No. 19-1212

IN THE

Supreme Court of the United States

ALEJANDRO N. MAYORKAS, SECRETARY OF HOMELAND SECURITY, ET AL.,

Petitioners,

—v.—

INNOVATION LAW LAB, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' OPPOSITION TO MOTION TO INTERVENE

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INTRODUCTION

Texas, Arizona, and Missouri seek to intervene in this case for the first time at the Supreme Court based on speculation about what might happen in the future if the United States decides not to maintain the policy challenged here. There is no basis for such intervention, for three basic reasons.

First, as this Court's recent denials of two similar intervention requests demonstrate, intervention is inappropriate where the States can seek to intervene in the district court if the injunction in this case impedes their interests in any cognizable way. Thus, in the event that the injunction in this case, currently stayed, ever goes back into effect, the States will have an opportunity to seek relief from that injunction in the district court.

Second, the request for intervention rests entirely on speculation about the federal government's future policy and litigation decisions—specifically, that the government will not defend the legality of the Migrant Protection Protocols ("MPP") before this Court and will allow the preliminary injunction to remain in place. But the United States is still reviewing the program and deciding what course of action to take. If it continues the program and defends its legality, the States' asserted interests will be fully protected. If it terminates the program, there will be no policy left to enjoin and the government could move to dissolve the injunction. The States' speculation to the contrary

provides no basis for intervention at the Supreme Court, which is limited to extraordinary circumstances.

Third, the States' central legal interest—to coerce the federal government to continue enforcing MPP—cannot be vindicated through intervention in this lawsuit, as it lacks any legal basis. The statute that assertedly authorizes MPP, and MPP itself, are explicitly discretionary, not mandatory. They *permit* the executive branch to return certain noncitizens to a contiguous territory in certain circumstances, but do not *require* it to do so under any circumstances. The States' contention that they can compel the federal government to take action that a federal statute expressly provides is discretionary, and thus override the federal government's policy choice in an area of exclusive federal prerogative, has no plausible legal basis.

Finally, granting intervention here risks judicial interference in a legitimate democratic process. An incoming presidential administration must have the freedom to review, and to modify, inherited policies. The President was elected on a platform that condemned MPP, and he has every right to follow through on his campaign promises by terminating a discretionary executive program put in place by his predecessor.

STATEMENT OF THE CASE

In December 2018, the Department of Homeland Security ("DHS") announced a "historic" new policy dubbed the Migrant Protection Protocols ("MPP"). Pet. App. 179a. Under MPP, instead of adjudicating individuals' applications for asylum, and then removing those individuals who did not qualify for relief, DHS forcibly returned certain non-Mexican nationals soon after they were encountered at the southwest border, while their immigration cases continued in the United States. *Id.* Individuals in MPP were required to repeatedly return to U.S. border posts over a period of months for their immigration hearings. Pet. App. 167a.

Since implementation of MPP, DHS has forced tens of thousands of individuals to return to some of the most dangerous parts of the world. Pet. App. 205a. It did so despite undisputed reports detailing the brutal violence faced by migrants in the border region, including: rape, human trafficking, and kidnapping, J.A. 373, 378, 404, 417; persecution by cartels, other criminal organizations, and corrupt Mexican officials, J.A. 393, 396, 417; and unlawful deportations from Mexico to Central America, J.A. 373, 378. DHS was also aware of reports that Mexico was unable to protect migrants from these dangers. J.A. 411. The State Department itself warned that "gun battles, murder, armed robbery, carjacking, kidnapping, forced disappearances, extortion, and sexual assault" were common in the border region and that "local law

enforcement has limited capability to respond to crime incidents." U.S. Dep't of State, *Mexico Travel Advisory*, https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html (last updated April 20, 2021); *see also* J.A. 544, 559, 575 (State Department report documenting violence against migrants by criminal groups and Mexican authorities). The dangers asylum seekers face in Mexico, the challenges of obtaining legal assistance from Mexico, and the delays in the scheduling of their removal proceedings led many returned to Mexico under MPP to abandon *bona fide* claims for protection. *See* Human Rights First, et. al. Amicus Br.

In March 2020, MPP was largely superseded as a border enforcement tool when, citing the COVID-19 pandemic, the Centers for Disease Control and Prevention ("CDC") issued an order barring all individuals who lack authorization for admission from entry at the border. *See* Order Under Sections 362 and 365 of the Public Health Service Act (42 U.S.C. §§ 265, 268) Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060 (Mar. 26, 2020) (effective date Mar. 20, 2020); *but see* Ason Dearen and Garance Burke, *Pence Ordered Borders Closed After CDC Experts Refused*, A.P. News (Oct. 3, 2020), https://apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health-4ef0c6c5263815a26f8aa17f6ea490ae. After the CDC

order was issued, the government suspended all MPP hearings and effectively discontinued use of MPP as a tool to process newly arriving migrants. U.S. Dep't of Homeland Security, *Joint DHS/EOIR Statement on MPP Rescheduling* (Mar. 23, 2020), https://www.dhs.gov/news/2020/03/23/joint-statement-mpp-rescheduling.

The instant case commenced in February 2019, shortly after MPP first took effect. Respondents—asylum seekers and legal services organizations that represent asylum seekers—filed suit and moved for a preliminary injunction of MPP, maintaining that it was contrary to the statutory scheme. The district court issued a preliminary injunction that "enjoined and restrained [DHS] from continuing to implement or expand [MPP]." Pet. App. 83a. The court of appeals upheld the preliminary injunction, holding that it was likely that MPP was not statutorily authorized, Pet. App. 18a, and that MPP "does not comply with the United States' anti-refoulement obligations under [8 U.S.C. §] 1231(b)," *id.* 38a. DHS moved to stay the merits decision while it sought review from the Supreme Court. The merits panel granted the request in part, staying the injunction's application outside of the Ninth Circuit. Pet. App. 93a.

This Court then stayed the district court's injunction in full pending resolution of a petition for certiorari. *See Wolf v. Innovation Law Lab*, 140 S. Ct. 1564 (Mar. 11, 2020). The government filed the

petition for a writ of certiorari on April 10, 2020, and the Court granted the petition on October 19, 2020.

Meanwhile, MPP was an important topic of debate during the 2020 presidential election, with President Biden promising that "within their first 100 days after taking office, [his administration] would . . . end the 'Remain in Mexico' and 'metering' border policies that prevent migrants seeking asylum from entering the United States." Tanvi Misra, *Biden's Immigration Plan: Cancel Trump Orders, Seek Bill in Congress*, Roll Call (Aug. 20, 2020), https://www.rollcall.com/2020/08/20/bidens-immigration-plan-cancel-trump-orders-seek-bill-in-congress/ On January 20, 2021, upon President Biden's inauguration, DHS issued a memorandum directing that, effective the next day, it would "suspend new enrollments in [MPP], pending further review of the program." Mot. of Pet'rs to Hold the Briefing Schedule in Abeyance and to Remove the Case from the February 2021 Argument Calendar, App. 1a ("Abeyance Mot."). At the same time, DHS announced that "current COVID-19 non-essential travel restrictions, both at the border and in the region, remain in place." U.S. Dep't of Homeland Sec., *DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program* (Jan. 20, 2021), https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program. Since that time, DHS has continued to expel to Mexico the majority of

asylum seekers encountered at the southwest border to Mexico pursuant to the independent CDC order, not at issue here. U.S. Customs & Border Protection, *Southwest Land Border Encounters* https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters (last updated May 11, 2021).

On February 1, 2021, with Respondents' consent, the United States moved to hold further briefing of this case in abeyance and to remove it from the February 2021 argument calendar "to allow for the completion of [its] review" of the MPP program. Abeyance Mot. at 4. The Court granted the motion on February 3, 2021. That review is ongoing.

More than two months after the Court granted the motion to stay the case, Arizona, Texas, and Missouri filed two separate suits in federal district court challenging the suspension of new enrollments into MPP. Compl., *Texas v. Biden*, No. 2:21-cv-00067-Z (N.D. Tex. Apr. 13, 2021); Compl., *Arizona v. Mayorkas*, No. 2:21-cv-00617 (D. Ariz. Apr. 11, 2021). On May 14, 2021, Texas and Missouri moved for a preliminary injunction to require DHS to reinstate MPP. *See* Mot. for Prelim. Inj., *Texas v. Biden*, No. 2:21-cv-00067-Z (May 14, 2021). The States' motion to intervene followed on May 18, 2021.

ARGUMENT

I. THE COURT SHOULD DENY INTERVENTION HERE, WHERE THE STATES CAN SEEK RELIEF IN THE FIRST INSTANCE IN THE DISTRICT COURT.

The States' extraordinary request for intervention should be denied at the outset for one simple reason: the States can protect whatever interests they have through intervention in the district court, and should not be permitted to leapfrog that process by seeking to intervene as an initial matter in the Supreme Court. The Court has now twice instructed proposed state intervenors, including Arizona and Texas, that the proper course is to exhaust judicial remedies by seeking intervention below rather than seeking to intervene directly before this Court. The same course is appropriate and available here. Thus, because the States can seek to intervene before the district court, and appeal any decision to the court of appeals, there is no justification for granting intervention in this Court in the first instance.

That is what this Court told Arizona and Texas less than two months ago in *Texas v. Cook County*, No. 20A150. In that case, fourteen states sought to intervene and stay the order of the district court enjoining the "public charge" immigration rule after the Biden administration agreed to voluntary dismissal of several pending cases challenging the rule. The proposed state intervenors claimed that their

"interests were vitally affected" by the challenged rule, and sought to defend the rule that the Biden administration had elected not to defend. Application for Leave to Intervene and for a Stay of the Judgment Issued by the United States District Court for the Northern District of Illinois at 8–9, *Texas v. Cook County*, No. 20A150 (U.S. Mar. 19, 2021). This Court denied the application, explaining that the denial was:

> without prejudice to the States raising these and other arguments before the District Court, whether in a motion for intervention or otherwise. After the District Court considers any such motion, the States may seek review, if necessary, in the Court of Appeals, and in a renewed application in this Court.

Order Denying Application, *Texas v. Cook County*, No. 20A150 (U.S. Apr. 26, 2021). In other words, the Court instructed proposed state intervenors that, to the extent they had any interest that would support intervention to defend the prior administration's policy, they should seek intervention in the district court, and then the court of appeals, before asking this Court to grant such an extraordinary request.

In May, the Court denied a similar attempt by the same States (joined by others, including Missouri) to intervene in *American Medical Association v. Becerra* and consolidated cases, Nos. 20-429, 20-454, 20-539. There, the States argued that because

President Biden had ordered agency review of the challenged rules, "one can reasonably expect that the Solicitor General will fail to defend those rules in this Court, either by changing positions or asking this Court to hold the cases in abeyance." Mot. of Ohio and 18 Other States for Leave to Either Intervene or to Present Oral Argument as *Amici Curiae* at 8, *Am. Med. Ass'n v. Becerra*, Nos. 20-429, 20-454, 20-539 (U.S. Mar. 8, 2021). Shortly thereafter, the parties jointly moved to dismiss the cases pursuant to Rule 46.1.

In response to the States' motion to intervene, the United States notified the Court that although it would continue to enforce the rules for now, it had committed to replacing the challenged rules through agency rulemaking, and that it would stop defending those rules on the merits in any future litigation. Letter Brief of the Acting Solicitor General at 2–3, *Am. Med. Ass'n v. Becerra*, Nos. 20-429, 20-454, 20-539 (U.S. May 3, 2021). This Court nonetheless denied intervention, holding that "any aggrieved party may file an application in this Court after seeking relief in the appropriate District Court and Court of Appeals." Order Dismissing Petitions and Denying Intervention, *Am. Med. Ass'n v. Becerra*, Nos. 20-429, 20-454, 20-539 (U.S. May 17, 2021). The same course should be followed here. Indeed, intervention would be even more premature in this case as the United States has merely suspended implementation of the MPP policy pending final review by the agency, but has taken no position as to whether it intends to continue to defend that policy

on the merits. If the United States fails to defend MPP in a way that gives rise to any cognizable claim by the States, the proper course is to seek relief in the lower courts before asking for such relief from this Court.

Because the States here have failed to exhaust available remedies in the lower courts, intervention before this Court should be denied, even assuming the States had otherwise demonstrated interests warranting intervention. But as demonstrated below, the States have not shown that intervention would be proper in any event.

II. THE STATES' REQUEST RESTS ON SPECULATION THAT DOES NOT SUPPORT INTERVENTION.

Intervention at the Supreme Court stage is permitted only in "unusual circumstances" in which "extraordinary factors" support the addition of new parties at such a late stage of litigation. Stephen M. Shapiro et al., Supreme Court Practice 427 (10th ed. 2013).[1] While there is no established standard for

[1] Even in the court of appeals, intervention sought for the first time at the appellate stage is granted "only in an exceptional case for imperative reasons." *Amalgamated Transit Union Int'l v. Donovan*, 771 F.2d 1551, 1552 (D.C. Cir. 1985) (per curiam) (quotation marks omitted); *accord Peruta v. Cty. of San Diego*, 771 F.3d 570, 572 (9th Cir. 2014) (order); *Hutchinson v. Pfeil*, 211 F.3d 515, 519 (10th Cir. 2000); *In re Grand Jury Investigation into Possible Violations of Tit. 18, etc.*, 587 F.2d 598, 601 (3d Cir. 1978); *Hall v. Holder*, 117 F.3d 1222, 1231 (11th Cir. 1997);

intervention, the Court has looked both to the Federal Rules of Civil Procedure and the Court's "general equity powers." *United States v. Louisiana*, 354 U.S. 515, 516 (1957) (per curiam).

No "extraordinary factors" support intervention here. The States' motion rests on a chain of speculation about how the federal government *might* act in the future. *See, e.g.*, States' Intervention Mot. at 10-11 (speculating that the federal government is "likely to simply dismiss the case"); *id.* at 13 (speculating that "the United States is likely to maintain that the district court's decision is effective nationwide"). But such conjecture is not a sufficient basis for granting the extraordinary step of intervention before this Court.

The States seek intervention on the supposition that "the party who had previously supported [their position] no longer does so." States' Intervention Mot. at 10. But there is no indication that the United States has changed its legal position, expressed in all its briefs, that MPP is statutorily authorized and a permissible exercise of discretion. The States have cited no basis to believe that the federal government will abandon the legal position that it has authority to impose MPP, even if it chooses, in its discretion, not to exercise that authority.

McKenna v. Pan Am. Petrol. Corp., 303 F.2d 778, 779 (5th Cir. 1962) (order).

The States further fear that the United States will move to dismiss the instant case under Rule 46.1, thereby leaving a preliminary injunction against MPP in place. States' Intervention Mot. at 3,11. They claim that this result "would impede if not preclude [them] from obtaining the relief" they are seeking in separate actions in Texas and Arizona district courts that challenge the Biden Administration's suspension of MPP. *Id*. at 13.[2] They also claim they have an interest in MPP that will be impaired if the government fails to defend its legality. *Id.* at 11–12.

But the States' concerns are too speculative to support intervention. There is no basis to presume that the federal government intends to take any action to dismiss the instant appeal before first completing its review of MPP. Depending on how that review concludes, the United States might choose to continue MPP or some modified version of it, and therefore maintain its defense of the program. In that case, the States' asserted interest would be fully protected. Or the United States might choose to terminate MPP and seek to dismiss the appeal as moot. In that case, there would no longer be a policy to enjoin, and the government could move to dissolve the injunction.

[2] Because this Court stayed the injunction in its entirety, there is no injunction in place at this point. The stayed injunction poses no obstacle to the relief the States are seeking in district court—an injunction requiring the federal government to continue enforcing MPP.

There, too, the State's interest in their distinct lawsuits would not be impaired, because no injunction would exist. And as noted above, if they believed their interests were implicated, they could seek to intervene in the district court.

The States' "unadorned speculation" that the government will pursue a different course, dismissing the appeal and leaving the preliminary injunction in place, is insufficient to justify intervention here. *Diamond v. Charles*, 476 U.S. 54 (1986); *see also Moosehead Sanitary Dist. v. S.G. Phillips Corp.,* 610 F.2d 49, 54 (1st Cir.1979) ("a petitioner must produce something more than speculation as to the purported inadequacy" in order to justify intervention as of right under Rule 24(a)(2)); *cf. League of United Latin Am. Citizens v. Clements,* 884 F.2d 185, 189 (5th Cir.1989) (same as to permissive intervention under Rule 24(b)) (internal quotation marks omitted).

None of the cases cited by the States support intervention on such speculative grounds. In *BNSF Railway Co. v. EEOC*, 140 S. Ct. 109 (2019), the Court allowed an employee to intervene where the EEOC brought a discrimination lawsuit on his behalf and obtained a monetary judgment, but later abandoned that position on certiorari and sought remand and vacatur of that judgment. The inadequacy of the representation was not speculative, and the employee's interest in intervention to defend the monetary judgment was concrete.

In *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969), the Court allowed a state court judge seeking re-election to intervene to seek certiorari to challenge an Ohio Supreme Court decision disqualifying him on the grounds of age. The State of Ohio was the named defendant in the state court proceedings; following the adverse judgment, Ohio disclaimed an intent to seek review by this Court, thus necessitating intervention by the harmed non-party. Similarly, in *Banks v. Chicago Grain Trimmers Ass'n*, 389 U.S. 813 (1967), intervention was granted to the widow and minor children of a deceased harbor worker, where the United States announced that it would not seek certiorari to challenge a decision concerning the deceased's estate compensation. In both cases, the inadequacy of representation, the intervenor's interest, and the intervenor's standing, were all concrete and non-speculative.

Even further afield are *Gonzalez v. Oregon*, 546 U.S. 807 (2005) (granting terminally-ill patients leave to intervene in litigation regarding the Oregon Death with Dignity Act, where existing parties might die before proceedings reached their conclusion), and *Insurance Co. of Pennsylvania. v. Ben Cooper, Inc.*, 498 U.S. 894 (1990) (granting United States permission to intervene to defend the constitutionality of an Act of Congress, pursuant to 28 U.S.C. § 2403(a)). None of the cases cited by the States support intervention based on the mere conjecture advanced here.

Intervention before this Court is extraordinary. At the least, such a request must be accompanied by concrete and immediate evidence of the inadequacy of representation and actual interest. The States provide only speculation. In the end, the States' request is premised on nothing more than a disagreement with the policies of a new administration, but "the mere change from one . . . administration to another, a recurrent event in our system of government, should not give rise to intervention as of right in ongoing lawsuits." *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1307 (9th Cir. 1997).

III. THE STATES' INTERVENTION WOULD BE FUTILE BECAUSE THEIR INTERESTS CANNOT BE VINDICATED THROUGH THIS LAWSUIT.

Even if the States' claims about how the federal government might act were not wholly speculative, intervention here would be futile because the States cannot obtain the relief they seek. The States' district court challenges to the suspension of MPP will be mooted by the final agency review of the program. With respect to the instant litigation, even if this Court were to decide that MPP were legal, the States cannot compel the federal government to continue it as a policy because the decision whether to exercise the return authority under 8 U.S.C. § 1225(b)(2)(C) and MPP is left solely to the discretion of the executive. At best, MPP would simply be an option

available to the federal government; under no conceivable theory is it *mandatory*.

The States assert a "concrete and particularized" interest in this litigation arising from their pending district court challenges to the "three-line suspension order" of MPP. States' Intervention Mot. at 11. But the suspension explicitly signals its temporary nature, as it merely *suspends* new enrollments in MPP "pending further review of the program." Abeyance Mot. at 1a.[3] The suspension, therefore, was not the final word on the future of the program, and that imminent final review will unquestionably moot the States' existing challenges to the temporary suspension of MPP, and thus eliminate any purported interest in intervention in this litigation.

Moreover, the relief the States have requested in the district court actions is unavailable, whatever happens with this litigation. In challenging the suspension of MPP in district court, and in seeking to

[3] Moreover, as noted above, given the Title 42 COVID-19 bar on entry, MPP was largely inoperative even before the suspension. The suspension announcement reaffirmed that "current COVID-19 non-essential travel restrictions, both at the border and in the region, remain in place at this time." *See* U.S. Dep't of Homeland Security, *DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program* (Jan. 20, 2021), https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program.

intervene here, the States seek "to *require* the new administration to implement the MPP." States' Intervention Mot. at 1 (emphasis in original); *see also id.* at 14–15 (explaining States' litigation "against the current Administration seeking to require it to apply the MPP"). Simply put, the States want to force the new administration to reshuffle internal agency operations so as to dispatch asylum officers and immigration judges to the border, re-establish tent courts along the southern border, and negotiate highly sensitive matters with a foreign government involving humanitarian considerations, all so the States can see noncitizens returned to Mexico.

But even if Title 42 did not already preclude entry for virtually all non-nationals seeking asylum, no such relief is available. The contiguous-territory-return provision in 8 U.S.C. § 1225(b)(2)(C)—the statutory authority that purportedly permits the federal government to return certain applicants for admission to Mexico pending resolution of their immigration cases—unambiguously provides that the decision whether to invoke such authority in an individual case is discretionary. The provision provides in full:

> **(C) Treatment of aliens arriving from contiguous territory**
>
> In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of

> arrival) from a foreign territory contiguous to the United States, the Attorney General *may* return the alien to that territory pending a proceeding under section 1229a of this title.

8 U.S.C. § 1225(b)(2)(C) (emphasis added).[4]

Consistent with the statute's permissive language, the MPP policy also unambiguously provides that the initial decision to "return" is *discretionary*, not mandatory. The MPP Policy Guidance explains "that citizens and nationals of countries other than Mexico ('third-country nationals') arriving in the United States by land from Mexico—illegally or without proper documentation—*may* be returned to Mexico pursuant to Section 235(b)(2)(C) for the duration of their Section 240 removal proceedings." Kirstjen M. Nielsen, Secretary, U.S. Dep't of Homeland Security, *Policy Guidance for Implementation of the Migrant Protection Protocols*, at 1 (Jan. 25, 2019) (emphasis added). Nothing in MPP even conceivably *requires* the return of noncitizens to Mexico.

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[4] While the decision to invoke the contiguous territory statute where it applies is discretionary, the act of returning someone to foreign territory is subject to other mandatory legal limitations, including nonrefoulement prohibitions. *See* 8 U.S.C. § 1231(b)(3); Foreign Affairs Reform and Restructuring Act of 1998, § 2242(a), Pub. L. No. 105-277, Div. G., Tit. XXI, 112 Stat. 2681 (codified at 8 U.S.C. §1231 note).

The States do not attempt to explain how the federal government could be *required* to return anyone to Mexico, when both the statutory language and the MPP policy itself leave that decision to the discretion of the executive. The States may have preferred the policies of the previous administration, but nothing in either MPP or the contiguous-territory-return statute gives them the power to force the federal government to maintain MPP as a policy, or if the policy remains in effect, to require that it be enforced by resuming the returns of large numbers of migrants, or indeed of any migrant, to Mexico.

In sum, the States' asserted interest for intervention relies on their challenge to the *temporary* suspension of MPP, and would require courts to disregard the clear language of § 1225(b)(2)(C)—and MPP itself—in order to transform what is plainly a discretionary contiguous-return authority into a mandatory obligation. Because their "interest" will be unaffected by this litigation, and in any event is baseless given the discretionary language in the statute and policy, their intervention here is entirely futile.

CONCLUSION

For the above reasons, the motion for intervention should be denied.

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