No. 20-1775

In the Supreme Court of the United States

THE STATE OF ARIZONA, *et al.*,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,

Respondents.

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

BRIEF FOR THE STATE RESPONDENTS

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QUESTION PRESENTED

Whether the court of appeals properly denied petitioners' motion to intervene.

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INTRODUCTION

The standards governing intervention are liberal, and courts are guided by practical and equitable considerations in applying them. The state respondents have successfully invoked those standards to intervene in litigation that threatened to impair our interests—including in litigation that reached this Court last Term. As the leading treatise acknowledges, however, "[l]iberality 'does not equate with rights of indiscriminate intervention'" and the standards governing intervention "set bounds that must be observed." Wright & Miller, 7C Fed. Prac. & Proc. Civ. § 1904 at pp. 269-270 (3d ed. 2007). Under the particular circumstances of this case, petitioners' motion to intervene in the court of appeals exceeded those bounds.

Petitioners sought to intervene in an appeal of two preliminary injunctions against enforcement of a 2019 Department of Homeland Security rule, which adopted a new interpretation of the statutory requirement that certain non-citizens who are "likely at any time to become a public charge" are "inadmissible" to the United States. 8 U.S.C. § 1182(a)(4)(A). The court of appeals substantially affirmed both preliminary injunctions in December 2020. By the time petitioners sought to intervene in March 2021, the challenged rule had been vacated in a separate proceeding—through a final judgment entered by the Northern District of Illinois—and DHS had dismissed its appeal of that judgment. Soon thereafter, DHS implemented that vacatur judgment by removing the rule from the Code of Federal Regulations. Thus, when the Ninth Circuit considered petitioners' motion to intervene in this case, the rule that was the subject of the preliminary injunctions below no longer existed.

Petitioners contend that the Ninth Circuit erred by not authorizing intervention as of right or permissive intervention under those circumstances. They say they want to intervene to protect their interests in the "continuing validity" of the 2019 public charge rule and in the financial savings and "benefits they otherwise would have obtained under the Public Charge Rule." Pet. Br. 24. The central problem with that argument is that there is now no practical sense in which *this* litigation could impair those interests. No matter what ultimately happens in any of the courts below in this case, the 2019 rule that petitioners seek to revive will still be subject to the final vacatur judgment entered by the Northern District of Illinois—and petitioners will still be "deprive[d]" of any purported "benefits" (*id.*) of that rule.

Petitioners seem to acknowledge as much. They assert that "once they become intervenors," they will seek to reverse or vacate "the district court *judgments* against the Rule" and "constrain the Biden Administration to rescind its repeal, which it predicated solely on the validity and finality of those same *judgments*." Pet. Br. 3 (emphasis added). But there are no district court judgments in this case: the district courts in the Ninth Circuit preliminarily enjoined the now-vacated rule but have not entered any judgments. And the federal government's repeal of that rule was predicated solely on the "judgment vacating the rule on the merits" entered by "the U.S. District Court for the Northern District of Illinois." Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. 14,221 (Mar. 15, 2021). Petitioners' ability to attack that judgment will depend on their ongoing efforts to intervene in that separate proceeding. Their desire to upend the judgment of the Northern

District of Illinois does not present any basis for holding that the Ninth Circuit erred by denying their motion to intervene here.

Finally, this case does not present an appropriate opportunity for this Court to consider the novel interpretation of Federal Rule of Civil Procedure 24 advanced by the federal respondents in opposing certiorari. The federal respondents did not even raise that interpretive theory in the court of appeals. But if this Court does consider that theory, it should reject it: The theory is at odds with the text of Rule 24 and with this Court's precedents. It would prohibit States and others from intervening in important matters where their interests are directly and profoundly implicated—and where, unlike here, their inability to intervene would actually pose a threat of impairing their interests.

STATEMENT

1. Since the late nineteenth century, federal immigration statutes have barred persons likely to become a "public charge" from admission into the United States. *E.g.*, Act of Aug. 3, 1882, Pub. L. No. 47-376, ch. 376, § 2, 22 Stat. 214. Today, the Immigration and Nationality Act bars the admission of "[a]ny alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the [Secretary of Homeland Security] at the time of application for admission or adjustment of status, is likely at any time to become a public charge[.]" 8 U.S.C. § 1182(a)(4)(A); *see* 6 U.S.C. § 557; 8 U.S.C. § 1103.

No federal statute has ever defined the term "public charge." Judicial and administrative decisions construing the term have held "that only an individual

with the inherent inability to be self-supporting is excludable as 'likely to become a public charge' within the meaning of the statute." Pet. App. 62 (quoting *Matter of Harutunian*, 14 I & N. Dec. 583, 589-90 (BIA 1974); *see, e.g.*, *Gegiow v. Uhl*, 239 U.S. 3, 10 (1915); *Howe v. United States*, 247 F. 292, 294 (2d Cir. 1917); *Matter of B-*, 3 I. & N. Dec. 323, 324-25 (A.G. 1948); *Matter of Perez*, 15 I. & N. Dec. 136, 137 (BIA 1974).

In 1999, the Immigration and Naturalization Service issued formal guidance "summariz[ing] longstanding law" and explaining that the term "public charge" covers only those noncitizens "likely to become . . . primarily dependent on the government for subsistence." Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999). Under that guidance, an individual may be found "primarily dependent on the government" based on evidence of receipt of public cash assistance for income maintenance or institutionalization for long-term care at public expense. *Id.* But immigration officials may not give "weight [to] the receipt of non-cash public benefits (other than institutionalization) or the receipt of cash benefits for purposes other than for income maintenance" in making public charge assessments, in view of the availability of supplemental benefits "to families with incomes far above the poverty level." *Id.* at 28,689, 28,692.

In 2019, the Department of Homeland Security promulgated a rule adopting a new definition of the term "public charge." *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,501 (Aug. 14, 2019). The rule defined "public charge" to mean "an alien who receives one or more public benefits," as separately defined by the rule, "for more than 12 months in the aggregate within any 36-month period (such

that, for instance, receipt of two benefits in one month counts as two months)." *Id.* The specified benefits included not just "cash assistance for income maintenance," but also many federal non-cash benefits, such as healthcare, housing, and nutrition assistance. *Id.* This new definition was materially "broader than the existing definition and policy," *id.* at 41,348, and "expand[ed]" the group of noncitizens who were potentially inadmissible to the United States, *id.* at 41,320.

2. Shortly after DHS adopted the 2019 public charge rule, plaintiffs across the Nation sued to challenge the rule.

a. Within the Ninth Circuit, respondents the States of California, Maine, Oregon, and Pennsylvania, and the District of Columbia sued in the Northern District of California. *California v. Dep't of Homeland Security*, No. 19-cv-4975, Dkt. 1 (N.D. Cal. Aug. 16, 2019). Respondents the City and County of San Francisco and the County of Santa Clara filed a separate lawsuit in the same court. *City & County of San Francisco v. USCIS*, No. 19-cv-4717, Dkt. 1 (N.D. Cal. Aug. 13, 2019).

The district court granted a preliminary injunction to respondents. Pet. App. 306. It reasoned that respondents were likely to prevail on the merits both because "DHS's new definition of 'public charge' is likely to be outside the bounds of a reasonable interpretation of the statute," and in light of respondents' "entirely independent arguments that defendants acted arbitrarily and capriciously" in the process leading up to the rule's adoption. *Id.* at 176; *see id.* at 190-242, 245-264. The court also concluded that respondents "will be irreparably harmed if defendants are permitted to implement the rule as planned" in October 2019. *Id.* at 176; *see id.* at 285-293. It limited the scope of the

preliminary injunction to the territorial boundaries of the respondent jurisdictions. *Id.* at 307; *see id.* at 304-307.

A separate group of States, also respondents here, filed suit in the Eastern District of Washington. That court entered a preliminary injunction as well. Pet. App. 308-368. It similarly reasoned that respondents had "demonstrated a substantial likelihood of success" with respect to their claims that the 2019 public charge rule was contrary to law and arbitrary and capricious, *id.* at 359; *see id.* at 342-359, and that they were "likely to incur multiple forms of irreparable harm" if the rule took effect as originally scheduled, *id.* at 359; *see id.* at 359-362.

A motions panel of the Ninth Circuit stayed the preliminary injunctions in the California and Washington cases pending appeal. Pet. App. 164-165. After full briefing and oral argument, however, the court of appeals affirmed the preliminary injunctions in relevant part. *Id.* at 88.[1] The court concluded that respondents had "demonstrated a high likelihood of success in showing that the rule is inconsistent with any reasonable interpretation of the statutory public charge bar and therefore is contrary to law." *Id.* at 77; *see also id.* at 77-85 (agreeing with district courts' ruling "that the plaintiffs were likely to succeed in their contention that the Rule is arbitrary and capricious"). It also agreed with the district courts that respondents had demonstrated "a likely threat of irreparable injury," *id.* at 85, and "that the balance of equities and public interest support an injunction," *id.* at 86.

[1] The court of appeals affirmed the preliminary injunction entered by the Eastern District of Washington in part, vacating "that portion of the Eastern District's injunction making it applicable nationwide." Pet. App. 88.

After the court of appeals granted the federal respondents' unopposed motion to stay issuance of the mandate, C.A. Dkt. 162, they filed a petition for a writ of certiorari in this Court, which was docketed on January 21, 2021. *USCIS v. City & County of San Francisco*, No. 20-962.[2]

b. Plaintiffs in three other federal judicial districts—the Southern District of New York, the District of Maryland, and the Northern District of Illinois—also obtained preliminary injunctions against the 2019 public charge rule. *See New York v. Dep't of Homeland Security*, 408 F. Supp. 3d 334 (S.D.N.Y. 2019); *Make the Road N.Y. v. Cuccinelli*, 419 F. Supp. 3d 647 (S.D.N.Y. 2019); *CASA de Md., Inc. v. Trump*, 414 F. Supp. 3d 760 (D. Md. 2019); *Cook County v. McAleenan*, 417 F. Supp. 3d 1008 (N.D. Ill. 2019). Each of those preliminary injunctions was stayed pending further appellate proceedings, either by the court of appeals or by order of this Court.[3]

The Second and Seventh Circuits then affirmed the district courts' preliminary injunctions. *See New York v. Dep't of Homeland Security*, 969 F.3d 42, 87 (2d Cir. 2020); *Cook County. v. Wolf*, 962 F.3d 208, 234 (7th Cir. 2020). A Fourth Circuit panel concluded that the 2019 public charge rule was likely valid, but the full court subsequently granted rehearing en banc, vacating the previous panel judgment and opinion. *See CASA de Md., Inc. v. Trump*, 971 F.3d 220, 255 (4th

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[2] Citations to "C.A. Dkt." are to the docket in Ninth Circuit No. 19-17214.

[3] *See CASA de Md., Inc. v. Trump*, No. 19-2222, Dkt. 21 (4th Cir. Dec. 9, 2019); *Dep't of Homeland Security v. New York*, 140 S. Ct. 599 (2020); *Wolf v. Cook County*, 140 S. Ct. 681 (2020).

Cir.), *reh'g en banc granted*, 981 F.3d 311 (4th Cir. 2020); *see generally* 4th Cir. R. 35(c).

The federal government filed petitions for writs of certiorari seeking this Court's review of the decisions of the Second and Seventh Circuits. *See Dep't of Homeland Security v. New York*, No. 20-449 (Oct. 7, 2020); *Wolf v. Cook County*, No. 20-450 (Oct. 7, 2020). Thereafter, this Court granted the petition arising out of the Second Circuit proceeding. *See Dep't of Homeland Security v. New York,* No. 20-449 (Feb. 22, 2021).

c. The *Cook County* proceeding in the Northern District of Illinois was the only case to reach a final judgment. In November 2020, the district court there granted the plaintiffs' motion for partial final judgment and vacated the 2019 public charge rule, concluding that the rule was contrary to law and that DHS acted arbitrarily and capriciously in adopting it. *Cook County v. Wolf*, 498 F. Supp. 3d 999, 1004-1005 (N.D. Ill. 2020). Reasoning that the "ordinary remedy . . . demanded by the APA's text" required the court to "hold unlawful and set aside" the 2019 rule, the court vacated the rule on a nationwide basis. *Id.* at 1007. The federal government filed a notice of appeal, and the Seventh Circuit stayed the district court's judgment pending that appeal. *See Wolf v. Cook County*, No. 20-3150, Dkt. 21 (7th Cir. Nov. 19, 2020).

3. On February 2, 2021, President Biden issued an executive order directing the Secretary of State, the Attorney General, and the Secretary of Homeland Security to evaluate their "public charge policies," identify "appropriate agency actions . . . to address concerns about the current public charge policies[]," and submit a report to the President on those matters within 60 days. Exec. Order No. 14,012, 86 Fed. Reg. 8277, 8278. As part of that review, DHS determined

in March 2021 that "continuing to defend" the 2019 public charge rule "is neither in the public interest nor an efficient use of limited government resources," and concluded that it would no longer pursue "appellate review of judicial decisions invalidating or enjoining enforcement" of the rule. Dep't of Homeland Security, *DHS Statement on Litigation Related to the Public Charge Ground of Inadmissibility* (Mar. 9, 2021).[4]

Based on that determination, the federal government filed a motion in the Seventh Circuit to dismiss the pending appeal of the partial final judgment vacating the rule. *See Cook County v. Wolf*, No. 20-3150, Dkt. 23 (7th Cir. Mar. 9, 2021). The Seventh Circuit dismissed the appeal and issued its mandate. *See id.*, Dkt. 24 (7th Cir. Mar. 9, 2021). As a result, the district court's judgment vacating the 2019 public charge rule on a nationwide basis took effect.

At the same time, the parties to *Department of Homeland Security v. New York*, No. 20-449, which arose out of the Second Circuit litigation, filed a joint stipulation in this Court to dismiss that case under Rule 46.1. The parties to the two other pending petitions, which sought review of the judgments by the Seventh and Ninth Circuits affirming preliminary injunctions regarding the 2019 public charge rule, submitted similar stipulations. This Court then dismissed all three matters. *See Dep't of Homeland Security v. New York*, No. 20-449 (Mar. 9, 2021); *Wolf v. Cook County*, No. 20-450 (Mar. 9, 2021); *USCIS v. City & County of San Francisco*, No. 20-962 (Mar. 9, 2021).

After those dismissals, the federal government issued a final rule implementing the Northern District

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[4] *Available at* https://tinyurl.com/ykpnuzfr (last visited Jan. 8, 2022).

of Illinois's judgment vacating the 2019 public charge rule. *See* Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. 14,221 (Mar. 15, 2021). The 2019 rule was removed from the Code of Federal Regulations. *See id.* Public charge assessments are presently controlled by the 1999 field guidance.[5] In August 2021, DHS commenced a new rulemaking proceeding "on the public charge ground of inadmissibility" and solicited "broad public feedback" for a future regulatory proposal.[6]

4. This proceeding arises out of petitioners' attempt, in March 2021, to intervene in the Ninth Circuit litigation.

a. Petitioners are Arizona and 12 other States. On March 10, 2021, they moved to intervene in the Ninth Circuit "so that they [could] file a petition for certiorari" seeking review of the court of appeals' judgment affirming the two preliminary injunctions against the 2019 rule. J.A. 55. Before that date, none of the petitioners had attempted to participate in any of the litigation challenging the 2019 public charge rule, as amicus or otherwise. Nor had petitioners submitted any comments during the rulemaking process for the 2019 public charge rule.[7]

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[5] *See* Dep't of Homeland Security, *DHS Secretary Statement on the 2019 Public Charge Rule* (Mar. 9, 2021), https://tinyurl.com/c8w5xmcn.

[6] *See* Proposed Rule, Public Charge Ground of Inadmissibility, 86 Fed. Reg. 47,025 (Aug. 23, 2021); U.S. Citizenship and Immigration Servs., *Public Charge Ground of Inadmissibility, Rulemaking Docket*, https://tinyurl.com/5n8dkr38 (last visited Jan. 8, 2022).

[7] *See* U.S. Citizenship and Immigration Servs., *Inadmissibility on Public Charge Grounds*, *Comments*, https://tinyurl.com/4p9j435k.

Petitioners argued that they were entitled to intervene "both as of right and permissively" under the standards in Federal Rule of Civil Procedure 24. J.A. 55, 60. The state and local respondents opposed petitioners' motion, explaining that the preliminary-injunction appeal was now moot and that intervention was unwarranted given the particular circumstances of the case. *Id.* at 87-94. Among other things, the underlying rule that was the subject of the preliminary injunctions had been vacated by a final judgment in a separate legal proceeding, *id.* at 87-89, and the injunctions at issue in this case did not in any event apply within the borders of any of the States seeking to intervene, *id.* at 92. The federal respondents opposed intervention for similar reasons. *Id.* at 75-79.

The court of appeals denied petitioners' motion to intervene. Pet. App. 13. Judge VanDyke dissented, asserting that the standards in Rule 24 "favor[ed]" intervention. *Id.* at 29. In his view, petitioners had a protectable interest in the continuing validity of the 2019 rule and should have been authorized to intervene to remedy the "procedural harm," *id.* at 32, arising from the vacatur of the 2019 public charge rule and the reinstatement of the prior guidance "without any formal agency rulemaking," *id.* at 31. He also acknowledged, however, that "[s]o long as the 2019 rule itself remains vacated nationwide by a single judge in the Seventh Circuit, not much can be done in this circuit to affect that." *Id.* at 35.

On May 6, petitioners submitted a motion for leave to intervene in this Court. *See Arizona v. City & County of San Francisco*, No. 20M81. On June 1, this Court issued an order holding that motion in abeyance "pending the timely filing and disposition of the peti-

tion for a writ of certiorari respecting the denial of intervention below." Petitioners thereafter filed a petition for a writ of certiorari. *See Arizona v. City & County of San Francisco*, No. 20-1775 (June 18, 2021). This Court then granted that petition, limiting its review to the first question presented regarding the court of appeals' denial of petitioners' motion to intervene. On the same day, the Court denied petitioners' motion for leave to intervene in this Court.[8]

b. Petitioners have also sought to intervene in other lower court proceedings involving the 2019 public charge rule.

All but one of the States that are petitioners here moved to intervene and to recall the mandate in the Fourth Circuit, shortly after that court dismissed the appeal of the preliminary injunction entered by the District of Maryland. *CASA de Md., Inc. v. Biden*, No. 19-2222, Dkt. 213-215 (4th Cir. Mar. 11, 2021). The Fourth Circuit denied the motions one week later. *Id.*, Dkt. 216 (Mar. 18, 2021). No certiorari petition was filed.

All but one of the petitioner States also filed a motion asking the Seventh Circuit to recall its mandate, to reconsider its order dismissing the appeal, and to grant them leave to intervene as defendants. *Cook*

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[8] In the Northern District of California, the district court granted the parties' request to stay proceedings pending this Court's resolution of this case. *California v. Dep't of Homeland Security*, No. 19-cv-4975, Dkt. 197 (N.D. Cal. Nov. 15, 2021); *see also City & County of San Francisco v. USCIS*, No. 19-cv-4717, Dkt. 169 (N.D. Cal. Nov. 15, 2021) (same). The Eastern District of Washington stayed its proceedings pending resolution of this matter and all appeals arising out of the Northern District of Illinois case. *Washington v. Dep't of Homeland Security*, No. 19-cv-5210, Dkt. 305 (E.D. Wash. Oct. 28, 2021).

County v. Mayorkas, No. 20-3150, Dkt. 25-1 to 25-3 (7th Cir. Mar. 11, 2021). The Seventh Circuit denied that motion. *Id.*, Dkt. 26 (7th Cir. Mar. 15, 2021). The same group of States then filed an application in this Court asking it either to stay the vacatur judgment of the Northern District of Illinois pending the filing of a petition for certiorari, or to summarily reverse the Seventh Circuit's order denying their motion to recall the mandate and to intervene. This Court denied that application, but without prejudice to the applicants seeking relief "before the District Court, whether in a motion for intervention or otherwise." *Texas v. Cook County*, No. 20A150 (Apr. 26, 2021); *see also id.* (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").[9]

After this Court denied their application, the same States filed motions to intervene and for relief from the final judgment in the Northern District of Illinois. The district court denied those motions as untimely. *See Cook County v. Mayorkas*, 2021 WL 3633917 (N.D. Ill. Aug. 17, 2021). The States appealed to the Seventh Circuit. On the current schedule, that appeal will be fully briefed on February 8, 2022. *Cook County v. Texas*, No. 21-2561, Dkt. 34 (7th Cir. Nov. 24, 2021).

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[9] In opposing the application in *Cook County*, the federal government represented that "[r]eal-world experience" from the one-year period when the 2019 rule was actually in effect showed that the rule did not "substantially reduce the number of noncitizens eligible for public benefits." U.S. Opp. 23, 24, *Texas v. Cook County*, No. 20A150 (Apr. 9, 2021) (just three out of 47,500 applicants were denied admission based on an adverse public charge determination).

SUMMARY OF ARGUMENT

The state respondents broadly agree with petitioners on the legal standards that governed petitioners' intervention request: Courts of appeals apply the substantive standards of Federal Rule of Civil Procedure 24 when ruling on motions to intervene. In assessing whether a movant has satisfied Rule 24(a)'s requirements for intervention as of right or Rule 24(b)'s criteria for permissive intervention, courts are guided primarily by practical and equitable considerations. Over the decades, in reliance on the settled judicial understanding of Rule 24, petitioners and the state respondents have successfully intervened in a range of suits that posed a practical threat to their interests, including suits challenging federal statutes and regulations.

But while the standards governing intervention are liberal, they are not limitless. Under the particular circumstances presented in this case, the Ninth Circuit properly denied petitioners' motion to intervene. By the time petitioners sought to intervene in the preliminary-injunction appeal below, that appeal was moot: the 2019 public charge rule that was the subject of the preliminary injunctions had been vacated by a final judgment entered in a separate proceeding in the Northern District of Illinois. There is now no practical sense in which the interests petitioners identified as the basis for their intervention motion—*i.e.*, their interests in the continuing validity of the 2019 rule and purported savings resulting from that rule—could be impaired by *this* litigation. That should be fatal to petitioners' arguments for both mandatory and permissive intervention in this proceeding.

Finally, to the extent the federal respondents continue to assert the novel arguments about the scope of

Rule 24 that they advanced at the petition stage, this case is not a suitable opportunity for addressing those arguments. Because the federal respondents did not raise any of those arguments below, the court of appeals had no opportunity to consider them when ruling on petitioners' motion. Moreover, there is no need to reach the arguments in this case: petitioners' motion would fail regardless of whether it is reviewed under the settled understanding of Rule 24—which each one of the parties here relied on below—or under the new theory belatedly raised by the federal respondents. But if the Court does reach that issue, it should reject the federal respondents' new theory, which is contrary to the text of Rule 24 and to decades of precedent construing that Rule.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY DENIED PETITIONERS' MOTION TO INTERVENE

A. The State Respondents Broadly Agree with Petitioners Regarding the Legal Standards Governing Intervention

Intervention is the "legal procedure by which . . . a third party is allowed to become a party to the litigation." *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009) (quoting Black's Law Dictionary 840 (8th ed. 2004)). Courts are guided primarily by equitable and practical considerations in ruling on a motion to intervene. *See, e.g.*, *United States v. Louisiana*, 354 U.S. 515, 516 (1957); Fed. R. Civ. P. 24 advisory committee's note (1966). As such, "the decision on any particular motion to intervene . . . is always to some extent bound up in the facts of the particular case." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 33 (1993). In light of petitioners' briefing in this case (*see* Pet. Br.

18-19; J.A. 59-61), it appears that petitioners and the state respondents share a common understanding of the standards governing intervention.

1. Federal Rule of Civil Procedure 24 governs motions to intervene at the trial court level. As a formal matter, that rule "appl[ies] only in the federal district courts." *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Scofield*, 382 U.S. 205, 217 n.10 (1965). But this Court has long recognized, and petitioners agree (Pet. Br. 18), that "the policies underlying" the rule "may be applicable in appellate courts." *Scofield*, 382 U.S. at 217 n.10. And the circuit courts have "held that intervention *in* the court of appeals is governed by the same standards as in the district court." *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997); *see, e.g.*, *Sierra Club, Inc. v. EPA*, 358 F.3d 516, 518 (7th Cir. 2004); *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997).

Rule 24 was adopted in 1938 to "amplif[y]" then-existing "federal practice at law and in equity." Fed. R. Civ. P. 24 advisory committee's note (1937); *see also Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 133-134 (1967) (Rule 24 "was not merely a restatement of existing federal practice at law and in equity"). Restrictive interpretations of the original rule prompted amendments in 1966. *See* Fed. R. Civ. P. 24 advisory committee's note (1966); *see generally* Wright & Miller, 7C Fed. Prac. & Proc. Civ. § 1903 at pp. 263-268 (3d ed. 2007). Those amendments "free[d] the rule from undue preoccupation with strict considerations of res judicata," instead incorporating "practical considerations" into the analysis of whether an applicant should be authorized to intervene. Fed. R. Civ. P. 24 advisory committee's note (1966). The policy

underlying the modern rule is that a prospective intervenor who "would be substantially affected in a practical sense by the determination made in an action . . . should, as a general rule, be entitled to intervene[.]" *Id.*; Wright & Miller, *supra*, § 1908.2 at p. 368 ("central purpose" of 1966 amendments was to "allow intervention by those who might be practically disadvantaged by the disposition of the action").

To implement that policy, Rule 24 establishes criteria that a movant must satisfy to intervene as of right or permissively. The principal basis for intervention as of right is where the movant "claims an interest relating to the property or transaction that is the subject of the action"; "disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest"; and the "existing parties" do not "adequately represent that interest." Fed. R. Civ. P. 24(a)(2); *see also* Pet. Br. 19. The primary basis for permissive intervention is where the movant "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B); *see also* Pet. Br. 27. Regardless of whether a movant is seeking to intervene on a mandatory or permissive basis, the motion must be "timely." Fed. R. Civ. P. 24(a), (b)(1), (b)(2); *see also id.* 24(b)(3).

2. Consistent with the criteria set out in Rule 24, States and other parties have successfully intervened in a range of legal proceedings that have posed a practical threat to their interests. For instance, in *Cascade Natural Gas Corp.*, the State of California and a corporate consumer of natural gas sought to intervene under an earlier version of Rule 24 to challenge the terms of a settlement agreement in an antitrust suit involving the merger of natural gas companies. 386 U.S. at 135-136. This Court concluded that the State

and the corporation had a sufficient stake in the outcome of the litigation to intervene because they would be "adversely affected" by a merger that reduced "the competitive factor in natural gas available to Californians." *Id.*

A more recent example, familiar to the respondents and the petitioners in this case, is *California v. Texas*, 141 S. Ct. 2104 (2021). There, the plaintiffs sought a judgment invalidating the entire Affordable Care Act. *Texas v. United States*, No. 18-cv-167, Dkt. 1 ¶ 49 (N.D. Tex. Feb. 26, 2018). A coalition of States promptly moved to intervene to defend the Act, either permissively or as of right, based on the financial and other harms they would suffer if the plaintiffs succeeded in obtaining such a judgment and in light of indications that the federal defendants agreed with certain legal arguments advanced by the plaintiffs. *Id.*, Dkt. 15 at 9-21 (Apr. 9, 2018). Over the plaintiffs' opposition, the district court granted the motion for permissive intervention. *Id.*, Dkt. 74 at 6 (May 16, 2018). During the ensuing litigation, the federal defendants abandoned any defense of the Act, with the United States Solicitor General ultimately arguing before this Court (without success) that "[t]he entire ACA . . . must fall." U.S. Br. 13, *California v. Texas*, No. 19-840 (June 25, 2020).

Of course, there have been many other cases in which courts have granted intervention to States or other movants under the standards of Rule 24 after a practical assessment of the circumstances demonstrated that intervention would allow the movants to

seek to protect their interests. Those cases have frequently involved suits challenging federal regulations or statutory schemes.[10]

B. The Court of Appeals Did Not Err By Denying Petitioners' Motion to Intervene

In this case, however, petitioners cannot demonstrate that their motion to intervene in the Ninth Circuit satisfied these settled legal standards. The appeal in which petitioners sought to intervene concerned two preliminary injunctions against a DHS rule that had since been vacated in a separate proceeding and withdrawn by DHS on that basis. That preliminary-injunction appeal is now moot. Petitioners nonetheless say they want to intervene in the Ninth Circuit proceeding to protect their interests in the continued vitality of the 2019 public charge rule and the benefits flowing from it. But even if they were allowed to intervene and somehow obtained reversal or vacatur of the appellate judgment below (or the preliminary injunctions that it affirmed), the 2019 rule would remain vacated. Under these circumstances,

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[10] *See, e.g.*, *U.S. House of Representatives v. Price*, 2017 WL 3271445 (D.C. Cir. 2017) (granting States' motion to intervene as of right in litigation involving insurance subsidy program established by the Affordable Care Act); *Sierra Club v. Glickman*, 82 F.3d 106, 108 (5th Cir. 1996) (reversing denial of Texas's motion to intervene in suit challenging USDA funding decisions); *Louisiana v. Salazar*, 170 F. Supp. 3d 75, 79 n.1 (D.D.C. 2016) (authorizing Texas and Mississippi to intervene in lawsuit challenging Department of Interior's revised approach to calculating oil and gas revenues for coastal States); *Dixon v. Heckler*, 589 F. Supp. 1512 (S.D.N.Y. 1984) (authorizing State of New York to intervene in action challenging standards for distribution of federal disability benefits); *see generally* Wright & Miller, *supra*, § 1908.1 at pp. 336-340 & n.45 (collecting cases).

petitioners cannot satisfy the standards for intervention as of right under Rule 24(a) or permissive intervention under Rule 24(b). And none of the other arguments raised by petitioners establishes that the Ninth Circuit erred by denying their motion to intervene.

1. The underlying appeal is moot

By the time petitioners filed their motion to intervene in the Ninth Circuit, the Northern District of Illinois had entered its partial final judgment vacating the 2019 public charge rule; the federal government had moved to dismiss its appeal of that judgment; and the Seventh Circuit had issued its mandate, allowing the district court's judgment to take effect. *Supra* pp. 8-9. In light of that judgment, the federal government issued a new rule that implemented the vacatur judgment by removing the 2019 rule from the Code of Federal Regulations. *See* Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. 14,221 (Mar. 15, 2021). Petitioners were thus seeking to intervene in an appeal of preliminary injunctions addressing a rule that no longer existed.

In the court of appeals, respondents argued that intervention was improper because the preliminary-injunction appeal had become moot. J.A. 75-77; 87-89. As this Court has recognized in comparable circumstances, "the question whether a preliminary injunction should have been issued . . . is moot" when intervening events have rendered the answer to that question irrelevant. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 398 (1981) (student entitled to translator under preliminary injunction had received translator and graduated). More precisely, an appeal from an "order granting a preliminary injunction becomes moot when, because of the defendant's compliance or

some other change in circumstances, nothing remains to be enjoined through a permanent injunction." *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 396 F.3d 416, 421 (D.C. Cir. 2005).

In this Court, petitioners offer several theories why the preliminary-injunction appeal is not moot, but none is persuasive. They initially contend that the federal respondents' "rescission" of the challenged rule "is a form of voluntary cessation." Pet. Br. 30. The "general rule that voluntary cessation of a challenged practice rarely moots a federal case . . . traces to the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001); *see also County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (case moot if "'there is no reasonable expectation . . .' that the alleged violation will recur"). Here, however, the cessation of the challenged rule was dictated by the final judgment of a federal court. Whatever the nature of the actions by the federal government that preceded that final judgment, compliance with a binding judgment of a federal court is not "voluntary." And there is nothing "temporary" about the federal respondents' compliance with that judgment; indeed, DHS has excised the rule from the Code of Federal Regulations. *See* 86 Fed. Reg. at 14,221; *supra* p. 10.

Next, petitioners invoke a recent Ninth Circuit case for the argument that "a nationwide injunction in a different circuit does not moot another case seeking the same relief." Pet. 32.[11] But that case involved the

[11] As petitioners acknowledge in another part of their brief (Pet.

question whether a *preliminary* injunction from a district court in the Third Circuit mooted the appeal of a separate preliminary injunction in the Ninth Circuit. *See California*, 941 F.3d at 423. The Ninth Circuit reasoned that the "preliminary injunction in the Pennsylvania case is, like all preliminary injunctions, of *limited duration*," and "the federal defendants will once again be subjected to the injunction in this case" upon the expiration of that provisional relief. *Id.* (emphasis in original). Here, of course, the vacatur judgment out of the Northern District of Illinois is final; the federal respondents have resolved to comply with that judgment; and they have "removed . . . the regulatory text that DHS promulgated in the [challenged] rule and restore[d] the regulatory text to appear as it did prior to the issuance of" that rule. 86 Fed. Reg. at 14,221.

Petitioners also suggest that the Ninth Circuit appeal is not moot because the 2019 rule that was the subject of the preliminary injunctions could spring back to life as a result of future developments in the Seventh Circuit litigation. *See* Pet. Br. 32-34; *cf.* Pet. App. 33 (VanDyke, J., dissenting). They posit that "if the States can intervene" in the Seventh Circuit, and if they then succeed in "challeng[ing] the district court's vacatur under Federal Rule of Civil Procedure 60(b)," Pet. Br. 32, and if they then use that result to force DHS "to rescind the rescission" of the 2019 public charge rule, *id.* at 33, the underlying preliminary-injunction appeal in this case would no longer be moot.

Br. 17), the judgment of the Ninth Circuit in that case has since been vacated. *See California v. U.S. Dep't of Health & Human Servs.*, 941 F.3d 410 (9th Cir. 2019), *vacated and remanded sub nom Little Sisters of the Poor Jeanne Jugan Residence v. California*, 141 S. Ct. 192 (2020).

But this Court has emphasized that "speculative contingencies," which "might conceivably affect substantive rights of interested parties," are not adequate to establish a "continuing case or controversy." *Bd. of License Comm'rs of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985); *see, e.g., Camreta v. Greene*, 563 U.S. 692, 711-712 (2011); *cf. Commodity Futures Trading Comm'n v. Bd. of Trade of Chicago*, 701 F.2d 653, 655 (7th Cir. 1983) (Posner, J.) ("[F]ew controversies are wholly beyond the power of changed circumstances to revive; but the probability of revival is too small in this case to allow a federal court to exercise jurisdiction.").

If all of the speculative contingencies identified by petitioners were to play out as they hope, resulting in a live controversy in one of the courts below over the validity of the 2019 public charge rule, petitioners could seek to intervene at that time. Under the present circumstances, however, the preliminary-injunction appeal is moot. As explained below, given those same circumstances, the Ninth Circuit properly denied petitioners' motion to intervene.

2. Under the circumstances of this case, petitioners cannot satisfy the requirements for intervention under Rule 24

In the court of appeals, petitioners sought intervention as of right or, alternatively, permissive intervention. J.A. 61-65. But they did not (and cannot) carry their burden of establishing that they were entitled to either form of intervention.

a. *Intervention as of right.* As the lower courts have recognized, prospective intervenors must satisfy each of "the four elements of Rule 24[(a)(2)]—timeliness, interest, impairment of interest, and adequacy of representation"—to qualify for mandatory intervention. *E.g.*, *Jones v. Prince George's County*, 348 F.3d

1014, 1017 (D.C. Cir. 2003); *see supra* p. 17; Pet. Br. 19. The "movant bears the burden of establishing its right to intervene." *Brumfield v. Dodd*, 749 F.3d 339, 341 (5th Cir. 2014).

Petitioners' asserted interests are in the "continuing validity" of the 2019 public charge rule and the financial savings they believe they would realize if it were in effect, including with respect to "their Medicaid and related social-welfare budgets." Pet. Br. 24, 25; *see also* J.A. 62-63; Pet. App. 31 (VanDyke, J., dissenting). It is well established that avoiding economic harms can, in appropriate circumstances, qualify as an interest of "the kind contemplated by Rule 24(a)(2)." *Donaldson v. United States*, 400 U.S. 517, 531 (1971); *see, e.g.*, *Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 43 (1st Cir. 1992); *N.Y. Pub. Interest Research Grp., Inc. v. Regents of the Univ. of the State of N.Y.*, 516 F.2d 350, 351-352 (2d Cir. 1975). But even assuming that this case presents such circumstances, petitioners must also demonstrate that the denial of intervention would, as a "practical matter," threaten to "impair or impede" their asserted interests. Fed. R. Civ. P. 24(a)(2). Petitioners cannot make that showing here.

There is no possible scenario (let alone a "practical" one) in which the outcome of this litigation would restore the 2019 public charge rule. This case does not involve a final judgment vacating the 2019 public charge rule. The district court orders at issue here were provisional in nature. So even if petitioners were able to intervene in the preliminary-injunction appeal and obtain a decision vacating those orders, that would not restore the 2019 public charge rule. That

rule would still remain subject to the final vacatur judgment in the Northern District of Illinois.[12]

For the same reason, no outcome in this appeal could allow petitioners to obtain a share of the financial savings predicted by the drafters of the 2019 rule. *See* Pet. Br. 24-25. The interlocutory orders that petitioners seek to appeal did not vacate the 2019 rule, and the denial of intervention below cannot have impaired or impeded petitioners' interest in any financial savings that might have flowed from that rule. *See also supra* n.9.

Indeed, petitioners all but concede that their participation as intervenors in this litigation could not protect their asserted interests. They acknowledge that it is the "lower *courts' denials* of intervention" that is impairing their interests, Pet. Br. 15 (emphasis added), and argue that petitioners will protect their interests by seeking to reverse or vacate "the district court *judgments* against the Rule," *id.* at 3 (emphasis added). Of course, there are no district court judgments at issue in this case—only preliminary injunctions regarding a rule that was vacated by the final judgment in the Northern District of Illinois case. Petitioners' argument that their interests will be impaired absent their intervention in *that* case, which is

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[12] Even during the pendency of the appeal, the injunctions did not impede the petitioner States from realizing any purported benefits flowing from the 2019 public charge rule. Both preliminary injunctions were stayed by the Ninth Circuit in December 2019. C.A. Dkt. 162. Moreover, the injunctions are limited in scope: the district court in the California case limited the scope to the geographic boundaries of the respondent jurisdictions; the Ninth Circuit later limited the scope of the injunction in the Washington case in the same way. *See supra* p. 6 & n.1.

the subject of ongoing litigation in the Seventh Circuit, does not provide any basis for concluding that those interests would be impaired if they are not allowed to participate in *this* one.[13]

b. *Permissive intervention.* Petitioners also briefly argue that the court of appeals erred by denying their request for permissive intervention under Rule 24(b)(1)(B). Pet. Br. 27-29. They assert that they were entitled to intervene permissively so they could "advance common legal arguments in defense of the Rule—*i.e.*, that the Public Charge Rule was substantively and procedurally valid." *Id.* at 27. But their arguments omit any real discussion of the requirements of Rule 24(b). *See id.* at 27-29.

Viewed in light of those requirements, the court of appeals did not err or abuse its discretion by denying permissive intervention. In exercising their discretion in this area, courts consider not only whether the movant "has a claim or defense that shares with the main

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[13] Earlier in the proceedings, petitioners asserted an alternative interest relating to their "procedural right to comment on any new rulemaking under the APA." Pet. 20; *cf.* Pet. App. 31-32 (VanDyke, J., dissenting). They have apparently abandoned that argument, *see* Pet. Br. 24-26, and for good reason. Intervention here would not enhance or diminish petitioners' procedural rights under the APA—including with respect to the ongoing DHS rulemaking regarding "the public charge ground of inadmissibility," in which petitioners have so far declined to participate even as they have pressed to intervene in this case. *See* Proposed Rule, Public Charge Ground of Inadmissibility, 86 Fed. Reg. 47,025 (Aug. 23, 2021); U.S. Citizenship and Immigration Servs., *Public Charge Ground of Inadmissibility, Rulemaking Docket*, https://tinyurl.com/5n8dkr38 (last visited Jan. 8, 2022); *cf. Cook County v. Mayorkas*, 2021 WL 3633917, *11 (N.D. Ill. Aug. 17, 2021) (noting petitioners' admission "that the APA does *not* prohibit an agency from taking the course that DHS took here").

action a common question of law or fact," Fed. R. Civ. P. 24(b)(1)(B), but also practical factors including the degree to which the movant would benefit from intervention, *see, e.g.*, *Rockford Bd. of Educ. v. Ill. State Bd. of Educ.*, 150 F.3d 686, 688 (7th Cir. 1998), and whether the movant "has other adequate means of asserting its rights," *Korioth v. Brisco*, 523 F.2d 1271, 1279 n.25 (5th Cir. 1975); *see generally* Wright & Miller, *supra*, § 1913 at pp. 487-489 & n.21. Here, petitioners' asserted desire to defend the 2019 rule on the ground that it "was substantively and procedurally valid" (Pet. Br. 16) was not sufficient to require a court to grant permissive intervention.

As discussed above, under the particular circumstances of this case, intervening in the preliminary-injunction appeal below would not help petitioners advance their interests in the continuing validity of the 2019 public charge rule. In addition, petitioners have alternative means of seeking to protect those interests: They are currently appealing the denial of intervention by the Northern District of Illinois, in the proceeding where the district court actually vacated the 2019 public charge rule. *See* Pet. Br. 14 n.7. They may sue to challenge the 2021 DHS rule implementing that vacatur. And they were also able to participate in the pending rulemaking regarding the new public charge rule. *See generally Korioth*, 523 F.2d at 1279 n.25 ("When an appellant has other adequate means of asserting its rights, a charge of abuse of discretion in the denial of a motion for permissive intervention would appear to be almost untenable on its face.").

Again, petitioners' arguments underscore why intervention is not proper in this case. They contend that the Ninth Circuit's denial of permissive intervention "allowed the Government to circumvent APA

rulemaking requirements." Pet. Br. 28. But the conduct that petitioners say interfered with the APA's rulemaking requirements was the federal government's decision to dismiss the appeal of the vacatur judgment entered by the Northern District of Illinois (on March 9, 2021) and to withdraw the 2019 public charge rule based on that vacatur (on March 15, 2021). *See* Pet. Br. 2-3; *supra* pp. 9-10. The Ninth Circuit's subsequent denial (on April 8, 2021) of petitioners' motion to intervene in this preliminary-injunction appeal did not interfere with petitioner's ability to comment on that withdrawal.

3. Petitioners' *Munsingwear* arguments do not establish that the court of appeals erred

Petitioners do not discuss the possibility of vacatur under *United States v. Munsingwear*, 340 U.S. 36 (1950), in the section of their brief arguing that they "satisfied Rule 24(a)'s standard for intervention as of right," Pet. Br. 19; *see id.* at 19-27, or in the section arguing that "the Ninth Circuit should have granted permissive intervention," *id.* at 27; *see id.* at 27-29. In a separate section of their brief, however, they argue that "[e]ven if a court thought the underlying appeal was moot, it could still grant Petitioners meaningful relief by vacating all prior decisions under *Munsingwear*." Pet. Br. 30; *see id.* at 34-37. That argument does not provide any proper basis for holding that the Ninth Circuit erred by denying petitioners' motion to intervene.

As a threshold matter, *Munsingwear* is not a rationale for intervention that petitioners presented to the court of appeals in their motion to intervene. The motion argued that petitioners should be allowed to

intervene to "offer a defense of the rule so that its validity can be resolved on the merits[.]" J.A. 56. Petitioners did not mention the possibility of *Munsingwear* vacatur until their reply brief. *See* J.A. 110. The court of appeals could have properly declined to entertain the argument on that ground alone. *See, e.g.*, *United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992) ("We 'will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief.'").

And even if forfeiture were not an obstacle to an argument that the court of appeals should have allowed petitioners to intervene for the purpose of seeking *Munsingwear* vacatur, that argument should not succeed. *Munsingwear* focuses on the interests of the existing parties with respect to a judgment that was obtained before a case became moot. Under the "equitable tradition of vacatur," a "party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994).[14] Here, petitioners are not parties and are not bound by any judgment in the courts below. And even if a non-party might conceivably seek to intervene and become a party in a moot case in order to seek vacatur—an issue petitioners acknowledge is "a question of first impression" (Pet. Br. 36)—petitioners have not

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[14] *See also Camreta*, 563 U.S. at 713 ("The point of [*Munsingwear*] vacatur is to prevent an unreviewable decision 'from spawning any legal consequences,' so that no party is harmed[.]"); *Munsingwear*, 340 U.S. at 40 (vacatur "eliminates a judgment," prevents it from becoming res judicata, and "clears the path for future relitigation of the issues between the parties").

articulated the kind of practical interest in obtaining vacatur that would be required to justify intervention.

As petitioners recognize, "the preliminary injunctions at issue no longer directly apply in the [petitioner] States." J.A. 62. Petitioners' discussion of the benefits of vacatur addresses the potential precedential effects of the court of appeals' opinion. Pet. Br. 37. Petitioners do not contend, however, that the opinion threatens to harm them directly. For example, they have not asserted that it would force them to "change the way [they] perform[]" government functions "or risk a meritorious damages action." *E.g.*, *Camreta*, 563 U.S. at 703; *see id.* at 713. Instead, they assert that vacatur would allow them "to litigate the Public Charge Rule on a clean slate" in potential future litigation. Pet. Br. 37. But vacatur here would hardly leave a "clean" precedential slate.[15] Moreover, this was a preliminary-injunction appeal; the Ninth Circuit's opinion addressed the plaintiffs' "likelihood of success," Pet. App. 77, based on the particular claims and arguments developed by the parties in the courts below. It did not finally resolve the claims in this case—let alone the range of issues that might be implicated in future litigation regarding DHS's prospective implementation of the public charge statute.

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[15] Petitioners have not suggested that they could or would seek to vacate the published Ninth Circuit order granting a stay of the district courts' preliminary injunctions after preliminarily concluding that DHS had demonstrated "a strong likelihood of success on the merits." Pet. App. 105; *see id.* at 90-170; *City & County of San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019). And the precedential slate would also continue to include, for example, the Second Circuit's opinion reaching a contrary preliminary conclusion in a case in which petitioners never tried to intervene. *See New York v. Dep't of Homeland Security*, 969 F.3d 42, 87 (2d Cir. 2020).

Under these circumstances, petitioners' concerns about leaving an opinion with which they disagree "on the books" (Pet. Br. 36) would not be sufficient to support mandatory or permissive intervention.

4. Petitioners' remaining arguments are unpersuasive

Petitioners also contend that intervention was warranted because of the "collusive nature" of the dismissal of the certiorari petition in No. 20-962, Pet. Br. 27, which sought review of the Ninth Circuit's judgment affirming the preliminary injunctions. Like the dissent below, they ask this Court to authorize intervention as a means of addressing "procedural gamesmanship." Pet. 18; *see* Pet. App. 28-40 (VanDyke, J., dissenting).

But petitioners never address this Court's Rule 46.1, which conditions "an order of dismissal" on "all parties fil[ing] with the Clerk an agreement in writing that a case be dismissed[.]" S. Ct. R. 46.1. The text of the Rule contemplates advanced "coordinat[ion]" (Pet. Br. 35) by the parties to obtain the necessary "agreement in writing." Here, after the federal government concluded that it would no longer pursue appellate review of judicial decisions invalidating or enjoining enforcement of the 2019 public charge rule, *see supra* pp. 8-9, the state respondents understandably decided that it would serve their interests and the interests of judicial efficiency to agree with the federal government as to the dismissal of its petition. There was nothing improper about that decision.

And for all the talk about a "coordinated[] and multi-court gambit," Pet. 2; *see* Pet. Br. 27, petitioners have acknowledged that their concerns are focused on "the Northern District of Illinois's nationwide vacatur"

of the 2019 public charge rule and DHS's subsequent removal of the rule from the Code of Federal Regulations in light of that vacatur. Pet. Br. 11. Those concerns should be addressed, if at all, through petitioners' ongoing attempts to intervene in the Illinois proceedings. *See supra* p. 13.

C. The Court Need Not Address the Novel Interpretation of Rule 24 Advanced by the Federal Respondents at the Petition Stage

In opposing certiorari, the federal respondents argued—for the first time in this case—that intervention was inappropriate because "the legal questions at issue do not implicate any substantive legal rights of States that petitioners can intervene to raise." U.S. Opp. 12. On "that understanding of intervention," *id.* at 13, a State would be precluded from intervening as a defendant under Rule 24 (as petitioners sought to do here) except where it "seeks to defend its own substantive legal rights in opposition to a claim in the pending action that could have been asserted against it," *id.* at 14. And a State apparently could not intervene as a plaintiff unless it could have brought a claim in the initial suit itself. *See id.* at 13. This case does not present an appropriate opportunity for the Court to address that novel theory. In any event, the theory is meritless.

1. The federal respondents did not raise this theory in the Ninth Circuit. When they opposed petitioners' motion to intervene in that court, they argued that "[n]either practical nor equitable considerations support permitting the States to belatedly intervene to defend the now-defunct Rule." J.A. 70. They discussed at length how the requirements of Federal Rule of Civil Procedure 24 applied to petitioners' motion, *see* J.A. 77-79—without ever suggesting to that court that

the Rule is limited in the manner suggested in their subsequent brief in opposition in this Court, *see* U.S. Opp. 12-17. As a result, the court of appeals never had an opportunity to consider the new theory in ruling on petitioners' motion. *Cf. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) ("Ours is 'a court of final review and not first view.'").

Indeed, very few lower courts have had an opportunity to pass on the theory. The federal government apparently first embraced it in a petition for a writ of certiorari filed in this Court in 2020, *see* Pet. 13-26, *United States v. Kane County*, No. 20-96 (July 24, 2020), *cert. denied*, 121 S. Ct. 1284 (2021), and has deployed it only sporadically since then. As a result, there are no reasoned lower-court decisions evaluating the theory. This Court often declines to consider an "issue of first impression" on the basis that "further percolation may assist [its] review." *E.g.*, *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1784 (2019) (Thomas, J., concurring). That is assuredly so here, where the issue is a proposal to upend the settled understanding of Rule 24 that has prevailed for more than half a century. *See infra* pp. 34-40.

And this case would be a particularly poor vehicle for entertaining the federal respondents' new interpretive theory because the theory does not matter to the outcome here: Whether petitioners' motion to intervene is evaluated under the settled understanding of Rule 24—which the federal respondents and every other litigant relied on below—or under the new theory, the motion was correctly denied. There is, accordingly, no need to evaluate the new theory in this case. *See generally PDK Labs. Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part

and concurring in the judgment) ("if it is not necessary to decide more, it is necessary not to decide more").

2. In any event, the theory that Rule 24 allows intervention as a defendant only if a claim in the suit "could have been asserted against" the putative intervenor (U.S. Opp. 14) is incorrect. It rests on a flawed reading of the Rule's text and this Court's precedents. And it would unduly constrain the States' ability to intervene to protect their practical interests—an ability that courts have repeatedly recognized over the decades, including in recent cases that have reached this Court.

a. As a textual matter, the federal respondents have pointed to Rule 24(c), which directs that "[a] motion to intervene . . . must . . . be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). They reason that Rule 24(c)'s requirement for a "pleading" setting out the "defense" a putative intervenor would assert if its motion is granted "accordingly limits intervention to circumstances where the intervenor seeks to defend its own substantive legal rights in opposition to a claim in the pending action that could have been asserted against it." U.S. Opp. 14.

But Rule 24(c) does not address the substantive standards governing intervention. It is a "notice and pleading require[ment]," Fed. R. Civ. P. 24(c), addressing the *procedure* for seeking intervention in a district court. A putative intervenor satisfies that pleading requirement by submitting a proposed complaint or answer in intervention that identifies the claim or defense it seeks to intervene to address. And Rule 24 plainly could not operate as intended if Rule 24(c)'s procedural requirement were read to impose a substantive requirement that a prospective intervenor

identify a claim in the original action that could have been asserted against it. For example, Rule 24(c) applies to all putative intervenors, including those given a "right to intervene by a federal statute." Fed. R. Civ. P. 24(a)(1), (b)(1)(A). But that category often includes parties who could not possibly have been sued in (or brought one of the claims in) the original action. *See, e.g.*, 28 U.S.C. § 2403(a) (granting the United States the right to intervene in "any action" in which the constitutionality of a federal statute is drawn into question, whether or not it could have been an original party).

Moreover, the provisions of Rule 24 that *do* provide substantive standards governing intervention, subdivisions (a) and (b), cannot be squared with the federal respondents' theory. Neither of those provisions categorically prohibits a movant from intervening as a defendant unless "a claim in the pending action . . . could have been asserted against it." U.S. Opp. 14. Indeed, the substantive provisions impose standards that are incompatible with that understanding. For example, Rule 24(a)(2) directs that a movant need only establish an "interest" in the litigation—not a "claim" or "defense." *Cf. Jones*, 348 F.3d at 1018. That provision also states that the required interest is one "relating to" the property or transaction at issue—a phrase that is "deliberately expansive." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). And it directs that the inquiry is a "practical" one, asking whether "disposing of the action may . . . impair or impede the movant's ability to protect its interest"—not a formal inquiry into whether a particular claim could have

been brought against (or by) the movant. Fed. R. Civ. P. 24(a)(2).[16]

While Rule 24(b)(1)(B) contemplates a movant that "has a claim or defense that shares with the main action a common question of law or fact," it does not require the movant to demonstrate that "a claim in the pending action . . . could have been asserted against it." U.S. Opp. 14. For that requirement, the federal respondents turn to Rule 8(b)(1)(A), *id.* at 13, which requires a *party*'s responsive pleading to "state in short and plain terms its defenses to each claim asserted against it." Fed. R. Civ. P. 8(b)(1)(A). Of course, that language does not appear in the provisions of Rule 24(b) governing permissive intervention, and Rule 8 does not purport to define the meaning of "defense" for purposes of every other provision of the Federal Rules of Civil Procedure.

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[16] In a certiorari petition filed by the federal government in a prior case—but not in the brief in opposition it filed in this one—the Solicitor General also argued that provisions of Rule 19 governing compulsory joinder "show that Rule 24(a)(2) requires that an intervenor be a proper party to the suit based on its own legal rights under substantive law." Pet. 19, *United States v. Kane County*, No. 20-96 (July 24, 2020); *see id.* at 19-21. As the respondents in that case explained, however, that argument is unpersuasive. Opp. 31-32, *United States v. Kane County*, No. 20-96 (Oct. 27, 2020). The two rules address different subjects; their text is not identical; they do not cross-reference each other; and although the advisory committee noted that Rule 24(a)(2) could be "seen to be a kind of counterpart to Rule 19(a)(2)(i)," it never stated that they impose the same substantive standards. Fed. R. Civ. P. 24 advisory committee's note (1966); *see also, e.g.*, *Smuck v. Hobson*, 408 F.2d 175, 178 (D.C. Cir. 1969) ("The occasions upon which a petitioner should be allowed to intervene under Rule 24 are not necessarily limited to those situations when the trial court should compel him to become a party under Rule 19.").

The other textual arguments the federal respondents have raised in support of this theory are similarly unpersuasive. The federal respondents highlight "several enumerated" provisions of the rule that "afford privileged status to States" for intervening under certain circumstances. U.S. Opp. 16 (quoting Fed. R. Civ. P. 24(a)(1), (b)(2)). It is of course correct that those provisions "ensure that States are able to control the defense of their own statutes and regulations." *Id.* (emphasis omitted). But the federal respondents are quite mistaken if they mean to suggest that those provisions demonstrate that a State may not "intervene in defense of federal statutes or regulations administered by federal officers and agencies" (*id.* at 16) unless "a claim in the pending action . . . could have been asserted against" the State (*id.* at 14). Like other parts of Rule 24, those provisions were not intended to offer "a comprehensive inventory of the allowable instances for intervention." *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502, 505 (1941). To the contrary, Rule 24(b)(2) was added to "avoid[] exclusionary constructions of the rule," Fed. R. Civ. P. 24 advisory committee's note (1946), with a view towards "liberally" authorizing intervention "to governmental agencies and officers seeking to speak for the public interest," Wright & Miller, *supra*, § 1912 at p. 472 & n.10 (collecting cases).

b. The federal respondents' theory is also inconsistent with this Court's precedents. In *Cascade Natural Gas Corp.*, for example, the Court held that Cascade was entitled to intervene under Rule 24(a)(2) to protect "its interests," 386 U.S. at 136, after considering the practical effects of a proposed merger that would reduce competition in the market for natural gas, *see id.* at 135. The Court did not examine whether Cascade could have brought the original action itself.

Similarly, in *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972), the Court considered whether a union member could intervene in a suit brought by the Secretary of Labor to set aside a union election. The federal statute at issue gave the Secretary the "'exclusive'" right to challenge the election, *id.* at 531, but the Court nevertheless held that the union member could intervene as a plaintiff under Rule 24(a)(2) based on his "interest in the proceedings," *id.* at 538; *see id.* at 538-539. As the United States recently told this Court, *Trbovich* establishes that "a person [may] intervene as a plaintiff even when no statute authorized him to initiate his own cause of action[.]" U.S. Br. at 14 n.2, *Town of Chester v. Laroe Estates, Inc.*, No. 16-605 (Mar. 3, 2017).

With respect to permissive intervention, this Court's only decision construing the language in Rule 24(b)(1)(B) is also at odds with the federal respondents' new theory. In *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 459-460 (1940), the Court held that the lower courts should have allowed the SEC to intervene in a bankruptcy case to argue that the litigation was subject to a separate chapter of the bankruptcy code. The Court concluded that the SEC maintained a "sufficient interest in the maintenance of its statutory authority and the performance of its public duties[.]" *Id.* at 460. That interest was a "public one," to maintain governmental "authority" and to promote government "policy," and the Court reasoned that "the 'claim or defense' of the Commission founded upon this interest" was "within the requirement of Rule 24." *Id.* In other words, although the agency "ha[d] no claim or defense that could be asserted in a separate action," the Court allowed it "to intervene to represent the public interest in a particular contro-

versy." Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721, 734 (1968). The understanding of Rule 24(b) reflected in *SEC Realty* cannot be squared with the interpretation that the federal respondents advanced at the petition stage in this case.

In fact, it appears that applying the federal respondents' theory would have prohibited the petitioners' intervention in a number of cases decided by this Court in recent years. *See, e.g.*, *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020) (petitioner was a religious congregation that intervened to defend regulation against suit under APA, which authorizes suits only against the federal government); *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019) (petitioner was a trade association that intervened to defend against suit under the Freedom of Information Act, which also authorizes suits only against the federal government); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010) (petitioner was a corporation that intervened in the remedial phase of an APA lawsuit challenging a federal agency's decision to deregulate a certain genetically engineered crop).[17]

[17] The federal respondents have suggested that, "[i]n some circumstances," "third parties may be able to intervene as defendants in an APA action in which a plaintiff alleges that the government acted unlawfully in granting the third party [legal] rights." U.S. Opp. 15 n.4. But they have not explained how that proposed exception could be reconciled with their position that the third party must identify "a claim in the pending action that could have been asserted *against it*. Fed. R. Civ. P. 24(c)." U.S. Opp. 14 (emphasis added).

The federal respondents have argued that *Donaldson v. United States*, 400 U.S. 517 (1971), "confirms" their narrow reading of Rule 24. U.S. Opp. 14. That argument is unpersuasive. To begin with, *Donaldson* arose in an unusual posture: a taxpayer's attempt to intervene in a summary proceeding to enforce an internal revenue summons. *See* 400 U.S. at 518-522, 523-525. The Court noted that the Federal Rules of Civil Procedure did not apply with full force in that kind of proceeding. *See id.* at 528-529; *see also* Wright & Miller, *supra*, § 1908.1 at p. 307 (that consideration "greatly colored" the Court's decision). And when the Court turned to the application of those Rules, it reasoned that Rule 24(a)(2) requires only "a significantly protectable interest," which it found lacking under the particular circumstances of the case. *Donaldson*, 400 U.S. at 531; *see also Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 315 (1985).[18] That approach is consistent with the "practical" approach that is compelled by Rule 24. Fed. R. Civ. P. 24(a)(2); *see id.* advisory committee's note (1966).

* * *

Consistent with precedent, text, and the policies underlying Rule 24, courts have long recognized that "Rule 24 should be construed liberally." *Nat'l Parks Conserv. Ass'n v. EPA*, 759 F.3d 969, 975 (8th Cir. 2014); *see also, e.g.*, *Brumfield*, 749 F.3d at 341; *supra* pp. 15-19. To be sure, Rule 24 sets limits on the ability

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[18] In reaching that conclusion, the Court noted that "the taxpayer, to the extent that he has such a protectable interest," may assert it "in due course at its proper place in any subsequent trial." *Donaldson*, 400 U.S. at 531. The Court also noted that if it were to allow the taxpayer "to intervene . . . , we would unwarrantedly cast doubt upon and stultify the [Internal Revenue] Service's every investigatory move." *Id.*

to intervene, and this case illustrates some of those limits: petitioners are not entitled to intervene in this case because there is now no practical sense in which this proceeding could impair the interests they seek to protect. *See supra* pp. 20-32. But this case does not present any proper opportunity to consider or adopt the new theory of intervention suggested by the federal respondents at the petition stage. If the federal respondents wish to effect a sea change in the standards that govern intervention, they should present their ideas to the Committee on Rules of Practice and Procedure, *cf.* 28 U.S.C. §§ 2702-2703, rather than attempting to insert them (belatedly) into this litigation.

CONCLUSION

The court of appeals' order denying the motion to intervene should be affirmed.

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