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

REPLY BRIEF FOR STATE PETITIONERS

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INTRODUCTION

This Court has already determined, by granting certiorari, that the validity of the Public Charge Rule warranted review. It continues to warrant review. This case now also presents the question of whether Respondents' unprecedented efforts to evade both this Court's review and the APA's requirements for rulemaking should be blessed by the Judiciary. Such tactics are corrosive to the rule of law and thwarting them is one of the core purposes of intervention. The Ninth Circuit's unexplained denial of intervention here, thereby attempting to shield its decision from review, is patently erroneous, directly conflicts with this Court's precedents, and also merits review.

Here, Respondents executed a nationwide, multi-court, simultaneous strategic surrender that (it was hoped) would move so quickly that no one would be able to intervene before all challenges to the Public Charge Rule were dismissed and appellate mandates issued. Respondents do not deny that no prior Administration has *ever* engaged in an equivalent gambit. But they failed in this case, and Petitioning States filed their motion to intervene before the Ninth Circuit could dash off its mandate. That should have forced the Ninth Circuit to address the States' motion on the merits. But in an entirely unreasoned order—and in the teeth of a dissent amply demonstrating its myriad errors, Pet.App.14-40—the Ninth Circuit denied intervention. But, then again, what could it have said?

Because the Ninth Circuit's denial of intervention was contrary to the decisions of this Court and raises issues of national importance—particularly as it is now one of the few vehicles to review the issues that

this Court has already determined warranted review—this Court should again grant certiorari, both to the validity of Public Charge Rule and the now-antecedent issue of intervention. And because the purported hurdle to review here was thrown up purely by Respondents themselves—through brazen, norm-breaking actions—Respondents should not now be heard to complain of it.

ARGUMENT

Respondents attempt to downplay the importance of the questions presented here. Yet the Court has already signaled the importance of the question relating to the validity of the Public Charge Rule when it granted certiorari to the Second Circuit case dealing with virtually identical issues. *See DHS v. New York*, No. 20-449 (U.S. Feb. 22, 2021). And as detailed in the Petition (at 15-18), the extraordinary circumstances surrounding the Existing Parties' dismissal of this case alone warrant this Court's review of the intervention question. Appeals from four circuits were almost simultaneously dismissed. And on the same day as the dismissals, DHS announced that the final judgment of the Northern District of Illinois vacating the rule in its entirety would now be in effect. DHS then rushed out a vacatur in the Federal Register with unprecedented haste. Through Respondents' machinations, the unreviewed decision of a single district court judge was suddenly the putative final word on the validity of the Public Charge Rule—all while completely evading this Court's review on questions this Court had granted review on, and simultaneously dodging the requirements of the APA for rulemaking.

This case provides a vehicle for the Court to reach not only the question it already agreed to hear, but also the important question of whether States with vital interests at stake can intervene when existing parties collusively dismiss appeals like they did here. Respondents' arguments to the contrary are unavailing.

1. The United States argues (at 11-12) that this appeal is moot. Not so. "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, 307-08 (2012) (emphasis added) (quotation marks omitted).

Here effective relief is readily available. The United States points (at 11) to the Public Charge Rule being removed from the Code of Federal Regulations. But if this Court were to grant review and uphold the validity of the Rule, Petitioners would have little difficulty challenging DHS' de-publication of the Public Charge Rule as "not in accordance with law," 5 U.S.C. §706, since the only basis for wiping the rule out of the CFR was that lower courts' conclusion that the Rule was invalid. The Northern District of Illinois's vacatur could not stand in the teeth of a controlling holding by this Court, and Respondents do not argue otherwise. Moreover, in that posture, parties could also seek relief in the Northern District of Illinois under Rule 60(b)(5). *See*, *e.g.*, *Agostini v. Felton*, 521 U.S. 203, 203-04 (1997) ("Rule 60(b)(5) … authorizes relief … if the moving party shows a significant change … in law."). And intervention to do so in light of this Court's holding would be timely if done expeditiously after this Court pronounced judgment.

In addition, there is pending litigation challenging that vacatur. *See Texas v. Cook Cty.*, —S. Ct.—, 2021 WL 1602614, at *1 (2021); *Cook Cty. v. Wolf*, No. 19-cv-06334, Dkt. 285 (N.D. Ill. Aug. 17, 2021) *appeal filed* (Aug. 20, 2021). That litigation is very much alive and serves as another vehicle for a favorable judgment for Petitioners here to provide effective relief. That too precludes mootness here.

2. Respondents' timeliness arguments also fail. Petitioners filed their motion to protect their vital interests within mere days after it became clear that the Petitioners' interests were no longer adequately protected by the United States. Pet.13. And the motion was timely pursuant to *United Airlines v. McDonald*, 432 U.S. 385, 396 (1977). Pet.20.

The United States also suggests (at 21) that some—but not all—of Petitioners' questions are "jurisdictionally out of time." But, under 28 U.S.C. §2101(c), it is *petitions* for writs of certiorari that are either timely filed or not—not questions presented within them. And the United States does not deny Petitioners' *petition* was timely filed, only attacking the timeliness of its QPs selectively. Thus, even if the time ran to seek review from the Ninth Circuit's "first judgment," its judgment denying intervention (and with it Petitioners' challenge to the merits) is a "second judgment" that permits this Court to "consider all of the substantial federal questions determined in the earlier stages of the litigation." *Reece v. Georgia*, 350 U.S. 85, 87 (1955).

Indeed, Petitioners could not have effectively sought review from this Court any earlier than the denial of intervention—which easily could have come 150 days after the Ninth Circuit's original decision. Surely the

United States is not suggesting that, in that posture, the only possible avenue to seek this Court's review as the 150-day clock approaches would be for the States to seek certiorari before judgment from the *potential* future denial of intervention? Or that the Ninth Circuit could completely insulate its decision from review by the expedient of sitting on motions to intervene until the 150-day clock runs? Moreover, the United States would have a similarly perverse incentive to wait 151 days from the original decisions to announce its strategic, simultaneous surrenders, confident that this Court's review had been successfully thwarted. That cannot be—and is not—the law.

3. The United States also advances the extraordinary contention (at 12-18) that intervention is proper only when the putative intervenor has its own *unique* claims or defenses. That contention violates both the precedents of this Court and lower Courts and the Department of Justice's understanding in prior administrations.

This Court has recognized that intervention may be appropriate even when the intervenor lacks a cause of action—indeed, even where the statute expressly prevented that intervenor from bringing a claim on their own. *See Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 530-31, 537 (1972); *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 135-36 (1967). Similarly, the Ninth Circuit previously excluded intervention as defendants in the merits phase of NEPA litigation, under its "so-called 'federal defendant' rule"—which is the *very same* conceptual theory that the United States now advances. *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1176 (9th Cir. 2011) (en banc). But that rationale

proved both doctrinally incoherent and practically unmanageable, so the Ninth Circuit reversed itself *unanimously* en banc. *See generally id.* In doing so, it joined many other courts. *See id.* at 1180 (citing decisions of Third, Fifth, Tenth and D.C. Circuits permitting intervention in NEPA cases, even though only federal defendants could be named initially in such suits).

Similarly, this Court regularly grants petitions for certiorari filed only by intervenors seeking to vindicate federal programs when the United States refuses to seek review itself. *See*, *e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009). In both cases (and likely innumerable others), the intervenor-petitioners did not assert a defense unique to them, but rather argued that the (wrongful) judicial invalidation of an actual-valid federal rule would cause them financial injury. Indeed, if anything, intervention by outside parties in significant APA challenges to final rules is the *prevailing norm*, not a near-categorically barred occurrence.

Tellingly, in both *Entergy* and *Monsanto*, the United States did not argue that this Court should dismiss as improvidently granted since intervenors lacked a "protectable interest" to invoke this Court's jurisdiction, and no other proper party sought review. But such a conclusion is the necessary corollary of the United States's novel argument here. Instead, in both *Entergy* and *Monsanto*, after certiorari was granted the United States simply supported the position of petitioners post without ever identifying a jurisdictional obstacle. That is because none existed and *no one*—not petitioners, respondents, the United States or any of the amici—thought that petitioners

could only have validly intervened if they had unique defenses of their own to raise. *See also Monsanto*, 561 U.S. at 153 ("hold[ing] that petitioners have standing to seek this Court's review").

To support its unprecedented argument of novel vintage, the United States now places enormous weight (at 14-15*)* on *Donaldson v. United States*, 400 U.S. 517 (1971). But *Donaldson* cannot bear it. Instead, *Donaldson* stands for the unremarkable proposition that a taxpayer cannot intervene in a tax case to protect "routine business records in which the taxpayer has no proprietary interest of any kind." *Id.* at 530-31. Rather, "*Donaldson* … hardly can be read without giving thought to its facts. … [I]t seems that any attempt to extrapolate … from *Donaldson* rules applicable to ordinary private litigation is fraught with great risks." 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1908.1 (3d ed.); *accord San Juan Cty., Utah v. United States*, 503 F.3d 1163, 1191 (10th Cir. 2007).

Unlike the taxpayer in *Donaldson*, the Petitioners here have legally protectable interests—monetary interests and procedural rights under the APA—that justify their intervention in this case. Indeed, those interests are apparent *from the face of the Rule itself*. Pet.20. The United States's instant position thus blinks the reality of its own rule, which makes plain the harm to the States in the clearest possible terms.[1]

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[1] The State Respondents contend that such harms do not count because "petitioners do not explain how intervening in this litigation could restore that rule." Cal.BIO.10. But as set forth above, a decision upholding the Public Charge Rule on the merits here would provide avenues to obtain effective relief and avoid the harms of the Rule's invalidation.

Moreover, intervention exists *precisely because* intervenors may "disagree[] with the manner in which the existing parties have asserted their respective claims or defenses." U.S.BIO.13. That is a primary *feature* of intervention, not a bug. And it is particularly important one where, as here, nakedly collusive behavior by existing parties threatens the rights of third parties.

Nor do Petitioners advance, as the United States claims, "a procedural right, unconnected to a plaintiff's own concrete harm." U.S.BIO.18 (cleaned up). Instead, Petitioners' procedural injury is directly connected to the concrete harm identified by the United States's own agency.

The United States also strangely relies (at 16-17) upon 28 U.S.C. §2403—which is designed to *expand* the States' ability to intervene—to suggest that the States are precluded from intervening here. But Congress's recognition of the unique sovereign interests of States in defending their own laws was not intended to constrain the States from intervening where other parties could. Thus, while the United States is correct that "States [have] no special role in defending federal statutes and regulations," U.S. BIO.16, it is wrong in implying that Congress intended the States to have a demeaned status wherein they cannot intervene where private parties—such as those in *Entergy* and *Monsanto*—could.

Ultimately, the United States's position is contrary to the precedents of both this Court and the courts of appeals, as well as its own repeated support of petitioners who, under their current position, now all obtained this Court's review and reversal in postures

where this Court actually lacked jurisdiction since no proper party invoked it. That contention is unserious. And it unsurprisingly is not advanced by the Respondent States here, many of whom notably obtained this Court's review without any unique defenses of their own as recently as *California v. Texas*, 141 S. Ct. 2104 (2021).

4. Neither are the additional scattershot obstacles that Respondents assert meaningful barriers to this Court's review. Respondents assert that this Court is precluded from reaching the questions concerning the Ninth Circuit's affirmance of the preliminary injunction. *See* U.S.BIO.20-21; Cal.BIO.13-14. But that too is incorrect.

Respondents' reliance on *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27 (1993) is misplaced. In *Izumi*, as here, the Court of Appeals denied petitioner's motion to intervene. *Id.* at 29. But when Izumi sought this Court's review, the only question presented concerned the underlying litigation—Izumi did not challenge the denial of intervention. The Court granted the petition, but subsequently dismissed the case as improvidently granted. In doing so, this Court focused almost entirely on Rule 14 and whether the intervention question was "fairly included" within the underlying question. Nothing in *Izumi* indicates that the Court could not have reached *both* questions *if* both had been presented. To the contrary, much of the Court's language in *Izumi* suggests otherwise. *See, e.g.*, *id.* at 28 ("In order to reach the merits of this case, we would have to address a question that was neither presented in the petition for certiorari nor fairly included in the one question that was presented."); *id.* at 31 ("Unless we can conclude that the question of the denial of

petitioner's motion to intervene in the Court of Appeals was 'fairly included' in the question relating to the vacatur of final judgments at the parties request, Rule 14.1 would prevent us from reaching it.").

The Respondent States also appear to suggest (at 14) that the Petitioners would have to "becom[e] intervenors on remand" and *only then* could seek review of the merits questions on a further, renewed petition. But *Izumi* does not require that result, and such a remand and re-petition would be obviously futile and pointless: the Ninth Circuit has already announced its conclusive holding that the Public Charge Rule is procedurally and substantively invalid. Nothing in this Court's jurisprudence requires the empty formalism of a remand to the Ninth Circuit for it to enter a one-line reiteration of its prior holding and then have the Respondent States' re-petition. Moreover, the Respondent States implicit recognition that such a second petition *could* timely seek review of the merits questions announced in the Ninth Circuit's first judgment belies the instant timeliness arguments here.

Notably, the courts of appeals regularly permit parties denied intervention to raise challenges to the denial of intervention and the merits in the same appeal. *See*, *e.g.*, *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1104 (9th Cir. 2002); *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309 (6th Cir. 2005). There is no reason to believe that this Court lacks the same walk-and-chew-gum jurisprudential capacity to consider intervention and merits questions in the same case.

5. Further, if the Court agrees with Respondents that the challenge to the preliminary injunctions is moot, it should vacate the decision below under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

As set forth above, this case is not actually moot. But, as an *alternative* argument—and not a concession[2]—Petitioning States argue that if this case is moot, this Court should vacate the decision below under *Munsingwear*. Under that decision, if this Court concludes that the case is moot, "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." 340 U.S. at 39.

That result should obtain here. Indeed, Respondents scarcely contend otherwise. Moreover, because this Court has an independent obligation to consider Article III jurisdiction *sua sponte*, this Court can vacate the decision below without having jurisdiction itself (which is the core premise of *Munsingwear* vacaturs).

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, if the Court deems this case

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[2] The United States strangely asserts that Petitioners have conceded that this case is moot. U.S.BIO.10-11. Not so. It stretches credulity to contend that by making an *alternative* argument premised on this Court rejecting their position that this case is *not moot* that the States somehow conceded the case *was moot*.

moot, this Court should remand with instructions for the Ninth Circuit to vacate its judgment.

September 8, 2021

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