No. 20-1775

In The Supreme Court of the United States

THE 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 FOR RESPONDENTS CITY AND COUNTY OF SAN FRANCISCO AND COUNTY OF SANTA CLARA

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QUESTION PRESENTED

Whether the court of appeals properly denied petitioners' motion to intervene.

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INTRODUCTION

In 2019, the City and County of San Francisco and the County of Santa Clara ("Counties") obtained a preliminary injunction preventing the federal government from implementing its new public charge rule within their borders. That decision was affirmed by the Ninth Circuit Court of Appeals. On January 19, 2021—the day before inauguration day—the federal government filed a petition for certiorari in this Court. Meanwhile, a district court in the Seventh Circuit proceeded to final judgment and vacated the rule in its entirety. In March, the federal government concluded that continuing to defend the rule was "neither in the public interest nor an efficient use of limited government resources" and moved to dismiss the pending petition. Thereafter, Arizona and 12 other States ("States" or "Petitioners") sought to intervene in the Ninth Circuit for the purpose of pursuing further relief in this Court.

The Ninth Circuit correctly concluded that intervention is not warranted in the circumstances presented here. Petitioners allege that they have an economic interest in having the rule implemented in their jurisdictions. But their purported economic interest is not—indeed cannot possibly be—impaired by the existence of a preliminary injunction that (a) does not apply in their jurisdictions and (b) prohibits enforcement of a rule that has been invalidated and vacated in its entirety by another federal court.

Nor has Petitioners' ability to participate in the creation of future regulatory proposals been impeded

by the injunction in this case. To the contrary, last August the Department of Homeland Security issued an advance notice of proposed rulemaking to seek input on the public charge ground of inadmissibility to inform its development of a new regulatory proposal. DHS specifically solicited information from state and local government agencies that are responsible for granting benefits to individuals. Notably, although nearly 200 individuals and entities—including state and local governments—submitted comments, not one of the Petitioners did so.

Finally, a coalition of States has also sought to intervene in the Seventh Circuit case, and Petitioners acknowledge that at least part of their rationale for seeking intervention here is to generate jurisprudence from this Court that it hopes will influence proceedings in the Seventh Circuit. *See* Br. 32. But a generalized interest in the favorable development of caselaw—whether on the merits of the Public Charge Rule, the standard for appellate intervention, or otherwise—is insufficient to give a party the right to intervene.

In short, no harm will come to Petitioners as a result of the disposition of this preliminary injunction appeal. As a result, intervention is neither warranted nor appropriate.

STATEMENT

A. The Public Charge Rule

Under the Immigration and Nationality Act (INA), the federal government may deny admission or adjustment of status to any noncitizen it determines is "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). This provision has been consistently understood and applied to deny admission and lawful permanent residence to a narrow category of noncitizens: those who are likely to be primarily dependent on the government for subsistence.

In October 2018, the Department of Homeland Security (DHS) published a notice of proposed rulemaking in the Federal Register titled *Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51,114 (Oct. 10, 2018). DHS issued a substantially similar final rule on August 14, 2019. *See Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (the "Public Charge Rule" or "Rule").

The Public Charge Rule overhauled the public charge assessment in two key ways.

First, the Rule required immigration officials to take non-cash benefits into account for the first time. Specifically, the Rule directed consideration of non-emergency Medicaid, Supplemental Nutrition Assistance Program (SNAP, formerly known as food stamps), public housing, and Section 8 housing assistance in addition to the cash benefits and institutionalized care

previously considered (the "enumerated benefits"). *Id.* at 41,501 (promulgating 8 CFR §§ 212.21(b)(2), (6)).

Second, the Rule replaced the longstanding definition of the term "public charge"—a noncitizen primarily dependent on the government—with a far broader definition that swept in any noncitizen who received any enumerated benefit for more than 12 months within a 36-month period (*Id.* (promulgating § 212.21(a))), even in amounts as low as 17 cents per day. Pet. App. 236.

B. Challenges to the Public Charge Rule

Shortly after the Public Charge Rule was issued, several state and local jurisdictions as well as advocacy organizations filed lawsuits challenging its validity.

1. The Counties' Challenge to the Public Charge Rule

The same week DHS issued the Public Charge Rule, the Counties filed suit. The Counties asserted that the Rule was "not in accordance with law" and was "arbitrary, capricious, [and] an abuse of discretion" in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A).

On October 11, 2019, the Northern District of California granted the Counties' motion for a preliminary injunction. The district court concluded that the Counties were likely to succeed on the merits with respect to their claim that the Rule's definition of public charge

was unreasonable, not based on a permissible construction of the statute, and arbitrary and capricious. Pet. App. 186-264. The district court also found that the harm to the Counties would be immediate and irreparable absent an injunction. *Id.* at 279-300.

Notably, however, the district court rejected the Counties' request for nationwide injunctive relief, concluding that the Counties had "failed to sufficiently tie [the] evidence to the need for an injunction beyond their borders in order to remedy the specific harms alleged and accepted by the court as likely, imminent, and irreparable." *Id.* at 306. Accordingly, the district court enjoined the Public Charge Rule only within the Counties. *Id.* at 306-08. In the related case brought by California, Oregon, the District of Columbia, Maine, and Pennsylvania, the court enjoined the Rule only within those plaintiff States. *Id*.

In December 2019, a motions panel of the Ninth Circuit Court of Appeals granted the federal government's motion to stay the preliminary injunction pending appeal. Pet. App. 90-170. After full briefing and argument on the merits, however, the merits panel affirmed the geographically limited preliminary injunction. *Id.* at 41-88.

An appeal from a nationwide injunction granted by the Eastern District of Washington was consolidated by the court of appeals. In the consolidated opinion, the court "vacate[d] that portion of the Eastern District's injunction making it applicable nationwide, but otherwise affirm[ed] it." Pet. App. 88.

On January 19, 2021—the last full day of the Trump Administration—the federal government filed a petition for certiorari. *See United States Citizenship and Immigr. Servs v. City & Cnty. of San Francisco*, No. 20-962 (docketed January 21, 2021). As explained below, that petition was later dismissed upon request by the parties.

2. The Public Charge Rule Was Judicially Vacated and Subsequently Withdrawn as a Result of a Challenge by Cook County, Illinois

In addition to the Respondents in this case, several other jurisdictions and organizations filed legal challenges to the Public Charge Rule and several district courts entered preliminary injunctions prohibiting its implementation. *See, e.g.*, *New York v. Dep't of Homeland Sec.*, 408 F. Supp. 3d 334 (S.D.N.Y. 2019) (granting preliminary injunction); *Cook Cnty. v. McAleenan*, 417 F. Supp. 3d 1008 (N.D. Ill. 2019) (same); *CASA de Md., Inc. v. Trump*, 414 F. Supp. 3d 760 (D. Md. 2019) (same). Each of these preliminary injunctions was stayed pending appeal by the relevant court of appeals or by this Court. *See CASA de Md., Inc. v. Trump*, 971 F.3d 220, 237 (4th Cir. 2019); *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020); *Wolf v. Cook Cnty.*, 140 S. Ct. 681 (2020); *see also id.* at 683 (Sotomayor, J., dissenting) (noting, despite stays being granted, that it was "far from certain" that the federal government would ultimately prevail on the merits).

While the appeals from these preliminary injunctions were underway, the Cook County case was proceeding in the district court. In November 2020, a district court in the Northern District of Illinois granted Cook County's motion for summary judgment and entered a final judgment vacating the Public Charge Rule. *Cook Cnty. v. Wolf*, 498 F. Supp. 3d 999 (N.D. Ill. 2020).

The federal government initially appealed. In March 2021, however, DHS determined that "continuing to defend the [Public Charge Rule was] neither in the public interest nor an efficient use of limited government resources." DHS Statement on Litigation Related to the Public Charge Ground of Inadmissibility (Mar. 9, 2021), https://www.dhs.gov/news/2021/03/09/dhs-statement-litigation-related-public-charge-ground-inadmissibility. "Consistent with that decision," the federal government decided it would "no longer pursue appellate review of judicial decisions invalidating or enjoining enforcement of the 2019 Rule." *Id.*

Accordingly, the parties to the public charge preliminary injunction appeals pending before this Court—including this case—filed joint stipulations to dismiss. The Court granted the motions and dismissed the cases. In addition, the Seventh Circuit Court of Appeals granted the federal government's motion to dismiss the appeal of the final judgment vacating the Rule and issued its mandate. *See Cook Cnty. v. Wolf*, No. 20-3150, 2021 WL 1608766 (7th Cir. Mar. 9, 2021); *id.* Dkt. 24-1 (7th Cir. Mar. 9, 2021).

Consistent with the final judgment vacating the Rule, the federal government issued a final rule that, effective March 9, 2021, removed the regulatory text of the Public Charge Rule from the Code of Federal Regulations and restored the regulatory text that appeared prior to August 2019. *Inadmissibility on Public Charge Grounds; Implementation of Vacatur*, 86 Fed. Reg. 14,221 (Mar. 15, 2021).

Shortly thereafter, in August 2021, DHS issued an advance notice of proposed rulemaking (ANPRM) to "seek broad public feedback on the public charge ground of inadmissibility that will inform its development of a future regulatory proposal." *Public Charge Ground of Inadmissibility*, 86 Fed. Reg. 47,025 (Aug. 23, 2021). The ANPRM specifically solicited information from—among others—state and local government agencies that are responsible for granting benefits to individuals. *Id.* at 47,032. Not one of the Petitioner-States submitted a comment. *See* Public Comments on Public Charge Ground of Inadmissibility ANPRM, https://www.regulations.gov/document/USCIS-2021-0013-0001/comment (containing all comments submitted).

C. Petitioners Attempt to Intervene in the Counties' Challenge to the Public Charge Rule

On March 10, 2021—after this Court dismissed the petition in the public charge cases, and after the Seventh Circuit dissolved the stay of the final judgment and vacatur issued by the Northern District of

Illinois—Petitioners made their first appearance in the Counties' case. They filed a motion to intervene in the Ninth Circuit for the purpose of filing a petition for certiorari in this Court. No. 19-17213, Dkt. 143 (Mar. 10, 2021). The court of appeals denied the motion on April 8; Judge Van Dyke dissented. Pet. App. 1-40.

In June 2021, Petitioners filed a petition for writ of certiorari seeking review of the Ninth Circuit's denial of their motion to intervene. The States also sought review of two questions related to the Ninth Circuit's December 2020 merits decision affirming the preliminary injunction—specifically, whether that decision was incorrect or, alternatively, should be vacated under *United States v. Munsingwear*, 340 U.S. 36 (1950). The Court granted review with respect to the first question only.

SUMMARY OF ARGUMENT

Neither intervention as of right nor permissive intervention is warranted in the circumstances presented.

1. Intervention as of right is not warranted here. Petitioners' alleged economic interest in having the Public Charge Rule implemented is not impaired by the Ninth Circuit's decision upholding preliminary injunctions that do not apply in their States. Moreover, the preliminary injunctions have been superseded by a final judgment of vacatur in the Northern District of Illinois.

a. The preliminary injunctions at issue here are not nationwide injunctions. The Ninth Circuit was careful to tailor these injunctions to the geographic boundaries of the States and localities that were plaintiffs in the underlying cases. The injunctions do not apply in any of the Petitioners' States and, as a result, they do not impair Petitioners' alleged economic interests.

b. To the extent Petitioners' interests are impaired at all, they are impaired by the Northern District of Illinois vacatur and the rescission of the Public Charge Rule—*not* by the Ninth Circuit's narrowly-tailored ruling on the Counties' preliminary injunction.

In November 2020, a Northern District of Illinois court in a different case granted Cook County's motion for summary judgment and entered a final judgment vacating the Public Charge Rule. *Cook Cnty. v. Wolf*, 498 F. Supp. 3d 999 (N.D. Ill. 2020). In March 2021, the Seventh Circuit dismissed the pending appeal of that judgment and issued its mandate. As a result, that judgment took effect. The Biden Administration, in compliance with the Illinois vacatur, issued a final rule removing the regulatory text of the Public Charge Rule from the Code of Federal Regulations and restoring the regulatory text that appeared prior to August 2019. Accordingly, even if the Ninth Circuit's decision were reversed or vacated under *Munsingwear*, the Public Charge Rule would not be implemented, so Petitioners would not obtain the benefits they allege would flow to them from implementation of the Rule.

Petitioners argue that the Illinois district court's vacatur does not preclude intervention here because a coalition of States has sought to intervene in that case, so the litigation in that case is not yet final. But intervention is not appropriate where the alleged harm is contingent upon a sequence of events occurring in other cases in other courts.

2. Petitioners' permissive intervention arguments fare no better. Whether to permit a party to intervene under Rule 24(b) is entirely within the discretion of the court and may only be reversed when there is a clear abuse of discretion.

Petitioners claim that the Ninth Circuit abused its discretion by denying intervention here and should have allowed Petitioners to intervene because of the "unprecedented" nature of Respondents' actions, allegedly designed to bypass the APA process and deny interested parties their notice-and-comment rights.

What exactly did Respondents do? The federal government decided that continuing to defend the Public Charge Rule was neither in the public interest nor an efficient use of government resources. Accordingly, the United States Department of Justice (DOJ) decided not to pursue further appellate or Supreme Court review and withdrew the petitions for certiorari that had been filed in this Court. DHS then initiated a new rulemaking process to address the infirmities identified by the court, inviting interested parties to submit comments in response to an advance notice of proposed rulemaking. Petitioners declined to avail

themselves of that opportunity. And, in the interim, DHS reverted to the prior rule in order to comply with the district court's vacatur. All of this was standard and, in any event, squarely within the federal government's discretion.

For these reasons, the Court should find that Petitioners do not satisfy the requirements for intervention as of right or permissive intervention and affirm the Ninth Circuit.

ARGUMENT

I. Intervention as of Right Is Not Warranted in the Circumstances Presented Here

Under Federal Rule of Civil Procedure 24(a), a court "must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."

In other words, to intervene as of right "(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests."

SEC v. Prudential Sec. Inc., 136 F.3d 153, 156 (D.C. Cir. 1998).

Here, however, the Court need not determine whether the States' motion to intervene was timely. Br. 20-24. Nor does the Court have to analyze whether the States' alleged interest—namely the purported economic benefit to their jurisdictions from implementation of the Rule—is sufficient to warrant intervention. *Id.* at 24-26. Though these questions may raise interesting issues,[1] they are purely academic in this case because the States cannot establish that their asserted interests could be impaired or impeded (or, on the flip side, protected or advanced) by the disposition of this case.

Petitioners devote only a single sentence to this critical intervention factor, claiming that the impairment is "obvious" because "absent intervention, Respondents' collusive conduct will deprive the States of all the benefits they otherwise would have obtained under the Public Charge Rule." Br. 24. But this argument suffers from a fatal flaw: nothing in *this case* impacts Petitioners' ability to obtain those purported benefits one way or the other.

As an initial matter, the preliminary injunctions at issue here do not impair Petitioners' alleged economic interests because they do not apply in the Petitioners' States. The Ninth Circuit tailored the scope of the injunctions to the plaintiffs actually before it. Pet.

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[1] *See generally, e.g.*, Caleb Nelson, *Intervention*, 106 Va. L. Rev. 271 (2020).

App. 87-88. The relief did not extend into any of the Petitioners' States, and they are thus "strangers to the suit" without an interest in the relief granted by the Ninth Circuit. *Cf. Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) (explaining that courts should grant injunctions narrowed only to the jurisdictions before them in order to avoid affecting the interests of jurisdictions not present in the case); *Trump v. Hawaii*, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring).

Moreover, even if the preliminary injunction in this case had applied nationwide, Petitioners' interests would still not be impaired by the decision in this case. The challenged decision here is an affirmance of a preliminary injunction. But this relief has now been superseded by a *final judgment* vacating the Rule and the federal government's subsequent regulatory actions. As detailed above (*see* pp. 6-7, *supra*), in November 2020, a district court in the Northern District of Illinois granted Cook County's motion for summary judgment and entered a final judgment vacating the Public Charge Rule. *Cook Cnty. v. Wolf*, 498 F. Supp. 3d 999 (N.D. Ill. 2020). In March 2021, the Seventh Circuit dismissed the pending appeal of that judgment and issued its mandate. As a result, that judgment took effect. Thereafter, in compliance with the Illinois district court's vacatur ruling, the federal government issued a final rule removing the regulatory text of the Public Charge Rule from the Code of Federal Regulations and restoring the regulatory text that appeared prior to August 2019. *See Inadmissibility on Public*

Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. 14,221 (Mar. 15, 2021). As a result of these events, the preliminary injunctions issued in the cases at issue here, as well as the Ninth Circuit's decision upholding them, are irrelevant to the state of affairs on the ground in Petitioners' jurisdictions.

Petitioners' attempts to avoid this practical reality are unavailing.

First, Petitioners argue—citing *California v. HHS*, 941 F.3d 410, 421-22 (9th Cir. 2019)—that an appeal from the preliminary injunction is still relevant because "even a nationwide injunction in a different circuit does not moot another case seeking the same relief." Br. 32; *see also id.* at 16-17. This argument fails for several reasons.

As an initial matter, the court of appeals in *HHS* held that a *preliminary* injunction issued by another jurisdiction did not moot the appeal from a separate preliminary injunction granted by the Northern District of California. *HHS*, 941 F.3d at 421; *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 835 (E.D. Pa. 2019) (granting a nationwide preliminary injunction against two final rules granting exemptions to Affordable Care Act's requirement that health plans cover women's preventive services). In fact, the court said that the calculus would likely be different if the Pennsylvania district court were to issue nationwide *permanent* relief. *See HHS*, 941 F.3d at 423 ("One possibility is to the contrary: the Pennsylvania district court could rule in favor of the plaintiffs, choose to exercise its discretion

to issue a permanent injunction, *and* choose to exercise its discretion to give the permanent injunction nationwide effect despite the existence of an injunction in this case.").

Petitioners do not cite a single case where a court considered an appeal from a preliminary injunction after another court ordered final relief—like vacatur of a rule—that rendered the preliminary injunction superfluous. Nor could they, given that "[a]n appeal from an order granting a preliminary injunction becomes moot when, because of the defendant's compliance or some other change in circumstances, nothing remains to be enjoined through a permanent injunction." *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 396 F.3d 416, 421 (D.C. Cir. 2005); *see also*, *e.g.*, *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 394 (1981) (holding that "the correctness of the decision to grant a preliminary injunction" was moot once the injunctive aspects of the appeal were superseded by subsequent events); *Walker v. Azar*, 480 F. Supp. 3d 417, 427 (E.D.N.Y. 2020) (explaining that a district court "has no power to revive a rule vacated by another district court" even if the vacatur is unlikely to stand); *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Human Servs.*, 485 F. Supp. 3d 1, 25-26 (D.D.C. 2020) (holding that injury resulting from the superseding of prior rule by a new rule was not redressable because the relevant portions of the prior rule that plaintiffs sought to restore had already been set aside by another district court).

More fundamentally, however, regardless of whether the Illinois vacatur and subsequent regulatory action

technically render this preliminary injunction appeal moot,[2] these facts make it impossible for Petitioners to establish that "this action may as a practical matter impair or impede" their interests. Fed. R. Civ. Proc. 24(a)(2). Even if the States were (i) permitted to intervene in this case, (ii) able to file a petition for certiorari in this Court seeking review of the Ninth Circuit's preliminary injunction decision,[3] and (iii) ultimately successful in getting this Court to reverse the Ninth Circuit's decision on the merits (or vacate it under *Munsingwear*), the Illinois vacatur of the rule would remain. Accordingly, the States still would not—indeed could not—obtain the benefits they allege would flow to them from implementation of the Public Charge Rule.

Thus, to the extent Petitioners' interests are impaired at all, they are impaired by the Illinois district court's vacatur and DHS's rescission of the Rule—not by the Ninth Circuit's decision on the Counties' preliminary injunction.

Second, Petitioners argue that the Illinois vacatur does not preclude intervention here because "the litigation over its legality is not yet final." Br. 32. It is true that a coalition of States moved to intervene in that

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[2] The Counties agree that it does for the reasons stated in Plaintiffs' Joint Opposition to Motion to Intervene. *See* Joint App. 87-89.

[3] Notably, Petitioners would be foreclosed from filing a Petition for Certiorari regarding the December 2020 decision since the "mandatory and jurisdictional" deadline to file has passed. *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990).

case, but that motion was denied. *Cook Cnty. v. Mayorkas*, No. 19-C-6334, 2021 WL 3633917 (N.D. Ill. Aug. 17, 2021). And although the States are appealing that denial (Br. 32), the fact that something may happen in the future that could cause a party's interests to be impaired is not an adequate basis for intervention as of right. *See, e.g.*, *Standard Heating and Air Conditioning Co. v. City of Minneapolis*, 137 F.3d 567, 571 (11th Cir. 1998) (denying intervention where a "sequence of events would have to occur for the interests of the associations to be impacted"); *Washington Elec. Co-op. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990) ("An interest . . . that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule."); *see also generally United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 983 (2d Cir. 1984) (courts must conduct intervention assessments "with an eye to the posture of the litigation *at the time the motion [to intervene] is decided*.") (emphasis added). And "[i]ntervention cannot be used as a means to inject collateral issues into an existing action." *United States v. City of New York*, 198 F.3d 360, 365 (2d Cir. 1999) (citations and internal quotation omitted).

In sum, the possibility that circumstances may change in the future based on the actions of different courts addressing a different motion brought by a group of States in a different case does not establish

that Petitioners have interests that are currently being, or at risk of being, impaired *in the Ninth Circuit*.[4]

Notably, Petitioners' discussion of the Illinois vacatur makes clear that at least part of their rationale for seeking intervention here is to generate jurisprudence from this Court now that would influence ongoing and future proceedings in the Seventh Circuit. Indeed, they frankly acknowledge this intent, stating: "If this Court concludes that the Petitioners should have been granted intervention here, the Seventh Circuit has no justifiable reason for denying intervention there." Br. 32. But a generalized interest in the favorable development of caselaw—whether on the merits of the Public Charge Rule, the standard for appellate intervention, or otherwise—is insufficient to support intervention. "Mere interest in the establishment of a legal precedent is not sufficient" to give a party the right to intervene "to appeal a decision which all other parties have decided not to appeal." *United States v. Imperial Irr. Dist.*, 559 F.2d 509, 521 (9th Cir. 1977); *see also*, *e.g.*, *Alaska Excursion Cruises, Inc. v. United States*, 603 F. Supp. 541, 551 (D.D.C. 1984) (holding that where disposition of action would have no effect, other than as legal precedent, on any property or interest held by party seeking to intervene, party was not entitled to intervention as of right).

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[4] And even if circumstances do change in the Illinois case, Petitioners' interests still would not be impaired by the geographically limited preliminary injunctions at issue here.

In short, under the current circumstances, Petitioners' alleged economic interests are simply not impaired by a decision upholding a preliminary injunction that (1) does not apply in their states and (2) has been superseded by a final judgment of vacatur in another case, along with subsequent executive action. For this reason alone, the Court should find that Petitioners do not satisfy the requirements for intervention as of right.

II. The Ninth Circuit Did Not Abuse Its Discretion in Denying Permissive Intervention in the Circumstances Presented Here

Petitioners' argument that the Ninth Circuit should have granted permissive intervention is similarly unavailing.

Courts are never required to grant permissive intervention, but they may do so if a party "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. Proc. 24(b)(1)(B). Petitioners devote one sentence to arguing that they meet this standard, stating simply that it is satisfied here because "the States sought to advance common legal arguments in defense of the Rule—*i.e.*, that the Public Charge Rule was substantively and procedurally valid." Br. 27. But not every party who wants to argue in favor of an action is necessarily able to intervene in a lawsuit challenging it. Were it otherwise, there would effectively be no difference between the standards to file an amicus brief and to intervene as a

party in a case. And while Petitioners may have a generalized interest in defending the Public Charge Rule, they have no redressable interest in the Ninth Circuit's review of the Counties' preliminary injunction. *See* Part I, *supra*.

Moreover, permissive intervention is "wholly discretionary," and courts may deny intervention "even when the requirements of 24(b) are satisfied." *Turner v. Cincinnati Ins. Co.*, 9 F.4th 300, 317 (5th Cir. 2021). Petitioners ignore entirely the inherently discretionary nature of a court's disposition of a permissive intervention motion, and that the Ninth Circuits decision on Petitioners' request for permissive intervention may be reversed only if that court abused its discretion. *See, e.g.*, *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 382 n.1 (1987) (stating that an order denying a motion for permissive intervention "is not appealable absent abuse of discretion") (Brennan, J., concurring); *St. Bernard Par. v. Lafarge N. Am., Inc.*, 914 F.3d 969, 973 (5th Cir. 2019) ("Denial of permissive intervention, on the other hand, is reviewed for clear abuse of discretion. . . . Under this standard, the Court will reverse a district court decision only under extraordinary circumstances.").

Instead, Petitioners devote the majority of their briefing on permissive intervention to an argument untethered from the Rule 24(b) standard: that the equities "demanded" intervention here because of the "unprecedented" nature of Respondents' actions, allegedly designed to circumvent the APA process and deny interested parties their notice-and-comment rights. Br.

27-29. Even if these allegations were true, they would not mandate permissive intervention. But Petitioners' allegations are demonstrably untrue.

Although Petitioners do not mention it anywhere in their briefs, DHS has in fact taken the first steps toward initiating the notice-and-comment process to develop a new rule on the public charge ground of inadmissibility.

In August 2021, DHS issued its ANPRM "seek[ing] broad public feedback on the public charge ground of inadmissibility that will inform its development of a future regulatory proposal." *Public Charge Ground of Inadmissibility*, 86 Fed. Reg. 47,025 (Aug. 23, 2021). DHS explained in the ANPRM that it was in the process of preparing a new regulatory proposal that will be "fully consistent with law," "reflect empirical evidence to the extent relevant and available," and will "consider[] public comments." *Id.* at 47,028.

DHS invited public participation through written comments or oral presentations at two virtual public listening sessions. DHS specifically solicited comments from state and local government agencies responsible for granting benefits to individuals. *Id.* at 47,032.

The comment period on the ANPRM closed in October 2021, and the Office of Information and Regulatory Affairs website states that "DHS intends to proceed with rulemaking to define the term public charge and identify considerations relevant to the public charge inadmissibility determination," and indicates that a

Notice of Proposed Rulemaking (NPRM) could be forthcoming as soon as March 2022.[5]

Accordingly, it is simply not true that DHS is "bypass[ing] notice and comment completely." Br. 38. The agency is complying with court orders prohibiting it from applying the Public Charge Rule while it engages in the notice and comment process. There is nothing remotely unusual or improper about doing this. Indeed, it has happened several times in just the last few years.

During the Obama Administration, the Department of Labor (DOL) issued a final rule increasing the salary threshold for employees to be deemed exempt from overtime pay ("2016 Rule"). *Nevada v. United States Dep't of Lab.*, 275 F. Supp. 3d 795, 799 (E.D. Tex. 2017). The 2016 Rule was challenged by a coalition of States and business groups. In 2016, a district court in the Eastern District of Texas granted a nationwide preliminary injunction. DOL appealed this decision, but moved to dismiss the appeal as moot after the district court issued a final judgment for plaintiffs, invalidating the 2016 Rule and rendering the appeal from the preliminary injunction moot. *See Nevada v. United*

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[5] *See* DHS/USCIS, Inadmissibility on Public Charge Grounds, RIN 1615-AC74, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=1615-AC74 (indicating an NPRM date of "03/00/2022"); *see also* Off. of Mgmt. & Budget, Off. of Info. & Regulatory Affairs, Unified Agenda of Regulatory and Deregulatory Actions (Fall 2021), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_1600_DHS.pdf ("USCIS will propose regulations to define the term 'public charge.' ").

States Dep't of Lab., Case No. 17-41130, Doc. 00514223773 at ¶ 2 (Nov. 3, 2017). The DOL—now under different leadership in the Trump Administration—did notice an appeal from the final judgment but did *not* actively defend the rule or prosecute the appeal. Instead, DOL immediately informed the court of appeal that the department intended to revisit the 2016 Rule and moved to hold the appeal in abeyance pending a new rulemaking process. *Nevada v. United States Dep't of Lab.*, Case No. 17-41130, Docs. 00514223773 (Nov. 3, 2017) & 00514226421 (Nov. 6, 2017).

For the next several years while the rulemaking process was pending, DOL complied with the district court's order invalidating the 2016 Rule. DOL explained in the federal register that the 2016 Rule had been invalidated and, as a result, that it was continuing to enforce the regulations that were in effect before the 2016 Rule was enacted. *See Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 84 Fed. Reg. 51,230 at 51,232 (Sept. 27, 2019) ("As a result of these rulings, the Department has continued to enforce the salary level set in 2004."); *see also id.* at 51,233 ("Due to the district court's decision invalidating the 2016 final rule, these are the salary levels the Department is currently enforcing.").

DOL issued a new final rule in September 2019, and the Fifth Circuit granted DOL's motion to dismiss its appeal shortly thereafter. *See Nevada v. United States Dep't of Lab.*, Case No. 17-41130, Docs.

00515288870 (Jan. 28, 2020) & 00515295004 (Feb. 3, 2020).

Similarly, in August 2020, DHS issued a final rule concerning the fee schedule for various immigration related services. *See U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, 85 Fed. Reg. 46,788 (Aug. 3, 2020) ("Fee Rule"). The Fee Rule was scheduled to go into effect on October 2, 2020, but lawsuits challenging the rule were promptly filed in districts courts in the District of Columbia and Northern District of California. The California district court issued a preliminary injunction on September 28; the D.C. court followed on October 8. *See Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520 (N.D. Cal. 2020); *Nw. Immigrant Rts. Project v. United States Citizenship & Immigr. Servs.*, 496 F. Supp. 3d 31 (D.D.C. 2020). DHS initially appealed, but then voluntarily withdrew both appeals in late December 2020.[6] In January 2021, DHS published a "notification of preliminary injunction" in the Federal Register informing the public that the rule had been enjoined and that the "Department [was] complying with the terms of these orders and is not enforcing the regulatory changes set out in the Final Rule." 86 Fed. Reg. 7493 (Jan. 29, 2021).

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[6] Order, *Immigrant Legal Res. Ctr. v. Wolf*, 20-17339, Dkt. No. 11 (9th Cir. Dec. 31, 2020); Order, *Nw. Immigrant Rts. Project v. United States Citizenship & Immigr. Servs.*, 20-5369, Doc. 1879700 (D.C. Cir. Jan. 12, 2021).

Since then, the cases have been stayed in the district court while DHS engages in a new rulemaking process.[7] In the interim, DHS has "continue[d] to accept the fees that were in place prior to October 2, 2020 and follow the guidance in place prior to October 2, 2020 to adjudicate fee waiver requests." *Notification of Preliminary Injunction*, 86 Fed. Reg. 7493 (Jan. 29, 2021).

Here, as in the cases above, the federal government decided not to continue defending the agency rule at issue. In all these cases, the agency instituted a new rulemaking process to develop and implement a new rule that addresses the infirmities identified by the court after providing an opportunity for all interested parties to have input into the process. And in all these cases the agency reverted to the prior rule for the duration of the rulemaking process in order to comply with the relevant district court decisions invalidating the rules at issue.

It is true that there are some procedural differences here—namely that the federal government chose to withdraw its appeals before the new rule was finalized and to remove the judicially invalidated language from the Code of Federal Regulations. But there is nothing improper about either of those actions.

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[7] Joint Status Report and Stipulated Request to Continue Abeyance, *Immigrant Legal Res. Ctr. v. Wolf*, 4:20-cv-05883-JSW, Doc. 119 (N.D. Cal. Sept. 9, 2021); Joint Status Report, *Nw. Immigrant Rts. Project v. United States Citizenship & Immigr. Servs.*, 1:19-cv-03283-RDM, Doc. 101 (D.D.C. Sept. 10, 2021).

The federal government has discretion to determine whether to appeal a successful challenge to a federal law or regulation. *See* 28 C.F.R. § 0.20(b) (granting discretionary authority to the Solicitor General to determine when to appeal from a judgment adverse to the interests of the United States). And it is not unusual for it to choose to forgo an appeal. In the 1979-1980 Supreme Court term, for example, the Solicitor General's Office "filed sixty-seven petitions for writs of certiorari, and participated in argument or filed briefs on the merits in 108 cases considered by the Court. During the same one-year period, there were 426 cases in which the Solicitor General decided *not* to petition for certiorari." Wade H. McCree, Jr., *The Solicitor General and His Client*, 59 Wash.U.L.Q. 337, 340-41 (1981); *see also*, *e.g.*, *United States v. Providence J. Co.*, 485 U.S. 693, 702 n.7 (1988) ("[T]his Court relies on the Solicitor General to exercise such independent judgment and to decline to authorize petitions for review in this Court in the majority of the cases the Government has lost in the courts of appeals."); *United States v. Mendoza*, 464 U.S. 154, 160-61 (1984) ("Unlike a private litigant who generally does not forego an appeal if he believes that he can prevail, the Solicitor General considers a variety of factors . . . before authorizing an appeal.").

Even the Ed Whelan article cited by Petitioners (Br. 12) acknowledges that there is no tradition—let alone requirement—that DOJ appeal every ruling against an agency action. Ed Whelan, *Biden Administration Defies Longstanding DOJ Norm on Agency Litigation*, Nat'l Rev. (Mar. 10, 2021). Mr. Whelan

asserts that it is "extremely rare" for DOJ to "abandon an appeal that has previously been pursued." *Id.* But in this case, DOJ filed its petition for certiorari with this Court on the afternoon before inauguration day in January 2021.[8] The Solicitor General's decision to stop pursuing that under-the-wire petition—which the federal government had concluded was "neither in the public interest nor an efficient use of limited government resources"[9]—was squarely within her discretion.

Nor was there anything improper about DHS removing the invalidated text from the Code of Federal Regulations without first engaging in notice and comment rulemaking.[10] It is true that the APA's rulemaking requirements apply to the repeal of a rule that was enacted through notice and comment rulemaking, but subsection 553(b)(B) sets forth a "good cause" exception to the notice and comment requirements. Specifically, it provides that an agency has "good cause" to conduct rulemaking without notice and comment when proceeding through notice and comment would

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[8] The petition was filed and served on January 19, and docketed by this Court on January 21. *See* Petition's Proof of Service for *United States Citizenship and Immigr. Servs. v. City & Cnty. of San Francisco*, No. 20-962 (docketed January 21, 2021).

[9] DHS Statement on Litigation Related to the Public Charge Ground of Inadmissibility (Mar. 9, 2021), https://www.dhs.gov/news/2021/03/09/dhs-statement-litigation-related-public-charge-ground-inadmissibility.

[10] If Petitioners believe that the rescission was improper because it was accomplished without engaging in notice-and-comment rulemaking, they can file a lawsuit challenging its validity. They have not done so.

be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). And courts have held that "good cause" exists where, as here, the rulemaking is "a reasonable and perhaps inevitable response to" a "court order." *American Federation of Government Employees, AFL–CIO v. Block*, 655 F.2d 1153, 1157 (D.C. Cir. 1981); *see also EME Homer City Generation, L.P. v. E.P.A.*, 795 F.3d 118, 134 (D.C. Cir. 2015).

Indeed, the Trump Administration acknowledged as much in circumstances strikingly similar to those presented here. In 2018, the federal government chose not to seek en banc review or petition for a writ of certiorari after the Fifth Circuit invalidated the Obama-era conflict-of-interest rule, known as the "Fiduciary Rule," that President Trump had been critical of since the early days of his presidency. *See Chamber of Com. of the United States of Am. v. Dep't of Lab.*, 885 F.3d 360, 363 (5th Cir. 2018); Jeffrey A. Lieberman, *Fifth Circuit Mandate Officially Ends DOL Fiduciary Rule* (June 15, 2018) (noting that the "DOL had until June 13, 2018, to appeal the decision to the U.S. Supreme Court, but it declined to do so"); *see also* Presidential Memorandum, Presidential Memorandum on Fiduciary Duty Rule (Feb. 3, 2017), available at https://trumpwhitehouse.archives.gov/presidential-actions/presidential-memorandum-fiduciary-duty-rule/ (last visited Jan. 4, 2021).[11]

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[11] Notably, the attorneys general of California, New York, and Oregon sought to intervene in the Fifth Circuit for purposes of seeking further review, but the Fifth Circuit denied the motion without opinion. *Chamber of Com. of the United States of America*

After letting the mandate issue without pursuing further review, DOL issued a final rule "implement[ing] the [judicial] vacatur of the Department's 2016 final rule" by "remov[ing] language from the CFR that the Fiduciary Rule added and reinstat[ing]" the prior regulatory language. *Conflict of Interest Rule-Retirement Investment Advice: Notice of Court Vacatur*, 85 Fed. Reg. 40,589 at 40,589-90 (July 7, 2020). The Department explained that the change was a merely a "technical amendment"—a "ministerial action to reflect the court's decision which affects no legal rights or obligations and imposes no costs." *Id.* at 40,590. It also declared that there was "good cause" under Section 553 because the "rule merely conforms the text in the CFR to reflect the mandate of the Fifth Circuit's decision, which vacated the Department's 2016 rulemaking *in toto*." *Id.*

Petitioners are attempting to create a lot of smoke here, but there is no fire. Nothing in the parties' conduct was improper. Indeed, the parties' actions in the Counties' case are particularly uncontroversial. The appellate court affirmed a preliminary injunction. The federal government made the decision not to pursue review of that interlocutory decision at this Court. Meanwhile, the Counties' public charge case remains stayed in the district court (Joint App. 6) and the federal government is undertaking a new rulemaking process. Petitioners have not been deprived of their right or ability to participate in notice and comment

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v. Dep't of Lab., No. 17-10238, Doc. 00514455324 (5th Cir. May 2, 2018).

rulemaking concerning application of the public charge ground of inadmissibility. To the contrary, they have already been invited to submit comments in response to DHS's ANPRM. They chose not to do so. *See* Public Comments on Public Charge Ground of Inadmissibility ANPRM, https://www.regulations.gov/document/USCIS-2021-0013-0001/comment (containing all comments submitted).

In these circumstances, the Ninth Circuit did not abuse its discretion by denying Petitioners' request for permissive intervention.

CONCLUSION

This Court should affirm the Ninth Circuit's judgment denying Petitioners' motion to intervene.

Respectfully submitted,

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