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

BRIEF IN OPPOSITION OF RESPONDENTS EAST BAY SANCTUARY COVENANT, ET AL.

Cecillia Wang
Cody Wofsy
Katrina Eiland
Morgan Russell
Spencer Amdur
Oscar Sarabia Roman
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
425 California Street, Suite 700
San Francisco, CA 94104

Melissa Crow
CENTER FOR GENDER & REFUGEE STUDIES
1121 14th Street, NW, Suite 200
Washington, DC 20005

Lee Gelernt
Counsel of Record
Omar C. Jadwat
Wafa Junaid
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
lgelernt@aclu.org

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, D.C. 20005

Counsel for Respondents East Bay Sanctuary Covenant, et al.

(*Counsel continued on inside cover*)

Anne Peterson
Blaine Bookey
Julie Bourdoiseau
Karen Musalo
CENTER FOR GENDER
& REFUGEE STUDIES
200 McAllister Street
San Francisco, CA 94102

Robert Pauw
CGRS COOPERATING ATTORNEY
GIBBS HOUSTON PAUW
1000 Second Avenue,
Suite 1600
Seattle, WA 98104

Keren Zwick
Richard Caldarone
Colleen Cowgill
Mary Georgevich
NATIONAL IMMIGRANT
JUSTICE CENTER
224 South Michigan Avenue,
Suite 600
Chicago, IL 60604

Michelle (Minju) Y. Cho
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
NORTHERN CALIFORNIA, INC.
39 Drumm Street
San Francisco, CA 94111

QUESTION PRESENTED

The States frame the question presented as whether the court of appeals erred when it denied them "the ability to intervene as defendants after the federal government stopped defending its own rule." But the rule at issue, a temporary border control measure, remains in effect because of the federal government's successful request for a stay, and the federal government continues to defend the rule. Thus, the question presented is more accurately stated as:

Whether the Ninth Circuit erred in denying intervention where the challenged rule is in effect and the federal government has—and continues to—vigorously defend it.

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INTRODUCTION

This case involves a challenge to a temporary border control regulation set to expire on May 11, 2025. The States contend that, like *Arizona v. City & County of San Francisco*, 596 U.S. 763 (2022), and *Arizona v. Mayorkas*, 143 S. Ct. 1312 (2023), this case provides the Court with another opportunity to decide whether intervention by states is proper where the federal government stops defending an agency rule and seeks to eliminate it without complying with the procedural requirements of the Administrative Procedure Act ("APA"). But this case does not present that question because the federal government has not ceased defending the rule at issue. Indeed, the rule remains in effect precisely because the federal government successfully sought a stay of the district court's judgment vacating the rule. That stay kept the rule in force and continues to do so. And the federal government continues to defend the rule. The federal government's mere agreement to negotiate, while the rule remains in place, does not imply any abandonment of the rule or its defense, much less any desire to soften asylum restrictions at the border. To the contrary, although the temporary 2023 rule at issue here remains on the books, the federal government has superseded it with a 2024 border rule that is even more restrictive and, according to the government, is responsible for the recent decrease in border numbers. There is simply no evidence that the federal government has retreated from defending its 2023 rule.

Because this case therefore does not present the "APA circumvention" issue that the States frame, the petition should be denied. The States do not argue that the question the court of appeals actually

decided—whether the States lack a legally protected interest necessary to intervene—warrants certiorari in the absence of any issue about circumventing the APA. That is understandable: There is no circuit split on the protectable-interest question, and just last year this Court provided the lower courts with guidance on assessing a state's interest in federal immigration policy. *See United States v. Texas*, 599 U.S. 670 (2023). The court of appeals applied that guidance from *Texas,* as well as traditional intervention standards, and properly concluded that the States here lacked a legally protectable interest.

Practical considerations further weigh against this Court's review, including that the States submitted no evidence to support their assertion that repeal of the rule would harm them, that the 2023 rule at issue here will sunset in May 2025 in any event, and that the new and more restrictive 2024 rule now governs asylum processing at the border.

STATEMENT OF THE CASE

A. The federal government issued the 2023 Rule as a temporary border control measure with a sunset date of May 2025.

On May 8, 2023, the federal government issued a temporary stopgap measure, the rule at issue here, titled "Circumvention of Lawful Pathways" (the "2023 Rule"). 88 Fed. Reg. 31314 (May 16, 2023) (codified at 8 C.F.R. pts. 208, 1003, 1208). The 2023 Rule took the place of the Title 42 border policy, based on an order by the Centers for Disease Control and Prevention, that governed during the pandemic. *Id.* at 31324. The 2023 Rule applies at the U.S.-Mexico border and at

adjacent coastal areas and took effect the day that the Title 42 order expired. *Id.* at 31318–19.

The 2023 Rule renders ineligible for asylum most noncitizens who cross the southern U.S. border between designated ports of entry or who request asylum at ports of entry without appointments obtained through the federal government's "CBP One" smartphone app. *Id.* at 31317–18. Noncitizens who can show "exceptionally compelling circumstances" at the time they crossed the border between ports can be excepted from the rule. *Id.* at 31450. Other exceptions apply to: (1) unaccompanied minors; (2) noncitizens who present at ports of entry without appointments if they can establish that "it was not possible to access or use" the CBP One app; (3) noncitizens who received advance authorization to travel to the United States; and (4) those who can show that they sought and were denied protection in another country en route to the United States. *Id.*

The 2023 Rule was specifically intended as a "temporary" measure, *id.* at 31314, 31382, to address an anticipated short-term increase in "migration at the [southern border] following the expiration of" the Title 42 policy, *id.* at 31366; *see also, e.g.*, *id.* at 31314. The rule therefore applies only to noncitizens who cross the southern border "during a limited, specified date range" between "May 11, 2023, and May 11, 2025." *Id.* at 31314, 31321. The "two-year temporary duration of the rule" was based on the federal government's determination "that a 24-month period [would be] sufficiently long to impact the decision-making process for noncitizens who might otherwise pursue irregular migration and make the dangerous journey to the United States." *Id.* at 31421. The May 2025 sunset date is in the 2023 Rule's regulatory text

itself, 8 C.F.R. §§ 208.33(a)(1)(i), (c)(2), and can be extended only by "additional rulemaking" that is "consistent with the requirements of the APA," 88 Fed. Reg. at 31421.[1]

B. The district court orders the 2023 Rule vacated, the federal government obtains a stay pending appeal, and the case is held in abeyance.

Plaintiffs challenged the 2023 Rule as contrary to statute, arbitrary and capricious, and procedurally defective under the APA. The district court granted summary judgment to Plaintiffs and ordered the 2023 Rule vacated. *See East Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025 (N.D. Cal. 2023). The federal government appealed and sought a stay of the district court's decision pending appeal, which the Ninth Circuit granted. *East Bay Sanctuary Covenant v. Biden*, No. 23-16032, 2023 WL 11662094, at *1 (9th Cir. Aug. 3, 2023). Accordingly, the 2023 Rule remains in effect.

After oral argument in the court of appeals, and with the 2023 Rule still in effect as a result of the stay, the parties jointly moved to hold the appeal in abeyance. CA9 Dkt. 83. The motion stated that the parties were "engaged in discussions regarding the Rule's implementation and whether a settlement could eliminate the need for further litigation," noting that "the status quo has been preserved," because the court of appeals had "stayed the district court's

[1] "[T]he rule will continue to apply" in adjudicating the asylum applications of noncitizens in immigration court proceedings "who entered the United States during the 24-month time frame" between May 11, 2023 and May 11, 2025. 88 Fed. Reg. at 31318.

vacatur of the Rule." *Id.* at 2. On February 21, 2024, the court of appeals granted the motion, over a dissent, and placed the appeal "in abeyance pending the parties' settlement discussions." *East Bay Sanctuary Covenant v. Biden*, 93 F.4th 1130, 1131 (9th Cir. 2024).

On March 7, 2024—after full briefing and argument in the court of appeals—the States of Kansas, Alabama, Georgia, Louisiana, and West Virginia moved to intervene. CA9 Dkt. 86. The States sought intervention "(1) to participate in settlement negotiations and to object, if necessary, to any proposed settlement, and (2) to move [the court], if necessary, to lift the abeyance and resume its expedited consideration." *Id.* at 1; *see also* Pet. 14 (The States "seek to be a part of the negotiations to protect their interests and to defend the Rule if the federal government has abandoned it."). The States argued that they have a significant protectable interest in the subject of this litigation for two reasons. They asserted that a settlement could "increase illegal immigration" and result in the presence of more new migrants in their States, which in turn could cause the States to incur costs related to education, publicly funded counsel, healthcare, and licensing. CA9 Dkt. 86 at 16-17. In support, the States cited several court decisions that they described as obligating them to provide certain services to undocumented noncitizens—but notably, they did not submit any calculations, projections, or other evidence concerning costs they claimed they might incur. *Id.* The States also claimed that a settlement could result in proportionally more new migrants settling in *other* states, and that this could eventually result in their States losing out in congressional representation

following "the 2030 census." *Id.* at 18–19 & n.15. To support that latter theory, the States cited border crossing statistics and two news reports about migrants, one of which describes Texas's practice of transporting newly arrived migrants to other states including "New York, Illinois, California, and Colorado." *Id.* at 18-19. Plaintiffs and the federal government opposed the States' motion. CA9 Dkts. 96, 97.

The court of appeals denied the States' motion to intervene, over a dissent. App. 7, 12. Although the court noted that appellate intervention is "unusual and should ordinarily be allowed only for imperative reasons," *id.* at 8 (cleaned up), it ultimately applied the traditional district court intervention standards set forth in Federal Rule of Civil Procedure 24, *id.* at 10 (citing *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 595 U.S. 267, 276–77 (2022), for the principle that "the 'policies underlying' Federal Rule of Civil Procedure 24 guide [the] analysis"). The court "conclude[d] that the States lack the requisite significant protectable interest to support intervention as of right under Rule 24(a)," because they "have no legally protectible interest in compelling enforcement of federal immigration policies" under, *inter alia*, *United States v. Texas*, 599 U.S. at 677–80, 680 n.3. App. 10, 12. The court stated that "[a]lthough *Texas* is about Article III standing, it holds that absent other circumstances, states cannot assert an interest in procuring greater immigration enforcement." *Id.* at 10 n.3 (citing *Texas*, 599 U.S. at 677, 681–83). The court therefore "decline[d] to reach a conclusion contrary to the principles articulated by the Supreme Court in *Texas*." *Id.* The court additionally noted that "[e]ven if disposition of this

appeal might affect state expenditures and political representation, such incidental effects are not at issue in the litigation and are, in any event, attenuated and speculative." *Id.* at 10–12. The court of appeals denied permissive intervention for "similar reasons," stating that "the 'nature and extent' of the States' interest in this appeal are far too attenuated to support intervention." *Id.* at 12 (citation omitted).[2]

C. The federal government subsequently issued a more restrictive 2024 asylum rule that supersedes the temporary 2023 Rule.

Effective June 5, 2024, while the 2023 Rule was still in effect pursuant to the stay, the federal government issued a new, more restrictive asylum regulation titled "Securing the Border" (the "2024 Rule"). 89 Fed. Reg. 48710 (June 7, 2024) (codified at 8 C.F.R. pts. 208, 235, 1208). The new 2024 Rule has superseded the 2023 Rule as the operative asylum restriction at the southern border.[3] The 2024 Rule

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[2] The same five States have also moved to intervene in *M.A. v. Mayorkas*, No. 1:23-cv-1843 (D.D.C.), another challenge to the 2023 Rule. That challenge is likewise in abeyance pending settlement discussions. As the parties stated in their abeyance motion to the court of appeals in this case, the plaintiffs in *M.A.* "are represented by some of the same counsel representing plaintiffs in this suit." CA9 Dkt. 83 at 2. In addition to the 2023 Rule, *M.A.* also concerns several other contemporaneous expedited removal policies described in the filings in that case. *See, e.g.*, *M.A.*, Dkt. 19, 37, 53. The States' intervention motion in *M.A.* remains pending.

[3] The new rule's provisions apply while crossings between ports average more than 1,500 per day, 89 Fed. Reg. at 48715—a numerical threshold that has been exceeded continuously since July 2020. *See* U.S. Customs & Border Protection, *Southwest*

makes clear that its new procedures—rather than those set out in the 2023 Rule—now govern asylum processing at the southern border. *See, e.g.*, 8 C.F.R. §§ 208.35, 1208.35 (2024 Rule's provisions apply "[n]otwithstanding any contrary section," specifically including the 2023 Rule's less restrictive provisions at §§ 208.33 and 1208.33); 89 Fed. Reg. at 48755.

Like the 2023 Rule, the 2024 Rule renders noncitizens who cross the southern U.S. border between ports of entry ineligible for asylum. 89 Fed. Reg. at 48731–32. And as with the 2023 Rule, the 2024 Rule requires asylum seekers to make CBP One appointments to present at ports of entry. *Id.* at 48715.

However, the 2024 Rule is more restrictive than the 2023 Rule in multiple respects. First, while the 2023 Rule does not apply to Mexican nationals, a significant proportion of recent asylum seekers, the 2024 Rule applies to noncitizens of *all* nationalities without exception. 89 Fed. Reg. at 48738.

Second, while the 2024 Rule maintains the 2023 Rule's exceptions for unaccompanied children and noncitizens who can demonstrate "exceptionally compelling circumstances," 89 Fed. Reg. at 48715, 48718, it does not include several of the 2023 Rule's

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Land Border Encounters, https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters; Adam Isacson, *The Futility of "Shutting Down Asylum" by Executive Action at the U.S.-Mexico Border,* Washington Off. on Latin Am. (June 4, 2024), https://www.wola.org/analysis/futility-of-shutting-down-asylum-by-executive-action-us-mexico-border/. Even if crossings fall below the 1,500 per day threshold, the new rule's provisions would resume operation once crossings exceed an average of 2,500 per day. 89 Fed. Reg. at 48715.

other exceptions. For example, unlike its predecessor, the new rule does not have exceptions for noncitizens who can show that they were denied protection in another country or for noncitizens who could not access or use the CBP One app to make an appointment at a port of entry. *Id.* at 48732 n.171.

Third, the 2024 Rule overrides longstanding protective regulations—which remained in place under the 2023 Rule—that required Border Patrol officers to advise noncitizens placed in expedited removal proceedings of their right to seek asylum and ask them if they fear removal. 89 Fed. Reg. at 48739. Under the 2024 Rule, noncitizens who cross the border without appointments are not asked and are referred to credible fear protection screening interviews only if they spontaneously "manifest" a fear of removal. *Id.* at 48739–40. The express purpose of this change is to reduce the number of noncitizens referred for credible fear interviews and thereby reduce the number who can remain in the United States to pursue protection claims. *Id.* at 48742–43. And under the 2024 Rule, even noncitizens who manage to spontaneously "manifest" fear of removal without being asked are not entitled to seek asylum, but only lesser forms of protection for which they must meet a "substantially more" stringent screening standard to avoid expedited removal. *Id.* at 48746 (emphasis added).[4]

Fourth, unlike the 2023 Rule—which was specifically intended to address what the federal government expected to be a *temporary* increase in migration after Title 42 expired in May 2023—the

[4] These other forms of protection are withholding of removal, 8 U.S.C. § 1231(b)(3), and relief under the Convention Against Torture.

2024 Rule has no sunset provision. Therefore, the 2024 Rule will remain in place indefinitely unless invalidated in court or rescinded consistent with APA procedures.[5]

The federal government specifically made these more restrictive "changes to asylum processing at the southern border" in an attempt to "reduce encounters." *See* Decl. of Dep't of Homeland Sec. ("DHS") Ass't Sec'y Royce Murray ¶ 17, *Las Americas* Dkt. 45-2, D.D.C. Case No. 1:24-cv-1702 ("Murray Decl."). Under the 2023 Rule, total encounters along the southern border rose to a level "higher than any previous month on record" in December 2023. *Id.* ¶ 11. While the 2023 Rule was being applied at the border "[b]etween May 12, 2023 and June 4, 2024, . . . prior to the implementation of the [2024] Rule," the federal government contends that "DHS was forced to resort to the release of the majority of individuals encountered, pending proceedings in the backlogged immigration court system." *Id.* ¶ 13. Under the 2024 Rule, by contrast, the number of crossings between ports of entry have fallen in the summer months to "the lowest they have been since the summer of 2020 and lower than were observed during much of 2019." *Id.* ¶ 25. In August 2024, border crossings between southern ports of entry "remained at a four-year low."[6]

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[5] The 2024 Rule has been challenged and the federal government is defending the rule in court. *See Las Americas Immigrant Advoc. Ctr. v. Dep't of Homeland Sec.*, No. 1:24-cv-1702 (D.D.C., filed June 12, 2024). The State of Texas has moved to intervene in that litigation. *Las Americas*, Dkt. 19-1.

[6] Camilo Montoya-Galvez, *"Deportations Are 24/7": Migrants Are Quickly Returned to Mexico Under Biden's Asylum Crackdown*, CBS News (Sept. 1, 2024), https://www.cbsnews.com/news/deportations-biden-asylum-crackdown/.

Thus, while the 2023 Rule at issue in this litigation remains in effect as a result of the federal government's vigorous defense of it, that rule has for all practical purposes been superseded by the more restrictive 2024 Rule.[7] In any event, the 2023 Rule sunsets in May 2025.

ARGUMENT

I. THIS CASE DOES NOT WARRANT THE COURT'S REVIEW BECAUSE THE "APA CIRCUMVENTION" ISSUE IS NOT PRESENTED AND THERE IS NO CIRCUIT SPLIT ON THE PROTECTABLE-INTEREST QUESTION.

A. This case does not present the "APA circumvention" question on which the States seek review.

The States ask this Court to decide whether the court of appeals incorrectly denied intervention "*after the federal government stopped defending its own rule*." Pet. at i (Question Presented) (emphasis added). The States contend that this case is an "appropriate vehicle" to resolve that question after the Court was unable to do so in *Arizona v. City & County*

[7] The federal government reportedly plans to make further changes to the final version of the 2024 Rule to ensure that its restrictions continue to apply without interruption. Hamed Aleaziz, *Biden Administration May Cement Asylum Restrictions at the Border*, N.Y. Times (Sept. 4, 2024), https://www.nytimes.com/2024/09/04/us/politics/biden-asylum-restrictions.html; Camilo Montoya-Galvez, *Biden Administration Weighs Making It Harder to End Asylum Crackdown at Border*, CBS News (Sept. 4, 2024), https://www.cbsnews.com/news/biden-asylum-rules-us-mexico-border/.

of San Francisco, 596 U.S. 763 (2022), and *Arizona v. Mayorkas*, 143 S. Ct. 1312 (2023). Pet. 10. But unlike the two *Arizona* cases, where the federal government effectively terminated the challenged agency actions, the rule here *is* in effect precisely because of the federal government's defense of it. Thus, this case simply does not present the issue on which the States seek review.

In the *Arizona* cases, unlike here, the federal government made litigation choices that halted those challenged rules. In *Arizona v. City & County of San Francisco*, the states moved to intervene as defendants in a lawsuit challenging a "public charge" rule that the federal government initially defended in several cases. After a change in administrations, however, the agency chose to acquiesce in a decision vacating the rule in one of the cases, dismissed its appeals in the remaining cases, and issued a new rule repealing the prior rule without engaging in notice and comment, on the ground that the repeal was "simply implement[ing]" the court's vacatur decision. 596 U.S. at 765 (Roberts, C.J., concurring) (quoting 86 Fed. Reg. 14221 (March 15, 2021) (internal quotation marks omitted). The states claimed that if they were not permitted to intervene, the agency would be able to terminate a rule without notice and comment simply by acquiescing in a district court's vacatur decision, thereby circumventing the APA's procedural requirements. *Id.* at 765–66. In short, the issue was whether intervention was incorrectly denied after the agency *had* abandoned its defense and effectively eliminated a rule without notice and comment.

Similarly, in *Arizona v. Mayorkas*, which involved the Title 42 border restriction, the issue was again whether intervention had been improperly denied

when the federal government wished to end the policy and, absent intervention, the policy would no longer be operative. In April 2022, the federal government issued a notice to rescind Title 42 because it was "no longer required in the interest of public health." 87 Fed. Reg. 19941, 19942 (Apr. 6, 2022). A group of states challenged that rescission order and obtained an injunction keeping Title 42 in place based on the government's failure to engage in notice-and-comment procedures. *See Arizona v. Mayorkas*, 143 S. Ct. 1312, 1313 (2023) (Statement of Gorsuch, J.). Several months later, a district court in a separate case ordered the Title 42 policy vacated. *See id.* The federal government appealed that decision but declined to seek a stay pending appeal, thereby allowing the district court's decision to render the policy inoperative. Several of the states that had successfully challenged Title 42's rescission moved to intervene in that second lawsuit to seek a stay of the district court's vacatur decision. After the D.C. Circuit denied intervention, the states sought emergency relief in this Court, which stayed the vacatur decision and granted certiorari concerning the denial of intervention. *See id.* The case ultimately became moot when the Title 42 policy expired under its own terms along with the underlying federal Covid-19 emergency declaration. *See id.* at 1312 (mem.).

In both *Arizona* cases, therefore, the question was whether the states had a right to intervene once the federal government had acquiesced without notice and comment—either permanently or temporarily—in the court-ordered termination of an agency policy, thereby allegedly harming the states. In both cases, the record made clear that the federal government intended to eliminate the policies. In one case, the

Biden administration openly *opposed* its predecessor's public charge rule, and quickly took steps toward repealing it; and in the other case, the administration published a notice seeking to formally terminate the Title 42 policy.

Here, by contrast, the Biden administration issued the 2023 Rule and has consistently defended it and has successfully ensured that it remains in place. The mere fact that the parties agreed to hold the appeal in abeyance—*while the 2023 Rule remains in effect*—does not suggest that the federal government has stopped defending it or that it intends to do so. And the States' implication that the administration is looking to soften asylum restrictions at the border is belied by, among other things, the stay it successfully obtained to keep the 2023 Rule in effect, and its issuance of the 2024 Rule imposing even greater border restrictions.

The States claim that the federal government nevertheless *might* at some point choose to terminate or modify the 2023 Rule based on the outcome of negotiations. But that is entirely speculative. And if that were to occur, the States could seek to intervene in this case at the Ninth Circuit at that point, with a request for a stay as necessary. *See Arizona v. Mayorkas*, 143 S. Ct. 478 (2022) (granting review of the denial of intervention and issuing a stay of the district court vacatur of Title 42 policy). Or they could file a separate APA action in district court alleging that the agency failed to follow the APA's procedural requirements in eliminating the rule. But at this point, with the 2023 Rule fully in place, this case does not present the considerations with which the Court grappled in the two *Arizona* cases. This case is not

just a poor vehicle for the *Arizona* question—it is not a vehicle for that question at all.

B. The Ninth Circuit's intervention decision does not independently warrant review.

The States make no argument that the Ninth Circuit's application of well-established intervention standards to this case warrants review absent the issue presented in the *Arizona* cases. That is understandable. The court applied relevant precedent to this case, and its ruling creates no circuit split; indeed, the States do not even assert one. Moreover, this Court recently provided significant guidance regarding a state's interest in federal immigration policy, and this case provides no reason for further guidance.

In *United States v. Texas*, 599 U.S. 670, on which the Ninth Circuit relied, this Court held that the State of Texas lacked standing to challenge the federal government's immigration arrest priorities. In doing so, the Court cautioned that "federal courts must remain mindful of bedrock Article III constraints in cases brought by States against an executive agency or office" because "federal policies frequently generate indirect effects on state revenues or state spending," *id.* at 680 n.3—precisely what the States here allege gives them a legally protectable interest for purposes of intervention. How to apply *Texas* is a question just beginning to percolate through the lower courts. It has not led to any circuit split. Indeed, no other court of appeals decision has even had occasion to apply *Texas* to assess a state's claim of standing or protectable interest to challenge or to defend a federal immigration policy. Outside of the immigration

context, the only other circuit decision applying *Texas* in assessing whether the fiscal impacts of a federal policy are too indirect to confer a protectable interest is another Ninth Circuit opinion denying intervention to a group of states. *See Washington v. FDA*, 108 F.4th 1163, 1174–76 (9th Cir. 2024) (concluding that several states lacked standing to intervene under *Texas* and under *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024)). The other opinions Plaintiffs are aware of applying *Texas* to assess states' standing or interest in a case concerning federal immigration policy are district court decisions.[8] It is premature for this Court to wade back into these waters so soon after *Texas*, especially in the absence of a circuit split.

Even if the Court were inclined to take up the scope of *Texas* so soon, there will be far better vehicles to do so, including cases in which the issue of a state's interest will definitely matter to the outcome of the litigation—a question that is in serious doubt here because the 2023 Rule remains in place and there has

[8] *See Texas v. Mayorkas*, No. 2:23-cv-24, 2024 WL 3679380, at *6–7 (W.D. Tex. Aug. 5, 2024) (concluding that state lacked standing to challenge federal government's decision in 2023 Rule not to bar asylum to noncitizens who enter at ports via appointments); *Gen. Land Off. v. Biden*, No. 7:21-cv-272, 2024 WL 1023047, at *5–6 (S.D. Tex. Mar. 8, 2024) (concluding that state has standing to challenge federal government's alleged failure to construct border walls); *Florida v. United States*, No. 3:21-cv-1066, 2024 WL 677713, at *1–5 (N.D. Fla. Feb. 20, 2024) (concluding that state has standing to challenge federal immigration non-detention policies); *Texas v. United States*, 691 F. Supp. 3d 763, 778–81 (S.D. Tex. 2023) (reasoning that "if called upon to revisit the standing issue" in light of *Texas*, the court "would again find [standing] exists" for a state to challenge DACA policy), *appeal docketed*, No. 23-40653 (5th Cir. Nov. 9, 2023).

been no indication that the federal government will abandon it.

This is also a poor vehicle to address the intervention question because the States offered no evidence of harm in support of their intervention motion. The protectable-interest question accordingly has an entirely abstract quality. If the Court seeks to further address the sorts of indirect harms that permit intervention or standing by states in cases involving federal policy, it would be far better to do so where the nature and extent of the harms are supported by facts in a record, rather than by bare speculation in a brief.

And as if that were not enough, this case is an especially poor vehicle for other practical reasons. First, as noted, the 2023 Rule at issue here has been superseded by the more restrictive asylum rule issued in June 2024. According to the federal government, the 2024 Rule was necessary precisely because the 2023 Rule was not adequately reducing border crossings. Thus, even if the 2023 Rule at issue here were to be terminated, it is unlikely that the States could show any meaningful, real-world impact in light of the 2024 Rule.

Second, the rule at issue here sunsets in May 2025 and can only be renewed with procedures "consistent with" APA requirements. 88 Fed. Reg. at 31421. Thus, even apart from the fact that the 2024 Rule is now DHS's operative border restriction, this case has an exceedingly short shelf life.[9]

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[9] Additionally, this case is a poor vehicle because it involves the particularly unusual situation of movants seeking to intervene to participate in negotiations. And, as noted, if negotiations were to result in the termination or revision of the

In sum, this case does not now, and may never, present the "APA circumvention" issue on which the States seek review. And, absent that issue, review of the Ninth Circuit's alleged error in the application of intervention standards to the circumstances of this case does not warrant review.

II. THE COURT OF APPEALS CORRECTLY DENIED INTERVENTION.

The decision below applied Rule 24's intervention standards and correctly denied the States' motion to intervene. The States make much of the Ninth Circuit's statement that appellate intervention "is unusual and should ordinarily be allowed only for imperative reasons." App. 8–9 (cleaned up); *see* Pet. 17–19. But as the court of appeals noted, "[o]ther circuits similarly distinguish between intervention at the district court and intervention on appeal." App. 8 n.1 (collecting cases). That makes sense because intervention under Rule 24 always requires a timely motion and, except in unusual situations, intervention on appeal is likely to be untimely. *See* Wright & Miller, 7C Fed. Prac. & Proc. Civ. § 1916 (3d ed. 2023).

In any event, the Ninth Circuit did not actually apply a heightened standard to the States' motion. It instead applied the traditional Rule 24 standard for district court intervention in concluding that the States lacked a legally protectable interest in the federal government's asylum rule. Indeed, the intervention cases cited by the court of appeals in reaching that conclusion, App. 9–12, all involved

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rule, the States could at that point seek to intervene again or file an independent APA action.

review of district court intervention governed directly by Rule 24, not appellate intervention.[10]

The Ninth Circuit's decision holding that the States lacked a legally protectable interest was correct.[11] Consistent with this Court's decisions, *see*, *e.g.*, *Donaldson*, 400 U.S. at 530–31, every circuit interprets Rule 24(a)(2) to require an interest that is direct and concrete, rather than contingent or generalized.[12] The States principally speculate that

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[10] *See Cooper v. Newsom*, 13 F.4th 857 (9th Cir. 2021); *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011); *Perry v. Proposition 8 Off. Proponents*, 587 F.3d 947 (9th Cir. 2009); *Media Liab. Mut. Ins. Co. v. Alan Curtis LLC*, 485 F.3d 1006 (8th Cir. 2007); *United States v. Alisal Water Corp.*, 370 F.3d 915 (9th Cir. 2004); *United States v. Peoples Benefit Life Ins. Co.*, 271 F.3d 411 (2d Cir. 2001).

[11] The Ninth Circuit did not separately address standing, but this Court would have to do so to afford the States relief. The States claim they need not show standing because they are not seeking different relief from the federal government. Pet. 22 n.6. That is incorrect. Insofar as the States are asking the court of appeals to mandate that they be permitted to participate in negotiations or "to lift the abeyance," or for the court of appeals to block the administration from terminating or modifying the 2023 Rule, *see* CA9 Dkt. 86 at 1; *see also* Pet. 14 (States seek "to defend the Rule if the federal government has abandoned it"), they are asking for something different than the federal government and must therefore show standing under *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 674 n.6 (2020). In any event, the standing and protectable interest inquiries overlap where intervenors cannot establish a sufficiently direct stake in the case. *See*, *e.g.*, *Donaldson v. United States*, 400 U.S. 517, 530–31 (1971); *Diamond v. Charles*, 476 U.S. 54, 75–76 (1986) (O'Connor, J., concurring in part and in the judgment).

[12] *Deutsche Bank Nat'l Tr. Co. v. FDIC*, 717 F.3d 189, 193–95 (D.C. Cir. 2013); *Ungar v. Arafat*, 634 F.3d 46, 51-52 (1st Cir. 2011); *In re N.Y.C. Policing During Summer 2020*

ending the 2023 Rule could increase the number of migrants in their States, which in turn could result in increased state expenditures. Pet. 24-25. But in addition to being entirely speculative in light of the 2024 Rule's superseding effect, that argument proves too much. It would give states a legally protectable interest (and Article III standing) to challenge virtually *any* policy or action that might affect the scope of migration to the United States. That would include, for example, a Federal Bureau of Investigation decision to divert resources from fighting human trafficking to fighting terrorism; reduced enforcement against employers for hiring undocumented workers; increased labor protections for the same workers; or even an agreement with Mexico on foreign aid, trade, or immigration. Each of these decisions (and countless others) could be said to risk increasing downstream costs that states bear vis-à-vis immigrants. And the same theory would apply to nearly every other kind of federal decision-making, such as budgeting or law enforcement. If effectively everything the federal government does allows states to intervene *as of right* in litigation concerning federal policies, Rule 24's protectable interest requirement (as well as Article III's case-or-controversy requirement)

Demonstrations, 27 F.4th 792, 799 (2d Cir. 2022); *Pennsylvania v. President United States of Am.*, 888 F.3d 52, 58 (3d Cir. 2018); *Matter of Richman*, 104 F.3d 654, 659 (4th Cir. 1997); *La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 305–06 (5th Cir. 2022); *Coal. to Def. Affirmative Action v. Granholm*, 501 F.3d 775, 782–83 (6th Cir. 2007); *Lopez-Aguilar v. Marion Cnty. Sheriff's Dep't*, 924 F.3d 375, 391–92 (7th Cir. 2019); *Alan Curtis LLC*, 485 F.3d at 1008–09; *Alisal Water Corp.*, 370 F.3d at 919–20; *Barnes v. Sec. Life of Denver Ins. Co.*, 945 F.3d 1112, 1121–22 (10th Cir. 2019); *Huff v. Comm'r of IRS*, 743 F.3d 790, 796 (11th Cir. 2014); *Am. Mar. Transp., Inc. v. United States*, 870 F.2d 1559, 1562 (Fed. Cir. 1989).

would be meaningless. The States' position, if accepted, would quickly lead to the specter of every such challenge becoming bloated with intervening states (potentially on both sides of the "v") offering tenuous legal interests but vehement political views.

In *Texas*, the Court made precisely this point, cautioning against too lenient a standing analysis because "federal policies frequently generate indirect effects on state revenues or state spending." 599 U.S. at 680 n.3. And here, the States did not even bother submitting evidence of the supposed effects on their expenditures, but simply speculated in conclusory fashion without offering a shred of evidence. *See Allen v. Wright*, 468 U.S. 737, 759 (1984) (denying standing where claimed injury depended on speculation about future decisions of multiple actors); *Trump v. New York*, 592 U.S. 125, 131–34 (2020) (denying standing where it was not yet possible to "predict[] how the Executive Branch might eventually implement" challenged policy); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 412 (2013) ("respondents can only speculate as to how [Executive officers] will exercise their discretion in determining which communications to target"). Under these circumstances, the court of appeals correctly denied intervention.

Nor could the States have made a factual showing that the elimination of the rule would cause them increased expenditures. First, the 2023 Rule is no longer the operative border restriction. Thus, even if it were wholly eliminated, the more restrictive 2024 Rule would continue to bar asylum for those seeking entry—including, for instance, the significant population of Mexican asylum seekers who are exempt from the 2023 Rule. The States make no attempt to show how any change in the 2023 Rule would have

effect on the ground in light of the 2024 Rule. Second, the 2023 Rule sunsets in May 2025, making it all the more speculative that its (superseded) provisions will have any impact on the number of migrants crossing the border and making their way to the States. Third, border crossings significantly *increased* under the 2023 Rule—reaching a figure "higher than any previous month on record" in December 2023—and U.S. officials have credited *Mexico's* "increase[d] enforcement measures" for reducing crossings again before the 2024 Rule took effect. Murray Decl. ¶ 11-12; *see also* Seung Min Kim, *US and Mexico Will Boost Deportation Flights and Enforcement to Crack Down on Illegal Migration*, Assoc. Press (Apr. 30, 2024) ("U.S. officials have credited Mexican authorities, who have expanded their own enforcement efforts, for the decrease.").[13] For all these reasons, the States' failure to make any effort to show that eliminating the 2023 Rule would lead to more new migrants settling in their States was properly fatal to their intervention motion. *See Texas v. U.S. Dep't of Homeland Sec.*, No. 6:23-cv-7, 2024 WL 1021068, at *16–17 (S.D. Tex. Mar. 8, 2024) (holding that state seeking to challenge federal immigration policy on the theory that the policy increased immigration "failed to prove" injury-in-fact where border data instead reflected that "the rate of entries" had "decreased subsequent to the implementation" of the policy), *reconsideration denied*, 2024 WL 2888758 (May 28, 2024), *appeal docketed*, No. 24-40160 (5th Cir. Mar. 12, 2024).

Nor did the States offer evidence that an increase in cross-border migration would impose additional

[13] Available at https://apnews.com/article/joe-biden-andres-manuel-lopez-obrador-mexico-immigration-border-c7e694f7f104ee0b87b80ee859fa2b9b.

costs on them. To demonstrate their protectable interest, the States must show both that eliminating the 2023 Rule while the 2024 Rule is in effect would increase migration *and* that they would incur additional expenditures if it did. They have shown neither. As a result, the States either failed to show a sufficiently concrete, direct interest, or failed to show that any supposed harms would be traceable to the 2023 Rule. *Cf. Texas*, 599 U.S. at 690 (Gorsuch, J., concurring in the judgment). Either way, the court of appeals was correct to deny intervention.

In even more attenuated speculation, the States maintain that a hypothetical settlement terminating the 2023 Rule could cause more migrants to settle in *other* states and thereby eventually cause their own States to lose political representation following the 2030 census more than five years from now. Pet. 25-26. Unlike in *Department of Commerce v. New York*, 588 U.S. 752 (2019) (cited at Pet. 26)—which concerned facts established at trial on the predictable effect that a specific question on the census itself would have on response rates—there are countless intervening economic and social factors that will influence the States' comparative populations, particularly over the course of half a decade. There will be at least one change of presidential administrations before the next census, if not two, and U.S. immigration policy will no doubt continue to evolve. The same is true of Mexico's approach to immigration enforcement.

Significant drivers of migration in the region—such as the political situations in Venezuela and Haiti—may also continue to change in unpredictable ways. Moreover, the States' intervention motion below highlighted yet another intervening factor

influencing the fact that many migrants "are settling in New York, Illinois, California, and Colorado": the State of Texas's program of busing migrants to those states. CA9 Dkt. 86 at 18 & n.14 (citing Julia Ainsley & Didi Martinez, *A City of 710,000 Struggles to Cope with 40,000 Migrant Arrivals*, NBC News (Jan. 27, 2024)).[14] Finally, if more migrants were to come to the United States, it is entirely speculative where they will settle and which states might gain or lose population in the 2030 Census. The States' political-representation theory is thus both highly attenuated and impermissibly "rest[s] on speculation about the decisions of independent actors," including migrants, foreign governments, and other states, *Clapper*, 568 U.S. at 414; *see also Murthy v. Missouri*, 144 S. Ct. 1972, 1993–94 (2024) (rejecting standing theories premised on a "speculative chain of possibilities" and "speculat[ion] about the decisions of third parties") (citations and internal quotation marks omitted).[15]

In sum, the States have not established a legally protectable interest related to this case. And the fact that they submitted not one iota of evidence in support of their speculation only underscores why the court of appeals' decision is correct—and why this is not a proper vehicle to address the intervention question.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[14] Available at https://www.nbcnews.com/news/us-news/denver-struggles-cope-40000-migrantsrcna135555.

[15] The States brief does not address permissive intervention. In any event, the court of appeals correctly denied permissive intervention.

Respectfully submitted,

Cecillia Wang
Cody Wofsy
Katrina Eiland
Morgan Russell
Spencer Amdur
Oscar Sarabia Roman
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
425 California Street,
Suite 700
San Francisco, CA 94104

Melissa Crow
CENTER FOR GENDER &
REFUGEE STUDIES
1121 14th Street, NW,
Suite 200
Washington, DC 20005

Anne Peterson
Blaine Bookey
Julie Bourdoiseau
Karen Musalo
CENTER FOR GENDER &
REFUGEE STUDIES
200 McAllister Street
San Francisco, CA 94102

Lee Gelernt
Counsel of Record
Omar C. Jadwat
Wafa Junaid
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
lgelernt@aclu.org

David D. Cole
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

Keren Zwick
Richard Caldarone
Colleen Cowgill
Mary Georgevich
NATIONAL IMMIGRANT
JUSTICE CENTER
224 S. Michigan Avenue,
Suite 600
Chicago, IL 60604

Robert Pauw
CGRS Cooperating Attorney
GIBBS HOUSTON PAUW
1000 Second Avenue, Suite 1600
Seattle, WA 98104

Michelle (Minju) Y. Cho
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.
39 Drumm Street
San Francisco, CA 94111

Counsel for Respondents East Bay Sanctuary Covenant, et al.

September 12, 2024