No. 23-1353

IN THE

Supreme Court of the United States

KANSAS, *et al.*,

Petitioners,

v.

ALEJANDRO N. MAYORKAS, SECRETARY OF HOMELAND SECURITY, *et al.*,

Respondents.

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

BRIEF *AMICUS CURIAE* OF THE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amicus curiae Immigration Reform Law Institute[1] ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of immigration-related cases before federal courts (including this Court) and administrative bodies, including: *Trump v. Hawaii*, 585 U.S. 667 (2018); *United States v. Texas*, 599 U.S. 670 (2023); *Ariz. Dream Act Coalition v. Brewer*, 855 F.3d 957 (9th Cir. 2017); *Wash. All. Tech Workers v. U.S. Dep't Homeland Security*, 50 F.4th 164 (D.C. Cir. 2022); and *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016).

STATEMENT OF THE CASE

Plaintiffs challenge a final rule promulgated by the Department of Homeland Security ("DHS") and the Department of Justice on May 16, 2023. The final rule, Circumvention of Lawful Pathways ("the Rule"), creates a presumption that aliens who travel through a country

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1. Pursuant to Rule 37.2, undersigned counsel notified counsel of record for all of the parties of IRLI's intention to file this amicus brief 10 days prior to the deadline to file this brief.

Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amicus*, its members, or its counsel—contributed monetarily to its preparation or submission.

other than their own before entering the United States irregularly through the southern border with Mexico are ineligible for asylum. 88 Fed. Reg. 31314, 31449-52 (May 16, 2023). Thus, the Rule generally limits asylum eligibility for aliens who attempt to cross the border surreptitiously instead of presenting themselves at a port of entry. The district court ruled in favor of Plaintiffs and vacated the rule as contrary to law, arbitrary and capricious, and procedurally infirm. *East Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025, 1040-53 (N.D. Cal. 2023).

The federal government (defendants below) appealed and successfully sought a stay in the Ninth Circuit. On appeal, the government contended that plaintiffs lack Article III standing to challenge the Rule and that their claims are otherwise not reviewable. Brief for Appellants, Dkt. 32 at 18-27 (Sept. 7, 2023). The government also defended the Rule on the merits and stressed the importance of the Rule in curtailing illegal border crossings, stating that in the absence of the Rule, it "expects 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 54 (quotation omitted). The government also argued that "for the government, for migrants and for the public," "the negative consequences of such an increase in migration" in the absence of the Rule, "would be greater than the consequences of the pre-May 11 increase because Title 8 processes take substantially longer and are more operationally complex than the Title 42 processes that were used before May 11." *Id.* at 54-55 (quotation omitted).

After the case was fully briefed and argued, the parties suddenly asked the Court to hold the case in abeyance

because the parties had "been engaged in discussions regarding the Rule's implementation" and suggested that "a settlement could eliminate the need for further litigation." Joint Motion to Place Appeal in Abeyance, Dkt. 83 at 2. Thereafter, the States of Alabama, Kansas, Georgia, Louisiana, and West Virginia ("Petitioners" or the "States") sought to intervene as parties in this case in order to participate in settlement negotiations and possibly to object to any settlement that would weaken the effectiveness of the Rule. The Ninth Court, however, determined that the States lacked a protectable interest in the outcome of this case and denied the States' motion to intervene. *E. Bay Sanctuary Covenant v. Biden*, 102 F.4th 996, 1001-02 (9th Cir. 2024).

SUMMARY OF THE ARGUMENT

The Ninth Circuit erred in concluding that Petitioner States do not have a significant protectable interest in maintaining the Rule or in the enforcement of federal immigration law. First, the Ninth Circuit's conclusion rested on a serious misreading of this Court's decision in *United States v. Texas*, 599 U.S. 670 (2023). Contrary to the Ninth Circuit's reading, in *Texas*, this Court did not imply that the States have no protectable interest in the enforcement of federal immigration policies, but ruled only that federal courts lack the authority to "order the Executive Branch to take enforcement actions against violators of federal law," and that the States in that case therefore lacked Article III standing to ask a court to do so. *Id.* at 684-85.

The Ninth Circuit compounded this error by failing to recognize that the various States have a special

interest in the faithful execution of federal immigration law. The States largely ceded their sovereign power over immigration to Congress upon their admission to the Union and are generally prohibited from enforcing federal immigration law themselves. Therefore, the States have a strong quasi-sovereign or special interest in the proper or rigorous enforcement of immigration policies as established by Congress. Petitioners identified both economic and political harms that they would incur in the absence of the Rule. These concrete harms, coupled with their strong special interest in the proper enforcement of federal immigration policies as reflected in the Rule, weigh heavily in favor of finding a legally protected interest to warrant intervention. This Court should grant certiorari to address the exceptionally important question raised by the petition and to correct the errors in the decision below.

ARGUMENT

"No statute or rule provides a general standard to apply in deciding whether intervention on appeal should be allowed." *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 595 U.S. 267, 276 (2022). In assessing a motion to intervene on appeal, this Court therefore "consider[s] the policies underlying intervention in the district courts, including the legal 'interest' that a party seeks to 'protect' through intervention on appeal." *Id.* at 277 (quoting Fed. R. Civ. P. 24(a)(2)) (other quotation and citation omitted).

The Ninth Circuit denied the States' motion to intervene based solely on the court's determination that the States failed to establish "the requisite significant protectable interest to support intervention as of right under Rule 24(a)." *E. Bay*, 102 F.4th at 1002. In making

this determination, the Ninth Circuit misconstrued this Court's precedent and erroneously failed to recognize the States' strong quasi-sovereign interest in the faithful enforcement of federal immigration law. This Court should grant certiorari and correct these mistakes.

I. The Ninth Circuit misconstrued this Court's decision in *Texas* in concluding that the States have no interest in the proper enforcement of federal immigration law.

Relying principally on this Court's decision in *Texas*, the Ninth Circuit proclaimed that the States "have no legally protectible interest in compelling enforcement of federal immigration policies." *E. Bay*, 102 F.4th at 1002 (citing, inter alia, *Texas*, 599 U.S. at 677-80, 680 n.3). This holding is a drastic and unwarranted expansion of *Texas*. Nothing in this Court's decision in *Texas* suggests that States have no protectable interest in the enforcement of federal immigration law. Rather, *Texas* was "an extraordinarily unusual lawsuit" in which the plaintiff States asked "a federal court to order the Executive Branch to alter its arrest policies so as to make more arrests." 599 U.S. at 686. Here, neither the States nor any other party ask a court to order the administration to alter its arrest policies, much less make more arrests.

Indeed, *Texas* "is categorically different" from typical cases involving judicial review of statutory requirements or agency actions

> because it implicates only one discrete aspect of the executive power—namely, the Executive Branch's traditional discretion over whether

> to take enforcement actions against violators of federal law. And *this case raises only the narrow Article III standing question of whether the Federal Judiciary may in effect order the Executive Branch to take enforcement actions against violators of federal law*—here, by making more arrests. Under this Court's Article III precedents and the historical practice, the answer is no.

Texas, 599 U.S. at 684-85 (emphasis added).

That States cannot, under *Texas*, establish Article III standing to obtain a judicial order requiring the Executive Branch to "take enforcement actions against violators of federal law" does not mean that the various States have no protectable interests in the faithful enforcement of federal immigration law. Indeed, this Court has recognized that "[t]he pervasiveness of federal regulation does not diminish the importance of immigration policy to the States." *Arizona v. United States*, 567 U.S. 387, 397 (2012); *id.* at 397-98 (acknowledging that Arizona "bears many of the consequences of unlawful immigration," which include elevated criminal activity, safety risks, property damage, and environmental problems); *id.* at 398 ("The problems posed to the State by illegal immigration must not be underestimated.").

In any event, *Texas* is also distinguishable because here, unlike in *Texas*, the States need not demonstrate standing because they do not seek any relief different from existing parties and only seek to defend the Rule. *See Town of Chester, N.Y. v. Laroe Ests., Inc.*, 581 U.S. 433, 440 (2017) (an intervenor must demonstrate Article III standing only when the intervenor "pursue[s] relief

that is different from that which is sought by a party with standing."). As Petitioners note, Cert. Petition at 22 n.6, the States moved to intervene as defendants, and seek only to defend the Rule.

The States, moreover, do not challenge an exercise of the Executive's enforcement discretion. Rather, the States seek to defend an administrative rule promulgated pursuant to the Administrative Procedure Act ("APA") designed to discourage aliens from crossing the border surreptitiously by making them ineligible for asylum. No party in this case seeks a court order requiring the Executive Branch to exercise its prosecutorial discretion in any particular manner.

This Court's standing decision in *Texas* turned upon the unavailability of relief sought and not upon the lack of a legally protected interest in the faithful enforcement of federal immigration law. Indeed, the leading precedent relied upon by this Court in *Texas*, *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), did not involve either a State party or immigration law. Instead, the *Linda R.S.* Court held that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." 410 U.S. at 619. This Court in *Texas* simply held that the plaintiff States in that case, like any other party, lack standing to invoke the judicial power to enjoin the Executive's prosecutorial discretion. 599 U.S. at 678 ("[T]his Court's precedents and longstanding historical practice establish that the States' suit here is not the kind redressable by a federal court."). The Ninth Circuit erred in reading *Texas*'s holding with respect to standing as a judgment that States lack a protectable interest in the enforcement of immigration laws.

II. The States have a special interest in the rigorous enforcement of immigration law.

The Ninth Circuit's erroneous conclusion that the States have "no legally protectable interest in compelling enforcement of federal immigration policies," *E. Bay*, 102 F.4th at 1002, is compounded by the court's failure to recognize that the States have a special interest in the faithful execution of federal immigration law. The States largely ceded their sovereign power over immigration to Congress upon their admission to the Union and are generally prohibited from enforcing federal immigration law themselves. Therefore, the States have a strong quasi-sovereign or special interest in the proper or rigorous enforcement of immigration policies as established by Congress.

This Court has recognized that "States are not normal litigants for the purposes of invoking federal jurisdiction" and may be "entitled to special solicitude" where States seek to protect their "quasi-sovereign" interests. *Massachusetts v. EPA*, 549 U.S. 497, 518, 520 (2007). The leading decision regarding the concept of "quasi-sovereign" interests is *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982), in which the Court noted that "[o]ne helpful indication" of a quasi-sovereign interest is "whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Id.* at 607; *Massachusetts*, 549 U.S. at 519 (discussing same). Just as in *Massachusetts*, the States here are largely precluded from exercising their sovereign powers to protect themselves from the burdens of illegal immigration. Instead, the States are largely dependent upon the federal government to protect their interests.

"When the original States declared their independence, they claimed the powers inherent in sovereignty—in the words of the Declaration of Independence, the authority 'to do all . . . Acts and Things which Independent States may of right do.'" *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 470 (2018) (quoting Declaration of Independence ¶ 32). Inherent in the sovereignty of an independent State, "and essential to self-preservation," is the power "to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892). "As a sovereign, [each State] has the inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress." *Arizona v. United States*, 567 U.S. 387, 417 (2012) (Scalia, J., concurring in part and dissenting in part); *id.* at 418 ("There is no doubt that 'before the adoption of the constitution of the United States' each State had the authority to 'prevent [itself] from being burdened by an influx of persons.'") (quoting *Mayor of New York v. Miln*, 36 U.S. 102, 132-133 (1837)).

Justice Scalia, in his dissent in *Arizona*, 567 U.S. at 420-21, argued that the States did not surrender their power to regulate immigration upon entering the Union. *Id.* (noting that the *Miln* Court held that the power to regulate the entrance of foreigners remained with the States following the adoption of the Constitution). But this Court rejected Scalia's position in *Arizona* and held that immigration decisions regarding who may enter or remain in the United States "is entrusted to the discretion of the Federal Government" and "must be made with one voice." 567 U.S. at 409. Since *Miln*, this Court has "deprive[d] States of what most would consider the defining

characteristic of sovereignty: the power to exclude from the sovereign's territory people who have no right to be there." *Arizona*, 567 U.S. 416-17 (Scalia, J., dissenting) (describing the import of that decision); *see also Truax v. Raich*, 239 U.S. 33, 42 (1915) ("The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government.") (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893)); *Galvan v. Press*, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are … entrusted exclusively to Congress …."). Thus, the States are largely precluded from regulating immigration, and no one questions Congress's power to set nationwide immigration policy. And no State may adopt immigration policies or standards that conflict with federal immigration law.

Petitioner States have shown that they have legally protectable economic and political interests that would be impaired if the federal government abandons the Rule. Cert. Petition at 24-26. There is no dispute that the Rule prevents some aliens from being released into the country and therefore diminishes the harms to Petitioner States. An alien for whom the Rule's presumption applies cannot establish a credible fear of persecution and is therefore subject to expedited removal. *See* 8 C.F.R. § 208.33 (b)(1)(i) (directing a negative credible fear finding); *see also* 8 U.S.C. § 1225(b)(1)(B)(iii) (requiring expedited removal if no credible fear of persecution is established).[2]

2. Congress has empowered the Executive Branch to adopt regulations limiting asylum eligibility. 8 U.S.C. § 1158(b)(2)(C) ("The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1)."). *See also* 88 Fed. Reg. at 31323 (discussing legal authorities for the Rule). Congress has also directed the Secretary of Homeland

Government data confirms that the Rule is effective in reducing the number of aliens released into the United States. The number of aliens subjected to expedited removal increased substantially after the Rule became effective, going from fewer than 15,000 per month leading up to May 2023 to averaging more than 20,000 per month after implementation of the Rule. *See* https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy2023 (last visited July 24, 2024) (expand U.S. Border Patrol—Dispositions and Transfers "tab"); *see also* https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics (for fiscal year 2024 numbers) (last visited July 24, 2024) (again, expand U.S. Border Patrol—Dispositions and Transfers "tab"). If the Rule were abandoned via settlement or vacated by the Court, the number of aliens released into the country would certainly increase, and this increase would negatively impact the States.

Accordingly, the States have established a significant protectable interest in the continuing validity of the rule because invalidating the rule (or altering its implementation via settlement) would inevitably cost the States money or dilute their political interests. *See* Cert. Petition at 24-26 (discussing education and healthcare costs, administrative costs incurred in screening unlawfully present aliens from certain benefits, and their political interests that may be adversely affected in apportionment).

The Ninth Circuit erred in finding these economic and political interests too attenuated and speculative

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Security to take all necessary and appropriate steps to achieve and maintain operational control over the border -- defined as preventing all unlawful entries. § 2, Secure Fence Act of 2006, Pub. L. 109-367, 120 Stat. 2638 (codified as note to 8 U.S.C. § 1701).

to constitute the requisite protectable interest for intervention. *E. Bay*, 102 F.4th at 1002. This error was compounded because the Ninth Circuit failed to recognize that in addition to the economic and political interests identified by the States, Petitioners have a special interest (or a quasi-sovereign interest) in the faithful execution of federal immigration law under *Massachusetts*.[3] Granting certiorari would provide this Court an opportunity to clarify that the various States have a special or quasi-sovereign interest in the rigorous enforcement of immigration law, particularly where the States must rely almost exclusively on the Executive Branch for faithful enforcement of the immigration policies established by Congress.

In sum, Petitioners effectively demonstrate that certiorari is warranted because this case presents an exceptionally important question—whether the government may lawfully adopt, modify, or nullify an administrative rule by settling litigation with a nominally opposing party (or via "rulemaking-by-collective-

3. In *Texas*, this Court determined that its decision in *Massachusetts* "does not control this case" because *Massachusetts* did not involve "a challenge to an exercise of the Executive's enforcement discretion." 599 U.S. at 685 n.6. This footnote distinguishing *Massachusetts* teaches only that no State is entitled to "special solicitude" in the Article III standing analysis in a case in which a State seeks a court order requiring the Executive Branch to alter its arrest policies so as to make more arrests. The fact that *Massachusetts v. EPA* did "not control" the standing analysis in such "an extraordinarily unusual lawsuit" should not be read to undermine its applicability in cases such as this in which the States seeking to protect their quasi-sovereign interests by defending a rule promulgated pursuant to the APA designed to discourage aliens from crossing the border surreptitiously.

acquiescence"). *Arizona v. City & Cnty. of S.F., Cal.*, 596 U.S. 763, 766 (2022) (Roberts, C.J., concurring). In addition, certiorari is warranted to correct the Ninth Circuit's misreading of *Texas* and to clarify that the States remain entitled to special consideration in establishing the requisite interest to participate in litigation relating to immigration policies.

CONCLUSION

For the foregoing reasons and those argued by the States, this Court should grant the petition for certiorari.

Respectfully submitted,

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