners' legal disagreement with the 2 reasoning of the court of appeals' decision. And we don't think that's enough to give them 3 the necessary stake to intervene under the 4 standards of Rule 24 to seek vacatur in these 5 6 circumstances. 7 CHIEF JUSTICE ROBERTS: So you'd have a different view if this were the case from the 8 Seventh Circuit? 9 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 course, our basis for intervene -- or opposing 13 14 an intervention motion here is that their 15 interests can't be impaired because of the vacatur judgment. 16 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 2.2 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 intervene on March 11 in the Seventh Circuit. 4 It was, we acknowledge, just two days after the 5 Seventh Circuit dismissed the appeal and issued 6 7 the mandate. CHIEF JUSTICE ROBERTS: Two -- two 8 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 there would be any prospect of live litigation 20 21 here in the Ninth Circuit. 2.2 After intervention, they would still have to secure modification of the final vacatur 23 judgment and then rescission of the rescission 24 rule before the rule could spring back to life 25

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1 and there could be any meaningful litigation in 2 the Ninth Circuit. 3 And that's primarily the basis for our opposition to the motion to intervene here, 4 which is nothing in this case can restore the 5 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. JUSTICE SOTOMAYOR: It's an equity 20 21 balance? 2.2 MS. HONG: The -- the preliminary 23 injunction factors certainly included an equitable balance. I -- I -- I take 24 25 Petitioners' arguments to be that the Ninth

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1 Circuit's decision on the likelihood of success 2 is what they would like to wipe off the books. JUSTICE SOTOMAYOR: Correct. So why 3 is that not an interest adequate in equity to 4 grant them intervention? 5 MS. HONG: Right. And the question is 6 7 whether they have a necessary stake to seek that. And we don't think that Petitioners have 8 9 identified anything different than bare legal disagreement with the reasoning of the decision. 10 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 and I were -- were -- were asking about if one 20 21 thinks that there is a kind of circumvention of 2.2 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

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that's a hard question, but, if one thinks that 1 2 and one is concerned about green-lighting that kind of government conduct, what should we do in 3 this case? What should we do in some other 4 5 case? MS. HONG: Your Honor, I think that 6 7 might be a basis for intervention in the proceedings where the rule was actually vacated. 8 So that would be the Seventh Circuit 9 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 the scope of that good cause exception. We 19 think those are two alternative fora where 20 21 Petitioners could try to make their case. 2.2 But even if the Court has concerns 23 about the federal government's conduct that led to the vacatur of the rule and then the issuance 24 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 concede that in their reply brief when they 4 recognize there's nothing that the Ninth Circuit 5 6 can do while the vacatur judgment exists to get 7 them to have the rule restored in these proceedings. And that's why we think the court 8 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 injunction by its terms that was issued in our 19 20 case is limited geographically, and, of course, 21 the Washington case injunction was narrowed by 2.2 the Ninth Circuit. I guess, to go back to Your Honor's --23 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 question was a little more specific than that. 5 What -- what would California's position be in 6 7 the Ninth Circuit litigation about the scope of the appropriate relief? 8 MS. HONG: Your Honor, if the rule 9 were restored, then the preliminary injunctions 10 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 think we would have to live with both the 20 21 district court's conclusion that the --2.2 JUSTICE GORSUCH: Are you representing you wouldn't seek a nationwide relief before the 23 Ninth Circuit? 24 25 MS. HONG: In terms of the final

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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 to litigate and there's no way the district 4 court, we think, could properly issue a vacatur 5 6 judgment in our case. 7 CHIEF JUSTICE ROBERTS: Thank you, 8 counsel. Justice Thomas? 9 Justice Breyer, anything further? 10 11 JUSTICE SOTOMAYOR: Just one question 12 following up on what Justice Gorsuch said. There'd have to be a vacatur of the nationwide 13 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 with respect to nationwide relief later, 18 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 --

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.)
19	
20	
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