No. 23-1353

In the Supreme Court of the United States

THE STATE OF KANSAS, ET AL.,

Petitioners,

v.

ALEJANDRO MAYORKAS, ET AL.,

Respondents.

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

BRIEF OF HAMILTON LINCOLN LAW INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

Hamilton Lincoln Law Institute ("HLLI") is a public-interest law firm dedicated to protecting free markets, free speech, limited government, and separation of powers, and against regulatory abuse and rent-seeking.[1] For example, HLLI has fought government and regulatory overreach by litigating to overturn unlawful conditions imposed by the Federal Communications Commission on a merger between three major U.S. cable companies. The D.C. Circuit ultimately agreed, granting relief. *Competitive Enter. Inst. v. FCC*, 970 F.3d 372 (D.C. Cir. 2020).

SUMMARY OF ARGUMENT

Our judicial system is built on the principle that adversarial presentation promotes fairness in the pursuit of justice. Consistent with this principle, the parties in a case—including the government—typically will aggressively defend themselves against lawsuits challenging their actions. In the present case, however, the government has taken a more unusual route that raises deep concerns.

Here, the federal government initially defended the rule that the States challenge, *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"). The Biden Administration promulgated the Rule to manage

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[1] Under Rule 37.6, *Amicus Curiae* affirms that no counsel for a party authored this brief in full or in part, and that no person or entity other than *Amicus* or their counsel financially contributed to preparing or submitting this brief. *Amicus* provided counsel of record for all parties notice of its intention to file an *amicus curiae* brief at least 10 days prior to the due date for this brief.

the "historic surge in migration" and the "significant strain on [the Department of Homeland Security's] operational capacity at the border," *id.*, with defendants telling the Ninth Circuit that "any interruption" would harm the government and the public. *See E. Bay Sanctuary Covenant v. Biden*, 93 F.4th 1130, 1132-34 (9th Cir. 2024) (VanDyke, J., dissenting). The federal government vigorously defended the Rule both in the present lawsuit, filed by organizations that represent and help noncitizens and asylum seekers, as well as in other lawsuits filed by the State of Texas and a coalition of states led by the State of Indiana. In those other lawsuits, the State plaintiffs challenged the Rule as too lenient. Here, in contrast, plaintiffs challenged the Rule as too harsh. And, here, again in contrast, the defendants joined with plaintiffs to seek to stay the litigation to explore a possible settlement, rather than allow the Ninth Circuit to rule on the fully briefed and argued appeal.

Such an abrupt and targeted change in litigation strategy raises the specter of the "sue-and-settle" phenomenon in which federal agencies cooperate with friendly parties who are ostensibly "foes" in litigation to settle on a policy outcome that the agencies could not achieve through the normal and lawful exercise of its powers. Sue-and-settle tactics raise fundamental questions regarding separation of powers, the valid exercise of policymaking, and the undue influence of special interest groups. The Congressional Research Service highlighted some of these issues, stating:

> To what extent can an administration bind itself and its successors to particular policies or actions that would otherwise remain discretionary? How can long-term judicial oversight of federal policy be consistent with the executive branch's duty to

> faithfully execute the law? Do policymaking settlements unduly transfer federal power to private plaintiffs, who can "collude" with friendly administrations to enshrine favorable approaches to huge swaths of policy entrusted to the executive branch?

Sarah Herman Peck & Ben Harrington, *The Flores Settlement and Alien Families Apprehended at the U.S. Border*, Cong. Research Serv. No. R45297 (2018).

Judge VanDyke recognized these issues in his dissent, observing that the about-face by defendants, embodied in the joint motion to place the appeal in abeyance, "seems to be nothing more than a collusive effort to postpone resolution of this case until a more politically palatable outcome." *E. Bay Sanctuary Covenant*, 93 F. 4th at 1134 (VanDyke, J., dissenting).

Intervention by the States would protect against such potential collusion between defendants and the organizational plaintiffs. The States have a vested interest in the outcome of this litigation. They are rightly concerned that any potential settlement will result in additional strains upon the services the States provide to residents. The sudden reversal by defendants—from vigorous defense to (selective) acquiescence—raises legitimate concerns that the Executive Branch defendants will not faithfully execute the law consistent with their constitutional role and may collude with plaintiffs to negotiate a settlement that is neither fair nor reasonable.

This issue of the Executive Branch exceeding its lawful authority by entering into friendly settlements to achieve policy goals it otherwise couldn't is a recurring problem that raises important constitutional and practical concerns. It is one that the States have sought to address by

seeking to intervene here and in previous cases. Granting certiorari would address this ongoing problem and the role that interested parties may play in curbing abuses of the justice system.

ARGUMENT

I. Sue-and-Settle Tactics Raise Serious Constitutional and Policymaking Questions, Enable Executive Branch Abuse, and Evade Democratic Accountability.

This case presents legitimate concern that the federal government is cooperating with plaintiffs (who assert that the Rule treats migrants too harshly) to reach a settlement that could undercut or even vacate the Rule, while vigorously defending the Rule against States (who assert the Rule is too lenient). This selective acquiescence runs the risk of allowing the Executive Branch to create a new immigration process for which it lacks statutory and regulatory authority and that was created outside of any sanctioned legal process.

Judge VanDyke's dissent directly assessed this gamesmanship. He observed that the government "could take credit for creating an important rule and defending it with one hand, and then, by colluding with the plaintiffs, it can set the policy it actually wants with the other," while blaming the judicial branch for the result. *E. Bay Sanctuary Covenant*, 93 F.4th at 1136 (VanDyke, J., dissenting). As a result, "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 1131 (VanDyke, J., dissenting). In contrast to typical cases in which courts will hold cases in abeyance during settlement

negotiations, "[t]he vague reasons the parties have provided for a stay of litigation are sharply at odds with the reasons the government gave [the Ninth Circuit] just a few short months ago for granting a stay of the district court's preliminary injunction." *Id.* at 1133. Instead, the government's goal appeared to be "avoiding an ultimate win" that would eventually come during an election year. *See id.* at 1133-35.

Pursuing this strategy would cause the federal defendants to fail the Executive's Article II duty to "Take Care that the laws be faithfully executed." U.S. Const. art. II § 3. The Take Care clause "does not allow agencies to abdicate their duty to implement the laws enacted by Congress." *See* Evan Bernick, *Faithful Execution: Where Administrative Law Meets the Constitution*, 108 Geo. L. J. 1, 48 (2019); *see also* Andrew Kent, *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111, 2186-87 (2019). Congress established the procedures by which administrative agencies may act through the Administrative Procedure Act. If the agency defendants could weaken, change, or even vacate the Rule through settlement, then they are effectively repealing the Rule without undertaking the notice-and-comment process and other protective measures the APA typically requires for such action.

Such "sue and settle" practices, in which an agency intentionally relinquishes its statutory discretion by settling (or even throwing) lawsuits filed against it, have been widely condemned. The practice allows outside groups to effectively dictate the responsibilities of the agency through a legally binding, court-approved settlement that was negotiated secretly, with no input or oversight by the public or even those who will be directly affected by the settlement. By becoming bound by the settlement, the agency loses its independence and discretion to perform

its duties, in service to the goals of a third party—usually special interest groups, as in the present case. The agency also circumvents the standard rulemaking process and the protections that Congress built into the process. Those protections include review by the Office of Management and Budget, public input, and compliance with executive orders, all of which are intended to promote transparency, accountability, and public participation in rulemaking by unelected and unaccountable bureaucrats.

"The federal government's regulatory role in areas ranging from education to natural resources to homeland security is made possible by the public's general acceptance of administrative agencies as fiduciary institutions capable of following legislative directives in good faith, suppressing self-interest, and resisting the distorting pressures of pork-barrel politics." Evan Criddle, *Fiduciary Foundations of Administrative Law*, 54 U.C.L.A. Rev. 117, 147 (2006). Federal agencies fall short of that standard when they attempt to avoid adjudication of a dispute and negotiate a settlement that side-steps APA-mandated notice-and-comment requirements. *See id.* at 128, 175; 5 U.S.C. § 553. Courts should not be complicit in that dereliction of duty. "The Attorney General's authority to settle litigation for its government clients stops at the walls of illegality" and "does not include license to agree to settlement terms that would violate the civil laws governing the agency." *Carpenter v. United States*, 526 F.3d 1237, 1242 (9th Cir. 2008).

As Justice Kennedy noted, citizen lawsuits against the government raise "[d]ifficult and fundamental questions" that typically are "committed to the Executive by Article II of the Constitution of the United States." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S.

167, 197 (2000) (Kennedy, J., concurring). The use of settlements to implement public policy removes important policy considerations from Congress and from public stakeholders. "The purpose of the [APA's] notice and comment requirement is to provide for meaningful public participation in the rulemaking process." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995). Sue-and-settle tactics subordinate public participation in rulemaking to the desires of private special interests and receptive allies in the Executive Branch.

This Court has recognized that sweeping regulatory reform litigation is different from other cases and "the public officials sometimes consent to, or refrain from vigorously opposing, decrees that go well beyond what is required by federal law." *Horne v. Flores*, 557 U.S. 433, 448 (2009) (citing Michael McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. Chi. Legal Forum 295, 317 (settlements with the government allow parties to "sidestep political constraints")); *see also* Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 Wis. L. Rev. 875, 892-93 (settlement of enforcement actions often achieve results of concessions otherwise not obtainable via typical regulation). In *Horne*, this Court further cautioned that such settlements or consent decrees could "improperly deprive future officials of their designated legislative and executive powers." 557 U.S. at 449 (quoting *Frew v. Hawkins*, 540 U.S. 431, 441 (2004)).

The problems with "sue-and-settle" are not exclusive to one side of the political or ideological spectrum. It is reminiscent of the third-party payments required by settlements in which the Obama-era Department of Justice offered to reduce overall settlement payments based on

the amount a settling party paid to political allies, making sure to exclude those organizations not politically aligned with the Administration. *See* J. Allison, et al. *Improper Third-Party Payments in U.S. Government Litigation Settlements*, Regulatory Transparency Project of the Federalist Society (Feb. 22, 2021).

Settlements in which an Executive Branch agency acquiesces thus raise an additional constitutional problem through the agency's expenditure of congressionally appropriated funds in ways not authorized by Congress. Although any settlement in the present case likely will not have this particular feature directly, Obama-era settlements collectively called for billions of dollars in "mandatory donations" to be made to unrelated third parties (who happened to be political allies of the Administration), rather than to the United States. These funds were effectively spent by the agencies without any congressional appropriation or oversight. Even without this extreme feature, an Executive Branch agency's intentional relinquishment of its discretion and responsibility to third parties and the courts diminishes the Executive Branch's constitutionally allocated powers and Congress's oversight of its delegated authority and funds appropriated toward the agency's mission.

To underscore the problem in the present regulatory context, one can easily imagine scenarios in which a new administration with different policy priorities engages in collusive "sue-and-settle" tactics that remove important public policy decisions from Congress and the public. The bottom line is that the practice is unlawful regardless of which policy priorities are favored. For example, the American Recovery Act amended Internal Revenue Code § 6050W(e), which now requires third-party payment platforms to issue form 1099-K to recipients who receive an

aggregate of $600 from the platform per year, which is dramatically lower than the $20,000 threshold under the prior law. 26 U.S.C. § 6050W(e); Pub. L. 117-2, 135 Stat. 4 (Mar. 11, 2021). The Internal Revenue Service has delayed the implementation of the new requirement (see I.R.S. Notice 2023-74), but one could imagine the current administration issuing regulations implementing the new requirement before the end of the calendar year. The new reporting requirement is controversial and many view it as oppressively burdensome, particularly for those who have hobby-businesses or work in the freelance "gig" economy. Ashlea Ebeling & Richard Rubin, *IRS Delays Tax Rule for Online Sellers—Again*, Wall St. J. (Nov. 21, 2023). So what is to stop a special interest coalition from suing the government to challenge a new regulation implementing the statutory requirement and then subsequently negotiating a settlement with a new administration that is sympathetic to the plaintiffs and agree that the statute and implementing regulations make for bad public policy? Such a potential settlement could perhaps thwart Congress's statutory intent or its ability to revise the statue, and surely would deprive other stakeholders the opportunity for notice and comment afforded under the APA. Many state income tax codes are derivative of the Internal Revenue Code and rely upon income reported on a taxpayer's federal income tax return. Thus, it would not be surprising if one or more states would seek to intervene in such a hypothetical lawsuit because any settlement might impact the states' tax revenue due to potential underreporting of income.

Likewise, a fossil fuel trade group might be inclined to sue the government regarding a new regulatory requirement that is detrimental to that industry. Instead of defending the rule or revoking the regulation and starting from scratch, a new administration might engage in legal

maneuvering, like what has transpired in this case, and seize an opportunity to negotiate a settlement with the industry group that alleviates regulatory burdens or restrictions. Would not some states or environmental groups be justified in seeking to intervene in such a situation? Similarly, a gun-advocacy interest group could sue the Bureau of Alcohol, Tobacco and Firearms regarding a revised firearm regulation. Instead of aggressively defending the regulation, a newly elected administration more aligned with the gun industry or gun owners might simply seek to bypass Congress and the public by negotiating a settlement that achieves a less restrictive firearms policy goal without having to trouble itself with an uncertain and frequently messy legislative or rule-making process.

These are just a few illustrations of the perils of policy-making via litigation, legal maneuvering, and settlement. It lacks transparency, raises constitutional separation-of-powers concerns, and surely falls short of President Lincoln's vision of a "government of the people, by the people, for the people." Pres. Abraham Lincoln, *Gettysburg Address* (Nov. 19, 1863).

II. Intervention by the States Will Reintroduce an Adversarial Element to Guard Against an Abusive Settlement.

The cases challenging the Rule progressed in the ordinary course until February 5, 2024. Plaintiffs had filed a complaint against the defendants under the APA challenging the Rule, which had replaced the prior administration's "Remain in Mexico" policy. The Department of Justice, as expected, defended the Rule before the district court and continued to defend the Rule on appeal to the

Ninth Circuit after the district court ruled in plaintiffs' favor and vacated the Rule. The Department of Justice forcefully asserted in briefing and at oral argument that the Rule should not be vacated and that doing so would cause immense burdens because of the massive influx of immigrants anticipated to cross the southern border. Then suddenly on February 5, 2024, the parties informed the Ninth Circuit that they "would like to engage in additional discussions without any further litigation developments" and requested an indefinite abeyance, which the Ninth Circuit granted over the dissent of Judge VanDyke. Defendants did not seek to pause the cases filed by the States, which challenged the Rule as being insufficient to deter the immigration crisis. Thus, defendants continue to defend the Rule against States demanding stronger immigration enforcement, while simultaneously engaging in settlement negotiations with organizational plaintiffs seeking to undo the Rule because it is too onerous. Defendants thus have essentially picked sides between the two groups of plaintiffs.

Given the posture of the case and defendants' apparent favoritism toward the organizational plaintiffs in the present case, the intervenor States are rightly concerned that defendants may agree to a settlement that amounts to a consent order that is detrimental to the States' interests. Moreover, the parties' eleventh-hour legal maneuvering raises concerns that they are colluding and may negotiate a settlement that is neither fair nor reasonable, nor supported by law. Courts frown upon post-argument legal manipulation that deprives them of jurisdiction, especially with respect to cases that might help resolve weighty issues of broad importance. *See Naruto v. Slater*, 2018 U.S. App. LEXIS 9477, 2018 WL 33854051 (9th Cir. Apr. 13, 2018) (declining joint motion to dismiss appeal two months after oral argument). Moreover, this Court has disallowed

parties securing vacatur of the equitable relief the district court granted below—vacating the Rule—through settlement on appeal. *See U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 29 (1994) ("mootness by reason of settlement does not justify vacatur of a judgment under review"); *see also DHX, Inc. v. Allianz AGF MAT, Ltd.*, 425 F.3d 1169, 1179 (9th Cir. 2005). When settling a suit, a litigant voluntarily forfeits his legal remedy of vacatur." *Bonner Mall*, 513 U.S. at 25. Granting the States' motion to intervene will counter such potential manipulation and ensure a conclusive resolution to the case.

This Court also has cautioned against sweeping settlements, noting that "parties who choose to resolve litigation through settlement may not … impose duties or obligations on a third party without that party's agreement." *Local No. 93, Int'l Assoc. of Firefighters v. Cleveland*, 478 U.S. 501, 529 (1986). And the Ninth Circuit holds that statutorily required procedures like those in the APA impose limitations on the government's settlement authority as to the validity of regulatory revisions. *See Conservation Northwest v. Sherman*, 715 F.3d 1181, 1185 (9th Cir. 2013). *Sherman* held that a settlement was improper because it constituted a "substantial and permanent" amendment to an agency rule. *Id.* at 1188. Notably, in *Sherman*, it was an intervenor, rather than the initial litigants, that was the prevailing party. The case thus illustrates the importance of permitting the States to intervene to fulfill the same role: to ensure that any settlement does not impose unwarranted burdens on the States or result in a weakening or wholesale abandonment of the Rule.

Intervention by the States will act as a check on any collusion by the parties, a risk that Judge VanDyke highlighted in his dissent, noting that the parties appeared to

be "colluding to avoid playing their politically fraught game during an election year." *E. Bay Sanctuary*, 93 F. 4th at 1133. Approval of a consent decree or similar settlement requires more than just a rubber stamp. The lower courts widely recognize that "judicial approval may not be obtained for a [settlement] that is illegal or the product of collusion." *United Black Firefighters Ass'n v. Akron*, 976 F.2d 999, 1004 (6th Cir. 1992). Rather, "before entering a consent decree the court must satisfy itself that the agreement is 'fair, adequate, and reasonable' and 'is not illegal, a product of collusion, or against the public interest.'" *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999) (quoting *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991)). A court must determine if a settlement "is tainted by improper collusion or corruption of some kind." *SEC v. Citigroup Global Mkts.*, 752 F.3d 285, 295 (2d Cir. 2014); *see also Pigford v. Glickman*, 206 F.3d 1212, 1215 (D.C. Cir. 2000) (applying Rule 23(e) to consent decree to determine if "the settlement is fair, adequate, and reasonable and is not the product of collusion between the parties").

Intervention by the States will mitigate the risk of any potential collusion by the parties, and they will be at the ready to either object to any collusive settlement or force the litigation back on a track to resolution. In short, allowing intervention will enable interested parties to reintroduce an adversarial element to the proceedings. Intervenors can alert the court to both the big picture constitutional concerns a proposed settlement raises as well as the more workaday problems with a specific settlement. That is especially true here, where the parties seek to retire from the field of battle to negotiate a separate peace while there is still a meaningful fight to be waged and willing combatants—the proposed intervenor States—with a vested stake in the outcome. Allowing intervention will

help guard against the parties' potential usurpation of authority not allowed by the Constitution and the Executive Branch's potential dereliction to faithfully execute the law.

CONCLUSION

The practice of sue-and-settle raises constitutional concerns that can be mitigated by the participation of the proposed State intervenors.

The petition for a writ of certiorari should be granted to allow the Court to rule on such intervention.

Respectfully submitted,

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