No. 23-1353

In the Supreme Court of the United States

THE STATE OF KANSAS, ET AL.,
Petitioners,
v.
ALEJANDRO MAYORKAS, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF STATES OF FLORIDA, ARKANSAS IDAHO, INDIANA, IOWA, KENTUCKY, MISSISSIPPI, NEBRASKA, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

ASHLEY MOODY
Attorney General of Florida

HENRY C. WHITAKER
Solicitor General
Counsel of Record
JAMES H. PERCIVAL
Chief of Staff
BRIDGET K. O'HICKEY
Assistant Solicitor General

Office of the Florida Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399
(850) 414-3300
henry.whitaker@myfloridalegal.com

Counsel for Amici Curiae
(additional counsel listed in addendum)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

INTEREST OF AMICI CURIAE

In at least two cases previously before this Court, the federal government has attempted to leverage unfavorable judgments against it to repeal disfavored rules without following the Administrative Procedure Act's notice-and-comment process. Multiple Justices have expressed concerns with that practice. *See Arizona v. City & Cnty. of San Francisco*, 596 U.S. 763, 765–66 (2022) (Roberts, C.J., concurring, joined by Thomas, Alito, & Gorsuch, JJ.).

In this case, the government has signaled that it is once again playing similar games. Specifically, the government has announced "settlement discussions" with groups politically aligned with the current Administration regarding the Circumvention of Lawful Pathways Rule. And despite the risk of a collusive settlement, the Ninth Circuit denied the States' motion to intervene to protect their distinct interest in stemming the tide of unlawful migration into this country over the southern border that the current Administration has let loose. Those States have now petitioned this court for certiorari.

Amici curiae States of Florida, Arkansas, Idaho, Indiana, Iowa, Kentucky, Mississippi, Nebraska, Ohio, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming[1] share the petitioning States' interest in ensuring that the federal government plays by the rules. States have an interest in de-

[1] Pursuant to Rule 37.2, amici curiae notified counsel of record for the parties of their intention to file this brief at least 10 days prior to this brief's filing deadline.

fending rules that protect their sovereign and financial interests in combating unlawful immigration. The Amici States therefore respectfully submit this brief in support of the States' petition.

SUMMARY OF ARGUMENT

To mitigate the border crisis, the federal government promulgated the Circumvention of Lawful Pathways Rule, 88 Fed. Reg. 31314 (May 16, 2023) (codified at 8 C.F.R. §§ 208.33, 1208.33), which creates a presumption that certain inadmissible aliens are not eligible for asylum. That rule is thus significant, as the vast majority of those who unlawfully cross the southern border do so to take advantage of the United States' generous asylum laws. Several organizational plaintiffs nonetheless sought to enjoin and vacate the rule. The federal government actively defended it in the district court and on appeal, until, suddenly, the government jointly moved with the plaintiffs to stay the case pending settlement negotiations. Kansas, Alabama, Georgia, Louisiana, and West Virginia moved to intervene to defend the rule, but the Ninth Circuit denied their motion, holding that they lacked a legally protected interest supporting intervention.

As the States' certiorari petition shows, that conclusion wrongly conflated the requirements for standing to sue with the requirements for having a legally protectable interest justifying intervention as a defendant. The petition presents an exceptionally important question, which affects states that desire to defend federal policies that protect their interests when the federal government shirks its duty to do so.

We have already seen how this movie ends: the federal government has before strategically capitulated to challenges to disfavored rules to circumvent the APA's procedural requirements. By abruptly signaling that it may surrender to its ideological allies in abandoning the rule's defense, the government threatened to repeat similar behavior here. The Ninth Circuit wrongly denied the States the opportunity to intervene to vindicate their clear interest in preventing such gamesmanship.

ARGUMENT

I. WHETHER STATES MAY INTERVENE WHEN THE FEDERAL GOVERNMENT THREATENS TO ABDICATE THE DEFENSE OF A RULE IN WHICH STATES ARE INTERESTED IS A QUESTION OF NATIONAL SIGNIFICANCE.

An agency "should ordinarily zealously defend its action when facing a lawsuit challenging that action." Memorandum from E. Scott Pruitt, Adm'r U.S. EPA, to Ass't Adm'rs, et al., U.S. EPA, Adhering to the Fundamental Principles of Due Process, Rule of Law, and Cooperative Federalism in Consent Decrees and Settlement Agreements (Oct. 16, 2017), https://tinyurl.com/46ms7j8b. When an agency instead "resolve[s] that litigation through a consent decree or settlement agreement," *id.*, the government's "maneuvers raise a host of important questions"—namely, whether its actions "comport with the principles of administrative law." *Arizona v. City & Cnty. of San Francisco*, 596 U.S. at 766 (Roberts, C.J., concurring, joined by Thomas, Alito, & Gorsuch, JJ.).

The federal government's decision to pause its defense of the Circumvention of Lawful Pathways Rule, 8 C.F.R. §§ 208.33, 1208.33, in favor of settlement negotiations continues a troubling pattern. In litigation challenging the Public Charge Rule, which implemented legislation preventing admission of aliens "likely at any time to become a public charge" (i.e., by collecting public benefits), 8 U.S.C. § 1182(a)(4), the federal government first defended its rule, *Arizona*, 596 U.S. at 765 (Roberts, C.J., concurring, joined by Thomas, Alito, & Gorsuch, JJ.). Multiple lower courts found the rule unlawful, and it appealed. *Id.* After the administration changed, however, the government dismissed those appeals, keeping in place the relief granted by the lower courts. *Id.* But then the government used a consent judgment against it—one that vacated the rule nationwide in separate litigation—as a basis to repeal that rule without following the APA's notice-and-comment procedure. *Id.* (citing 86 Fed. Reg. 14221 (2021) ("Because this rule simply implements the district court's vacatur of the August 2019 rule . . . DHS is not required to provide notice and comment.")). In other words, "the [government] didn't just stop defending the . . . rule and ask the courts to stay the legal challenges while it promulgated a new rule through the ordinary [APA] process." *City & Cnty. of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 992 F.3d 742, 743 (9th Cir. 2021) (VanDyke, J., dissenting). Instead, it colluded with "the various plaintiffs who had challenged the rule in federal courts across the country" and "simultaneously dismissed all the cases challenging the rule . . . , acquiesc[ing] in a single judge's nationwide vacatur of the rule." *Id.* The government then used "that now-unopposed vacatur

to immediately remove the rule from the Federal Register, and quickly engage[] 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." *Id*.

The federal government executed a similar gambit in litigation over the Title 42 policy—which excluded aliens from entering the United States for public-health reasons. Specifically, after the government sought to end the Title 42 policy without notice and comment, several states successfully challenged that action and obtained an injunction keeping the policy in effect. *Arizona v. Mayorkas*, 143 S. Ct. 1312, 1312–13 (2023) (statement of Gorsuch, J.). But rather than seek an expedited appeal or an emergency stay, the government waited until a different court vacated the Title 42 policy. It then tried to use that vacatur as a vehicle to end the policy—a legislative rule—without bothering with notice-and-comment procedures. *Id*. at 1313; Pet. Br., *Arizona v. Mayorkas*, No. 22-592, 2023 WL 363968, at *2 (Jan. 18, 2023). As a result of the government's conduct, several states moved to intervene, arguing that the federal government was "not defend[ing] the Title 42 orders as vigorously as they might." *Arizona v. Mayorkas*, 143 S. Ct. 478, 478 (2022) (Gorsuch, J., dissenting from grant of stay, joined by Jackson, J.). This Court granted the states an emergency stay keeping the Title 42 policy in effect. *Arizona*, 143 S. Ct. at 478 (mem.).

Following the end of the Title 42 policy, the current administration promulgated the Circumvention of

Lawful Pathways Rule at issue here "to relieve 'significant strain on DHS's operational capacity at the border.'" *E. Bay Sanctuary Covenant v. Biden*, 93 F.4th 1130, 1132 (9th Cir. 2024) (VanDyke, J., dissenting) (quoting 88 Fed. Reg. 31314 (May 16, 2023)). Certain organizational plaintiffs, among the respondents here, sought to enjoin and vacate the rule, but the federal government vigorously defended its necessity in the district court and on appeal because "any interruption in the rule's implementation will result in another surge in migration that will significantly disrupt and tax DHS operations." *Id.* (quoting Appellants' Br. at 54, *E. Bay Sanctuary Covenant v. Biden*, No. 23-16032 (9th Cir. Sept. 7, 2023), DE32). Then, out of the blue, the federal government and the plaintiffs jointly moved to hold the case in abeyance while they "engage[ ] in discussions regarding the Rule's implementation and whether a settlement could eliminate the need for further litigation." *Id.* Recognizing that the government was poised to "snatch[ ] defeat from the jaws of victory," *id.* at 1133, the petitioning States sought to intervene to defend the rule.

By denying the States' motion to intervene, the Ninth Circuit removed the final roadblock preventing the federal government from "implement[ing] a plan to instantly terminate the rule," *City & Cnty. of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 992 F.3d at 743 (VanDyke, J., dissenting), and "short-circuit[ ] the normal APA process." *Id.* at 744. Permitting the federal government to continue to evade the APA process without giving the states a meaningful voice in the matter harms all states not to mention the public interest.

For years, interested states across the political spectrum have moved to intervene in litigation when the federal government does not zealously defend its policies. *Compare Arizona v. Mayorkas*, 143 S. Ct. at 1312–13 (statement of Gorsuch, J.) (observing that several states moved to intervene to defend the federal government's Title 42 immigration orders), *with Texas v. United States*, No. 4:18-cv-167, 2018 WL 10562846, at *1 (N.D. Tex. May 16, 2018) (granting states' motion to intervene to defend aspects of Affordable Care Act). Continuing this practice is necessary to ensure that in our system of dual sovereignty, federal courts do not "turn[] a deaf federal ear to [state] voices." *Berger v. N.C. State Conf. of the NAACP*, 597 U.S. 179, 191 (2022).

II. THE PETITIONING STATES MEET THE REQUIREMENTS FOR INTERVENTION.

Though "[n]o statute or rule provides a general standard to apply in deciding whether intervention on appeal should be allowed," courts consider the "policies underlying" Federal Rule of Civil Procedure 24, which governs intervention in the district court, in deciding whether to permit intervention on appeal. *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 595 U.S. 267, 276–77 (2022); *see also Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Scofield*, 382 U.S. 205, 217 n.10 (1965). The Ninth Circuit denied the States' motion to intervene on the grounds that the States "lack[ed] the requisite significant protectable interest to support intervention." Pet. App. 12. That is wrong. The panel failed to account for the States' sovereign interests and misapplied *United States v. Texas*, 599 U.S. 670 (2023).

A. The Ninth Circuit misapprehended the States' interests, which support intervention.

Rule 24(a) requires intervenors to have "an interest relating to the property or transaction that is the subject of the action." Fed. R. Civ. P. 24(a)(2). This Court has described that interest as "significantly protectable." *Donaldson v. United States*, 400 U.S. 517, 531 (1971), *superseded by statute on other grounds*. A significantly protectable interest is one that is "protected by law" and has "a relationship" with "the claim or claims at issue." *Cooper v. Newsom*, 13 F.4th 857, 865 (9th Cir. 2021); *see also Wash. Elec. Co-op., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990) (explaining that an interest under Rule 24(a)(2) must be "direct, substantial, and legally protectable"); *Worlds v. Dep't of Health & Rehab. Servs.*, 929 F.2d 591, 594 (11th Cir. 1991); *Baker v. Wade*, 743 F.2d 236, 241 (5th Cir. 1984). Economic interests may support a right of intervention so long as that interest is "concrete and related to the underlying subject matter of the action." *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004); *see also Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 568 (5th Cir. 2016) ("[E]conomic interests can justify intervention when they are directly related to the litigation."); *United States v. Albert Inv. Co.*, 585 F.3d 1386, 1398 (10th Cir. 2009) ("An interest in preventing an economic injury is certainly sufficient for intervention as of right."). Ordinarily, courts construe Rule 24 "broadly in favor of proposed intervenors" to promote "efficient resolution of issues and broadened access to the courts." *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011); *see also*

Nat'l Parks Conservation Ass'n v. EPA, 759 F.3d 969, 975 (8th Cir. 2014); *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000); *La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 305 (5th Cir. 2022).

This Court has recognized that states "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012). As the petitioning States have ably explained, they have substantial economic and political interests in ensuring the rule stays in effect to mitigate the crisis of unlawful crossings over our southern border. Pet. Br. 24–26.

But the petitioning States also have a sovereign interest in the rule's validity and any settlement negotiations that would extinguish or blunt its force. "Although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence," it "specifically recognizes the States as sovereign entities." *Alden v. Maine*, 527 U.S. 706, 713 (1999). "When a State enters the Union," however, "it surrenders certain sovereign prerogatives" to the federal government, *Massachusetts v. EPA*, 549 U.S. 497, 519 (2007), such as the regulation of immigration and naturalization generally, *see Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 588 (2011). But a state retains a strong sovereign interest in who is present within its borders even if it has yielded its sovereign control over that matter. States, in other words, maintain a "stake" in protecting their sovereign interests even in areas where they have ceded sovereign authority to the federal government, and the federal government exercises that ceded authority in part to protect those sovereign interests. *Massachusetts*, 549 U.S. at 519–

20. So states have an interest in defending the rule even if the federal government will not. *See id.* at 519 (explaining that Congress directs executive action in areas where states lack regulatory authority to "protect" the states' sovereign interests); *cf. Plyler v. Doe*, 457 U.S. 202, 228 n.23 (1982) ("Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns.").

B. The Ninth Circuit flouted this Court's decision in *Cameron* and misapplied *United States v. Texas*.

In rejecting intervention here despite those clear state interests, the Ninth Circuit misapplied this Court's precedent.

The Ninth Circuit panel began by artificially loading the dice against the States' intervention request, declaring that intervention at the "appellate stage is, of course, unusual and should be allowed only for imperative reasons." Pet. App. 8. But as this Court has explained, "the point to which [a] suit has progressed is . . . not solely dispositive." *Cameron*, 595 U.S. at 279. Instead, "the most important circumstance relating to timeliness," is that the proposed intervenor "sought to intervene 'as soon as it became clear' that [his] interests 'would no longer be protected' by the parties in the case." *Id.* at 279–80 (quoting *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977)). And as the Ninth Circuit did not dispute, the petitioning States intervened on appeal at the earliest possible moment

they could: after they caught wind of the federal government's plan to hold the case in abeyance, thus clearing the path for the government to negotiate its own surrender. *See* Pet. App. 15–16 (VanDyke, J., dissenting).

The Ninth Circuit then mistakenly relied on little more than a footnote in this Court's decision in *Texas*, 599 U.S. at 677–80, 680 n.3, to hold that the States "do not have a significant protectible interest in maintaining the Rule or in reducing immigration into the United States." Pet. App. 10. That reads a lot into very little. *Texas* just held that states generally do not have standing to *sue* the federal government to compel it "to alter its arrest policies so as to make more arrests." 599 U.S. at 686. While the monetary costs the states would incur as a result of the federal government's failure to arrest more noncitizens were "of course an injury," *id*. at 676, they were not "redressable by a federal court," *id*. at 678, because redressing them would require the federal judiciary to interfere with "the Executive Branch's traditional discretion over whether to take enforcement actions against violators of federal law," *id*. at 684.

That holding says nothing about a party's power to intervene as a defendant. "[A]n intervenor of right" need only "demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests." *Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433, 439 (2017). Here, the petitioning States only seek to uphold the rule—the same relief the federal government originally sought.

Texas also does not suggest that states have no cognizable interest in immigration policy. To the contrary, it acknowledged that they did. *See Texas*, 599 U.S. at 676. The Court nonetheless explained that it could not provide the relief the states sought without creating separation-of-powers concerns. *Id.* (explaining that "the alleged injury must be legally and judicially cognizable," meaning that it is "traditionally redressable in federal court"); *see also id.* at 680–81. No comparable concerns exist where, as here, the only relief the States seek is to uphold the rule as a lawful exercise of Executive authority, which would enhance, not contract, that power.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ASHLEY MOODY
Attorney General of Florida

HENRY C. WHITAKER
Solicitor General
Counsel of Record
JAMES H. PERCIVAL
Chief of Staff
BRIDGET K. O'HICKEY
Assistant Solicitor General

Office of the
Attorney General
The Capitol – PL-01
Tallahassee, FL 32399
Phone: (850) 414-3300
henry.whitaker@
myfloridalegal.com

July 29, 2024

Counsel for Amici Curiae

ADDITIONAL COUNSEL

TIM GRIFFIN
Attorney General of Arkansas

RAÚL LABRADOR
Attorney General of Idaho

THEODORE E. ROKITA
Attorney General of Indiana

BRENNA BIRD
Attorney General of Iowa

RUSSELL COLEMAN
Attorney General of Kentucky

LYNN FITCH
Attorney General of Mississippi

MIKE HILGERS
Attorney General of Nebraska

DAVE YOST
Attorney General of Ohio

ALAN WILSON
Attorney General of South Carolina

MARTY JACKLEY
Attorney General of South Dakota

JONATHAN SKRMETTI
Attorney General of Tennessee

KEN PAXTON
Attorney General of Texas

SEAN REYES
Attorney General of Utah

BRIDGET HILL
Attorney General of Wyoming