No. 20M81

In the Supreme Court of the United States

THE STATE OF ARIZONA ET AL.,
Movants,

v.

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

REPLY IN SUPPORT OF THE MOTION FOR LEAVE TO INTERVENE

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INTRODUCTION

Existing Parties' responses are notable for what they do not contest: *i.e.*, that (1) their actions were collusive, (2) their simultaneous, nationwide machinations to have all challenges to the Public Charge Rule dismissed, and the rule swiftly vacated, are utterly without precedent, and (3) all of the traditional Rule 24 requirements for intervention are satisfied here. To oppose intervention now, they raise attacks on this Court's jurisdiction (which this Court implicitly rejected just last month), ignore the equitable considerations at issue here, and advance an incorrect mootness argument. These further attempts to avoid this Court's review of the Public Charge Rule's validity on the merits should be rejected.

There is some obvious truth to Federal Respondents' characterization (at 3-4) that this motion is "highly unusual." But what the motion seeks—intervention—is actually a textbook response to the inadequate defense by Existing Parties. Instead, the unusual nature of the motion here is simply the product of the truly unprecedented actions that Existing Parties have engaged in:

> 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 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.

Pet.App.14 (VanDyke, J., dissenting).

This sort of conduct unsurprisingly calls for some unorthodox responses, since this Court's rules do not specifically contemplate anything like what Existing Parties are trying to do here. But the motion's nature is no genuine obstacle to intervention. The Existing Parties do not dispute that the intervention question is governed by this Court's equitable powers. And "[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citation omitted). Existing Parties' actions are inequitable and collusive, and this Court has ample equitable powers to respond by granting intervention.

ARGUMENT

I. This Court Has Authority To Grant Intervention And Should Do So.

Existing Parties do not dispute that the Movants have met the standard for intervention under Rule 24, ignoring that question completely. *See* Mot. for Leave to Intervene at 12-15. However, they advance a smattering of other arguments suggesting that this Court lacks authority to grant intervention or that intervention is unwarranted because their collusive surrender should be the last word in this litigation. Those arguments lack merit for at least two reasons.

First, Existing Parties' contention that the Movants are not "part[ies]" and therefore cannot invoke this Court's jurisdiction under 28 U.S.C. §1254(1) is specious and circular. *See* U.S. Resp. at 11; States' Resp. at 7.[1] The entire premise of

[1] Cites to "U.S. Resp." reference the "Federal Respondents' Opposition to the Motion for Leave to Intervene." Cites to "States' Resp." reference the "Opposition of the States of California, Maine, Oregon, Pennsylvania, and the District of Columbia to Motion for Leave to Intervene."

intervention is that non-parties can become parties. That is precisely what the States' motion seeks and, if granted, places them squarely within section 1254(1). This Court has repeatedly acknowledged as much by granting motions to intervene by before-then non-parties and subsequently reaching their petitions for certiorari. *See, e.g.*, *Pyramid Lake Paiute Tribe of Indians v. Tuckee-Carson Irrigation Dist.*, 464 U.S. 863 (1983)*; Banks v. Chi. Grain Trimmers Ass'n*, 389 U.S. 813 (1967).

Existing Parties' contention further conflicts with this Court's well-established recognition that it has jurisdiction to review denials of intervention below—review that is sought by then-non-parties. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 30 (1993) (citing *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. AFL-CIO, Loc. 283 v. Scofield*, 382 U.S. 205, 208-209 (1965) ("One who has been denied the right to intervene in a case in a court of appeals may petition for certiorari to review that ruling"); *see also Cameron v. EMW Women's Surgical Ctr., P.S.C.*, No. 20-601 (Mar. 29, 2021) (granting certiorari to review denial of intervention).

Even Existing Parties acknowledge (U.S. Resp. at 12-13; States' Resp. at 13) that a successful intervenor is a party under section 1254(1) *if* it is a real party in interest. But there is zero textual basis for Existing Parties' reading of "party" to mean "existing parties below and prospective intervenors, but *only* insofar as they are real parties in interest."

While Existing Parties correctly observe that the parties that have been granted intervention by this Court previously were real parties in interest, they tellingly

identify no actual *reasoning* by this Court limiting intervention to such real parties. Nor is there any sound justification for such a limitation. And the fact that prior grants of intervention have gone to real parties in interest likely only reflects that few others have previously had occasion to try—again underscoring the truly unprecedented nature of Existing Parties' collusive actions.

Moreover, this Court has already implicitly acknowledged that Movants can qualify as "parties." A highly similar group of states sought intervention by application in a similar action out of the Seventh Circuit, which this Court denied "without prejudice" and indicated that the movants could, after seeking intervention in the district court, "seek review, if necessary, in the Court of Appeals, and in a renewed application in this Court." *Texas v. Cook Cty.*, ___ S. Ct. ___, No. 20A150, 2021 WL 1602614, at *1 (U.S. Apr. 26, 2021). But if the movants there actually fell outside of "party" under section 1254(1), this Court should have denied the application with extreme prejudice and not left the door open to "renewed application."

Second, the Existing Parties do not dispute that this Court's authority to grant intervention is rooted in its equitable powers. And the "essence" of that power is "to do equity"; "Flexibility rather than rigidity has distinguished it." *Weinberger*, 456 U.S. at 312. But Existing Parties' arguments rely heavily on rigid (and wrong) formalisms, and ignore the actual equities here. That is unsurprising, given the profoundly inequitable nature of Existing Parties' conduct in this case.

Instead of following the "traditional route" and holding the case in abeyance until a new rule could be properly promulgated, Existing Parties worked together—

after this Court granted certiorari—and within the course of a few days stipulated to dismiss *all* three cases pending before this Court. The ultimate effect left in place the un-reviewed order of a single district court judge vacating the Rule nationwide. As Judge VanDyke aptly summarized, "Not only have [Existing Parties] gotten rid of a rule they dislike, but they've done so in a way that allowed them to dodge the pesky requirements of the APA *and* ensure that it will be very difficult for any future administration to promulgate another rule like the 2019 rule." Pet.App.28. This is not merely a case where the States could participate in notice-and-comment rulemaking if a new rule is introduced (which it has not been). The collusive dismissals have left in place a nationwide vacatur of a rule that would be difficult to revive, all while evading this Court's review if intervention is denied. *See* Mot. for Leave to Intervene at 9-12.

II. This Action Is Not Moot As Litigation Regarding The Rule Is Ongoing.

"A case becomes moot only when it is *impossible* for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emp. Int'l Union, Loc. 1000*, 567 U.S. 298, 307-308 (2012) (emphasis added). "[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* Thus, to establish mootness, a "demanding standard" must be met. *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019). That standard is not met here.

Existing Parties' main argument pertaining to mootness appears to be that because the United States has removed the Public Charge Rule (pursuant to the

judgment in the Northern District of Illinois), there is no longer a live case or controversy here. U.S. Resp. at 18; States' Resp. at 8. This argument ignores that Movants here are still seeking "effectual relief" that this Court has the power to give.

Notably, most of the Movants here are also parties to the recent Application filed in this Court seeking a stay and intervention in the case that originated in the Northern District of Illinois. *See Texas v. Cook Cty.*, No. 20A150. While this Court denied the application, as discussed above, it did so "without prejudice to the States raising these and other arguments before the District Court, whether in a motion for intervention or otherwise." *Texas*, 2021 WL 1602614, at *1. The States' motion to intervene in the district court is now pending, making that case far from over. *See Cook Cty. v. Wolf*, No. 19-cv-06334, Dkt. 259 (N.D. Ill. May 12, 2021). The new rule DHS published cites only the judgment that is at the center of that litigation. *See* 86 Fed. Reg. 14,221 (Mar. 15, 2021). Because that judgment provides DHS's sole basis for avoiding notice-and-comment procedures in promulgating a new rule, the new rule plainly violates the APA if the judgment is overturned. This easily cancels out Existing Parties' mootness pleas.

Moreover, Movants could also obtain relief by independent suit if this Court grants this motion and the related petition for certiorari, and ultimately upholds the validity of the Rule. If this Court did so, Movants should have little difficulty challenging the Federal Defendants' de-publication of the Public Charge Rule as "contrary to law," 5 U.S.C. §706—since the only basis for wiping the rule out of the

CFR was a lower courts' conclusion that the Rule was invalid, which would obviously yield to the contrary determination of this Court.

III. Alternatively, The Court Should Hold This Motion.

Alternatively, if this Court is not inclined to grant this motion outright, it should hold it pending resolution of intervention motions and related actions in the Northern District of Illinois and Seventh Circuit—actions which this Court has specifically contemplated. *See Texas*, 2021 WL 1602614, at *1. This action may serve as a useful alternative vehicle, and there is little reason to eliminate it if it could simply be held.

* * *

This Court has properly held that "postcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye." *Knox*, 567 U.S. at 307. Little critical scrutiny is needed to conclude the machinations of Existing Parties here are collusive and inequitable. If this sort of "multifaceted, calculated capitulation and avoidance of the APA" is indulged, future new administrations may seize upon this precedent to render meaningless the procedures of the APA. Pet.App.35 (VanDyke, J., dissenting). This type of collusive activity calls for the Court's exercise of its equitable powers to correct, and instead permit adjudication on the Public Charge Rule's validity *on the merits*—which this Court already indicated was appropriate by previously granting certiorari.

CONCLUSION

The motion for leave to intervene should be granted.

May 19, 2021

Respectfully submitted,

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