No. 20-1775

In the Supreme Court of the United States

STATE OF ARIZONA, *ET AL.*,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, *ET AL.*,

Respondents.

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

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

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QUESTION PRESENTED

The question presented is whether the Ninth Circuit erred and/or abused its discretion in denying Petitioners' motion to intervene.

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INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute[1] ("IRLI") is a nonprofit 501(c)(3) public interest law firm dedicated both to litigating immigration-related cases in the interests of United States citizens and to assisting courts in understanding federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of immigration-related cases. For more than twenty years the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization.

[1] *Amicus* files this brief with all parties' written consent. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amicus* and its counsel—contributed monetarily to preparing or submitting the brief.

STATEMENT OF THE CASE

Various state, local, and private plaintiffs challenge a final rule, *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (hereinafter, the "2019 Rule"), promulgated by the federal Department of Homeland Security ("DHS"). The 2019 Rule concerns the scope of the "public charge" grounds for excluding an alien under the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1537 ("INA"). Two different district courts issued preliminary injunctions against the 2019 Rule, and the Ninth Circuit affirmed. After the change in administrations, the new administration abandoned its defense of the rule in this action and in several other related actions. Led by Arizona, several states moved to intervene here to defend the 2019 Rule against the preliminary injunction. In a related action in the Seventh Circuit, states led by Texas moved to intervene to defend the merits of the 2019 Rule from a district court's partial final judgment on a portion of the 2019 Rule.

Statutory Background

"Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes." 8 U.S.C. § 1601(1).[2]

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[2] *See* Act of March 3, 1875, § 5, 18 Stat. 477 (excluding convicts and sex workers, thought likely to become dependent on the public coffers for support); Immigration Act of 1882, § 2, 22 Stat. 214 (barring admission of "any person unable to take care of himself or herself without becoming a public charge."); Act of March 3, 1891, § 1, 26 Stat. 1084 (excluding "paupers"); Act of March 3, 1903, § 2, 32 Stat. 1213, 1214 (excluding "professional beggars"); Act of February 5, 1917, § 3, 39 Stat. 874, 875

"Strong sentiments opposing the immigration of paupers developed in this country long before the advent of federal immigration controls." 5 Gordon *et al.*, *Immigration Law and Procedure*, § 63.05[2] (Rel. 164 2018). Indeed, those sentiments predated the founding of the Nation: "American colonists were especially reluctant to extend a welcome to impoverished foreigners[.] Many colonies protected themselves against public charges through such measures as mandatory reporting of ship passengers, immigrant screening and exclusion upon arrival of designated 'undesirables,' and requiring bonds for potential public charges." JAMES R. EDWARDS, JR., PUBLIC CHARGE DOCTRINE: A FUNDAMENTAL PRINCIPLE OF AMERICAN IMMIGRATION POLICY 2 (Center for Immigration Studies 2001) (citing E. P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965 (Univ. of Penn. Press, 1981)). Nothing about the challenged Rule is inconsistent with the INA.

While dictionary definitions should suffice, *see*, *e.g.*, *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (absent a statutory definition, "we construe a statutory term in accordance with its ordinary or natural meaning"); *Public Charge*, Black's Law Dictionary (3d ed. 1933) ("one who produces a money charge upon, or an expense to, the public for support and care"); *accord* Black's Law Dictionary (4th ed. 1951), the 2019 Rule is consistent with other INA provisions. *See* 8 U.S.C.

(excluding "vagrants"); Act of March 3, 1903, § 26; 32 Stat. 1213, 1220 (authorizing bonds that promise, in consideration for admission, that an alien will not become a public charge); Act of February 20, 1907, § 26, 34 Stat. 898, 907.

§ 1601(5) ("a compelling government interest to enact new rules … to assure that aliens be self-reliant"); 8 U.S.C. § 1601(2)(A) ("aliens … [should] not depend on public resources to meet their needs").

1999 INS actions

In 1999, the former Immigration and Naturalization Service ("INS") issued a notice of proposed rulemaking ("NPRM") to define "public charge" for INS purposes. *Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28,676 (May 26, 1999). On the same day, in conjunction with that NPRM, the INS also published an intra-agency guidance memorandum as "field guidance." *Field Guidance on Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28,689 (May 26, 1999) (the "1999 Field Guidance"). The INS never completed the NPRM's rulemaking to define "public charge," but the field guidance appears to have remained in place until DHS issued its final rule. 84 Fed. Reg. at 41,292 (superseding 1999 Field Guidance).

Although INS never finalized the parallel NPRM, the Field Guidance remained extant as guidance. Unlike the field guidance, the 2019 Rule underwent the full notice-and-comment process under the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"), and, in doing so, expressly superseded the 1999 Field Guidance.

While the 1999 Field Guidance may have had a longer-than-planned run as stand-alone guidance (that is, as merely another agency guidance memorandum), nothing about INS's aborted 1999 rulemaking imbues the 1999 Field Guidance with

anything more—under the APA[3]—than an agency guidance document published in the Federal Register.

2019 rulemaking

When viewed independently from INS's aborted 1999 NPRM, the 1999 Field Guidance may qualify as an "interpretative rule[], general statement[] of policy, or rule[] of agency organization, procedure, or practice" that the APA exempts from notice-and-comment requirements. 5 U.S.C. § 553(b)(A). Under the circumstances, the rulemaking challenged here expressly superseded—that is, nullified—the 1999 Field Guidance: "This final rule supersedes the 1999 Interim Field Guidance on Deportability and Inadmissibility on Public Charge Grounds." 84 Fed. Reg. at 41,292. Since federal courts lack authority under the APA to require any more of an agency when it changes prior APA-exempt guidance, *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101-02 (2015), the 1999 Field Guidance has no ongoing relevance to this matter.[4] Strictly from an APA perspective, however,

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[3] Quite simply, an NPRM that never becomes a final rule is a nullity. *NRDC v. Abraham*, 355 F.3d 179, 201 (2d Cir. 2004) (no deference to agency actions that fail to complete the full notice-and-comment process applicable to the relevant rulemaking context); *Tedori v. United States*, 211 F.3d 488, 492 n.13 (9th Cir. 2000) ("any notion of ascribing weight to anything that has remained in the 'proposed regulation' limbo for a like period [of 13 years] is totally unpersuasive"); *Matter of Appletree Markets, Inc.*, 19 F.3d 969, 973 (5th Cir. 1994); *Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 829 (10th Cir. 2000).

[4] Congress did not ratify the 1999 Field Guidance because Congress did not enact anything pertaining to public charge admissibility since 1999: there is no Act from which to infer congressional acquiescence. "It is impossible to assert with any

the 1999 Field Guidance is simply a superseded, sub-regulatory guidance document: a nullity.

Until 2015, it was arguably a hard case whether an interpretive rule modifying a prior interpretive rule required a rulemaking, even if the initial interpretive rule did not. *But see Perez*, 575 U.S. at 101-02 (resolving that issue). By contrast, it is an easy case when—as here—a final rulemaking superseded a prior guidance document:

> An *initial agency interpretation is not instantly carved in stone*. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.

Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 863-64 (1984) (emphasis added). Indeed, *Chevron* was a slightly harder case because the final rule challenged there reversed a prior final rule. *See* 46 Fed. Reg. 50,766 (Oct. 14, 1981) (the discussion in the Background section explains the final rule that the *Chevron* agency changed). DHS had every right, then, to change the 1999 Field Guidance.

***Cook County* litigation**

The Cook County litigation entered a partial final judgment against the regulatory part of the 2019 Rule (that is, the new regulatory definition on the scope of the "public charge" provision of the INA), but did not

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degree of assurance that congressional failure to act represents affirmative congressional approval[.]" *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (interior quotation marks omitted), *abrogated in part on other grounds*, PUB. L. NO. 102-166, §§ 101-102, 105 Stat. 1071, 1072-74 (1991).

address the 2019 Rule's rescission of the 1999 Field Guidance. *See Cook Cty. v. Wolf*, 498 F.Supp.3d 999, 1008-09 (N.D. Ill. 2020) (leaving consideration of the 1999 guidance to the remaining APA and equal protection claims). The Texas parties' intervention is pending in the Seventh Circuit.

Factual Background

IRLI adopts the facts as stated by the Arizona parties. *See* Pets.' Br. at 4-15.

SUMMARY OF ARGUMENT

The Arizona parties' intervention is not moot for at least two independent reasons. First, the Texas parties could succeed in undoing the *Cook County* judgment, which would make the interim relief from the Ninth Circuit a barrier that would harm the Arizona parties. *See* Section I.A, *infra*. Second, even if the Texas parties fail in their *Cook County* intervention or on the merits, the Ninth Circuit's injunction is broader than the *Cook County* partial judgment because the Ninth Circuit keeps the 1999 Field Guidance in place, but the Cook County court did not vacate the rescission of that guidance. Accordingly, the Ninth Circuit injunction still hinders the Arizona parties, even if the regulatory portion of the 2019 Rule remains vacated. *See* Section I.B, *infra*.

Even if the Arizona parties' intervention were moot, moreover, nothing would prevent this Court or the Ninth Circuit on remand from vacating the preliminary injunction and dismissing the underlying case as an alternative to dismissing the intervention; neither this Court's precedents nor Article III impose a jurisdictional hierarchy requiring dismissal of moot cases over other jurisdictional or prudential grounds

for dismissal. *See* Section II.A, *infra*. Here, it is far from clear that Plaintiffs have standing, *see* Section II.B, *infra*, and the collusive nature of the federal respondents' scuttling their own appeals makes this litigation a "friendly" lawsuit between the ostensible plaintiffs and defendants that warrants prudential dismissal. *See* Section II.C, *infra*.

Finally, aside from a perceived mootness, nothing would preclude the Arizona parties' intervention, which they attempted as soon as the federal government ceased its heretofore successful appellate effort to defend the 2019 Rule. *See* Section III, *infra*.

ARGUMENT

I. THIS ACTION IS NOT MOOT.

The test for mootness is rigorous: "A case becomes moot only when it is *impossible* for a court to grant any effectual relief whatever to the prevailing party." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012) (internal quotation marks omitted, emphasis added). As explained in this Section, relief remains available to the Arizona parties *vis-à-vis* both the 2019 Rule and the 1999 Field Guidance.

A. The challenge to the 2019 Rule could not become moot while the Seventh Circuit appeal is pending.

While the Texas intervention still could succeed in vacating the partial final judgment in *Cook County*, relief for the Arizona parties in this litigation is not "impossible" under *Knox*. *See* Pets.' Br. at 33-34. Under those circumstances, this action is not moot. Indeed, if this Court were to remand with instructions to dismiss the underlying lawsuit as a "friendly suit,"

as outlined in Section II.C, *infra*, the result here might control or guide the result in *Cook County*.

B. The challenge to the rescission of the 1999 Field Guidance is not moot.

Regardless of whether the Texas intervention in *Cook County* succeeds, the issue of the Ninth Circuit's preliminary injunction to preserve operation of the *1999 INS Field Guidance* remains a live issue. As the Court explained in *Cook County*, the partial final judgment there did not address whether the guidance rescinded in the 2019 rulemaking would continue. *Cook Cty.*, 498 F.Supp.3d at 1008-09 (the plaintiffs' *unresolved* "equal protection claim … could entail a requirement that, until a new rule is promulgated, DHS resume applying its 1999 field guidance"). For its part, the Ninth Circuit's preliminary injunction provides that the field guidance continue in effect. *See City & Cty. of San Francisco v. United States Citizenship & Immigration Servs.*, 408 F. Supp. 3d 1057, 1111-12 (N.D. Cal. 2019) (Pet. App. 263a-264a) (Field Guidance is part of the preserved status quo); *Washington v. United States Dep't of Homeland Sec.*, 408 F. Supp. 3d 1191, 1215-16 (E.D. Wash. 2019) (same) (Pet. App. 347a-3499a); *City & Cty. of San Francisco v. United States Citizenship & Immigration Servs.*, 981 F.3d 742, 763 (9th Cir. 2020) (Pet. App. 88a) (affirming same in pertinent part). This ongoing part of the original litigation continues, even if the Texas intervention fails to save the underlying 2019 Rule.

Specifically, "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Campbell-Ewald Co.*

v. Gomez, 577 U.S. 153, 161 (2016) (interior quotation marks omitted). So even if the *Cook County* plaintiffs prevail and keep their partial final judgment in place, the Ninth Circuit injunction still provides something against which the Arizona parties could prevail here or on remand to the Ninth Circuit.

II. EVEN IF THIS ACTION *WERE* MOOT, THIS COURT NEED NOT DISMISS ON MOOTNESS GROUNDS.

If the respondents are correct that this action is moot, that would preclude this Court's reaching the merits. *Calderon v. Moore*, 518 U.S. 149, 150 (1996) ("Federal courts may not give opinions upon moot questions or abstract propositions") (internal quotation marks omitted). While mootness would preclude deciding the merits, it would not mandate dismissal for mootness if the Court had another basis on which to dismiss.

All of these doctrines are important, and many of them are interrelated:

> "All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."

Allen v. Wright, 468 U.S. 737, 750 (1984) (quoting *Vander Jagt v. O'Neill,* 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)). Importantly, these

overlapping doctrines apply *throughout* the litigation: "We have interpreted this requirement to demand that an actual controversy be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (interior quotation marks and alterations omitted). As explained in the next section, the Court can choose among the bases on which to dismiss, and this Court could dismiss because Plaintiffs lack Article III standing or because the litigation has become a "friendly lawsuit" that would justify dismissal on prudential grounds.

A. There is no "unyielding jurisdictional hierarchy" on the bases for dismissal.

Assuming *arguendo* that this action were moot, this Court still would have some discretion on how to resolve the matter: "there is no unyielding jurisdictional hierarchy" that requires dismissal for lack of subject-matter jurisdiction before dismissing on another threshold basis. *Ruhrgas Ag v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999). "[J]urisdiction is vital only if the court proposes to issue a judgment on the merits." *Id.* (interior quotation marks omitted); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 100 n.3 (1998). On the question of *how* to dismiss the case, "a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits." *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007).

The decision on how to dismiss a case "is rooted in equity." *Azar v. Garza*, 138 S.Ct. 1790, 1792 (2018) (discussing *vacatur* under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)); *see also*

Munsingwear, 340 U.S. at 39 (citing *United States v. Hamburg-American Co.*, 239 U.S. 466, 478 (1916)). Barring an exception to mootness, federal courts cannot reach the merits of a moot case, but they nonetheless must "determine[e] what will be 'most consonant to justice' in view of the conditions and circumstances of the particular case." *Hamburg-American Co.*, 239 U.S. at 478 (quoting *South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.*, 145 U.S. 300, 302 (1892)). Here, that may require dismissing the plaintiffs' underlying case, as opposed to denying intervention.

Equity gives this Court broad flexibility in choosing how to proceed here:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.

Winter v. Natural Resources Defense Council, Inc.,, 555 U.S. 7, 51 (2008) (internal quotation marks omitted). For example, in *Bass v. Butler*, 258 F.3d 176, 180 n.4 (3d Cir. 2001), then-Judge Alito would have decided an issue of appellate jurisdiction, but his two panel colleagues elected to decide the Article III issue of mootness. Here, if the Arizona parties' claims were indeed moot—they are not—the Court nonetheless could focus instead on the plaintiffs' lack of Article III standing. A court simply is not bound by a hierarchal order in which to decide these jurisdictional issues.

In addition to alternate *jurisdictional* bases on which to dismiss, the Court also can look to prudential ones. *Levin v. Commerce Energy, Inc.*, 560 U.S. 413,

432 (2010) (dismissing on comity grounds, which "is a prudential doctrine"); *cf. Cheng v. Boeing Co.*, 708 F.2d 1406, 1409 (9th Cir. 1983) ("doctrine of *forum non conveniens* permits a court to decline to exercise its jurisdiction for prudential reasons"). Even if the canon against "friendly" or collusive litigation is not jurisdictional, therefore, the Court also could consider that basis for dismissing this litigation.

B. The plaintiffs lack Article III standing.

The first alternate basis on which this Court could dismiss this litigation is standing. Like any federal appellate court, this Court has the duty to consider not only its jurisdiction but also that of the lower courts:

> Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it.

Steel Co., 523 U.S. at 95 (interior quotation marks omitted). Here, the plaintiffs lack standing for at least some of the claims. Moreover, the party asserting a claim bears the burden of proof on it, *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Renne v. Geary,* 501 U.S. 312, 316 (1991) (court "presume[s] that federal courts lack jurisdiction unless the contrary appears affirmatively from the record"), and the parties cannot confer jurisdiction by consent or waiver. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 (1982). Under the circumstances here, it is unclear that Plaintiffs ever had standing for interim relief.

1. The Ninth Circuit improperly relied on plaintiffs' pleadings to support interim relief.

Plaintiffs must demonstrate standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992). Even in opposing motions to dismiss, plaintiffs must establish non-obvious harm with evidence, *Va. House of Delegates v. Bethune-Hill*, 139 S.Ct. 1945, 1955 (2019) (party asserting federal jurisdiction "bears the burden of doing more than simply alleging a nonobvious harm") (interior quotation marks omitted), but the standard for a preliminary injunction requires actual evidence. *City of Los Angeles v. Lyons*, 461 U.S. 95, 104-05 (1983) (discussing the existence of "a case or controversy … that would justify the equitable relief"); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 907 n.8 (1990); *Speech First, Inc. v. Killeen*, 968 F.3d 628, 638 (7th Cir. 2020) (requiring "affidavit or other evidence specific facts, rather than "general factual allegations of injury") (internal quotation marks omitted) (citing *Nat'l Wildlife Fed'n*); *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011) (same). While Plaintiffs filed affidavits in district court, the Ninth Circuit affirmed without distinguishing between Plaintiffs' allegations and their evidence, Pet. App. 119a, based on a Ninth Circuit precedent that improperly allows interim relief based only on *allegations*. *Id.*; *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017) ("At this very preliminary stage of the litigation, the States may rely on the allegations in their Complaint and whatever other evidence they

submitted in support of their TRO motion to meet their burden."). This Court should vacate the finding of standing for interim relief as based on insufficient evidence.

2. The state and local plaintiffs lack *parens patriae* standing against the federal government.

State and local governments cannot assert *parens patriae* standing against the federal government. *Alfred L. Snapp & Son v. Puerto Rico,* 458 U.S. 592, 610 n.16 (1982). Harms to third parties, then, cannot form any part of the state and local plaintiffs' standing.

3. The funding injuries are self-inflicted and speculative.

The state and local plaintiffs claim injury from a reduction in Medicaid reimbursement, Pet. App. 68a, but this claim fails because the harm is self-inflicted and too speculative for Article III.

Not every pecuniary loss or exchange qualifies as an Article III injury in fact: "To support standing, an injury must be legally and judicially cognizable." *Bethune-Hill*, 139 S.Ct. at 1953. Where it applies, Medicaid reimburses a *portion* of the costs incurred, 42 U.S.C. § 1396b(a)(1), but the states would *save* money—and get less of a partial refund—under the 2019 Rule. On balance, the states would be better off financially. To the extent that they choose to cover healthcare that they need not cover, the injury would be a self-inflicted one, which would not suffice for standing. *Pennsylvania v. New Jersey,* 426 U.S. 660, 664 (1976). While Plaintiffs may—or may not—be out some money, their alleged injury is not cognizable.

4. Plaintiffs' injuries fall outside the zone of interests.

To satisfy the zone-of-interests test, a "plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Air Courier Conference v. Am. Postal Workers Union*, 498 U.S. 517, 523-24 (1991) (interior quotation marks omitted, emphasis in original). If a claim would "frustrate [rather] than … further [the] statutory objectives," that plaintiff would be an unreliable litigant to pursue the objectives. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 397 n.12 (1987) ("concern that the plaintiff be 'reliable' carries over to the 'zone of interest' inquiry, which seeks to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives"); *Nat'l Wildlife Fed'n*, 497 U.S. at 883 (not all direct pecuniary interests satisfy zone-of-interests test). Plaintiffs' various interests do not meet the test.

The history of the public-charge restriction on immigration reflects a desire that immigrants be self-sufficient members of their communities. To deem the expenditures that private or public third parties incur voluntarily is antithetical to the INA, which makes it "national policy with respect to welfare and immigration" that "the availability of public benefits not constitute an incentive for immigration to the United States," 8 U.S.C. § 1601(2)(B), and recognizes "a compelling government interest to enact new rules for eligibility and sponsorship agreements in order to assure that aliens be self-reliant in accordance with

national immigration policy," *id.* § 1601(5), and "to remove the incentive for illegal immigration provided by the availability of public benefits." *Id.* § 1601(6). Under these circumstances, the plaintiffs' interests frustrate the statutory concern with self-sufficiency.[5]

5. Plaintiffs' injuries are insufficient for an action in equity.

In addition, Plaintiffs lack sufficient injury for a suit in equity. To sue in equity, Plaintiffs need more than an injury that would—or at least *could*—suffice to confer standing under the APA. Instead, an equity plaintiff or petitioner must invoke a statutory or constitutional right for equity to enforce, such as life, liberty, or property under the Due Process Clause or equal protection under the Equal Protection Clause or its federal equivalent in the Fifth Amendment. *See*, *e.g.*, *United States v. Lee*, 106 U.S. 196, 220-21 (1882) (property); *Ex parte Young*, 209 U.S. 123, 149 (1908) (property); *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982) (liberty); *cf. Wadley S. R. Co. v. Georgia*, 235 U.S. 651, 661 (1915) ("any party affected by [government] action is entitled, by the due process clause, to a judicial review of the question as to whether he has been thereby deprived of a right protected by the Constitution"). Plaintiffs' claimed injuries here fall short of what equity requires.

Unlike with APA review and this Court's liberal modern interpretation of Article III, pre-APA equity

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[5] If Plaintiffs fall outside the INA's zone of interests, they also lack an APA cause of action. 5 U.S.C. § 702; *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153-54 (1970) (zone-of-interests test applies to APA).

review requires "direct injury," which means "a wrong which directly results in the violation of a legal right." *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938). Without that elevated level of direct injury, there is no review:

> It is an ancient maxim, that a damage to one, without an injury in this sense, (*damnum absque injuria*), does not lay the foundation of an action; because, if the act complained of does not violate any of his legal rights, it is obvious, that he has no cause to complain. Want of right and want of remedy are justly said to be reciprocal. Where therefore there has been a violation of a right, the person injured is entitled to an action. The converse is equally true, that where, although there is damage, there is no violation of a right no action can be maintained.

Id. (alterations, citations, and interior quotation marks omitted). In short, Plaintiffs lack sufficient injury to bring an action in equity, assuming *arguendo* they lack an APA action under the zone-of-interest test.

C. The federal respondents' norm-breaking conduct warrants dismissal as a friendly lawsuit.

The second alternate basis on which this Court could dismiss this litigation is the "friendly" nature of the suit between the plaintiffs and the federal

parties.[6] As the Arizona parties make clear, the federal respondents scuttled successful appeals in support of the 2019 Rule. *See* Pets.' Br. at 8; *Dep't of Homeland Sec. v. New York*, 140 S.Ct. 599 (2020) (stay in favor of 2019 Rule); *Wolf v. Cook County*, 140 S.Ct. 681 (2020) (same). As this Court's stays made clear, the federal respondents were likely to prevail on their defense of the 2019 Rule. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). While the federal respondents potentially could have asked the various courts—including this Court—to stay those appeals to allow a new rulemaking, simply dismissing the appeals and avoiding a rulemaking is norm-breaking behavior, *see* Pets.' Br. at 9-13, which this Court should view "with a critical eye." *Knox*, 567 U.S. at 307 ("post-certiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye"). Certainly, the Court ought not *reward* that type of behavior.

For both prudential and jurisdictional reasons, federal courts should—and often *must*—dismiss a case when the ostensibly opposing parties want the same result. Generally, "there is no Art. III case or controversy when the parties desire precisely the same result." *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 383 (1980) (interior quotations omitted); *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 47-48 (1971) ("[t]here is … no case or controversy within the meaning of Art. III" if when the opposing parties agree

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[6] Dismissal under this Court's friendly-lawsuit precedents would be similar in rationale to the "*Munsingwear vacatur*" proposed in dissent by Judge VanDyke. Pet. App. 35a-40a.

on an outcome). But even when the parties' agreement does not eliminate an Article III case or controversy, federal courts still must weigh the *prudential* aspects of entertaining the suit, lest federal courts become complicit in collusive efforts to bypass the political process or APA rulemaking through the vehicle of a friendly lawsuit.

Specifically, federal courts should recognize that the need for actual adversity *prudentially* limits the suits that they should entertain. *Rescue Army v. Municipal Court of City of Los Angeles*, 331 U.S. 549, 568 (1947); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 583 (1979). "It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." *Chicago & G.T. Ry. Co. v. Wellman*, 143 U.S. 339, 344-45 (1892). Under this prudential analysis, this Court could remand with instructions to dismiss the suit on prudential grounds to ensure that respondents do not use the federal courts to subvert the proper APA procedure for rescinding the 2019 Rule.

Of course, when a plaintiff raises a valid claim that government defendants must concede, the prudential rationale for dismissal can give way to allow resolving a substantial federal claim. For example, in *United States v. Windsor*, 570 U.S. 744, 755-63 (2013), the government defendant adopted the plaintiff's merits views, but continued to enforce the challenged law pending the litigation's final resolution:

> The decision of the Executive not to defend the constitutionality of [the challenged law]

> in court while continuing to deny refunds and to assess deficiencies does introduce a complication. Even though the Executive's current position was announced before the District Court entered its judgment, the Government's agreement with Windsor's position would not have deprived the District Court of jurisdiction to entertain and resolve the refund suit; for her injury (failure to obtain a refund allegedly required by law) was concrete, persisting, and unredressed. The Government's position—agreeing with Windsor's legal contention but refusing to give it effect—meant that there was a justiciable controversy between the parties, despite what the claimant would find to be an inconsistency in that stance.

Windsor, 570 U.S. at 756. If the federal respondents and their now-allies from the other side had wanted to resolve this in court, the Department of Justice and the Office of Solicitor General could have done so. This Court could remand with instructions to dismiss on prudential grounds.

III. UNDER THE CIRCUMSTANCES, DENYING INTERVENTION WAS UNTENABLE.

For post-judgment interventions, the issue is one of timing: "The critical inquiry in every such case is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-96 (1977). As the Arizona parties explain, see

Pets.' Br. at 22-23, they expeditiously moved to intervene once the federal government stopped defending the 2019 Rule.[7]

Given that "this Court reviews judgments, not opinions," *Chevron*, 467 U.S. at 842, the brevity of the Ninth Circuit opinion is no obstacle: "The Motion to Intervene by the States of Arizona, et al., is **DENIED**." Pet. App. at 13 (emphasis in original). The Arizona parties have met all the criteria for intervening, whether to vacate the injunction and to dismiss the litigation or to litigate the merits on remand. Certainly, the Ninth Circuit gave no reason to deny intervention.

CONCLUSION

The Court should reverse the Ninth Circuit's denial of the Arizona motion to intervene and either (a) remand with instructions to dismiss the various cases for lack of Article III standing or on prudential grounds as a friendly lawsuit; or (b) remand to allow the parties to brief the issues presented, to wit: (i) if the Texas intervention fails, *vacatur* for mootness and the merits with respect to the 1999 Field Guidance, or (ii) if the Texas intervention succeeds, the merits generally.

If the Court remands for further proceedings, the Court also should stay the preliminary injunction for the same reason that the Court granted stays in the

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[7] The Arizona parties explain why they meet the criteria for intervention as of right and permissive intervention. Pets.' Br. at 18-29. *Amicus* IRLI concurs with their analysis and so focuses only on the issue of mootness and jurisdiction.

federal government's stay applications. *Dep't of Homeland Sec. v. New York*, 140 S.Ct. at 599; *Wolf v. Cook County*, 140 S.Ct. at 681.

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