No. ____

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.

MOTION FOR LEAVE TO INTERVENE AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Under the Immigration and Nationality Act, 8 U.S.C. §§1101 *et seq.*, an alien is "inadmissible" if, "in the opinion of the [Secretary of Homeland Security] at the time of application for admission or adjustment of status, [the alien] is likely at any time to become a public charge." 8 U.S.C. §1182(a)(4)(A). Following notice-and-comment rulemaking, the United States Department of Homeland Security (DHS) promulgated a final rule (the "Rule") interpreting the statutory term "public charge" and establishing a framework for applying it.

Litigation about the Rule ensued, and the Second, Seventh, and Ninth Circuits affirmed preliminary injunctions, while the Fourth Circuit initially reversed. The United States sought review in multiple cases, and this Court granted review of the Second Circuit's opinion. *DHS v. New York*, No. 20-449 (U.S. Feb. 22, 2021). But the United States suddenly announced it would no longer pursue its appeals. The result was to leave in place a partial grant of summary judgment and vacatur of the Rule in one district court, applying nationwide—evading this Court's review and the procedures of the APA.

The questions presented are:

1. Whether Petitioners should be granted leave to intervene to defend the Rule in light of the United States' abdication.

2. Whether the Rule is contrary to law or arbitrary and capricious.

3. Alternatively, whether the decision below should be vacated as moot under *Munsingwear*.

PARTIES TO THE PROCEEDINGS

Petitioners are the State of Arizona; the State of Alabama; the State of Arkansas; the State of Indiana; the State of Kansas; the State of Louisiana; the State of Mississippi; the State of Missouri; the State of Montana; the State of Oklahoma; the State of South Carolina; the State of Texas; and the State of West Virginia.

Respondents (plaintiffs-appellees below) are the City and County of San Francisco; the County of Santa Clara; the State of California; the District of Columbia; the State of Colorado; the State of Delaware; the State of Hawaii; the State of Illinois; the State of Maine; the State of Maryland; the Commonwealth of Massachusetts; the State of Minnesota; the State of Nevada; the State of New Jersey; the State of New Mexico; the State of Oregon; the Commonwealth of Pennsylvania; the State of Rhode Island; the Commonwealth of Virginia; the State of Washington; and Dana Nessel, Attorney General on behalf of the People of Michigan. Respondents (defendants-appellants below) are the United States Citizenship and Immigration Services; the U.S. Department of Homeland Security; Alejandro N. Mayorkas, in his official capacity as Secretary of the United States Department of Homeland Security; and Tracy Renaud, in her official capacity as Acting Director of the United States Citizenship and Immigration Services.

STATEMENT OF RELATED PROCEEDINGS

United States District Court (E.D. Wash.):

State of Washington v. United States Department of Homeland Security, No. 19-cv-5210 (Oct. 11, 2019)

United States District Court (N.D. Cal.):

City & County of San Francisco v. United States Citizenship & Immigration Services, No. 19-cv-4717 (Oct. 11, 2019)

State of California v. United States Department of Homeland Security, No. 19-cv-4975 (Oct. 11, 2019)

United States Court of Appeals (9th Cir.):

City & County of San Francisco v. United States Citizenship & Immigration Services, Nos. 19-17213, 19-17214, 19-35914 (Dec. 2, 2020)

Supreme Court of the United States:

United States Citizenship & Immigration Services v. City & County of San Francisco, No. 20-962 (March 9, 2021)

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The panel order denying intervention is reported at 992 F.3d 742. The panel opinion affirming the preliminary injunctions is reported at 981 F.3d 742, while the published opinion of the same court staying the preliminary injunction is reported at 944 F.3d 773. The opinions of the district courts are reported at 408 F.Supp.3d 1057 and 408 F.Supp.3d 1191.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This petition is timely under this Court's March 19, 2020 Order.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this petition. *See* App.369-384.

INTRODUCTION

This case involves challenges to a 2019 final rule that defined "public charge" for purposes of federal immigration law (the "Rule"). The United States actively defended challenges to the Rule in courts across the country—going as far as filing petitions for writs of certiorari in this case and two materially similar cases in the Second and Seventh Circuits, after those courts affirmed preliminary injunctions of the Rule.

The incoming Biden Administration elected not to withdraw these petitions for certiorari, signaling their intent to continue defending the Rule. And on February 22, 2021, this Court granted one of them, which sought review of the Second Circuit opinion.

But that all changed on March 9, 2021. Without any prior warning, the existing parties sprung an unprecedented, coordinated, and multi-court gambit. Through it, they attempted to execute simultaneous, strategic surrenders in all pending appeals involving the Rule. That included the Second Circuit appeal that this Court had already agreed to hear, as well as the pending petitions for writs of certiorari in this case and the Seventh Circuit case.

The ultimate effect of these voluntary dismissals was to effectuate a partial final judgment and vacatur of the Rule issued by a district court in the Northern District of Illinois. Left undisturbed, that vacatur potentially frustrates this Court's review entirely (although efforts at obtaining review of that vacatur are underway. *See, e.g.*, *Texas v. Cook Cty.*, No. 20A150 (U.S.)). This unusual tactic effectively reversed a full year of notice and comment rulemaking at a stroke, while also evading the procedures re-

quired by the Administrative Procedure Act to rescind or modify the Rule.

In light of the Petitioning States' vital interests in the Rule discussed below and the collusive actions of the Respondents, the Petitioning States respectfully seek leave to intervene and for a writ of certiorari to be granted to review the decision of the Ninth Circuit affirming a preliminary injunction enjoining the Rule.

STATEMENT[1]

The United States Department of Homeland Security (DHS) issued a rule interpreting the provision of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 163 (8 U.S.C. §§1101 *et seq.*), that makes an alien inadmissible if, "in the opinion of" the Secretary of Homeland Security, the alien is "likely at any time to become a public charge." 8 U.S.C. §1182(a)(4)(A). The district courts here entered preliminary injunctions barring implementation of the Rule, one nationwide and the other within the geographic bounds of the plaintiffs' jurisdictions, *see* App.308-367, 171-307, and district courts in three other States also entered preliminary injunctions against implementation of the Rule (some nationwide and some on a more limited basis). Those preliminary injunctions were all stayed—some by the Fourth and Ninth Circuits, *see* Order, *CASA de Maryland, Inc. v. Trump*, No. 19-2222, Dkt. 21 (4th Cir. Dec. 9, 2019); App.90-170, and the remainder by this

[1] Given that petitions for certiorari were already filed in this case and similar cases, this Statement, as well as some sections below, reproduce portions of text from those petitions. *See, e.g.*, *U.S. Citizenship & Immigr. Servs. v. City & Cty. of S.F.*, No. 20-962 (Jan. 21, 2021).

Court, *see DHS v. New York*, 140 S. Ct. 599 (2020); *Wolf v. Cook Cty.*, 140 S. Ct. 681 (2020). A Fourth Circuit panel subsequently reversed the preliminary injunction entered by a district court in Maryland, *see CASA de Maryland, Inc. v. Trump*, 971 F.3d 220 (2020), but the full court then granted rehearing en banc, 981 F.3d 311 (2020), *appeal dismissed before rehearing, CASA de Maryland., Inc. v. Biden*, No. 19-2222, Dkt. 211 (4th Cir. Mar. 11, 2021). The Second Circuit affirmed the injunctions entered by a district court in New York (though limiting their geographic scope), *see New York* v. *DHS*, 969 F.3d 42 (2020), *cert. granted*, 141 S. Ct. 1370 (2021), *cert. dismissed*, 141 S. Ct. 1292 (2021), and the Seventh Circuit affirmed an injunction entered by a district court in Illinois, *Cook Cty. v. Wolf*, 962 F.3d 208 (2020), *cert. dismissed*, 242 S. Ct. 1292 (2021). In the decision here, a divided panel of the Ninth Circuit affirmed the preliminary injunctions entered by the district courts, but concluded that the injunctions should not extend nationwide. App.41-89.

A. The Public-Charge Inadmissibility Rule

1. The INA provides that "[a]ny alien who …, in the opinion of the [Secretary of Homeland Security] at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible." 8 U.S.C. §1182(a)(4)(A).[2] That assessment "shall at a minimum consider the alien's (I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; and (V) educa-

[2] The statute refers to the Attorney General, but in 2002 Congress transferred the authority to the Secretary of Homeland Security. *See* 8 U.S.C. §1103; 6 U.S.C. §557; *see also* 6 U.S.C. §211(c)(8).

tion and skills." 8 U.S.C. §1182(a)(4)(B). A separate INA provision provides that an alien is deportable if, within five years of entry, the alien "has become a public charge from causes not affirmatively shown to have arisen" since entry. 8 U.S.C. §1227(a)(5).

Three agencies make public-charge determinations under this provision: DHS, for aliens seeking admission at the border and aliens within the country applying to adjust their status to that of a lawful permanent resident; the Department of State, for aliens abroad applying for visas; and the Department of Justice, for aliens in removal proceedings. *See* 84 Fed. Reg. 41,292, 41,294 n.3 (Aug. 14, 2019). The rule at issue governs DHS's public-charge determinations. *Id.*

2. The "public charge" ground of inadmissibility dates back to the first general federal immigration statutes in the late nineteenth century. *See, e.g.*, Immigrant Fund Act, Act of Aug. 3, 1882, ch. 376, §§1-2, 22 Stat. 214. Through the nearly 140 years that the public-charge inadmissibility ground has been in effect, however, Congress has consistently chosen not to define the term "public charge" by statute. Indeed, in an extensive report that served as a foundation for the enactment of the INA in 1952, the Senate Judiciary Committee recognized that "[d]ecisions of the courts have given varied definitions of the phrase 'likely to become a public charge,'" and that "'different consuls, even in close proximity with one another, have enforced [public-charge] standards highly inconsistent with one another.'" S. Rep. No. 1515, at 347, 349 (1950). Rather than recommend adoption of a specific standard, the Committee indicated that because "the elements constituting likelihood of becoming a public charge are

varied, there should be no attempt to define the term in the law." *Id.* at 349; *see* INA §212(a)(15) (using term without definition).

In 1999, the Immigration and Naturalization Service (INS), recognizing that the term was "ambiguous" and had "never been defined in statute or regulation," proposed a rule to "for the first time define 'public charge.'" 64 Fed. Reg. 28,676, 28,676-28,677 (May 26, 1999); 64 Fed. Reg. 28,689, 28,689 (May 26, 1999) ("1999 Guidance"). The proposed rule would have defined "public charge" to mean an alien "who is likely to become primarily dependent on the Government for subsistence as demonstrated by either: (i) [t]he receipt of public cash assistance for income maintenance purposes, or (ii) [i]nstitutionalization for long-term care at Government expense." 64 Fed. Reg. at 28,681. When it announced the proposed rule, INS also issued "field guidance" adopting the proposed rule's definition of "public charge." 64 Fed. Reg. at 28,689. The proposed rule was never finalized, however, leaving only the 1999 Guidance in place. *See* 84 Fed. Reg. at 41,348 n.295.

3. In October 2018, DHS announced a new approach to public-charge determinations by providing notice of a proposed rule and soliciting comments. 83 Fed. Reg. 51,114 (Oct. 10, 2018). After responding to comments timely submitted, DHS promulgated a final rule in August 2019. 84 Fed. Reg. at 41,501.

The Rule defines "public charge" to mean "an alien who receives one or more public benefits [as defined in the Rule] … for more than 12 months in the aggregate within any 36-month period." 84 Fed. Reg. at 41,501. The designated public benefits include cash assistance for income maintenance and certain

non-cash benefits, including most Medicaid benefits, Supplemental Nutrition Assistance Program benefits, and federal housing assistance. *Id.* As the agency explained, the Rule's definition of "public charge" differs from the 1999 Guidance in that (1) it incorporates certain non-cash benefits and (2) it replaces the "primarily dependent" standard with the 12-month/36-month measure of dependence. *Id.* at 41,294-41,295.

The Rule also sets forth a framework immigration officials will use to evaluate whether, considering the "totality of an alien's individual circumstances," the alien is "likely at any time in the future to become a public charge." 84 Fed. Reg. at 41,369; *see id.* at 41,501-41,504. Among other things, the framework identifies a number of factors an adjudicator must consider in making a public-charge determination, such as the alien's age, financial resources, employment history, education, and health. *Id.* The Rule was set to take effect on October 15, 2019. *Id.* at 41,292.

B. Procedural History

1. Plaintiffs are a group of States, counties, and cities. In three separate lawsuits, they challenged the Rule, urging that the Rule's definition of "public charge" is at odds with that term's settled meaning; the Rule is arbitrary and capricious, *see* 5 U.S.C. §706(2)(A); the Rule violates the Rehabilitation Act of 1973 (Rehabilitation Act), Pub. L. No. 93-112, 87 Stat. 355 (29 U.S.C. §§701 *et seq.*), because disabled aliens are less likely to be admissible; and the Rule violates constitutional equal-protection principles.

Two of the lawsuits were brought in the Northern District of California, and the relevant plaintiffs' mo-

tions for preliminary injunctions were decided together in a single opinion on October 11, 2019, with the district court issuing a preliminary injunction applicable to all the plaintiff jurisdictions in those cases. App.171-307. The third lawsuit was brought in the Eastern District of Washington, and the district court issued a nationwide injunction on October 11, 2019. App.308-368.

a. In the California cases (heard by the same judge), the district court concluded that plaintiffs were likely to prevail on their claim that the Rule's definition of "public charge" was not a reasonable interpretation of the statute. App.190-242. The court reasoned that the Rule's definition was at odds with the term's purportedly "long-standing focus on the individual's ability and willingness to work or otherwise support himself," and the legislative history of Congress's 1996 amendments to the INA and an amendment Congress rejected in 2013. App.239.

The district court also concluded that plaintiffs were likely to succeed in demonstrating that the Rule was arbitrary and capricious because DHS allegedly failed to adequately consider the adverse economic costs and public-health-related effects of the Rule. App.245-264.

b. In the Washington case, the district court also concluded that plaintiffs were likely to prevail on their claim that the Rule's definition of "public charge" was not a reasonable interpretation of the statute. App.343-357. The court reasoned that the public-charge statute's recent legislative history, including Congress's recent rejection of legislative proposals that would have expressly defined "public charge" to include receipt of non-cash benefits, indi-

cated that Congress unambiguously foreclosed DHS from adopting the Rule. App.356-357. The court further concluded that Congress had not delegated the authority to DHS to define who qualifies as a "public charge." *Id.*

The district court also concluded that plaintiffs were likely to succeed in demonstrating that the Rule was arbitrary and capricious, because DHS allegedly failed to provide reasoned explanations for changing the definition of "public charge" and for adopting its chosen framework. App.357-359. The court further concluded that there was "doubt" as to whether the Rule complied with the Rehabilitation Act, because the Rule required DHS to consider an alien's disability as a negative factor in some circumstances. App.355.

2. The government sought a stay pending appeal, which the Ninth Circuit granted in a published opinion. App.90-170. The court concluded that the government had demonstrated a "strong" likelihood of success on the merits, that the government would suffer irreparable harm, and that the balance of the equities and public interest favored a stay. App.105.

On the merits, the Ninth Circuit observed that the statute's text entrusts the public-charge determination to the "'opinion' of the consular or immigration officer," which "is the language of discretion." App.128-129 (quoting 8 U.S.C. §1182(a)(4)(A)). The court further reasoned that the term "public charge" is ambiguous, that Congress had identified a nonexclusive list of factors for the agency to consider, and that DHS had authority to adopt regulations to enforce the provision. App.130. The court reviewed the history of the term's interpretation, and was "unable

to discern one fixed understanding of 'public charge' that has endured since 1882," instead concluding that "different factors have been weighted more or less heavily at different times." App.140; *see* App.131-141.

The court then concluded that DHS had adopted a reasonable interpretation of the ambiguous term. App.145-147. The court's conclusion was bolstered by the statements of immigration policy enacted by Congress in 1996, contemporaneously with the current version of the public-charge provision, that emphasize self-sufficiency. App.146 (citing 8 U.S.C. §1601).

The court stated that plaintiffs' reliance on the Rehabilitation Act "need not detain us long." App.147. Immigration officers are statutorily required to consider an immigrant's "health," 8 U.S.C. §1182(a)(4)(B)(i)(II), and DHS uses a totality-of-the-circumstances test to determine whether an alien is likely to become a public-charge, and would not deny an alien admission or adjustment of status "solely by reason of her or his disability," 29 U.S.C. §794(a). App.147-148.

The court likewise rejected plaintiffs' arbitrary-and-capricious argument. The court noted that "DHS addressed at length the costs and benefits associated with the Final Rule." App.151. And DHS "not only addressed [concerns related to public health] directly, it changed its Final Rule in response to the comments." App.158.

Finally, the court concluded that the government had demonstrated irreparable harm, given that it might grant lawful-permanent-resident status to aliens whom the Secretary would have deemed likely

to become public charges. App.159-162. Because the government had made a strong showing of likelihood of success on the merits and had demonstrated irreparable harm, the court concluded that a stay was warranted. App.164.

Judge Owens would have denied the motions to stay. App.169-170.

3. After plenary review, however, the Ninth Circuit affirmed the preliminary injunctions, but narrowed them not to apply nationwide. App.41-89.

The court concluded that the statute's history suggested that "it had been interpreted to mean long-term dependence on government support, and had never been interpreted to encompass temporary resort to supplemental non-cash benefits." App.71. The court accepted plaintiffs' argument that repeated reenactment of the public-charge provision without change, against that backdrop, supported their reading of the statute. App.71-72.

The court rejected reliance on other INA provisions that indicate that Congress intended that those admitted to the country be able to support themselves without relying on non-cash benefits for an intense or extended period. The court, for example, dismissed the requirement that certain immigrants furnish an affidavit of support from a sponsor under which the sponsor must agree to reimburse the government for any means-tested benefit the alien receives, 8 U.S.C. §1182(a)(4)(C)-(D), because the court concluded that provision had "no historic or functional relationship" to the public charge provision. App.76.

The court also concluded that the Rule was arbitrary and capricious. App.77-85. The court agreed with plaintiffs' arguments that the Rule "failed to take into account the costs the Rule would impose on state and local governments; it did not consider the adverse effects on health …, and it did not adequately explain why it was changing the policy that was thoroughly explained in the 1999 Guidance." App.78.

The court did not reach the Rehabilitation Act issue, because it had upheld the preliminary injunction on other grounds. App.88.

Judge VanDyke dissented. App.89. He would have reversed the injunctions for the reasons set forth in the motions panel's stay order, the Fourth Circuit's decision in *CASA de Maryland*, *supra*, and then-Judge Barrett's dissent in *Cook County*, *supra*. App.89.

4. The United States filed a petition for a writ of certiorari appealing the Ninth Circuits' decision. *U.S. Citizenship & Immigr. Servs. v. City & Cty. of S.F.*, No. 20-962 (U.S. Jan. 21, 2021). While that petition was pending, this Court granted a petition for a writ of certiorari in *DHS v. New York*, 141 S. Ct. 1370 (2021), the Second Circuit case dealing with virtually identical issues. Yet before this Court was able to rule on these important issues, the United States abruptly announced on March 9, 2021, that it would no longer seek appellate review of decisions enjoining the Rule.[3] That same day, the United

[3] Press Release, U.S. Dep't of Homeland Security, DHS Statement on Litigation Related to the Public Charge Ground of Inadmissibility (Mar. 9, 2021) https://www.dhs.gov/news/2021/

States voluntarily dismissed the petitions for writs of certiorari in this case and the Seventh Circuit case,[4] as well as the pending case arising from the Second Circuit.[5] They also dismissed a pending Seventh Circuit appeal arising from a November 2, 2020, 54(b) judgment issued by the Northern District of Illinois vacating the Rule in its entirety.[6] DHS then issued another statement noting that "[f]ollowing the Seventh Circuit dismissal …, the final judgment …, which vacated the 2019 public charge rule, went into effect" and "[a]s a result, the 1999 interim field guidance … that was in place before the 2019 public charge rule is now in effect."[7]

5. One day after the United States dismissed its petition in this case, the State of Arizona in conjunction with twelve other States moved to intervene in the Ninth Circuit for the purpose of protecting their interests and defending the Rule. *City & Cty. of S.F. v. U.S. Citizenship & Immigr. Servs.*, No. 19-17213, Dkt. 143 (Mar. 10, 2021); *see also id.* at Dkts. 145, 152. On April 8, 2021, a majority of the court denied the motion over a strong dissent by Judge VanDyke. App.14-40. Judge VanDyke determined that he

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03/09/dhs-statement-litigation-related-public-charge-ground-inadmissibility.

[4] *U.S. Citizenship & Immigr. Servs. v. City & Cty. of S.F.*, No. 20-962 (U.S. Mar. 9, 2021); *Mayorkas v. Cook Cty.,* No. 20-450 (U.S. Mar. 9, 2021).

[5] *DHS v. New York*, No. 20-449 (U.S. Mar. 9, 2021).

[6] *Cook Cty. v. Wolf*, No. 20-3150, Dkt. 24 (7th Cir. Mar. 9, 2021).

[7] Press Release, U.S. Dep't of Homeland Security, DHS Secretary Statement on the 2019 Public Charge Rule (Mar. 9, 2021) https://www.dhs.gov/news/2021/03/09/dhs-secretary-statement-2019-public-charge-rule.

would have granted intervention because "[a]bsent intervention, the parties' strategic cooperative dismissals preclude those whose interests are no longer represented from pursuing arguments that [this Court] has already alluded are meritorious." App.8.

Looking to Federal Rule of Civil Procedure 24, Judge VanDyke concluded that all four elements to intervene were satisfied and intervention should have been granted. App.29-34. He reasoned that in addition to having a significant protectable interest because the Rule's invalidation "could cost the states as much as $1.01 billion annually," the Petitioning States' motion was also timely as they moved "within mere days of the federal government" announcing that it would no longer defend the Rule. App.30-31. He further concluded that the Petitioning States' interests were no longer adequately represented because the existing parties were "now united in vigorous *opposition* to the rule." App.32. Finally, the Petitioning States' ability to protect their interests in the Rule were impaired by "[t]he disposition of this action, together with the federal government's other coordinated efforts to eliminate the rule while avoiding APA review." App.32.

He concluded that intervention should be granted because the United States evaded the APA process "on such shaky grounds as a district court decision that never withstood the crucible of full appellate review." App.34.

REASONS FOR GRANTING INTERVENTION AND THE PETITION FOR A WRIT OF CERTIORARI

I. This Court Should Grant The Petitioning States' Motion To Intervene.

This Court may, pursuant to its "general equity powers," permit States to intervene in appropriate cases. *See United States v. Louisiana,* 354 U.S. 515, 516 (1957) (*per curiam*). This case amply warrants exercise of that equitable authority. In addition, because the Petitioning States moved to intervene in the Ninth Circuit below and their interests will be vitally affected by the vacatur of the Rule, they fall within the definition of a "party" in 28 U.S.C. §1254(1). *See Pyramid Lake Paiute Tribe of Indians v. Truckee-Carson Irrigation Dist.*, 464 U.S. 863 (1983); *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969).[8]

Before March 9, the Petitioning States' interests were adequately represented—there was no reason to intervene. Petitioners had no indication that any machinations were forthcoming—indeed, the Biden Administration's decision *not* to pull its petitions regarding the Rule in the first month of the administration strongly signaled the opposite. Had Petitioners attempted to intervene before that date,

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[8] The Ninth Circuit's denial of intervention was erroneous, and independently warrants review under Rule 10. This Court has ample authority to deem this motion as a petition for certiorari on the issue of the denial of the Petitioning States' motion to intervene in the Ninth Circuit and should exercise that power if it prefers to address the intervention issue in that posture. *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. AFL-CIO, Loc. 283 v. Scofield*, 382 U.S. 205, 209 (1965).

plaintiffs would have howled that their interests were adequately represented by the United States. And when the United States abruptly abdicated its defense of the Rule, Petitioners sought to intervene *the very next day*—which is plainly timely.

But now, absent the ability to intervene and seek a writ of certiorari, the Petitioning States will be severely prejudiced by the United States' failure to defend the Rule. The Petitioning States respectfully ask this Court for leave to intervene in order to seek this Court's review of the Ninth Circuit's opinion and the lawfulness of the Rule.

A. The Petitioning States Have A Vital Interest In Defending The Rule.

The Petitioning States' interests are adversely affected by the United States' failure to defend the Rule. In particular, the States have important interests in conserving their Medicaid and related social-welfare budgets. Providing for the healthcare needs of economically disadvantaged individuals represents a substantial portion of the States' budgets.

As the Ninth Circuit noted, "The Rule itself predicts a 2.5 percent decrease in enrollment in public benefit programs[.]" App.68. In addition, the federal government only pays a portion of the costs involved in the public benefit programs at issue. The Rule gives the following examples:

> [T]he Federal Government funds all SNAP food expenses, but *only 50 percent of allowable administrative costs* for regular operating expenses. Similarly, Federal Medical Assistance Percentages (FMAP) in some U.S. Department of Health and Human Services

> (HHS) programs, like Medicaid, *can vary from between 50 percent to an enhanced rate of 100 percent in some cases*. Since the state share of federal financial participation (FFP) varies from state to state, DHS uses the average FMAP across all states and U.S. territories of *59 percent to estimate the amount of state transfer payments*.

84 Fed. Reg. at 41,301 (emphases added). DHS thus estimated that the Rule would save all of the states "about $1.01 billion annually" in direct payments. *Id*.

More generally, the Rule will reduce demand on States' already over-stretched assistance programs. For example:

- In fiscal year 2019, Arizona spent $3,059,000,000 on Medicaid benefits and $104,000,000 on administrative costs for Medicaid (as well as the Children's Health Insurance Program).[9] Increasing the number of Medicaid participants would increase the State's spending on Medicaid (the costs of which typically exceed State general fund growth[10]) and would require the State to make budget adjustments elsewhere.

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[9] *MACStats: Medicaid and CHIP Data Book*, Medicaid and CHIP Payment and Access Commission, 45 (Dec. 2020), https://www.macpac.gov/wp-content/uploads/2020/12/MACStats-Medicaid-and-CHIP-Data-Book-December-2020.pdf.

[10] Robin Rudowitz et al., *Medicaid Enrollment & Spending Growth: FY 2018 & 2019*, 5 (Oct. 2018), http://files.kff.org/attachment/Issue-Brief-Medicaid-Enrollment-and-Spending-Growth-FY-2018-2019.

- In 2019, Arizona paid $85 million in maintenance-of-effort costs for the Temporary Assistance for Needy Families program ("TANF").[11] Because TANF resources are limited—in 2019, less than a quarter of impoverished families received this assistance[12]—admitting aliens into the United States who are not likely to utilize this resource will make this program more accessible to others who are in need.
- States incur administrative costs for each SNAP recipient.[13] For fiscal year 2016, Arizona paid $77,730,088 in administrative costs for administering this program.[14] By admitting aliens who are unlikely to depend on this resource, the State will save money that would have otherwise gone to fund administrative costs for aliens who would depend on the program.

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[11] *Arizona TANF Spending*, Center on Budget and Policy Priorities (2019), https://www.cbpp.org/sites/default/files/atoms/files/ tanf_spending_az.pdf.

[12] *Policy Basics: An Introduction to TANF*, Center on Budget and Policy Priorities (2018), https://www.cbpp.org/sites/default/files/atoms/files/7-22-10tanf2.pdf.

[13] Daniel Geller et al., AG-3198-D-17-0106, *Exploring the Causes of State Variation in SNAP Administrative Costs*, USDA, 18-19 (June 2019), https://fns-prod.azureedge.net/sites/default/files/media/file/SNAP-State-Variation-Admin-Costs-FullReport.pdf.

[14] *Supplemental Nutrition Assistance Program State Activity Report Fiscal Year 2016*, Food and Nutrition Service, 12 (2017), https://fns-prod.azureedge.net/sites/default/files/snap/FY16-State-Activity-Report.pdf.

In sum, the United States' decision to abandon its defense of the Rule will cost the States millions of dollars.

B. The United States' Actions Are Collusive, Unprecedented, and Prejudicial To Petitioners.

By stipulating to dismiss pending appeals challenging the Rule, all while leaving a "favorable" final judgment in place, the Administration has circumvented the APA rulemaking processes, and deprived the States of the input they would normally have. Moreover, all this is happening in an area implicating a "fundamental sovereign attribute," *Fiallo v. Bell*, 430 U.S. 787, 792 (1977), for which the States must depend on the federal government. *See Arizona v. United States*, 567 U.S. 387, 394-395 (2012). This procedural gamesmanship has harmed and will continue to harm the Petitioning States for years to come. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007) (recognizing that given States' procedural rights to comment and stake in "protecting [their] quasi-sovereign interests," they are "entitled to special solicitude in [the] standing analysis").

It is no surprise that an incoming administration would seek to amend, repeal, or replace some rules promulgated by an outgoing administration. But when an incoming administration concludes that current litigation is inconsistent with its policy preferences, it typically takes the "traditional route" and requests that the court hold cases in abeyance while

the United States pursues the APA process. App.32 (VanDyke, J., dissenting).[15]

Accordingly, the Biden Administration has followed this course—holding cases in abeyance while it pursues the APA process—in numerous cases, including in cases before this Court.[16] Similarly, when this Administration has changed the United States' position in a case where this Court has granted certiorari, it has also filed a notification of its change and a suggestion that the Court appoint counsel as amicus curiae. *See, e.g.*, Letter of Resp't U.S., *Terry v. United States*, No. 20-5904 (U.S. March 15, 2021).

Yet that is not what happened here. As Judge VanDyke aptly summarized:

> In concert with the various plaintiffs …, the federal defendants simultaneously dismissed all the cases challenging the rule (including cases pending before the Supreme Court), acquiesced in a single judge's nationwide vacatur of the rule, leveraged that now-unopposed vacatur to immediately remove the rule from the Federal Register, and quickly engaged in a cursory rulemaking

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[15] *See also* Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 28 nn.129 & 130 (2019) (noting that previous administrations followed the path of holding cases in abeyance and pursuing the APA process).

[16] *See, e.g.*, *Biden v. Sierra Club*, No. 20-138 (U.S. Feb. 01, 2021); *Mayorkas v. Innovation Law Lab, et al.*, No. 19-1212 (U.S. Feb. 01, 2021); *Sierra Club v. EPA*, No. 20-1115 (D.C. Cir. Feb. 3, 2021); *Centro Legal de la Raza v. EOIR*, No. 21-cv-00463-SI (N.D. Cal. Mar. 24, 2021); *California v. Wheeler*, No. 3:20-cv-03005, at 5 n.5 (N.D. Cal. April 9, 2021) (collecting cases).

> stating that the federal government was reverting back to the Clinton-era guidance—all without the normal notice and comment typically needed to change rules.

App.14. By taking this unusual course, the United States did more than just cease to defend the Rule. It "terminate[d] the rule with extreme prejudice—ensuring not only that the rule was gone faster than toilet paper in a pandemic, but that it could effectively never, ever be resurrected, even by a future administration." App.15 (VanDyke, J., dissenting).

If the Administration had followed the APA's rulemaking requirements, DHS would be required to "issue a '[g]eneral notice of proposed rulemaking,'" "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," and "consider and respond to significant comments received during the period for public comment." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015). The States would then have the right to submit input and to protect their interests before the agency. If unsatisfied with the ultimate result, they would have been permitted to challenge the resulting decision under the APA.

This move by the United States could have far reaching consequences. The United States has evaded the APA entirely based on the decision of one district court without any appellate review of that decision—even after this Court granted review in a substantively similar case. "Left unchecked, it seems quite likely this will become the mechanism of choice for future administrations to replace disfavored rules with prior favored ones." App.28 (VanDyke, J., dissenting).

Granting the Petitioning States' motion to intervene here would ensure that this Court has a chance to review the decision below and dissuade future administrations from taking the unprecedented actions of the United States.

C. Intervention Is Appropriate Under These Circumstances.

This case is precisely the type of case that warrants a favorable exercise of this Court's equitable discretion. Not only are the facts surrounding this case such that the Court should act, but the Petitioning States satisfy all conditions for intervention. And as discussed above, their prior attempt to intervene in the Ninth Circuit qualifies them as "part[ies]" for purposes of 28 U.S.C. §1254(1). While this Court's rules do not set forth any standard for determining when intervention is appropriate, this Court has repeatedly granted motions to intervene to aggrieved parties when a losing party opts not to seek this Court's review. *See Pyramid Lake*, 464 U.S. 863; *Hunter*, 396 U.S. 879; *Banks v. Chi. Grain Trimmers Ass'n*, 389 U.S. 813 (1967).[17] And federal courts have consistently recognized the propriety of parties intervening for the purposes of appeal. *See, e.g.*, *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 387 (1977).

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[17] *See also* Stephen M. Shapiro et al., Supreme Court Practice §6.16(b) (11th ed. 2019) (the Court has allowed intervention by motion in the Supreme Court "where those interests, which were defended by the losing party below, had been abandoned by the losing party's failure to apply for certiorari"); *id.* Form FF ("Motion for Leave to Intervene to File Petition for Certiorari").

Not only is this an exceptional case warranting intervention, the Petitioning States also meet the standard for intervention under Federal Rule of Civil Procedure 24. While Rule 24 only applies in federal district courts, federal courts of appeals considering a motion to intervene often look to Rule 24. *See Nat'l Ass'n for Advancement of Colored People v. New York*, 413 U.S. 345, 365 (1973) ("Intervention in a federal court suit is governed by Fed. Rule Civ. Proc. 24.").[18] And this Court has recognized that "the policies underlying intervention" as implemented by Rule 24 "may be applicable in appellate courts." *Int'l Union*, 382 U.S. at 217 n.10.

Accordingly, courts have read Rule 24(a)(2) to authorize anyone to intervene in an action *as of right* when the applicant demonstrates that:

> (1) the intervention application is timely; (2) the applicant has a "significant protectable interest relating to the property or transaction that is the subject of the action"; (3) "the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest"; and (4) "the existing parties may not adequately represent the applicant's interest."

Prete v. Bradbury, 438 F.3d 949, 954 (9th Cir. 2006). Courts considering whether Rule 24(a)(2) is satisfied "normally follow 'practical and equitable considerations' and construe the Rule 'broadly in favor of pro-

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[18] *See also Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007); *Sierra Club, Inc. v. EPA*, 358 F.3d 516, 517-518 (7th Cir. 2004) ("[A]ppellate courts have turned to ... Fed. R. Civ. P. 24."); *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997) (same).

posed intervenors.'" *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (citations omitted).

In light of the Petitioning States' swift response to the United States withdrawal and their significant interest in defending the Rule, the Petitioning States easily satisfy the considerations of Rule 24.[19]

As to the first factor, under this Court's guidance, the Petitioning States' motion is plainly timely. When considering post-judgment intervention for the purpose of appeal, this Court held in *United Airlines, Inc. v. McDonald* that the intervention motion was timely filed where the party "filed [its] motion within the time period in which the named plaintiffs could have taken an appeal." 432 U.S. at 396. The Court noted that "[t]he critical inquiry in every such case is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *Id.* at 395-396.

Here, the Petitioning States filed this motion (as well as the motion in the Ninth Circuit) "within the time period in which [the United States] could have taken an appeal." *See supra* at 1. Furthermore, the Petitioning States moved in the Ninth Circuit a mere *one day* after it became clear that the United States would no longer defend the Rule.[20] Up until that point, the United States had been actively defending the Rule for well over a year, even going so far as to file multiple petitions for certiorari, including in this case. *See supra* at 12. If the Petitioning States had

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[19] The same was true when the Petitioning States moved to intervene in the Ninth Circuit. *See supra* 13.

[20] *See, supra*, note 3.

tried to intervene earlier, they would likely have been met with resistance. *See, e.g.*, *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) ("If an applicant for intervention and an existing party share the same ultimate objective, a presumption of adequacy of representation arises. To rebut the presumption, an applicant must make a 'compelling showing' of inadequacy of representation.") (citation omitted).

As to the remaining factors, the Petitioning States have significant protectable interests in the continuing validity of the Rule and that interest is no longer being represented at all. As already discussed, *see supra* at 14, the Rule itself estimates that it would save all of the states cumulatively $1.01 billion annually, and the Petitioning States here would save a share of that amount. The States also have an important procedural right to comment on any new rulemaking under the APA. The dismissal of pending appeals, and the subsequent vacatur-by-surrender, has obviously impeded the Petitioning States' ability to protect their interests.

Additionally, appellate courts have looked to Rule 24(b)'s standard when considering permissive intervention, and the Petitioning States also satisfy that standard. Under Rule 24(b)(1)(B), federal courts may permit intervention by litigants who have "a claim or defense that shares with the main action a common question of law or fact." That standard is easily satisfied here as Petitioners seek to advance common legal arguments in defense of the Rule. And a favorable exercise of discretion is amply warranted here for all of the reasons discussed above.

* * *

Because the Petitioning States qualify as parties under 28 U.S.C. §1254(1), and because invalidation of the Rule will directly harm them, this Court should exercise its general equitable powers and grant this motion to intervene. Alternatively, this Court should deem the motion a petition for certiorari on the issue of the denial of the Petitioning States' motion to intervene in the Ninth Circuit, and grant certiorari. *See* note 8, *supra*.

II. The Validity Of The Rule Continues To Warrant This Court's Review.

In previously granting certiorari, this Court has already recognized that the validity of the Rule is one of such extraordinary national importance that this Court's review is warranted. Nothing underlying that essential conclusion has changed: although the Biden Administration decided, *post-certiorari*, to abandon defense of the Rule, the fundamental considerations that led this Court to grant certiorari warrant a second cert. grant.

A. The Decision Below Warrants This Court's Review.

The Ninth Circuit majority's determination that plaintiffs were likely to succeed in their challenge to the Rule warrants this Court's review.

The Court has already considered and granted a petition asking a question almost identical to the one here. *See New York*, 141 S. Ct. 1370. In that case, the United States quite correctly stressed both the importance of the question and the circuit splits on the issues. The incoming Biden Administration appears to have gambled that this Court would deny

certiorari due to the change in administration, rather than withdraw their petitions in a posture where Petitioners could simply have picked up defense of the Rule. That gamble badly miscalculated this Court's view of the cert. worthiness of this case. But rather than pursue the petitions they had affirmatively elected to stand on, they reacted to this Court's grant of review with an unprecedented and collusive abdication of their defense of the Rule.

The question is, if anything, now even more important than when this Court previously granted review. The United States withdrew and leveraged a single district court's cursory vacatur—all while evading this Court's review of questions that this Court already concluded warranted review. The Court should grant this petition because the question remains important and the Court should view respondents' avoidance of this Court's review "with a critical eye." *Knox v. Serv. Emp. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012).

B. The Court Of Appeals Erred In Holding That Plaintiffs Are Likely To Succeed In Their Challenge To The Rule.

Entry of a preliminary injunction was inappropriate here because plaintiffs' claims present legal questions that fail on the merits. The plaintiffs below argued that the Rule was contrary to law based on the statutory meaning of the term "public charge" or the Rehabilitation Act. They further argued that it was arbitrary and capricious based on DHS's 1) failure to consider costs to state and local governments, 2) failure to consider adverse effects on health, and 3) failure to explain why it was changing the policy from the 1999 Guidance. For all of the reasons explained

by the Ninth Circuit's decision granting a stay pending review—but cast off by the panel below over Judge VanDyke's dissent—the Rule comports with both the statutory law and the APA.

1. Some form of the public charge provision has been in statutes since the late 19th Century. Yet the term has never been defined. When Congress enacted the INA in 1952, "[t]he ordinary meaning of 'public charge' … was 'one who produces a money charge upon, or an expense to, the public for support and care.'" *See CASA de Maryland*, 971 F.3d at 242 (quoting Black's Law Dictionary 295 (4th ed. 1951)); *see also id.* (citing Arthur E. Cook & John J. Hagerty, Immigration Laws of the United States § 285 (1929) (noting that "[p]ublic [c]harge" meant a person who required "any maintenance, or financial assistance, rendered from public funds, or funds secured by taxation")). That ordinary meaning easily encompasses the Rule's definition of the term.

Related statutory provisions confirm that the Rule represents a lawful interpretation of the INA. *See CASA de Maryland*, 971 F.3d at 243-244; *see also Cook Cty.*, 962 F.3d at 234-246 (Barrett, J., dissenting). Those provisions show that receipt of public benefits, including non-cash benefits, can establish that an alien qualifies as likely to become a public charge, even if the alien is not primarily dependent on public support for sustenance.

One such set of provisions requires that many aliens seeking admission or adjustment of status must submit "affidavit[s] of support" executed by sponsors, such as a family member. *See* 8 U.S.C. §1182(a)(4)(C) and (D). Congress specified that the sponsor must agree "to maintain the sponsored alien

at an annual income that is not less than 125 percent of the Federal poverty line," 8 U.S.C. §1183a(a)(1)(A), and Congress granted federal and state governments the right to seek reimbursement from the sponsor for "any means-tested public benefit" the government provides to the alien during the period the support obligation remains in effect, 8 U.S.C. §1183a(b)(1)(A), including non-cash benefits. Aliens who fail to obtain the required affidavit are deemed inadmissible on the public-charge ground, regardless of individual circumstances. 8 U.S.C. §1182(a)(4). Those provisions show Congress's recognition that the mere possibility that an alien might obtain unreimbursed, means-tested public benefits in the future could be sufficient to render that alien likely to become a public charge, regardless of whether the alien was likely to be primarily dependent on those benefits. *See Cook Cty.*, 962 F.3d at 246 (Barrett, J., dissenting) ("[T]he affidavit provision reflects Congress's view that the term 'public charge' encompasses supplemental as well as primary dependence on public assistance.").

Surrounding statutory provisions also show why Congress intended the Executive Branch to take such public benefits into account in making public-charge determinations. In legislation passed contemporaneously with the 1996 enactment of the current public-charge provision, Congress stressed the government's "compelling" interest in ensuring "that aliens be self-reliant in accordance with national immigration policy." 8 U.S.C. §1601(5). Congress observed that "[s]elf-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes," 8 U.S.C. §1601(1), and provided that it "continues to be the

immigration policy of the United States that … (A) aliens within the Nation's borders not depend on public resources to meet their needs, … and (B) the availability of public benefits not constitute an incentive for immigration to the United States," 8 U.S.C. §1601(2). Congress equated a lack of "self-sufficiency" with the receipt of "public benefits" by aliens, 8 U.S.C. §1601(3), which it defined broadly to include any "welfare, health, disability, public or assisted housing … or any other similar benefit," 8 U.S.C. §1611(c)(1)(B). And Congress emphasized the government's strong interest in "assuring that individual aliens not burden the public benefits system." 8 U.S.C. §1601(4).

Given the broad, plain meaning of the statutory phrase "public charge" as one who imposes a charge upon the public, and Congress's statutory policy of ensuring that aliens do "not burden the public benefits system" or find the nation's generous benefits programs to be "an incentive for immigration to the United States," 8 U.S.C. §1601(2)(B), (4), the Rule "easily" qualifies as a "permissible construction of the INA." App.145-147; *see also CASA de Maryland*, 971 F.3d at 251 (holding that the Rule is "unquestionably lawful"). And that is especially true in light of the heightened deference traditionally afforded to Executive Branch determinations in the immigration context, "where Congress has expressly and specifically delegated power to the executive in an area that overlaps with the executive's traditional constitutional function." *CASA de Maryland*, 971 F.3d at 251 n.6; *see id.* at 251 ("When Congress chooses to delegate power to the executive in the domain of immigration, the second branch operates at the apex of its constitutional authority.") (citing *United States v.*

Curtiss-Wright Exp. Corp., 299 U.S. 304, 319-320 (1936)).

2. Accordingly, the Ninth Circuit majority erred in holding that the Rule is likely contrary to law. The court concluded that, based on the review of the history of the provision, "'public charge' has meant dependence on public assistance for survival." App.72. Other appellate courts have concluded differently. *See Cook Cty.*, 962 F.3d at 226; *see also CASA de Maryland*, 971 F.3d at 245-250. And for good reason.

This is not a case where plaintiffs' proffered construction was reflected in a "judicial consensus so broad and unquestioned that [the Court] must presume Congress knew of and endorsed it" when it reenacted the "public charge" term in its current form in 1996. *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 349 (2005); *see Fed. Deposit Ins. Corp. v. Phila. Gear Corp.*, 476 U.S. 426, 438 (1986) (recognizing that it is appropriate to "give a great deal of deference" to a "longstanding and consistent" agency interpretation of a statutory phrase). The court of appeals ignored, for example, the broader definitions of "public charge" from legal dictionaries and an immigration treatise referenced above. *See supra* at 28. It likewise ignored that in connection with its issuance of the 1999 Guidance—on which the court of appeals relied in other respects—INS stated that the term was "ambiguous," had "never been defined in statute or regulation," and required further administrative specification in light of "confusion over the meaning of 'public charge.'" 64 Fed. Reg. at 28,676. And most fundamentally, it failed to acknowledge the broad range of meanings given to "public charge" in judicial and administrative decisions over the course of the nineteenth and twentieth centuries.

As the Fourth Circuit explained, "executive and judicial practice from 1882 to the present rebuts any idea that 'public charge' has been uniformly understood … as pertaining only to those who are 'primarily dependent' on public aid." *CASA de Maryland*, 971 F.3d at 246. Indeed, "[w]hen courts did endeavor to define the term 'public charge,' they often adopted its ordinary meaning." *Id.* at 248. Thus—as the Ninth Circuit put it when it stayed the preliminary injunctions—the "history of the use of 'public charge' in federal immigration law demonstrates that 'public charge' does not have a fixed, unambiguous meaning. Rather, the phrase is subject to multiple interpretations, it in fact has been interpreted differently, and the Executive Branch has been afforded the discretion to interpret it." App.140-141; *see Cook Cty.*, 962 F.3d at 226 ("[T]he meaning of 'public charge' has evolved over time," but "[w]hat has been consistent is the delegation from Congress to the Executive Branch of discretion, within bounds, to make public-charge determinations.").

The Ninth Circuit majority's view that "public charge" is limited to plaintiffs' narrower meaning is also impossible to reconcile with the affidavit-of-support provision discussed above. *See supra* at 28-29. That provision reflects Congress's recognition that an alien who uses unreimbursed, means-tested public benefits may qualify as a public charge even if he is not primarily dependent on those benefits.

The Ninth Circuit majority discounted the relevance of that provision, noting that the two provisions "were parts of two separate acts," and thus, "have no historical or functional relationship to each other." App.76. But that response is wrong. "The public charge provision explicitly cross-references the

affidavit provision, thereby tying the two together, and it makes obtaining an affidavit of support *a condition of admissibility*." *Cook Cty.*, 962 F.3d at 244-245 (Barrett, J., dissenting). Furthermore, "the affidavit provision expressly states that the point of the affidavit is 'to establish that an alien is not excludable as a public charge under section 1182(a)(4).'" *Id.* at 245. The majority was thus wrong to ignore the "compelling evidence" the affidavit-of-support provision offers about the "scope of the public charge inquiry." *Id.* at 246.

Although the Ninth Circuit did not reach the issue, the Rule is also not contrary to the Rehabilitation Act. The Act provides that "[n]o otherwise qualified individual with a disability ... shall, *solely by reason of her or his disability*, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity ... conducted by any Executive agency." 29 U.S.C. §794(a) (emphasis added). Consistent with the Rehabilitation Act, the Rule does not deny any alien admission into the United States, or adjustment of status, "solely by reason of" disability. "Throughout the Final Rule, DHS confirms that the public charge determination is a totality-of-the-circumstances test." App. 148. Furthermore, the Rule itself states that "it is not the intent, nor is it the effect of this rule to find a person a public charge solely based on his or her disability." 84 Fed. Reg. at 41,368. Plaintiffs did not "demonstrate[] even serious questions" in their claim that the Rule violates the Rehabilitation Act. App.245.

3. The Ninth Circuit majority's view that the Rule is likely arbitrary and capricious is similarly flawed.

Applying a proper understanding, the arbitrary-and-capricious claim fails.

First, contrary to the majority's conclusion, DHS "forthrightly acknowledged" its change in approach and provided "good reasons for the new policy." *FCC v. Fox Television Stations*, 556 U.S. 502, 515, 517 (2009). Specifically, DHS explained that the Rule is designed "to better ensure that applicants for admission to the United States and applicants for adjustment of status to lawful permanent resident who are subject to the public charge ground of inadmissibility are self-sufficient, *i.e.*, do not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their family, sponsor, and private organizations." 83 Fed. Reg. at 51,122; 84 Fed. Reg. at 41,317-41,319. DHS also explained that "congressional policy statements relating to self-sufficiency, immigration, and public benefits inform DHS's proposed administration of … 8 U.S.C. §1182(a)(4)." 83 Fed. Reg. at 51,122-51,123. DHS also pointed out that the 1999 Guidance included an "artificial distinction between cash and non-cash benefits." *Id.* at 51,123.

Second, DHS demonstrated that it rationally weighed the benefits and costs of the Rule. It explained that, by excluding those aliens likely to rely on public benefits from the country and encouraging those within the country to become self-sufficient, the Rule is likely to save federal and state governments billions of dollars annually in benefit payments and associated costs. *See* 83 Fed. Reg. at 51,228. At the same time, it considered that disenrollment in some programs could have adverse effects. *See, e.g.*, *id.* at 51,118; 84 Fed Reg. at 41,313. But in the end, DHS rationally concluded that the

benefits obtained from promoting self-sufficiency outweighed the Rule's potential costs. *See* 84 Fed. Reg. at 41,314.

Third, the majority also erred by concluding that DHS ignored potentially adverse health consequences. Not only did DHS acknowledge the potential impact of the Rule on public health in general, as well as vaccinations, but it also took steps to mitigate that impact. *See* 84 Fed. Reg. at 41,384-41,385, 41,463. Most notably, it excluded CHIP benefits and Medicaid benefits provided to women during pregnancy and for 60 days following pregnancy and aliens under twenty-one from the Rule's coverage. *Id.* at 41,379-41,380; *see also id.* at 41,384 (explaining that the exclusion of Medicaid benefits for women and those under twenty-one "should address a substantial portion . . . of the vaccinations issue"). DHS also explained that local health centers and state health departments provide low- or no-cost vaccinations to adults and children through services not covered by the Rule. *Id.* at 41,385.

The arbitrary-and-capricious test does not allow a court "to substitute its judgment for that of the agency." *Fox Television Stations*, 556 U.S. at 513 (citation omitted). Instead, the test is satisfied so long as the agency "remained 'within the bounds of reasoned decisionmaking,'" regardless of whether the reviewing court believes the agency's "decision was 'the best one possible' or even whether it was 'better than the alternatives.'" *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2569, 2571 (2019) (citations omitted). DHS's explanation here is clearly sufficient under that deferential standard.

III. Alternatively, The Court Should Vacate The Decision Below As Moot Under *Munsingwear*.

Alternatively, if this Court does not re-grant certiorari on the validity of the Public Charge Rule, it should at least grant this motion to intervene and vacate the decision below as moot. In that circumstance, given this Court's prior cert. grant and the States' inability to obtain review in this Court, this Court should eliminate entrenchment of the Ninth Circuit's decision as binding precedent. Under *United States v. Munsingwear, Inc.*, this Court would vacate the judgment below and remand with a direction to dismiss. 340 U.S. 36, 39 (1950).

Judge VanDyke, dissenting below, believed that the exception of *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), would apply and avoid mootness. App.36-37. The Petitioning States do not agree that *Bancorp* applies here. Vacatur of opinions below based on mootness is "rooted in equity, [and] the decision whether to vacate turns on 'the conditions and circumstances of the particular case.'" *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam) (citation omitted).

The actions of plaintiffs and the federal government here are norm-breaking. Those parties sprung an unprecedented, coordinated, and multi-court gambit, attempting to execute simultaneous, strategic surrenders in all pending cases involving the Rule. Permitting entrenchment of bad precedent based purely on these extraordinary actions is not remotely equitable. *Bancorp* has never been applied to circumstances remotely like this—unsurprisingly,

since federal courts have never encountered anything quite this brazen before.

But even if *Bancorp* is binding, this Court should distinguish or modify its *Bancorp* rule as Judge VanDyke explained in his dissent. App.35-40. Either way, if this Court does not grant review on the second question presented, it should grant this motion to intervene and vacate the decision below as moot.

CONCLUSION

For the foregoing reasons this motion for leave to intervene and petition for writ of certiorari should be granted.

April 30, 2021

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