No. _____

IN THE

Supreme Court of the United States

THE STATE OF KANSAS, ET AL.,
Petitioners,

v.

ALEJANDRO MAYORKAS, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents the same question on which this Court granted review in *Arizona v. City & County of San Francisco*, No. 20-1775, and *Arizona v. Mayorkas*, No. 21-592. In both cases, this Court was ultimately unable to resolve the question of whether the federal government can implement rules by acquiescing to collusive "settlements" in litigation. The Court granted certiorari then to decide whether States could intervene and oppose these "sue and settle" arrangements.

Here, the federal government originally, and vigorously, defended its Circumvention of Lawful Pathways rule against challenges from various interest organizations. It did so at the district court, and it did so in the Ninth Circuit. Then came the "surprising switcheroo": The federal government "gave up its defense of the rule and entered into settlement negotiations." App.18, 21 (VanDyke, J., dissenting). Petitioners promptly sought intervention to protect their interests in the Rule by participating in these settlement negotiations. In a 2-1 decision, the Ninth Circuit denied intervention, setting the stage for yet another "rulemaking-by-collective-acquiescence." *Arizona v. City & Cnty. of S.F.*, 596 U.S. 763, 766 (2022) (Roberts, C.J., concurring) (citation omitted).

The question presented is:

Did the Ninth Circuit err when it denied States with sufficient interests the ability to intervene as defendants after the federal government stopped defending its own rule.

PARTIES TO THE PROCEEDING

Petitioners are the State of Kansas, the State of Alabama, the State of Georgia, the State of Louisiana, and the State of West Virginia.

Respondents (plaintiffs-appellees below) are East Bay Sanctuary Covenant, Central American Resource Center, Tahirih Justice Center, National Center for Lesbian Rights, Immigrant Defenders Law Center, and American Gateways. Respondents (defendants-appellants below) are Joseph R. Biden, President of the United States; Merrick B. Garland, Attorney General; United States Department of Justice; David Neal; Executive Office for Immigration Review; Alejandro N. Mayorkas; U.S. Department of Homeland Security; Ur M. Jaddou; United States Citizenship and Immigration Services; and Troy A. Miller; United States Customs and Border Protection.

STATEMENT OF RELATED PROCEEDINGS

East Bay Sanctuary Covenant, et al. v. Biden, et al., No. 18-cv-06810-JST (N.D. Cal.) (order granting the plaintiffs' motion for summary judgment, issued July 25, 2023).

East Bay Sanctuary Covenant, et al. v. Biden, et al., No. 23-16032 (9th Cir.) (order granting motion to place appeal in abeyance, issued February 21, 2024).

East Bay Sanctuary Covenant, et al. v. Biden, et al., No. 23-16032 (9th Cir.) (order denying motion to intervene, issued May 22, 2024).

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PETITION FOR WRIT OF CERTIORARI

The State of Kansas, the State of Alabama, the State of Georgia, the State of Louisiana, and the State of West Virginia respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The Ninth Circuit's opinion is reported at 102 F.4th 996 and reproduced at App.1–28.

JURISDICTION

The Ninth Circuit issued its opinion on May 22, 2024. App.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Legal and Factual Background.

1. *Arizona v. City & County of San Francisco.*

The story of this case begins with a different one. In 2019, the Department of Homeland Security (DHS) promulgated a regulation known as the Public Charge rule, interpreting the statutory term "public charge" to implement federal immigration law. *See Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41292 (Aug. 14, 2019). When several parties sued to challenge the rule in courts across the country, the federal government defended it. And when multiple lower courts found the rule unlawful, the federal government appealed those decisions. Yet after a change in administrations, the federal government reversed course and voluntarily dismissed those appeals. In

effect, the federal government's strategic surrender left in place the relief already entered, including a nationwide injunction by the Northern District of Illinois. DHS then repealed the rule without notice and comment.

One day after the federal government dismissed its petition for a writ of certiorari in the Public Charge case, a group of thirteen states moved to intervene in the Ninth Circuit to defend the rule. The Ninth Circuit denied the motion, and the States petitioned this Court for review. This Court granted review to consider "[w]hether States with interests should be permitted to intervene to defend a rule when the United States ceases to defend." Petition for a Writ of Certiorari, *Arizona v. City & Cnty. of S.F.*, No. 20-1775 (U.S. June 18, 2021); *see Arizona v. City & Cnty. of S.F.*, 142 S. Ct. 417 (2021) (granting petition as to question one). Four months after oral argument, however, this Court dismissed the writ of certiorari as improvidently granted. *Arizona v. City & Cnty. of S.F., Cal.*, 596 U.S. 763 (2022).

To give some color to the dismissal, the Chief Justice authored a concurring opinion, joined by Justices Thomas, Alito, and Gorsuch. The Chief Justice explained that the government's "maneuvers"—leveraging a final judgment vacating the rule nationwide as a basis to immediately repeal the rule without using the required notice-and-comment procedure—"raise[d] a host of important questions." *Id.* at 765–66 (C.J., Roberts, concurring). Though the "most fundamental" question was whether administrative law principles blessed these tactics, "bound up in that inquiry [we]re a great many issues beyond the question of appellate intervention on which [this Court]

granted certiorari." *Id.* at 766. Given these likely distractions, the Chief Justice concluded: "It has become clear that this mare's nest could stand in the way of our reaching the question presented on which we granted certiorari, or at the very least, complicate our resolution of that question." *Id.* at 766.

Left for another day, therefore, was whether the States can jump into a case to prevent the federal government from getting away with its "rulemaking-by-collective-acquiescence." *Id.* (quoting *City and Cnty. of S.F. v. U.S. Citizenship and Immigr. Servs.*, 992 F.3d 742, 744 (9th Cir. 2021) (VanDyke, J., dissenting)).

2. *Arizona v. Mayorkas.*

Unfortunately, the federal government did not heed the Chief Justice's warning. Instead, it quickly went back to the well, this time in the context of Title 42. During the COVID-19 pandemic, the federal government implemented public-health orders (known as "Title 42 orders") under which migrants without proper travel documents were generally expelled rather than processed into the United States.

On the Title 42 orders, two lawsuits proceeded at once. In the Western District of Louisiana, a group of twenty-four states successfully sued to enjoin the federal government from halting the Title 42 orders on APA grounds. *See Louisiana v. Centers for Disease Control & Prevention*, 603 F.Supp.3d 406 (W.D. La. 2022). Meanwhile, on the flip side of the coin, a group of noncitizens successfully challenged the same Title 42 orders—on different grounds in a different court—and convinced the district court to vacate them. *See Huisha-Huisha v. Mayorkas*, 642 F.Supp. 3d 1 (D.D.C. 2022).

The same twenty-four states in *Louisiana* moved to intervene in the D.C. Circuit case. They sought to prevent the federal government from trying to leverage the vacatur in *Huisha-Huisha* to avoid complying with the injunction in *Louisiana*. *See Huisha-Hushia v. Mayorkas*, 2022 WL 19653946 (D.C. Cir. Dec. 16, 2022). The D.C. Circuit denied the intervention on timeliness grounds. *Id.* at *1–*2.

The twenty-four states then petitioned this Court for review, and this Court granted the petition to review "[w]hether the State applicants may intervene to challenge the District Court's summary judgment order." *Arizona v. Mayorkas*, 143 S. Ct. 478 (2022). This Court also issued a stay, precluding the district court's vacatur in *Huisha-Huisha* from taking effect. *Id.*

Yet as in *Arizona v. City & County of San Francisco*, this Court never had the chance to decide the ultimate issue of state intervention. On May 18, 2023, this Court remanded the case with instructions to dismiss the motion to intervene as moot because Congress ended the COVID-19 National Emergency and the Title 42 Orders that came with it. *See Arizona v. Mayorkas*, 143 S. Ct. 1312 (2023).

3. The Lawful Pathways Rule.

The executive branch did not wait long to give this Court a third opportunity to address this question, again in the context of immigration. It has yet again started down the path toward rulemaking-by-collective-acquiescence, this time in litigation involving another immigration regulation, *The Circumvention of Lawful Pathways Rule*, 88 Fed. Reg. 31314 (May 16,

2023) (codified at 8 C.F.R. §§ 208.33, 1208.33) (the "Rule").

As noted above, during the COVID-19 pandemic, the federal government implemented the "Title 42 orders" to expel migrants without proper travel documents. *Id.* at 31,315. Even with the deterrent effects of these orders, border encounters were "at historically high levels" in 2022. *Id.* at 31,331. The final Title 42 orders were set to end, though, when the COVID-19 public health emergency expired on May 11, 2023. *See id.* at 31,314–16. Anticipating a "surge in irregular migration" following this expiration, DHS and the Department of Justice promulgated the Rule. *Id.* at 31,319.

The Rule restricts eligibility for a discretionary grant of asylum to migrants using certain orderly migration pathways, absent exceptionally compelling circumstances. *See* 8 C.F.R. §§ 208.33(a)(1), 1208.33(a)(1). The Departments hoped—and expected—that encouraging migrants to pursue lawful migration pathways with the threat of asylum-ineligibility would, among other goals, "protect against an unmanageable flow of migrants arriving" at the southwest border. 88 Fed. Reg. at 31,318.[1]

B. Procedural Background.

1. Two days after the Departments published the Rule, the plaintiffs—organizations that represent and

[1] Petitioners do not assert the Rule is perfect, other provisions of which are being challenged in separate lawsuits. These lawsuits are still pending. *See State of Indiana, et al. v. Mayorkas, et al.*, No: 1:23-cv-106 (filed D.N.D. filed May 31, 2023); *Texas v. Mayorkas, et al.*, No. 2:23-cv-24 (N.D. Tex. filed May 23, 2023). None of Petitioners are a party to either lawsuit.

help noncitizens and asylum seekers—brought statutory and procedural claims challenging the Rule under the Administrative Procedure Act.[2] Soon thereafter, the plaintiffs and the federal government cross-moved for summary judgment. The district court granted summary judgment in the plaintiffs' favor, found the Rule substantively and procedurally invalid, and vacated the Rule accordingly. *See E. Bay Sanctuary*, 683 F. Supp. 3d at 1053.

The federal government appealed and moved for a stay of the district court's vacatur pending appeal. The federal government claimed that an emergency stay was necessary because vacatur of the Rule "would impose enormous harms on the government and the public." Emergency Motion for Stay Pending Appeal, Dkt. 8 at 8 (July 27, 2023). Should the Rule become "unavailable for any amount of time," the federal government predicted that "the current decline in border encounters will quickly be erased by a surge in border crossings that could match—or even exceed—the levels seen in the days leading up to the end of the Title 42 order." *Id.* at 10; *see also id.* at 11 ("[A]ny interruption in the rule's implementation will result in another surge in migration that will significantly disrupt and tax DHS operations.") (citation omitted).

The Ninth Circuit granted a stay, and given the importance of the issues at stake, ordered expedited briefing and argument. *E. Bay Sanctuary Covenant v.*

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[2] The plaintiffs brought these claims in an amended complaint in ongoing litigation challenging earlier DHS and DOJ rules concerning asylum seekers. *See generally E. Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025, 1033 (N.D. Cal. 2023) (describing procedural history).

Biden, No. 23-16032, 2023 WL 11662094, at *1 (9th Cir. Aug. 3, 2023). On appeal, the federal government argued, among other things, that the plaintiffs lacked standing to bring their claims, the Immigration and Nationality Act precludes judicial review of their claims under the APA, and the Rule is substantively and procedurally valid. *See* Brief for Appellants, Dkt. 32 (Sept. 7, 2023). The court heard oral argument in November 2023. Dkt. 82. Until this point—through several rounds of briefing in the district court and in the Ninth Circuit—the federal government had maintained a vigorous defense of the Rule.

2. On February 5, 2024—four months *after* oral argument but before the Ninth Circuit issued a decision—something changed. The federal government and the plaintiffs jointly moved the court to hold the appeal in abeyance. Joint Motion to Place Appeal in Abeyance, Dkt. 83 at 2 (Feb. 5, 2024). The parties asserted that "there are currently two pending cases raising overlapping claims relating to the Rule and its implementation that have been brought by some similarly situated the plaintiffs represented by overlapping counsel." *Id.*; *see M.A. v. Mayorkas*, No. 1:23-cv-1843 (D.D.C.). To explore "whether a settlement could eliminate the need for further litigation in either case" the parties asked the Ninth Circuit to place the appeal in abeyance. Dkt. 83 at 2.[3] Just over two weeks later, the court granted the motion in a perfunctory order.

[3] The federal government also filed a similar joint motion in *M.A. v. Mayorkas* except, in that case, the parties anticipated negotiations that involve not just the Rule but "related policies." *See M.A. v. Mayorkas*, No. 1:23-cv-1843, Dkt. 66 (D.D.C.). This vague hint raises further concerns about rulemaking by acquiescence.

E. Bay Sanctuary Covenant v. Biden, 93 F.4th 1130, 1131 (9th Cir. 2024).

Judge VanDyke dissented. At its root, he reasoned that "the government's sudden and severe change in position looks a lot like a purely politically motivated attempt to throw the game at the last minute." *Id.* at 1132 (VanDyke, J., dissenting). After spending months telling the Ninth Circuit that the Rule is so important that "any interruption" would impose enormous harm on the government and the public, it "makes no sense as a legal matter" that the federal government would "engag[e] in discussions that could result in the rule going away." *Id.* With no legitimate legal explanation for why the federal government would "snatch[] defeat from the jaws of victory," Judge VanDyke concluded that the joint motion "seems to be nothing more than a collusive effort to postpone resolution of this case until a more politically palatable time." *Id.* at 1134; *see also id.* at 1135–36 (exploring political reasons motivating the federal government now to request "something that is completely inconsistent with its previous actions and representations to the court").

3. Only two weeks later, the States of Alabama, Georgia, Kansas, Louisiana, and West Virginia (Petitioners here) moved to intervene in the Ninth Circuit to protect their interests and preserve the Rule. Motion to Intervene, Dkt. 86 (Mar. 7, 2024). Both the plaintiffs and the federal government opposed the motion. *See* Appellants' Opposition to Motion to Intervene, Dkt. 96 (Mar. 18, 2024); Appellees' Opposition to Motion to Intervene, Dkt. 97 (Mar. 18, 2024).

In a 2-1 decision, the Ninth Circuit denied intervention. App.7. Circumventing the Ninth Circuit's typically permissive intervention standard, *see, e.g.*, *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) ("In general, we construe Rule 24(a) liberally in favor of potential intervenors."), the majority set the bar for allowing intervention on appeal at "only for 'imperative reasons.'" App.8 (quoting *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997) (quoting *Landreth Timber Co. v. Landreth*, 731 F.2d 1348, 1353 (9th Cir. 1984), *rev'd on other grounds*, 471 U.S. 681 (1985))). Through this artificially restrictive lens, the majority found that the States lacked the "'significantly protectable interest' in the litigation" required for intervention under Federal Rule of Civil Procedure 24. App.9 (citing *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011) (en banc)). In so holding, the majority misapplied *United States v. Texas*, 599 U.S. 670 (2023), to create a blanket rule that "states have no legally protectible interest in compelling enforcement of federal immigration policies." App.10.

Lamenting the Ninth Circuit's "troubling trend" of denying intervention "whenever it might upset a possible collusive settlement resulting in a favored policy," Judge VanDyke again dissented. *Id.* at 12–13 (citing *San Francisco*, 992 F.3d 742, *and Cooper v. Newsom*, 26 F.4th 1104 (9th Cir. 2022) as examples). Judge VanDyke found that all four elements to intervene under Rule 24 were satisfied and that intervention should have been granted. He reasoned that the States' motion was timely because they "acted swiftly" after the court granted the parties' left-field abeyance motion—the only point when it became clear that the

federal government would no longer protect their interests. App.13–22. A settlement negating the Rule's effects could harm the States' economic and political interests. *Id.* at 22–26. And the federal government could no longer adequately represent the States' interests once it "abruptly changed course and asked to put the case on ice." *Id.* at 26–28.

This petition followed.

REASONS FOR GRANTING THE PETITION

This case presents a recurring question of exceptional importance to federal rulemaking. The federal government has found a backdoor allowing circumvention of the APA's procedural notice-and-comment safeguards through acquiescence. Rather than close the door to more "sue and settle" exploitation by allowing the States to intervene, the Ninth Circuit took off the door's hinges. If the decision below stands, the federal government's underhanded approach to rulemaking will be repeated again and again.

This case is also the appropriate vehicle to resolve the question presented. Because the appeal is paused for settlement negotiations but still pending, none of the procedural traps that prevented this Court from answering a similar question in *Arizona v. City & County of San Francisco* and *Arizona v. Mayorkas* are present here.

As to the merits, the decision below is wrong. The States met all the Rule 24 factors for intervention and should have been allowed to intervene. In finding otherwise, the Ninth Circuit neglected this Court's decision in *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 595 U.S. 267 (2022), on how to assess when a

motion to intervene is timely. It also expanded the reach of the circumscribed holding in *United States v. Texas*, 599 U.S. 670 (2023) far beyond what this Court intended. This disregard for this Court's precedents alone warrants review.

——The petition for a writ of certiorari should be granted.

I. The question presented is exceptionally important, and this is the appropriate vehicle to resolve it.

A. Whether states with interests may intervene when the federal government stops defending its own APA rule is an exceptionally important question.

1. As four members of this Court correctly recognized, backdoor rulemaking maneuvers "raise a host of important questions." *Arizona*, 596 U.S. at 766. This case concerns the latest episode of the federal government's foray into "rulemaking-by-collective-acquiescence." *Id.* (citation omitted); *see, e.g.*, *Cook Cnty., Illinois v. Texas*, 37 F.4th 1335, 1340 (7th Cir. 2022), *cert. denied sub nom. Texas v. Cook Cnty.*, 143 S. Ct. 565 (2023); *Danco Lab'ys, LLC v. All. for Hippocratic Med.*, 143 S. Ct. 1075, 1076 (2023) (Alito, J., dissenting from grant of application for stays). Though the federal government here does not seek to undo a regulation from the previous administration as it did in the Public Charge cases—it is poised instead to undo one of its own—the questions raised by its "tactic[s]" are no less significant and maybe even more so. *Arizona*, 596 U.S. at 765. The potential for the federal government to normalize this perverse approach to rulemaking warrants this Court's intercession.

Giving the federal government carte blanche to cut a deal with nominally opposing parties would normalize the "sue and settle" roadmap for future administrations. This seismic shift in administrative practice would have dangerous consequences. Because the federal government published the Rule through notice-and-comment procedures, it can rescind or amend the Rule only through the same process. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015); *see* 5 U.S.C. § 551(5). This "usual and important procedure" gives the States the right to submit input and protect their interests before DHS and to challenge the resulting decision in court under the APA. *Arizona*, 596 U.S. at 765 (Roberts, C.J., concurring).

If, however, the federal government skirts the APA's rulemaking process, settling with the plaintiffs for less than the Rule as issued, or dismissing its appeal altogether, it will deprive the States and other interested parties of these rights. And if this Court lets the federal government lawfully proceed with this end-around, no future administration will likely undertake the APA's process for rescinding a disfavored rule. *Cf. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 825 (2015) (Roberts, C.J., dissenting) ("What chumps! D[o]n't they realize that all they ha[ve] to do" is acquiesce in an adverse judgment against any rule they wish to rescind?).

The Biden administration's willingness to scrap the APA's rulemaking process for *its own rule* rather than that of its predecessor is an even more egregious affront. That an incoming administration would seek to amend, repeal, or replace some rules promulgated by an outgoing administration is to be expected. But for an administration to ditch this process for its own

rule threatens to entrench a new level of disregard for the APA's procedural safeguards. The reason for such an unusual change of course needs to be made clear and defended in the daylight of the APA's notice-and-comment rule making.

2. Equally troubling is the secrecy with which the federal government is manipulating the process. This appeal sat for four months *after* oral argument in a case that the federal government spent months vigorously defending. A decision on the merits was likely near, and the federal government had ample reason to be confident awaiting that decision. After all, in staying the district court injunction, *see E. Bay Sanctuary*, 2023 WL 11662094, the Ninth Circuit had to find that the federal government "made a strong showing" that it is "likely to succeed on the merits." *Nken v. Holder*, 556 U.S. 418, 425–26 (2009). Only at this point did the federal government ask the Court to hold off on deciding the merits—"snatching defeat from the jaws of victory," *E. Bay Sanctuary*, 93 F.4th at 1132 (VanDyke, J., dissenting)—while the parties "engage[] in discussions" that could result in the Rule going away. Dkt. 83 at 2. As Judge VanDyke appropriately interjected, "What?" *E. Bay Sanctuary*, 93 F.4th at 1134 (VanDyke, J., dissenting).

Indeed, that sequence makes no sense. And "it is impossible to know the federal government's exact motives for its current course of action because it hasn't even attempted to tell" the court. *Id.* at 1136. With no logical explanation for this about-face, it is hard to conclude anything other than "wholly political" reasons dictate these moves. *Id.* at 1135; *see also id.* at 1135–36 (outlining "several interrelated possibilities" motivating the federal government to

"request[] something that is completely inconsistent with its previous actions and representations to the court"). But that does not make things more palatable. This Court should take no comfort in leaving the States' vital interests to the whims of an unpredictable administration using the court system for political theater.[4]

B. This case is the appropriate vehicle to address the question presented.

This case is an appropriate vehicle to address the "problem[s]" presented by the federal government's collusive approach to rulemaking. *Texas*, 599 U.S. at 694 (Gorsuch. J., concurring in the judgment). Put simply, the States tried to intervene while the appeal is still pending. The Ninth Circuit has not issued an opinion—and cannot do so until the parties ask to lift the abeyance—but the federal government has not withdrawn its appeal either. In this procedural posture, the parties are engaged in settlement negotiations with no court-enforced timetable. Meanwhile, the many harms that the federal government relied on when defending the Rule continue. The States merely seek to be a part of the negotiations to protect their interests and to defend the Rule if the federal government has abandoned it.

In *Arizona v. City & County of San Francisco*, the States tried to intervene after the federal government had withdrawn its petition for a writ of certiorari in

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[4] To compound the confusion, the administration recently issued a "Proclamation" restricting noncitizens' asylum eligibility that purports to be *stricter* than the Rule itself. *See Securing the Border*, 89 Fed. Reg. 48710 (June 7, 2024).

this Court, leaving the lower court ruling in place. *See San Francisco*, 992 F.3d at 747–48 (VanDyke, J., dissenting from denial of motion to intervene); *see also Cook Cnty.*, 37 F.4th at 1337 (trying to intervene after the federal government withdrew its appeal in the Seventh Circuit). Because of this unique procedural posture, "a great many issues beyond the question of appellate intervention" prevented the Court from resolving whether the States could intervene to defend the Public Charge rule's legality. *Arizona*, 596 U.S. at 766.

The path here is free from the obstacles that complicated review in *Arizona*. This Court need not wade in the murky waters of mootness or *Munsingwear* vacatur, nor touch merits-related questions on "the scope of injunctive relief in an APA action" or whether the APA authorizes district courts to vacate regulations nationwide. *Id.* It need answer only whether the States have a right to intervene for a spot at the settlement table when all appearances point to the federal government capitulating on the Rule.

* * *

This Court's review is the only way to prevent this case from becoming a blueprint for future APA rulemaking evasion. To let the federal government flout this "usual and important procedure"—again—threatens to undermine the integrity of the rulemaking process. *Id.* at 765.

II. The Ninth Circuit's decision misapplied this Court's precedent and is wrong.

The Ninth Circuit erroneously denied the States' right to intervene. Although "[n]o statute or rule provides a general standard to apply in deciding whether

intervention on appeal should be allowed," *Cameron*, 595 U.S. at 276, this Court has looked to the "policies underlying intervention" in the district courts under Federal Rule of Civil Procedure 24 for guidance. *Auto. Workers v. Scofield*, 382 U.S. 205, 217, n.10 (1965).

Despite the States satisfying Rule 24(a)'s standard for intervention as of right, the Ninth Circuit denied intervention. Along the way, the majority ignored and misapplied this Court's precedent (and even its own precedent). The court of appeals' error on this important issue warrants this Court's review.

A. The States satisfied Rule 24(a)'s standard for intervention as of right.

Courts assessing a party's motion to intervene as of right under Rule 24(a) consider four factors: (1) whether the motion is "timely"; (2) whether the movant has "significantly protectable interest relating to the property or transaction that is the subject of the action"; (3) whether "the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest"; and (4) whether the existing parties "adequately represent the applicant's interest." *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011); *see* Fed. R. Civ. P. 24(a)(2). Courts interpret these requirements "broadly in favor of intervention" and based on "practical considerations, not technical distinctions." *W. Watersheds Project v. Haaland*, 22 F.4th 828, 835 (9th Cir. 2022); *see also Berg*, 268 F.3d at 818 ("In general, we construe Rule 24(a) liberally in favor of potential intervenors."); *accord Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 540 (1972) (noting that the 1966 amendments to Rule 24 were

"liberalizing") (Douglas, J., dissenting in part). The States' motion to intervene satisfied all four factors.

1. The panel majority applied a rule contrary to this Court's precedent, which plainly establishes the propriety of the States' intervention on appeal.

Though the Ninth Circuit did not mention "timeliness" in name, it resurrected a once-interred rule that placed an immediate handicap on the States' motion based solely on the stage of the proceeding: "Intervention at the appellate stage is, of course, unusual and should ordinarily be allowed only for 'imperative reasons.'" App.8 (quoting *Bates*, 127 F.3d at 873 (quoting *Landreth*, 731 F.2d at 1353)). This rule cannot be squared with this Court's precedent.

In taking "guidance" from the "policies underlying intervention" in the district court, this Court has never held appellate intervention to a higher standard than intervention in the district court. *Cameron*, 595 U.S. at 277. If intervening on appeal could scarcely qualify as timely, that would make "the point to which [a] suit has progressed" dispositive when this Court said that it's "not." *NAACP v. New York*, 413 U.S. 345, 365–66 (1973). Rather, "[t]he *most* important" factor related to timeliness is whether the party sought to intervene "as soon as it became clear" that its interests "would no longer be protected by the parties in the case." *Cameron*, 595 U.S. at 279–80 (emphasis added; citation omitted).

This makes sense. Sometimes, as in *Cameron* and here, the needed clarity for intervening does not arise until the case is on appeal. Courts must therefore assess timeliness in relation to the "point in time" when

the "need to seek intervention" arises—not when the complaint was filed. *Cameron*, 595 U.S. at 280.

That the Ninth Circuit's "imperative-reasons" rule contradicts decades of this Court's precedent is not surprising: It originates from a bad game of telephone. The Ninth Circuit in *Bates* borrowed this rule from *Landreth*, which, in turn, lifted this rule from *McKenna v. Pan Am. Petroleum Corp.*, 303 F.2d 778 (5th Cir. 1962)—a now sixty-year-old single-paragraph Fifth Circuit opinion. And *McKenna* seems to have coined the rule based on this offhand remark in *Morin v. City of Stuart*, 112 F.2d 585, 585 (5th Cir. 1939): "Intervention in an appellate court is certainly unusual." Besides this observation, *Morin* itself had little to say on intervention in its fourteen-sentence opinion. The intervenor there asked the Fifth Circuit to "hear and decide another case about different [but perhaps "somewhat similar"] property"—a case which the Fifth Circuit had no original jurisdiction to entertain. *Id.* at 585.

At any rate, even in the Ninth Circuit, the imperative-reasons rule is no longer the correct standard. In *Peruta v. Cnty. of San Diego*, the Ninth Circuit held that a county policy defining good cause to obtain a firearm for self-defense infringed on Second Amendment rights. 742 F.3d 1144, 1179 (9th Cir. 2014), *rev'd on reh'g en banc*, 824 F.3d 919 (9th Cir. 2016). When the county sheriff declined to file a petition for rehearing en banc, the State of California moved to intervene. A Ninth Circuit panel denied the motion as untimely because the movants did not meet the "heavy burden" of showing "imperative reasons" to intervene at such a late stage. *Peruta v. Cnty. of San Diego*, 771

F.3d 570, 572 (9th Cir. 2014) (quoting *Bates*, 127 F.3d at 873).

Sitting en banc, including panel members Judge Fletcher and Judge Paez—authors of the majority opinion here—the Ninth Circuit reversed. The en banc court granted the motion, finding that California's intervention was necessary to "fill the void created by the late and unexpected departure" of the county sheriff. *Peruta v. Cnty. of San Diego*, 824 F.3d 919, 940–41 (9th Cir. 2016). For its part, the imperative-reasons rule received no endorsement from the en banc court. *See id.*; *see also Day v. Apoliona*, 505 F.3d 963, 966 (9th Cir. 2007) (allowing Hawaii to intervene to file a petition for rehearing en banc without overcoming the hurdle of showing imperative reasons even though the court found its "explanation for why it did not intervene earlier less than entirely persuasive").

At bottom, the Ninth Circuit cannot pick and choose when it wants to "require[] closer scrutiny" for appellate intervention based on a putative intervenor's position on the merits. App.9 (ignoring *Peruta* in claiming that the court "see[s] nothing to suggest" that *Bates* and *Landreth* "have been overruled"). Such partiality doubtfully complies with the need to follow "equitable considerations" when analyzing intervention, *Wilderness Soc.*, 630 F.3d at 1179, or the general principles of fairness that always govern. *See, e.g.*, *Exxon Valdez v. Exxon Mobil*, 568 F.3d 1077, 1090 (9th Cir. 2009) ("We look to precedent because fairness requires that like cases be treated alike, instead of being treated differently according to how the judges feel.") (Kleinfeld, J., concurring in part and dissenting in part).

Turning to the merits, *Cameron*'s "most important circumstance relating to timeliness" supports the States' right to intervene.[5] Like Kentucky's attorney general in *Cameron*, the States moved to intervene "as soon as it became clear" that the government would not "protect[] its interests." *Cameron*, 595 U.S. at 279–80. Before the government entertained post-oral argument settlement negotiations with the plaintiffs, the government represented the States' interests in defending the Rule's validity. In other words, the States "had little reason to anticipate" the government's eleventh-hour change of heart such that they should have intervened sooner. *Peruta*, 824 F.3d at 940. But "as soon as [the States] had a reason to do so," they tried to intervene. *Cameron*, 595 U.S. at 292 (Kagan, J., concurring in the judgment); *accord United States v. Carpenter*, 298 F.3d 1122, 1125 (9th Cir. 2002) ("[U]ntil parties have notice that the government may not be representing their interests, parties are entitled to rely on the presumption that the government is representing their interests.").

Nothing more is required to find that the States' motion was timely. The Ninth Circuit's adoption of a heighted standard for appellate intervention is directly contrary to this Court's precedents.

2. The States have significantly protectable interests that could be impaired.

The next two interest factors can be addressed together. *See Berger v. N.C. State Conf. of the NAACP*,

[5] The government did not contest that the States' motion was timely. *See* Dkt. 96.

597 U.S. 179, 190 (2022). The States have "significantly protectable interest[s]" in preserving the Rule that could be impaired without intervention. *Donaldson v. United States*, 400 U.S. 517, 531 (1971); *Citizens for Balanced Use*, 647 F.3d at 897. Showing a significantly protectable interest is not a high bar. *See Berger*, 597 U.S. at 200 (reversing the Fourth Circuit's denial of motion to intervene for "setting the [intervention] bar . . . too high"). Like all the intervention factors, the significantly protectable interest should also be construed "broadly in favor of intervention." *W. Watersheds Project*, 22 F.4th at 835. In keeping with this "liberal policy in favor of intervention," *Wilderness Soc.*, 630 F.3d at 1179, the interest test is a "practical, threshold inquiry, and no specific legal or equitable interest need be established." *Citizens for Balanced Use*, 647 F.3d at 897 (cleaned up). "It is generally enough that the interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *Wilderness Soc.*, 630 F.3d at 1179; *accord Cameron*, 595 U.S. at 277 (describing Rule 24(a)(2)'s "interest" as a "legal" one).

a. Before turning to the States' specific interests in preserving the Rule, the majority held that the States generally lack a sufficient interest "in maintaining the Rule or in reducing immigration into the United States." App.10. It reached this errant conclusion by stretching this Court's "narrow" holding in *United States v. Texas* way too far. 599 U.S. at 686.

In *Texas*, DHS issued new guidelines for immigration enforcement that prioritized arresting and removing from the United States criminal noncitizens and recent entrants, while imposing hurdles to taking

enforcement acts against other illegal aliens. *Id.* at 673–74. Texas and Louisiana sued the federal government, alleging that the guidelines violate two federal statutes purportedly requiring the federal government "to arrest *more* criminal noncitizens." *Id.* at 674 (emphasis in original). In other words, the States "essentially want[ed] the Federal Judiciary to order the Executive Branch to alter its arrest policy so as to make more arrests." *Id.* at 674. This Court determined that the States did not have standing and dismissed the case. *Id.* at 686. In doing so the Court applied the longstanding Article III principle "that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution."[6] *Linda R. S.*

[6] As an aside, the States need not independently show standing to intervene to participate in settlement negotiations, and in skipping a standing analysis, the Ninth Circuit agreed. *See generally Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–101 (1998) (holding federal courts may not assume hypothetical Article III jurisdiction to address the merits). An intervenor of right must have Article III standing only when that party "pursue[s] relief that is different from that which is sought by a party with standing." *Town of Chester, N.Y. v. Laroe Ests., Inc.*, 581 U.S. 433, 440 (2017). The States moved to intervene as *defendants* and are not seeking relief separate from any existing party so they need not show independent standing. *See e.g.*, *Commonwealth of Pennsylvania v. President U.S. of Am.*, 888 F.3d 52, 57 n.2 (3d Cir. 2018) (holding that intervenors need not show Article III standing to defend a challenged federal law they because they "moved to intervene as defendants and seek the same relief as the federal government"—the upholding of the law); *Kane Cnty., Utah v. United States*, 928 F.3d 877, 887, 887 n.12 (10th Cir. 2019) (applying *Town of Chester* to defendant-side intervenors in finding that they could piggyback off the United States's standing); *Melone v. Coit*, 100 F.4th 21, 28–29 (1st Cir. 2024) (rejecting argument that intervenor needed to establish

v. Richard D., 410 U.S. 614, 619, (1973). For good measure, Judge Kavanaugh clarified before signing off that the Court's "standing decision" is "narrow and simply maintains the longstanding jurisprudential status quo." *Texas*, 599 U.S. at 686.

This Court in *Texas* made clear that its "narrow" holding was limited to only the executive decision of "whether to arrest or prosecute," 599 U.S. at 677, a decision limited by "inevitable resource constraints." *Id*. at 680. This Court then went on to emphasize that "we do not suggest that federal courts may never entertain cases involving the Executive Branch's alleged failure to make more arrests or bring more prosecutions." *Id*. at 681. The Court then offered five examples of situation where its "narrow" holding likely would not control, two of which clearly apply in the instant case: a case involving "the Executive Branch's provision of legal benefits or legal status" or a case involving "the continued detention of noncitizens who have already been arrested." *Id*. at 683. The Rule concerns the legal benefit of asylum and typically involves individuals who are already in the custody of DHS.

The Ninth Circuit majority here rejected the States' right to intervene because "states have no legally protectible interest in compelling enforcement of federal immigration policies." App. 10 (citing *Texas*, 599 U.S. at 677–80). That is an incorrect description of the narrow *Texas* holding. However, even if it were close (which it is not), the gulf between *Texas* and this

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independent standing when the intervenor "simply seeks to defend the agency's position").

case, in terms of the posture of the parties, is obvious. The States do not seek to intervene to make the federal government do anything; they seek to support a lawful regulation as issued by the federal government.

Put simply, *Texas* has no application here. Courts of appeals—including the Ninth Circuit—must faithfully interpret this Court's precedent rather than gerrymander it for convenience. Further review is warranted to remedy this error.

b. Without *Texas* clouding the analysis, the States' significantly protectable interests support intervention. First, the Rule will save the States money. Federal law requires the States to provide government resources to noncitizens, including emergency Medicaid, costly public education, and legal counsel, regardless of their immigration status. *See* 42 C.F.R. § 435.406(b) (emergency Medicaid); *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (public education); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (publicly funded counsel). Even where state or federal law prohibits the States from providing resources to noncitizens, *see* 8 U.S.C. §§ 1621(a), (c)(1), public education is excepted; and the States incur increased administrative costs to determine eligibility for these benefits. *See, e.g.*, Kan. Stat. Ann. § 8-237(i) (prohibiting the Kansas division of vehicles from issuing a driver's license to anyone "[w]hose presence in the United States is in violation of federal immigration laws").

Invalidating the Rule would inflict concrete economic injury on the States, and avoiding such economic injury is a classic protectable interest supporting intervention. *See, e.g.*, *United States v. Alisal*

Water Corp., 370 F.3d 915, 919 (9th Cir. 2004);[7] *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d 1111, 1115 (10th Cir. 2002) ("The threat of economic injury from the outcome of litigation undoubtedly gives a petitioner the requisite interest."); *Nat'l Parks Conservation Ass'n v. EPA*, 759 F.3d 969, 976 (8th Cir. 2014) (holding "direct financial interests" satisfy Rule 24's interest requirement). And the potential impairment here is just as obvious: Without intervention, Respondents' collusive conduct could deprive the States of all the benefits they obtain under the Rule. *See, e.g.*, *California ex rel. Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006) ("Having found that appellants have a significant protectable interest, we have little difficulty concluding that the disposition of this case may, as a practical matter, affect it.").

On top of these significant economic interests, the Rule protects the States' constitutional political interests. The Constitution requires an "actual Enumeration" of the "whole number of persons in each State" every ten years. Art. I, § 2, cl. 3; amend. XIV, § 2. This population count is used not only to "provide a basis for apportioning representatives among the states in the Congress," *Baldrige v. Shapiro*, 455 U.S.

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[7] The States' interests are nothing like the economic interest that *Alisal Water* rejected. *See* App.11–12. There, the Ninth Circuit found that the proposed intervenor's interest in "the prospective collectability of a debt" is "several degrees removed" from the United States's environmental enforcement action. 370 F.3d at 920–21. The States' economic interests in reducing unlawful migration are directly "related to the underlying subject matter of the action"—a regulation designed to deter unlawful migration. *Id.* at 919.

345, 353 (1982); *see* Art. I, § 2, cl. 3, but also to allocate federal funds and draw electoral districts. *Dep't of Com. v. New York*, 588 U.S. 752, 759 (2019). This political representation is "zero-sum"—one State's population gain is another State's loss, which "necessarily advantages the former group at the expense of the latter." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 219 (2023).

Because the population count is based on "persons in each State," under the current administration's policy, a person may not be excluded from the total count based on immigration status. *See* Executive Order 13986, *Ensuring a Lawful and Accurate Enumeration and Apportionment Pursuant to the Decennial Census*, 86 Fed. Reg. 7015 (2021). When some States' populations go up—in particular, the southern border States: Texas, California, Arizona, and New Mexico—the other States lose political representation and funding. This is also a "concrete" interest that would be impaired if the federal government abandoned the Rule. App.25 (VanDyke, J., dissenting).

3. The federal government no longer adequately represents the States' interests.

Although the Ninth Circuit did not reach the adequacy-of-representation prong, it is not reasonably disputable here. This Court has instructed that an intervenor need only show that the representation of its interests "'may be' inadequate" and that this burden is "minimal." *Trbovich*, 404 U.S. at 538 n.10

(citation omitted); *accord W. Watersheds Project*, 22 F.4th at 840 (same).

The federal government stopped adequately representing the States' interests when it "abruptly changed course and asked to put the case on ice while it considers settlement." App.26 (VanDyke, J., dissenting). From the moment the plaintiffs challenged the Rule until the filing of the joint motion, the federal government challenged the plaintiffs' right to bring their claims and defended the Rule, insisting that its unavailability—"for any amount of time"—could bring untold harm to our country. Dkt. 8 at 10. The plaintiffs, on the other hand, insisted the opposite: The Rule is unlawful, and its mere existence harms them. For this reason, "it would make little sense for the plaintiffs . . . to accept anything less than rescission of the rule." *E. Bay Sanctuary*, 93 F.4th at 1134 (VanDyke, J., dissenting). Only a court order could resolve these two seemingly incompatible positions.

That Respondents now enter settlement discussions "hand-in-hand" suggests, at a minimum, that the federal government might accept something less than the Rule as promulgated—an unacceptable result. *Id.* at 1132. The States have paramount interests in the federal government's original litigation position, *see supra* at II.A.2., so they can no longer rely on the federal government to adequately represent these interests in settlement negotiations. *See Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) ("The most important factor in determining the adequacy of representation is how the interest compares with the interests of existing parties.").

Allowing parties to intervene to participate in settlement negotiations is hardly unusual. The courts of appeals, including the Ninth Circuit, have often allowed parties to intervene to protect their interests in settlement. *See, e.g.*, *Carpenter*, 298 F.3d at 1124; *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 974 (3d Cir. 1998); *City of Chi. v. FEMA*, 660 F.3d 980, 986 (7th Cir. 2011). This case should be no different. In short, the federal government's bizarre about-face creates "sufficient doubt about the adequacy of representation to warrant intervention." *Trbovich*, 404 U.S. at 538.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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