No. 20M81

IN THE SUPREME COURT OF THE UNITED STATES

THE STATE OF ARIZONA, ET AL., MOVANTS,

v.

CITY AND COUNTY OF SAN FRANCISCO, ET AL.

ON MOTION FOR LEAVE TO INTERVENE TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FEDERAL RESPONDENTS' OPPOSITION TO THE MOTION FOR LEAVE TO INTERVENE

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The Acting Solicitor General, on behalf of Secretary of Homeland Security Alejandro N. Mayorkas and the other federal respondents, respectfully files this response in opposition to movants' motion for leave to intervene in order to petition for a writ of certiorari seeking review of the Ninth Circuit's December 2, 2020 decision upholding preliminary injunctions against enforcement of a final rule adopted by the U.S. Department of Homeland Security (DHS) in 2019.

The motion should be denied. Congress has provided that only a "party" to a "[c]ase[] in the courts of appeals" may petition

for a writ of certiorari to review the court of appeals' judgment. 28 U.S.C. 1254(1). Movants, however, were never "part[ies]" in the court of appeals. See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 30 (1993) (per curiam) (observing that where "the Court of Appeals denied [a litigant's] motion for intervention, [the litigant] is not a party to th[at] particular civil case"). And while this Court has on rare occasions allowed litigants who were the real parties in interest in the court of appeals to intervene in order to file petitions for writs of certiorari even though they had never formally been made parties, movants do not -- and could not plausibly -- contend that they are the real parties in interest in this challenge to a federal immigration regulation. Allowing movants to petition for a writ of certiorari to challenge the Ninth Circuit's preliminary-injunction decision here would thus read the "party" limitation in Section 1254(1) out of the statute entirely.

Even if movants could be granted leave to file their proposed petition under Section 1254(1), moreover, denial of the motion would be appropriate because the underlying appeal is moot. As movants acknowledge (Mot. 4), the DHS rule addressed by the Ninth Circuit has already been vacated in its entirety in separate litigation; that decision has become final; and the rule has been removed from the Code of Federal Regulations. The preliminary injunctions in this case accordingly have no further relevance. The Court should not grant petitioners' highly unusual

intervention motion here just to consider whether to grant certiorari to review the Ninth Circuit's decision in an appeal that is no longer live.

Contrary to movants' strident rhetoric (Mot. 9-12), none of this means that movants would be otherwise unable to participate in the process of determining what framework will be used in applying the public-charge inadmissibility provision. See 8 U.S.C. 1182(a)(4)(A). DHS intends to engage in further rulemaking action with respect to the public-charge provision this year. Movants will be free to participate in that process, and may take whatever additional steps they deem necessary if they are dissatisfied with the policies that result at its conclusion. It is that tried-and-true path, not the novel and counter-statutory path envisioned in their present motion, that movants should follow.

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., provides that an alien is "inadmissible" if, "in the opinion of the [Secretary of Homeland Security] at the time of application for admission or adjustment of status, [the alien] is likely at any time to become a public charge." 8 U.S.C. 1182(a)(4)(A). In August 2019, DHS adopted a rule under which DHS would treat certain applicants for admission or adjustment of status as likely to become "public charge[s]" for purposes of that provision if it determined that the applicants were likely to

receive specified public benefits, including participation in Medicaid or the Supplemental Nutrition Assistance Program, for more than 12 months (in aggregate) within any 36-month period. See 84 Fed. Reg. 41,292, 41,501 (Aug. 14, 2019) (2019 Rule or Rule). The 2019 Rule represented a significant departure from the definition and standards that U.S. Citizenship and Immigration Services (USCIS) had previously used in applying the public-charge ground of inadmissibility.

2. The 2019 Rule generated extensive litigation across the United States at all levels of the federal judiciary. Plaintiffs who had opposed adoption of the Rule (including 21 States and numerous local governments and nongovernmental organizations) filed suits in five different district courts in four different circuits alleging that the Rule was unlawful on numerous grounds.

a. All five district courts concluded that the 2019 Rule was likely unlawful, and they each entered preliminary injunctions in October 2019 barring the Rule from taking effect. See Make the Road N.Y. v. Cuccinelli, 419 F. Supp. 3d 647 (S.D.N.Y. 2019); New York v. DHS, 408 F. Supp. 3d 334 (S.D.N.Y. 2019); Cook County v. McAleenan, 417 F. Supp. 3d 1008 (N.D. Ill. 2019); Casa de Maryland, Inc. v. Trump, 414 F. Supp. 3d 760 (D. Md. 2019); Proposed Pet. App. 171-307 (N.D. Cal. 2019); Proposed Pet. App. 308-368 (E.D. Wash. 2019).[1]

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[1] In this response, "Proposed Pet. App." refers to the appendix to the proposed petition for a writ of certiorari

b. The government sought stays pending appeal of those preliminary injunctions. The Fourth and Ninth Circuits granted stays of the preliminary injunctions entered by district courts in their jurisdictions, see Proposed Pet. App. 90-170; Order, Casa de Maryland, Inc. v. Trump, No. 19-2222 (4th Cir. Dec. 9, 2019), while the Second and Seventh Circuits declined to do so, see New York v. DHS, Nos. 19-3591 & 19-3595, 2020 WL 95815 (2d Cir. Jan. 8, 2020); Order, Cook County v. Wolf, No. 19-3169 (7th Cir. Dec. 23, 2020). This Court subsequently granted the government's motions for stays pending appeal of the preliminary injunctions entered in New York and Illinois. See Wolf v. Cook County, 140 S. Ct. 681 (2020); DHS v. New York, 140 S. Ct. 599 (2020).

c. Following this Court's entry of a stay pending appeal in the Northern District of Illinois case, DHS began implementing the Rule for the first time in February 2020. See New York v. DHS, 969 F.3d 42, 58 (2d Cir. 2020). The government's appeals of the preliminary injunctions proceeded, and the Second, Seventh, and Ninth Circuits affirmed the preliminary injunctions entered in their respective jurisdictions. See id. at 50, 88-89; Cook County v. Wolf, 962 F.3d 208 (7th Cir. 2020); Proposed Pet. App. 41-89. The government filed petitions for writs of certiorari seeking this Court's review of all three decisions. See DHS v. New York, No. 20-449 (filed Oct. 7, 2020); Wolf v. Cook County, No. 20-450

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submitted with the motion for leave to intervene, and "Proposed Pet." refers to the proposed petition itself.

(filed Oct. 7, 2020); USCIS v. City & County of San Francisco, No. 20-962 (filed Jan. 21, 2020).

A divided panel of the Fourth Circuit initially reversed the preliminary injunction entered by the District of Maryland, see Casa de Maryland, Inc. v. Trump, 971 F.3d 220 (2020), but the en banc Fourth Circuit subsequently vacated that decision and set the case for re-argument, see 981 F.3d 311 (2020).

d. In November 2020, the District Court for the Northern District of Illinois entered a partial final judgment, which vacated the 2019 Rule on a nationwide basis under the Administrative Procedure Act (APA), 5 U.S.C. 701 et seq. See Cook County v. Wolf, No. 19-C-6334, 2020 WL 6393005 (Nov. 2, 2020). Applying the Seventh Circuit's earlier decision affirming the preliminary injunction, the district court concluded that the 2019 Rule did not represent a reasonable interpretation of the INA and that DHS had acted arbitrarily and capriciously in adopting it. See id. at *1-*2.

The Seventh Circuit thereafter granted a stay pending appeal of the partial final judgment, and it placed the appeal in abeyance pending the disposition of the government's petitions for writs of certiorari in DHS v. New York, No. 20-449, and Wolf v. Cook County, No. 20-450. See 20-3150 C.A. Doc. 21 (7th Cir. Nov. 19, 2020).

3. On February 2, 2021, after the change in Administration, President Biden directed the Secretary of Homeland Security, along with the Attorney General, the Secretary of State, and other

relevant agency heads, to "review all agency actions related to implementation of the public charge ground of inadmissibility * * * and the related ground of deportability." Exec. Order No. 14,012, § 4, 86 Fed. Reg. 8277, 8278 (Feb. 5, 2021).

4. On February 22, 2021, this Court granted the government's petition for a writ of certiorari in DHS v. New York, No. 20-449, in order to review the preliminary injunctions issued in October 2019 by the District Court for the Southern District of New York. Approximately two weeks later, DHS announced that the government had determined that continuing to defend the 2019 Rule before this Court and in the lower courts would not be in the public interest or an efficient use of government resources. See DHS, DHS Statement on Litigation Related to the Public Charge Ground of Inadmissibility (Mar. 9, 2021), https://www.dhs.gov/news/2021/03/09/dhs-statement-litigation-related-public-charge-ground-inadmissibility. Consistent with that determination, on March 9, 2021, the government filed stipulations with the Clerk of this Court dismissing DHS v. New York, No. 20-449; Mayorkas v. Cook County, No. 20-450; and USCIS v. City & County of San Francisco, No. 20-962.

The government likewise filed motions to dismiss active public-charge-related appeals in the lower courts, including its appeal of the partial final judgment entered in the Northern District of Illinois vacating the 2019 Rule and its appeal of the preliminary injunction entered by the District of Maryland. See

20-3150 C.A. Doc. 23 (7th Cir. Mar. 9, 2021); 19-2222 C.A. Doc. 210 (4th Cir. Mar. 9, 2021). The Seventh and Fourth Circuits granted the government's motions and dismissed the appeals. See 20-3150 C.A. Doc. 24-1 (7th Cir. Mar. 9, 2021); 19-2222 C.A. Doc. 211 (4th Cir. Mar. 11, 2021). Because the vacatur entered by the Northern District of Illinois had become final, DHS published a rule that removed the 2019 Rule from the Code of Federal Regulations. DHS, Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. 14,221, 14,221 (Mar. 15, 2021).

5. Following the government's dismissal of its pending cases before this Court and its active appeals in the lower courts, movants -- a group of States that had not previously participated in any of the above-described litigation -- filed a series of motions attempting to intervene in order to revive the litigation about the validity of the 2019 Rule.

a. Of most direct relevance here, movants sought leave to intervene in the Ninth Circuit appeal of the preliminary injunctions entered in Washington and California. See 19-17213 C.A. Docs. 143 (Mar. 10, 2021), 145 (Mar. 11, 2021), 152 (Mar. 29, 2021). (Although the Ninth Circuit had affirmed those preliminary injunctions in December 2020, the appeal remained pending before the Ninth Circuit because the Ninth Circuit had stayed the issuance of its mandate in January 2021. See 19-17213 C.A. Doc. 139 (Jan. 20, 2021).) The Ninth Circuit denied movants' motion to intervene

on April 8, 2021, over a dissent by Judge VanDyke. See Proposed Pet. App. 1-40.

b. Similar groups of States filed motions to recall the mandate and to intervene in the Fourth and Seventh Circuits. See 19-2222 C.A. Docs. 213, 214, 215 (4th Cir. Mar. 11, 2021); 20-3150 C.A. Doc. 25 (7th Cir. Mar. 11, 2021). Both courts of appeals denied the motions without noted dissent. See 19-2222 C.A. Doc. 216 (4th Cir. Mar. 18, 2021); 20-3150 C.A. Doc. 26 (7th Cir. Mar. 15, 2021).

c. The States that had sought to intervene in the Seventh Circuit thereafter filed an application for a stay in this Court, which this Court denied. See Texas v. Cook County, No. 20A150, 2021 WL 1602614 (Apr. 26, 2021). This Court's order noted that it was "without prejudice to the States raising this and other arguments before the District Court, whether in a motion for intervention or otherwise." Id. at *1. Those States have since filed a motion for relief from judgment under Federal Rule of Civil Procedure 60(b) as well as a motion to intervene in the district court. See 19-cv-6334 D. Ct. Docs. 256, 257, 259, 260 (N.D. Ill. May 12, 2021). Those motions remain pending.

6. On April 30, 2021, 149 days after the Ninth Circuit's December 2, 2020 decision affirming the preliminary injunctions entered against the Rule in California and Washington, movants submitted to the Clerk's Office of this Court a combined "Motion

for Leave to Intervene and Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit." That submission did not comply with this Court's Rules and was never placed on the docket. See Sup. Ct. R. 12.4 ("A petition for a writ of certiorari may not be joined with any other pleading, except that any motion for leave to proceed in forma pauperis shall be attached."). Movants thereafter submitted the present motion on May 6, 2021, seeking leave "to intervene in order to file a petition for a writ of certiorari to review the decision of the Ninth Circuit affirming a preliminary injunction enjoining the Rule." Mot. 2. The same day, movants also submitted a proposed petition for a writ of certiorari.

ARGUMENT

Movants seek leave "to intervene in order to file a petition for a writ of certiorari to review the [December 2, 2020] decision of the Ninth Circuit affirming a preliminary injunction enjoining the Rule." Mot. 2. Their motion should be denied. The applicable jurisdictional statute permits only a "party" to the "[c]ase[] in the court[] of appeals" to file a petition for a writ of certiorari. 28 U.S.C. 1254(1). Movants do not presently meet that statutory requirement (as the filing of their motion itself establishes). Nor would successful intervention in this Court make them parties "in the court[] of appeals." Ibid. Moreover, even if Section 1254(1) did not foreclose movants' request, denial of the motion would still be appropriate because movants themselves

recognize that they are seeking to intervene in a case that has become moot.

A. MOVANTS ARE NOT "PARTIES" ELIGIBLE TO PETITION FOR CERTIORARI UNDER 28 U.S.C. 1254(1) WITH RESPECT TO THE NINTH CIRCUIT'S PRELIMINARY-INJUNCTION DECISION

1. In defining this Court's appellate jurisdiction, see U.S. Const. Art. III, § 2, Congress has authorized certiorari review under Section 1254(1) only at the request of a "party" to a "[c]ase[] in the courts of appeals." 28 U.S.C. 1254(1). Movants, however, were never "part[ies]" in the court of appeals. Ibid. At the time of the court of appeals' December 2, 2020 decision upholding the preliminary injunctions against the 2019 Rule, movants had never filed anything in this or any other public-charge-related litigation, and while they later tried to become parties, that effort was unsuccessful. See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 30 (1993) (per curiam) (stating that where "the Court of Appeals denied [a litigant's] motion for intervention, [the litigant] is not a party to th[at] particular civil case"). Under a straightforward reading of Section 1254(1), therefore, movants are not eligible "to file a petition for a writ of certiorari to review the decision of the Ninth Circuit affirming [the] preliminary injunction[s] enjoining the Rule," Mot. 2, because they were never "part[ies]" to the "[c]ase[] in the court[] of appeals," 28 U.S.C. 1254(1).

2. Movants' contrary arguments lack merit.

a. Movants first contend that this Court may grant them leave to intervene and seek review of a lower-court decision to which they were not parties "pursuant to [this Court's] 'general equity powers.'" Mot. 6 (quoting United States v. Louisiana, 354 U.S. 515, 516 (1957) (per curiam)). The only case they cite for that proposition, however, is one in which this Court was already exercising original jurisdiction over an existing case and simply permitted other States to intervene in that pending proceeding. See United States v. Louisiana, 354 U.S. at 515-516. It thus does not speak at all to movants' eligibility to petition for a writ of certiorari under 28 U.S.C. 1254(1). Congress has adopted express limitations on this Court's appellate jurisdiction in Section 1254(1), and United States v. Louisiana provides movants with no basis for circumventing them. See U.S. Const. Art. III, § 2, Cl. 2 (providing that this "Court shall have appellate jurisdiction * * * with such Exceptions, and under such regulations, as the Congress shall make").

b. Movants next assert (Mot. 6, 12) that they may be treated as "part[ies]" for purposes of 28 U.S.C. 1254(1) under this Court's decisions in Pyramid Lake Paiute Tribe of Indians v. Truckee-Carson Irrigation District, 464 U.S. 863 (1983); Hunter v. Ohio ex rel. Miller, 396 U.S. 879 (1969); and Banks v. Chicago Grain Trimmers Ass'n, 389 U.S. 813 (1967). None of those cases, however, supports an interpretation of "party" expansive enough to reach

movants, whose only submissions in the court of appeals related to their unsuccessful attempt to intervene months after the court had already decided the appeal.

Unlike movants, the petitioner in each of the three cases movants invoke was the real party in interest in the litigation: a benefits claimant seeking to defend her administrative workers' compensation award in Banks; a candidate for election seeking to remain on the ballot in Hunter; and an Indian Tribe seeking to defend its water rights in Pyramid Lake Paiute Tribe. See Banks v. Chicago Grain Trimmers Ass'n, 390 U.S. 459, 460-461 (1968); Pet. at 6-9, Hunter, supra (No. 69-654); U.S. Br. at 6-10, Pyramid Lake Paiute Tribe, supra (No. 82-1723) (describing background of Tribe's intervention motion). The petitioners had not been formal parties in the lower courts only because, in each case, the government had been assigned special responsibility to represent their individualized interests. See Stephen M. Shapiro et al., Supreme Court Practice 2.5 at 2-22 & n.43 (11th ed. 2019) (discussing Banks and Hunter); U.S. Br. at 13, Pyramid Lake Paiute Tribe, supra (No. 82-1723) (supporting intervention on the ground that "the Tribe will be bound by the holding on the contract limitation issue in this case by virtue of the United States' appearance as a party") (citing Nevada v. United States, 463 U.S. 110 (1983)); see also Nevada, 463 U.S. at 135 (discussing the United States' participation in litigation as "a party * * * acting as a representative for the Reservation's interests").

As the United States explained in Banks, that unusual posture -- in which the party seeking to petition had been "[i]n a practical sense * * * the real party in interest in the judicial proceedings [below] even if not formally named" -- meant that "it would not appear unreasonable to deem [the] petitioner a party below for purposes of entitlement to file a petition for a writ of certiorari." Supreme Court Practice 2.5 at 2-22 n.43 (quoting U.S. Mem. at 2-3, Banks, supra (No. 67-59)). Cf. Black's Law Dictionary 1351 (11th ed. 2019) ("For purposes of res judicata, a party to a lawsuit is a person who has been named as a party and has a right to control the lawsuit either personally, or, if not fully competent, through someone appointed to protect the person's interests.").

Movants cannot make any comparable claim here. They were not, and do not claim to have been, the real parties in interest in the court of appeals or either district court. They have no role in administering the INA or making admissibility and adjustment-of-status determinations, and the court of appeals' decision will not benefit or burden them in any direct, particularized way. Nor will that judgment have res judicata effect against them in subsequent litigation.

Instead, movants assert only that they have a more general interest in the underlying subject matter of the litigation, contending that continued enforcement of the 2019 Rule might have reduced their future expenditures in public-benefits programs.

See Mot. 7-9. It is far from clear that that is correct: while DHS anticipated that the 2019 Rule would have a material effect on benefits payments by States over time, actual experience during the period that the 2019 Rule was in effect showed that it made a difference in only a miniscule number of immigration adjudications -- just five of the roughly 47,500 applications for adjustment of status to which the Rule was applied. See Gov't Resp. Br. at 23-24, Texas v. Cook County, No. 20A150 (filed Apr. 9, 2021) (summarizing information provided by DHS).[2] But even assuming that the 2019 Rule would have a material economic impact on movants, that does not make movants the real parties in interest -- let alone actual parties -- in all litigation implicating the Rule.

To hold otherwise would mean that whenever a federal court of appeals heard a challenge to a state or federal law, anyone whose finances might be implicated by the court of appeals' decision could file a petition for a writ of certiorari seeking this Court's review, regardless of whether they had been a formal party (or even participated) in the litigation to that point. That is not a plausible understanding of the text of 28 U.S.C. 1254(1).

c. Finally, movants contend that "their prior attempt to intervene in the Ninth Circuit qualifies them as 'part[ies]' for purposes of 28 U.S.C. § 1254(1)." Mot. 12 (brackets in original).

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[2] Movants do not address that real-world evidence when speculating about the budgetary effects of the 2019 Rule, even though all but one of them (Missouri) joined in the application for a stay in Texas v. Cook County, supra.

That, too, is incorrect, at least insofar as movants seek leave to petition for a writ of certiorari to review the court of appeals' December 2, 2020 decision upholding the preliminary injunctions against the 2019 Rule. As discussed above, see p. 11, supra, merely filing an unsuccessful motion to intervene does not qualify a litigant as a "party" who may, under Section 1254(1), seek review of the merits of a court of appeals' decision on issues other than intervention. Indeed, this Court has stated that where a "Court of Appeals denied [a litigant's] motion for intervention, [the litigant] is not a party to th[at] particular civil case." Izumi Seimitsu Kogyo Kabushiki Kaisha, 510 U.S. at 30 (emphasis added). Movants' argument (Mot. 13-15) that they satisfy the requirements of Federal Rule of Civil Procedure 24, and thus should have been permitted to intervene in March 2021, is thus beside the point in assessing whether movants ever became "part[ies]" eligible to petition for a writ of certiorari to review the Ninth Circuit's December 2, 2020 decision. 28 U.S.C. 1254(1).

In a handful of cases, this Court has held or suggested that "[o]ne who has been denied the right to intervene in a case in a court of appeals may petition for certiorari to review that ruling" -- i.e., the intervention ruling. Izumi Seimitsu Kogyo Kabushiki Kaisha, 510 U.S. at 30 (citing International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Scofield, 382 U.S. 205, 208-209 (1965)) (emphasis added). Those cases have made clear, however, that "such a putative intervenor cannot petition

for review of any other aspect of the judgment below." Supreme Court Practice 6.16(c) at 6-62 (collecting cases); see, e.g., Scofield, 382 U.S. at 209 (observing that while the Court could review "the orders denying intervention," the unsuccessful intervenor "would not have been entitled to file a petition to review a judgment on the merits"); cf. Cameron v. EMW Women's Surgical Center, P.S.C., No. 20-601 (Mar. 29, 2021) (granting a writ of certiorari on the question whether intervention should have been allowed, but not on whether the court of appeals' judgment on the merits should be vacated). Accordingly, the fact that movants filed an unsuccessful motion for leave to intervene in the court of appeals provides no basis for granting them leave to petition for a writ of certiorari, as they propose, to review "the Ninth Circuit's [preliminary-injunction decision] and the lawfulness of the Rule." Mot. 7.[3]

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[3] Movants cursorily assert in a footnote that "[t]he Ninth Circuit's denial of intervention was erroneous, and independently warrants review under Rule 10," and state that "[a] petition for certiorari on that question will also be filed at the same time as this motion should the Court prefer to address the intervention issue in that posture." Mot. 6 n.7. That statement may refer to the proposed petition, which focuses primarily on the court of appeals' December 2, 2020 judgment but also asserts that "[i]f this Court denies the Petitioning States' separate motion to intervene, the Court should grant cert. from the Ninth Circuit's denial of the motion to intervene." Proposed Pet. 15. But granting movants' present motion is unnecessary to permit them to seek certiorari to review the court of appeals' intervention decision. In fact, on May 10, 2021, movants' counsel of record sent a letter to the Clerk of this Court clarifying footnote 7 of their motion. That letter "acknowledge[s]" that, if the motion to intervene is denied by this Court, movants would "be required to timely file an independent petition" for a writ of certiorari in

B. MOVANTS SEEK TO INTERVENE IN AN APPEAL THAT HAS ALREADY BECOME MOOT

Even if movants were (or could be made) eligible to petition for a writ of certiorari to review the Ninth Circuit's December 2, 2020 decision, allowing them to intervene would be unwarranted because any dispute over the preliminary injunctions at issue in this case is moot.

1. The court of appeals' decision concerned preliminary injunctions that temporarily barred DHS from enforcing the 2019 Rule. See Proposed Pet. App. 58, 65-66. But as movants acknowledge (Mot. 4), a district court in separate litigation has since "vacat[ed] the Rule in its entirety," that court's judgment has become final, and the Rule has accordingly been removed from the Code of Federal Regulations. The preliminary injunctions that movants seek to challenge consequently have no ongoing real-world effect.

2. Movants do not dispute that their proposed petition asks this Court to review a preliminary-injunction appeal that has already become moot. Indeed, their proposed petition affirmatively contends that the case is moot. See Proposed Pet. 28-29. Movants do not attempt to explain how, in light of that mootness, this Court could properly adjudicate the substantive question of "the lawfulness of the Rule" to which their proposed petition would be directed. Mot. 7.

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order to seek review of "the question of the Ninth Circuit's denial of intervention."

Movants' failure to address that issue provides an additional reason to deny their motion. This Court has allowed intervention of the sort movants seek only in "rare" and "extraordinary" cases, Supreme Court Practice 6.16(c) at 6-62, and should not expand its use in a case, like this one, where doing so would not even permit review of the judgment in question.

3. Movants' proposed petition suggests that the Court could, in the alternative, grant their petition and "vacate the decision below as moot under" United States v. Munsingwear, Inc., 340 U.S. 36 (1950). Proposed Pet. 28 (capitalization altered; emphasis omitted). Granting the motion, however, would not enable that disposition. For the reasons already discussed, movants are not parties who may file a petition for a writ of certiorari under Section 1254(1), and cannot be made such parties through their present intervention motion in this Court. Accordingly, this case presents no occasion to apply Munsingwear in the fashion movants suggest. See Karcher v. May, 484 U.S. 72, 81-83 (1987) (declining to apply Munsingwear at the request of litigants who the Court determined were not "'parties' entitled to appeal the Court of Appeals' judgment under 28 U. S. C. §1254(2)").

CONCLUSION

The motion for leave to file a petition for a writ of certiorari should be denied.

Respectfully submitted.

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