No. 23-1353

In the Supreme Court of the United States

STATE OF KANSAS, ET AL., PETITIONERS

v.

ALEJANDRO N. MAYORKAS,
SECRETARY OF HOMELAND SECURITY, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
DANIEL TENNY
SEAN R. JANDA
BRIAN J. SPRINGER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals abused its discretion by denying intervention in the circumstances of this case.

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OPINIONS BELOW

The order of the court of appeals denying petitioners' motion to intervene (Pet. App. 1-30) is reported at 102 F.4th 996. The order of the district court granting private respondents' motion for summary judgment is reported at 638 F. Supp. 3d 1025. The order of the court of appeals staying that judgment pending appeal is not published in the Federal Reporter but is available at 2023 WL 11662094. The order of the court of appeals placing the appeal in abeyance pending settlement discussions is reported at 93 F.4th 1130.

JURISDICTION

The order of the court of appeals denying intervention was entered on May 22, 2024. The petition for a

writ of certiorari was filed on June 26, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In May 2023, the Department of Homeland Security and the Department of Justice jointly promulgated a rule providing that, absent exceptionally compelling circumstances, noncitizens are not eligible for a discretionary grant of asylum unless they use certain orderly migration pathways to enter the United States. See U.S. Department of Homeland Security & Executive Office for Immigration Review, U.S. Department of Justice, *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31,314 (May 16, 2023) (Rule). The Departments did so as an exercise of their statutory authority to "establish additional limitations and conditions" on the circumstances in which the Executive will exercise its discretion to grant asylum to noncitizens who meet the statutory eligibility requirements for such relief. 8 U.S.C. 1158(b)(2)(C).

The Departments concluded that adoption of the Rule was appropriate in light of the then-imminent end of an order issued under public-health authorities in Title 42 of the United States Code, under which many noncitizens without proper travel documents were not processed under immigration laws but were instead expelled under Title 42. See 88 Fed. Reg. at 31,315; see also Centers for Disease Control and Prevention, Department of Health and Human Services, *Public Health Determination and Order Regarding Suspending the Right To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists*, 87 Fed. Reg. 19,941, 19,941-19,942 (Apr. 6. 2022). Specifically, the Departments anticipated that the termination of the Title 42 public-health order would occasion a

significant increase in noncitizens' seeking to enter the United States at the southwest border and concluded that the Rule was necessary to discourage that irregular migration, which would lead to the presence in the United States of many noncitizens who entered unlawfully or without authorization and would be found ineligible for asylum; divert the government's limited resources; and threaten to overwhelm the immigration system. See, *e.g.*, 88 Fed. Reg. at 31,314.

Because the Rule was adopted to address "a potential surge of migration" after the "termination of the CDC's [Title 42] Order," the Departments provided that it will sunset after 24 months. 88 Fed. Reg. at 31,319. The Rule thus applies to covered noncitizens who enter the United States "[b]etween May 11, 2023, and May 11, 2025." 8 C.F.R. 208.33(a)(1)(i), 1208.33(a)(1)(i). The Departments explained that the 24-month sunset would allow the Rule to be "subject to review to determine whether" that date "should be extended, modified, or remain as provided in the rule." 88 Fed. Reg. at 31,319.

Private respondents—eight "immigration legal services organizations that represent noncitizens seeking asylum," C.A. E.R. 11—challenged the Rule under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Other plaintiffs also challenged the Rule in separate suits. In two of those suits, States have generally argued that the Rule's exceptions are impermissibly lenient. See *Indiana* v. *Mayorkas*, No. 23-cv-106 (D.N.D.); *Texas* v. *Mayorkas*, No. 23-cv-24 (W.D. Tex.). In a third suit, immigration-advocacy organizations and noncitizens challenged both the Rule and additional procedures applicable in expedited-removal proceedings, generally contending—as do private respondents in this

case—that the Rule and the other actions are impermissibly restrictive. See *M.A.* v. *Mayorkas*, No. 23-cv-1843 (D.D.C.).

2. The district court in this case granted summary judgment in private respondents' favor and vacated the Rule in its entirety. See C.A. E.R. 36-38. At the government's request, however, the court granted a 14-day administrative stay of its judgment. *Id.* at 38. The government immediately appealed and sought a stay pending appeal in light of the tremendous disruption that vacatur of the Rule would cause. Before the expiration of the administrative stay, the court of appeals granted a stay pending appeal. See Aug. 3, 2023 C.A. Order 1.[1] The court set the case for expedited briefing and argument and held oral argument in November 2023.

In February 2024, the parties jointly moved for the court of appeals to hold the appeal in abeyance (and filed a similar motion concurrently in *M.A.*, the district court suit brought by individual and organizational plaintiffs who claim the Rule and implementing actions are too restrictive). See Pet. App. 7. The parties explained that counsel had "been engaged in discussions regarding the Rule's implementation and whether a settlement could eliminate the need for further litigation in either case." C.A. Joint Abeyance Mot. 2. In addition, the parties explained that the court of appeals had preserved the status quo—allowing the Rule to remain

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[1] Judge VanDyke dissented from the court of appeals' order granting a stay pending appeal. See Aug. 3, 2023 C.A. Order 2-6. He agreed that granting a stay pending appeal "[wa]s the right *result*" as a "matter of first impression," but believed that earlier circuit precedent—from which he had also dissented—required leaving in place the district court's vacatur of the Rule absent a decision of the en banc court of appeals or this Court. *Id.* at 4-5.

in effect—by staying the district court's vacatur of the Rule. *Ibid.* Over a dissent by Judge VanDyke, the court granted that motion and placed the appeal in abeyance. 93 F.4th 1130. Because the court's stay pending appeal continues while the case is in abeyance, the Rule remains in effect—as it has continuously for the 17 months since it took effect in May 2023.

3. A month after the parties moved to place the appeal in abeyance (and two weeks after the court of appeals granted the abeyance), petitioners moved to intervene in the appeal. They contended that they had an interest in the Rule's continued implementation and speculated that the parties' motion for abeyance suggested that the federal government "can no longer be trusted to defend the Rule." Pet. C.A. Mot. to Intervene 3. Petitioners therefore sought leave to intervene for purposes of objecting to any proposed settlement and moving the court, "if necessary, to lift the abeyance and resume its expedited consideration" of the appeal. *Id.* at 1.

The court of appeals denied petitioners' motion. Pet. App. 7-12. The court explained that "the 'policies underlying' Federal Rule of Civil Procedure 24 guide" the analysis of whether intervention should be permitted in the courts of appeals, even though no "statute or rule provides a general standard to apply in deciding whether intervention on appeal should be allowed." *Id.* at 9 (quoting *Cameron* v. *EMW Women's Surgical Ctr., P.S.C.*, 595 U.S. 267, 276-277 (2022)). The court additionally explained that, to intervene as of right under Rule 24, a putative intervenor must demonstrate, among other requirements, that it has "a 'significantly protectable interest relating to the property or transaction which is the subject of the action'" and that its in-

terest "is inadequately represented by the parties to the action." *Ibid.* (citation omitted).

Applying those principles, the court of appeals held that petitioners had "not shown that they have a 'significantly protectable interest' in th[is] litigation." Pet. App. 10 (citation omitted). First, the court rejected petitioners' asserted general interest in defending the Rule and reducing immigration. The court explained that, under this Court's decision in *United States* v. *Texas*, 599 U.S. 670 (2023), "states have no legally protectible interest in compelling enforcement of federal immigration policies." Pet. App. 10.

Second, the court of appeals rejected petitioners' argument that they have a concrete interest in the suit because continued implementation of the Rule will assertedly reduce their state expenditures in various ways and "preserv[e] their population-based political representation" following the 2030 census. Pet. App. 11. The court explained that "such incidental effects" of the Rule "are not at issue in the litigation and are, in any event, attenuated and speculative." *Ibid.*

The court of appeals thus found "that [petitioners] lack the requisite significant protectable interest to support intervention as of right" and declined to "reach the remaining factors." Pet. App. 12. "For similar reasons," the court "decline[d] to exercise [its] discretion to allow [petitioners] to intervene permissively." *Ibid.*

Judge VanDyke dissented. Pet. App. 12-30. In his view, petitioners had established the requisite significant protectible interest, both through their asserted economic interest in downstream expenditures caused by noncitizens who reside in their territory and through their asserted "political interest" in preventing "an increase in other states' populations from illegal immigra-

tion." *Id.* at 24; see *id.* at 23-27. He also would have held that the remaining factors articulated in Rule 24(a)(2) supported petitioners' intervention. *Id.* at 14-23, 27-30.

4. Approximately two weeks after the court of appeals denied petitioners' motion to intervene, the President issued a Proclamation to address continued historic levels of migration at the southern border. See Exec. Order No. 10,773, 89 Fed. Reg. 48,487 (June 7, 2024). The Proclamation finds that entry into the United States of certain groups of noncitizens during emergency border circumstances is detrimental to the United States and thus suspends and limits entry of such persons—generally including, but not limited to, those who are subject to the Rule's restrictions—while the volume of border encounters remains above specified thresholds. See *ibid.*

The Department of Homeland Security and the Department of Justice then issued a joint interim final rule imposing corresponding limitations on the circumstances in which they will exercise their statutory discretion to grant asylum. See *Securing the Border*, 89 Fed. Reg. 48,710 (June 7, 2024). That rule specifically provides that noncitizens described in the Proclamation who enter while the emergency circumstances continue are generally ineligible for asylum, absent exceptionally compelling circumstances. See *id.* at 48,769-48,771. It also implements various procedural changes to permit more-efficient expedited removal of noncitizens who are not eligible for protection. See *ibid.* Unlike the May 2023 Rule at issue here, the June 2024 rule does not have a sunset date and will continue to apply whenever border encounters remain above the rule's thresholds (as they have continuously since the rule was adopted).

ARGUMENT

Petitioners assert (Pet. i) that this case presents the question whether "the Ninth Circuit err[ed] when it denied States with sufficient interests the ability to intervene as defendants after the federal government stopped defending its own rule." But for multiple reasons, that question is not implicated here. As the court of appeals recognized, petitioners do not have a sufficient interest in this litigation to support intervention. Nor can petitioners establish the Article III standing that would be necessary for them to maintain this appeal in place of the federal government—the ostensible purpose of their attempt to intervene. Moreover, directly contrary to the express premise of the question presented, the federal government has not stopped defending the Rule. Instead, the government has vigorously defended the Rule throughout this litigation and has no intention of acquiescing in the district court's decision. Indeed, the Rule remains in effect pursuant to the stay pending appeal that the federal government obtained from the court of appeals—a stay that has not been disturbed during the appeal's abeyance. In addition, the Rule's time-limited nature would make this case a poor vehicle for considering the question presented even if that question otherwise warranted review: In the coming months, the Rule will either expire by its own terms or be extended through additional rulemaking, and either of those developments would further counsel against this Court's review. The petition for a writ of certiorari should be denied.

1. At the outset, petitioners are not entitled to intervene in this case because they have not demonstrated a "legally and judicially cognizable" injury that would give them standing to maintain the appeal. *United*

States v. *Texas*, 599 U.S. 670, 676 (2023) (quoting *Raines* v. *Byrd*, 521 U.S. 811, 819 (1997)).

a. The Rule reflects the Departments' discretionary choice to adopt, pursuant to 8 U.S.C. 1158(b)(2)(C), eligibility criteria that ordinarily preclude any grant of asylum to noncitizens who failed to enter the country through certain orderly pathways. See, *e.g.*, 88 Fed. Reg. at 31,314, 31,343; see 8 U.S.C. 1158(b)(2)(C). The Rule thus has the effect of subjecting certain noncitizens who fail to meet its criteria to expedited removal from the United States.

Third parties, including States, have no "judicially cognizable interest" in the Executive's adoption, maintenance, or termination of a policy of that sort regarding discretionary determinations about how to enforce the immigration laws against others. *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973). As this Court has long recognized, an entity that does not face prosecution "lacks standing to contest the policies of the prosecuting authority," *ibid.*, and similarly has "no judicially cognizable interest in procuring enforcement of the immigration laws" against someone else, *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 897 (1984).

In *Texas*, this Court applied those principles to hold that two States lacked standing to challenge the Executive's immigration-enforcement priorities. See 599 U.S. at 676. The Court rejected those States' contention that they could show standing by establishing, for example, that they might spend money on incarceration or social services for "noncitizens who should be (but are not being) arrested by the Federal Government." *Id.* at 674. The Court held that the States' asserted injuries, which flowed from the Executive's exercise of immigration-enforcement discretion against third par-

ties, did not overcome the principle recognized in *Linda R.S.* and *Sure-Tan* that no one, including a State, has standing to challenge the exercise of enforcement discretion against others. See *id.* at 676-678.

That principle also applies here. Petitioners claim (Pet. 24) that they have an interest in the continued implementation of a discretionary immigration-enforcement policy on the ground that any reversal of the policy would cause petitioners to make additional expenditures—by "provid[ing] government resources to noncitizens" and incurring "administrative costs." Petitioners also assert (Pet. 25-26) purported "political interests" in having relatively fewer noncitizens settle before the 2030 census in "the southern border States: Texas, California, Arizona, and New Mexico." But like the States in *Texas*, petitioners cannot rely on such incidental, downstream effects to establish a judicially cognizable interest in the Executive's discretionary enforcement policies toward noncitizens. See *Texas*, 599 U.S. at 676-678.[2]

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[2] Petitioners' theories of injury are also unduly speculative, such that they would be insufficient even apart from the enforcement-specific principles addressed in *Texas*, *Linda R.S.*, and *Sure-Tan*. In order for petitioners' feared "political" injury (Pet. 26) to come to pass, for example, the parties would need to settle this case in a manner that ends the federal government's implementation of the Rule (despite the federal government's promulgation of the Rule just last year and its vigorous defense of the Rule to date); then the lack of enforcement of the Rule would need to result in an increase in the number of noncitizens entering the country, notwithstanding the federal government's intervening adoption of separate and stricter limits on asylum eligibility in a June 2024 interim final rule, see p. 7, *supra*; those noncitizens would need to settle disproportionately in States other than petitioners; then the disproportionate nature of those hypothetical future settlement patterns would need to be sufficiently large and sustained to result in a material difference

b. Petitioners contend that *Texas* is inapposite because it concerned "the executive decision of 'whether to arrest or prosecute,'" Pet. 23 (citation omitted), whereas this case concerns the Executive's discretionary authority to establish and enforce conditions on asylum eligibility. The fundamental principles that this Court applied in *Texas*, however, apply equally in the circumstances of this case.

In rejecting the States' claim to standing in *Texas*, this Court explained why "federal courts have not traditionally entertained lawsuits of this kind." 599 U.S. at 678. When the Executive makes a discretionary enforcement decision regarding a third party, it "does not exercise coercive power" over "the plaintiff." *Ibid.* Additionally, lawsuits challenging enforcement policies "run up against the Executive's Article II authority to enforce federal law"—and such suits in the immigration context "implicate[] not only 'normal domestic law enforcement'" discretion "but also 'foreign-policy objectives.'" *Id.* at 678-679 (citation omitted). Finally, courts lack "meaningful standards for assessing" discretionary enforcement policies that reflect the Executive's weighing of factors like "resource constraints" and "public-safety and public-welfare needs." *Id.* at 679-680.

Each of those rationales applies here as well. Neither the Rule nor petitioners' imagined settlement im-

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in the census count six years from now; and that material difference in the census count would need to result in one or more of petitioners losing a seat in the House of Representatives (or losing some unspecified funding). Each of the links in that "highly attenuated chain of possibilities" is speculative; taken together, they manifestly fail to "satisfy the requirement that threatened injury must be certainly impending." *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 410 (2013).

plicates any exercise of coercive government power directed at petitioners. Instead, as in *Texas*, petitioners' entire claimed interest in this case stems from their fear that the Executive Branch will not prioritize the removal of noncitizens who petitioners believe should be removed from the United States. Petitioners thus seek to second-guess the Executive's discretionary law-enforcement determinations in an area with significant implications for foreign relations. And petitioners identify no judicially administrable standards by which to evaluate the Executive Branch's balancing of the many policy considerations that influenced its adoption of the Rule and that the Executive Branch would necessarily take into account in contemplating any hypothetical settlement. In those circumstances, any indirect, downstream effects that petitioners speculate a settlement might cause are not sufficient to give petitioners a "legally and judicially cognizable" interest in this case. *Texas*, 599 U.S. at 676 (citation omitted).

c. As a fallback, petitioners insist—as they did in the court of appeals—that they "need not independently show standing to intervene" in this appeal because they "moved to intervene as *defendants* and are not seeking relief separate from any existing party." Pet. 22 n.6; see Pet. C.A. Reply in Support of Mot. to Intervene 5 ("the States are *not* required to demonstrate Article III standing"). But it is impossible to reconcile that claim with petitioners' explanation (Pet. 14) that they wish to intervene "to defend the Rule if the federal government has abandoned it."

Petitioners point to cases in which lower courts have held that intervenors did not need to establish Article III standing where they merely made additional arguments in support of a disposition already sought by one

or more of the existing parties. Pet. 22 n.6 (*Pennsylvania* v. *President of the United States of America*, 888 F.3d 52, 57 n.2 (3d Cir. 2018); *Kane County* v. *United States*, 928 F.3d 877, 887 & n.12 (10th Cir. 2019), cert. denied, 141 S. Ct. 1283, and 141 S. Ct. 1284 (2021); and *Melone* v. *Coit*, 100 F.4th 21, 28-29 (1st Cir. 2024)). In this case, however, petitioners specifically disclaimed any such theory for their intervention, explaining that "the appeal ha[d] already been briefed and argued" and that "the States d[id] not propose intervening in order to influence the Court's decision on the merits (unless invited to do so)." Pet. C.A. Mot. to Intervene 13. Instead, they explained that they sought "to prevent a bad settlement and to defend the Rule if needed." *Id.* at 13-14.

Intervention for that purpose would plainly require Article III standing. As this Court has explained, "an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Diamond* v. *Charles*, 476 U.S. 54, 68 (1986); see *Town of Chester* v. *Laroe Estates, Inc.*, 581 U.S. 433, 439 (2017). Because petitioners' object in seeking intervention was to ensure that they could press for reversal of the district court's judgment in the speculative event that "the federal government * * * abandoned" its own request for that relief, Pet. 14, petitioners were required to satisfy those requirements.

2. Even if this case did not implicate Article III's special limitations on suits seeking "enforcement of the immigration laws" against third parties, *Sure-Tan*, 467 U.S. at 897, petitioners still would not be entitled to intervention as of right. As the court of appeals correctly

recognized (Pet. App. 11-12), petitioners' asserted interests are too attenuated from the immediate subject matter of this suit to support mandatory intervention. In addition, petitioners cannot show that the United States is an inadequate representative in defending a regulation that the federal government adopted just last year and has actively sought to enforce (successfully) throughout the pendency of this litigation.

a. To support a request for intervention as of right, a prospective intervenor must demonstrate a "significantly protectable interest" in the litigation. *Donaldson* v. *United States*, 400 U.S. 517, 531 (1971); see Fed. R. Civ. P. 24(a)(2). That showing requires that a prospective intervenor do more than articulate some asserted harm or interest that is tangentially related to the action; the "requirement of a 'significantly protectable interest' calls for a direct and concrete interest that is accorded some degree of legal protection." *Diamond*, 476 U.S. at 75 (O'Connor, J., concurring in part and concurring in the judgment); see *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 315 (1985) (holding that an intervenor must demonstrate that the interest in question is "legally protectible").

In *Donaldson* itself, the government petitioned a district court to enforce administrative summonses issued by the Internal Revenue Service to Donaldson's former employer and its accountant for records related to Donaldson's tax liability. 400 U.S. at 518-520. Donaldson moved to intervene in order to oppose enforcement, asserting that he "possesse[d] 'an interest relating to the property or transaction which is the subject of the enforcement action'" because the records the government sought "presumably contain[ed] details" bearing on his tax situation that he did not want the IRS to obtain. *Id.*

at 527, 531 (brackets and citation omitted). But this Court held that Donaldson's claimed interest was insufficient to support intervention as of right: Donaldson possessed no "proprietary interest" or legally recognized "privilege" in his employer's records, *id.* at 530, and his pragmatic interest in avoiding the downstream economic effects that production of those records might ultimately have for him was not the type of "significantly protectable interest" necessary to support mandatory intervention, *id.* at 531.

Following that decision, the lower courts have consistently recognized that "[e]conomic interests or interests contingent on a sequence of events are generally insufficient for mandatory intervention." Pet. App. 11 n.5 (quoting *Medical Liability Mutual Insurance Co.* v. *Alan Curtis LLC*, 485 F.3d 1006, 1008 (8th Cir. 2007)); see, *e.g.*, *United States* v. *Peoples Benefit Life Insurance Co.*, 271 F.3d 411, 415 (2d Cir. 2001) (per curiam) ("An interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule.") (citation omitted); *Mountain Top Condominium Ass'n* v. *Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3d Cir. 1995) ("[A] mere economic interest in the outcome of the litigation is insufficient to support a motion to intervene."); *New Orleans Public Service, Inc.* v. *United Gas Pipe Line Co.*, 732 F.2d 452, 466 (5th Cir.) (en banc) (holding that "an economic interest alone is insufficient" to support mandatory intervention because "such intervention is improper where the intervenor does not itself possess the only substantive legal right it seeks to assert in the action"), cert. denied, 469 U.S. 1019 (1984). A contrary understanding—under which any person who might ex-

perience downstream effects from the result of a case would be entitled to intervene as of right—would be utterly unworkable, "clutter[ing] too many lawsuits with too many parties." *City of Chicago* v. *Federal Emergency Management Agency*, 660 F.3d 980, 985 (7th Cir. 2011).

Applying that standard here, the court of appeals correctly recognized that petitioners' claimed interests are too "attenuated and speculative" to support mandatory intervention. Pet. App. 11. As the court observed, petitioners "allege that elimination of the Rule would cause increased immigration, and that at least some immigrants would end up in their [S]tates and thus strain state resources," while other immigrants would end up in other States and thus potentially reduce petitioners' "population-based political representation." *Id.* at 11 & n.4. That "causal chain demonstrates" that petitioners' interests are several steps "removed from the 'subject of the action,'" which is whether the Departments acted lawfully when they promulgated the Rule last year. *Id.* at 11 n.4 (quoting Fed. R. Civ. P. 24(a)(2)). And under *Donaldson* and the other decisions cited above, those indirect, downstream interests do not entitle petitioners to intervene as of right in this case.

b. Petitioners also failed to demonstrate that the United States does not "adequately represent" their interest in continued enforcement of the Rule. Fed. R. Civ. P. 24(a)(2). Although the court of appeals found it unnecessary to address that requirement, see Pet. App. 12, it provides an independent basis for rejecting petitioners' claim that they have a right to intervene.

The United States has consistently and vigorously defended the Rule since promulgating it in May 2023. In seeking a stay pending appeal from the Ninth Circuit

in this case, for example, the government explained that "[v]acatur of the Rule would impose enormous harms on the government and the public." Gov't Mot. for Stay Pending Appeal 8. The government further argued that the district court's decision vacating the Rule is flawed as a matter of both procedure, *id.* at 12-15, and substance, *id.* at 16-22. The government repeated those arguments in its brief on appeal, see Gov't C.A. Br. 18-57, and it has pressed them in other cases. See, *e.g.*, 23-cv-1843, D. Ct. Doc. 53, at 12-65 (D.D.C. Oct. 27, 2023).

That defense has been effective. Although various plaintiffs have brought four separate lawsuits challenging the Rule, none of those suits has produced a preliminary injunction of the Rule. This suit is the only one that has proceeded to a final judgment, and the United States obtained an administrative stay of that judgment from the district court, see C.A. E.R. 38, followed by a stay pending appeal from the Ninth Circuit, see Aug. 3, 2023 C.A. Order. As a result, the Rule has remained in effect without interruption for the 17 months since it initially took effect in May 2023.

Petitioners dispute none of that; indeed, they acknowledge that the United States "maintained a vigorous defense of the Rule" through oral argument in the court of appeals, Pet. 7, and as noted above, see p. 13, *supra*, they explicitly declined to offer any additional arguments on the merits beyond those already offered by the United States. But petitioners nevertheless argue (Pet. 27) that the United States is an inadequate defender of the Rule because it agreed to an abeyance of this and another related suit to allow for settlement discussions—which petitioners take to be a sign that the government "might accept" a settlement resulting in "something less than the Rule as promulgated."

That assertion is wholly speculative. The abeyance motion on which petitioners rest their claim—a motion that, again, froze the status quo with the Rule in effect—stated that the parties have "been engaged in discussions regarding the Rule's implementation and whether a settlement could eliminate the need for further litigation." C.A. Joint Abeyance Mot. 2. Participation in "discussions regarding the Rule's implementation" is not the equivalent of declining to defend the Rule; to the contrary, if the Rule can be "implement[ed]" in a way that continues to protect the government's paramount interests while also addressing at least some discrete concerns of the private respondents, private respondents might agree to resolve this case on terms agreeable to both the federal government and petitioners.[3] And petitioners' unsupported speculation that discussions

[3] In dissenting from the decision to place the appeal into abeyance, Judge VanDyke stated that the federal government's willingness to engage in settlement discussions "looks a lot like a purely politically motivated attempt to throw the game at the last minute" and "makes no sense as a legal matter." 93 F.4th at 1132. But Judge VanDyke has previously voted to deny a stay of the district court's vacatur based on his view that the Rule is invalid under existing circuit precedent and that the government could not prevail without a favorable decision by the en banc court of appeals or this Court. See Aug. 3, 2023 C.A. Order 2-6 (VanDyke, J., dissenting from the grant of a stay pending appeal); p. 4 n.1, *supra*. And because the abeyance extends to the parallel challenge in the U.S. District Court for the District of Columbia, it also avoids the risk of an adverse decision from that court. Under the circumstances, it was hardly unreasonable for the government to explore whether a settlement resulting in the dismissal of private respondents' claims might be possible. And that is particularly so because placing the challenges to the Rule into abeyance leaves the Rule in effect, furthering the government's interest in ensuring that it will be enforceable throughout its 24-month lifespan.

may have taken a different course than the parties represented below provides no basis for concluding that the United States will not adequately represent petitioners' interest "in channeling migration into the United States through lawful and orderly pathways and alleviating the negative consequences of irregular migration." Gov't C.A. Br. 53.

Indeed, developments since the court of appeals' denial of intervention further confirm that petitioners' speculation is unfounded. As petitioners acknowledge (Pet. 14 n.4), "the administration recently issued a 'Proclamation' restricting noncitizens' asylum eligibility that purports to be *stricter* than the Rule itself." See 89 Fed. Reg. at 48,769-48,771; p. 7, *supra*. Petitioners make no effort to reconcile that new executive action with their assertion that the federal government's commitment to defending the Rule is faltering.

3. In urging the Court to grant a writ of certiorari, petitioners do not claim that the decision below conflicts with any decision of another court of appeals. Instead, petitioners contend only that the question whether "[S]tates with interests may intervene when the federal government stops defending its own APA rule" is "exceptionally important." Pet. 11; see Pet. 11-15. But that contention provides no sound basis for the Court's review here.

To start, petitioners are incorrect in claiming (Pet. 12) that this Court's intervention is necessary to address a "seismic shift in administrative practice" in which the federal government uses settlements "with nominally opposing parties" to avoid the requirements of notice-and-comment rulemaking. Petitioners point (Pet. 1-4) to just two examples of that supposed shift: *Arizona* v. *City & County of San Francisco*, 596 U.S.

763 (2022) (per curiam), and *Arizona* v. *Mayorkas*, 143 S. Ct. 1312 (2023). But neither of those cases involved any improper circumvention of ordinary regulatory procedures. After lower courts in *City & County of San Francisco* and several related cases held that the Department of Homeland Security's 2019 interpretation of the "public charge" ground of inadmissibility was unlawful, the Department initiated notice-and-comment procedures and ultimately finalized a new "public charge" regulation in September 2022. See U.S. Citizenship and Immigration Services, Department of Homeland Security, *Public Charge Ground of Inadmissibility*, 87 Fed. Reg. 55,472 (Sept. 9, 2022). And in *Arizona* v. *Mayorkas*, the federal government appealed the district court's judgment vacating the Title 42 public-health orders at issue, but the Title 42 orders eventually terminated by their own terms with the end of the COVID-based national health emergency in May 2023 before the government's appeal had been resolved. See Letter from Elizabeth B. Prelogar, Solicitor Gen., to Scott S. Harris, Clerk of Court, *Arizona* v. *Mayorkas*, No. 22-592 (May 12, 2023); *Arizona* v. *Mayorkas*, 143 S. Ct. at 1312-1314 (statement of Gorsuch, J.) (summarizing procedural history of case). In neither case, therefore, did the government engage in any "'sue and settle' exploitation" of the sort petitioners allege. Pet. 10.

Petitioners' contention (Pet. 12) that the government is engaged in an "end-around" of ordinary administrative requirements in this case is likewise mistaken. As discussed above, see pp. 16-19, *supra*, the government promulgated the Rule less than 18 months ago, remains committed to defending its lawfulness, and has no intention of acquiescing in the district court's decision. This case accordingly provides no opportunity to address

whether "[S]tates with interests may intervene when the federal government stops defending its own APA rule." Pet. 11.

Even if the government *had* chosen not to seek review of the district court's decision here, moreover, that would hardly represent a "perverse approach to rulemaking" that would warrant this Court's intervention in the absence of any conflict in the lower courts. Pet. 11. The APA itself provides for judicial review of final agency actions. See 5 U.S.C. 706. When a district court or court of appeals exercises that power, complying with its judgment does not overthrow the APA's design but rather is consistent with it. The government is of course free to seek—as it has sought here—review of the lower court's decision. But nothing in the APA or any other source of law requires that the government do so invariably. To the contrary, over the decades the government has either declined to appeal or dropped appeals in numerous cases in which agencies' rules were held invalid.[4]

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[4] See, *e.g.*, *Merck & Co.* v. *United States Department of Health & Human Services*, 962 F.3d 531 (D.C. Cir. 2020) (affirming vacatur of Department of Health and Human Services rule requiring disclosure of cost of prescription drugs paid for by Medicare or Medicaid on the ground that the rule exceeded statutory authority; no certiorari sought); *Chamber of Commerce of United States* v. *United States Department of Labor*, 885 F.3d 360 (5th Cir. 2018) (invalidating 2016 Department of Labor "Fiduciary Rule" on the ground that it was inconsistent with statutory text; no certiorari sought); *National Ass'n of Manufacturers* v. *SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015) (invalidating Commission's rule on the ground that it required companies to make disclosures that violated the First Amendment; no certiorari sought); *National Ass'n for Advancement of Colored People* v. *DeVos*, 485 F. Supp. 3d 136, 145 (D.D.C. 2020) (declaring Department of Education "interim final rule" to be "void" on the grounds that it was substantively inconsistent with the governing

To be sure, the government maintains that the APA did not depart from traditional equitable principles by authorizing a novel remedy of universal vacatur, and thus that—absent a special statutory review provision

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statute and beyond the agency's delegated authority; no further review sought); *Tiwari* v. *Mattis*, 363 F. Supp. 3d 1154 (W.D. Wash. 2019) (invalidating Department of Defense regulation on the ground that it violated equal-protection component of the Due Process Clause), appeal dismissed, No. 19-35293, 2019 WL 3047272 (9th Cir. Apr. 26, 2019); *Desert Survivors* v. *United States Department of Interior*, 336 F. Supp. 3d 1131 (N.D. Cal. 2018) (vacating legally binding Department of the Interior policy, adopted in 2014 after notice and comment, on the ground that it represented an impermissible interpretation of the governing statute), appeal dismissed, No. 18-17054, 2018 WL 7117946 (9th Cir. Nov. 19, 2018); *Latif* v. *Holder*, 28 F. Supp. 3d 1134, 1162-1163 (D. Or. 2014) (holding that procedures to challenge asserted inclusion on the "No-Fly List" did not satisfy due process), appeal dismissed, No. 14-36027 (9th Cir. Dec. 31, 2014); *Free Speech Coalition, Inc.* v. *Holder*, 957 F. Supp. 2d 564, 570 (E.D. Pa. 2013), aff'd in part, vacated in part, remanded *sub nom. Free Speech Coalition, Inc.* v. *Attorney General of the United States*, 825 F.3d 149 (3d Cir. 2016) (no cross-appeal of district court judgment holding that a Department of Justice regulation relating to record-keeping requirements for producers of sexually explicit material violated the Fourth Amendment); *Gonzales & Gonzales Bonds & Insurance Agency Inc.* v. *DHS*, 913 F. Supp. 2d 865, 880 (N.D. Cal. 2012) (declaring 2003 DHS regulation "invalid" on the ground that it was "inconsistent with Congress's statutory mandate"), appeal dismissed, No. 13-15415 (9th Cir. Aug. 9, 2013); *Boardley* v. *Department of Interior*, 605 F. Supp. 2d 8 (D.D.C. 2009), aff'd in part, No. 09-5176, 2009 WL 3571278 (D.C. Cir. Oct. 19, 2009), rev'd in part, 615 F.3d 508 (D.C. Cir. 2010) (no appeal from portion of district court order invalidating Park Service regulation governing permitting process for demonstrations and picketing); *Linares* v. *Jackson*, 548 F. Supp. 2d 21, 24 (E.D.N.Y. 2008) (enjoining the Department of Housing and Urban Development from enforcing regulation allowing no-cause evictions on the ground that it denied tenants due process), appeal dismissed, No. 08-4522 (2d Cir. Dec. 18, 2008).

authorizing such extraordinary relief—district courts must instead grant declaratory or injunctive relief that is "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979); see, *e.g.*, U.S. Br. at 40-44, *Texas*, *supra* (No. 22-58); see also *Texas*, 599 U.S. at 693-704 (Gorsuch, J., concurring in the judgment). A decision by this Court endorsing that view would greatly diminish petitioners' concerns about the consequences of the government's acquiescence in adverse lower-court decisions because it would limit the effect of those decisions. Regardless of how this Court resolves the dispute about the scope of relief authorized by the APA, however, the possibility that the government might elect not to seek further review of adverse judicial decisions plainly is not an "egregious affront" to "the APA's procedural safeguards" (Pet. 12-13). Instead, it is an inherent feature of the judicial review of agency action expressly authorized by the APA, and it has been a regular occurrence for decades.

Petitioners nonetheless urge this Court to loosen traditional intervention doctrine to allow States to routinely take over the defense of federal regulations from the federal government—even where the same administration that promulgated the regulation decides not to seek further review. But Congress has seen things differently. By statute, the "Solicitor General" and other "officer[s] of the Department of Justice" as the Attorney General may direct have responsibility for "attend[ing] to the interests of the United States" in the courts. 28 U.S.C. 517. In the case of the Solicitor General, those responsibilities have long included "[d]etermining whether, and to what extent, appeals will be taken by the Government to" the courts of appeals, and

whether to seek further review before this Court. 28 C.F.R. 0.20; see 34 Fed. Reg. 20,388, 20,390 (Dec. 31, 1969) (similar).

As this Court has recognized, the decision to give the Attorney General and Solicitor General authority to determine not just *how* but *whether* to pursue appellate review "represents a policy choice by Congress." *Federal Election Comm'n* v. *NRA Political Victory Fund*, 513 U.S. 88, 96 (1994). "Whether review of a decision adverse to the Government * * * should be sought depends on a number of factors which do not lend themselves to easy categorization." *Ibid.* The Solicitor General has a "broad[] view of litigation in which the Government is involved throughout the state and federal court systems" and is therefore better positioned to evaluate the overall costs and benefits of pursuing a particular appeal than are others with more "parochial view[s]" of a given case. *Ibid.* The Court has acknowledged that the Court itself "is well served by such a practice" and that "the practice also serves the Government well." *Ibid.*; see also *United States* v. *Mendoza*, 464 U.S. 154, 160, 163 (1984) (declining to apply offensive nonmutual collateral estoppel to the federal government in order to preserve the government's "discretion" in determining whether to seek review of "judgments unfavorable to it").

Petitioners are of course free to disagree with Congress's "policy choice," *NRA Political Victory Fund*, 513 U.S. at 96, and to believe that decisions about how best to defend federal regulations should instead be made collectively by 50 state attorneys general. But in the absence of any conflict among the lower courts on the issue, that bare policy disagreement provides no sufficient ground for this Court's review.

4. Finally, this case would not be an appropriate vehicle in which to take up the question presented even if that question otherwise warranted review. By its terms, the Rule applies only to noncitizens who enter the country during a 24-month window ending on "May 11, 2025," 8 C.F.R. 208.33(a)(1)(i), 1208.33(a)(1)(i). Accordingly, the Rule will soon either expire by its terms or be affirmatively extended through further rulemaking. And either of those developments would further confirm that this Court's review is unwarranted.

If the sunsetting of the Rule occurs as scheduled, that development would at minimum greatly diminish the practical stakes of the litigation over the Rule's validity. It could also complicate this Court's consideration of the question presented in the petition, because it would make petitioners' claims to Article III standing and a legally protected interest in the litigation even more speculative and attenuated than they already are.[5]

If, on the other hand, the Departments choose to "extend[]" the May 25, 2025 sunset date through further rulemaking, 88 Fed. Reg. at 31,319, that development would counsel strongly against petitioners' claimed entitlement to intervene for a different and equally dispositive reason: A new rulemaking to reaffirm and extend the Rule would decisively refute petitioners' unfounded

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[5] After the Rule sunsets, it will "continue to apply" to noncitizens "who entered the United States during the 24-month time frame" while the Rule was in effect, preventing any such noncitizens who remain in the United States from obtaining asylum through removal proceedings or affirmative asylum applications. 88 Fed. Reg. at 31,318. But even if those continued effects of the Rule meant that the sunset did not technically moot private respondents' underlying challenge to the Rule, it would at minimum dramatically reduce the Rule's ongoing practical effects on both private respondents and petitioners.

speculation that the government is somehow seeking to use this litigation to unwind the Rule. There is no sound reason for this Court to review the court of appeals' denial of petitioners' attempt to intervene in litigation that will have ongoing practical significance only if the central premise of petitioners' intervention motion is proved wrong.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
DANIEL TENNY
SEAN R. JANDA
BRIAN J. SPRINGER
Attorneys

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