No. 19-17213, 19-17214, 19-35914

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY AND COUNTY OF SAN FRANCISCO; COUNTY OF SANTA CLARA,
Plaintiffs-Appellees,
v.
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, *et al.*,
Defendants-Appellants,
and
STATE OF ARIZONA et al.,
Proposed Intervenor-Defendant-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
Case No. 4:19-cv-04975-PJH

REPLY TO RESPONSE IN SUPPORT OF THE MOTION TO INTERVENE BY THE STATES OF ARIZONA, ALABAMA, ARKANSAS, INDIANA, KANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, OKLAHOMA, SOUTH CAROLINA, TEXAS, AND WEST VIRGINIA.

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INTRODUCTION

The Plaintiffs and Federal Defendants here ("Existing Parties") tried to pull a collusive fast one. Without any notice or warning, and *after* the Supreme Court had granted Federal Defendants' petition for certiorari raising *identical* issues, they sprung an unprecedented, coordinated, and multi-court gambit. Through it, they attempted to execute simultaneous, strategic surrenders in all pending cases involving the Public Charge Rule, including this one, pursuant to a settlement. Their obvious hope was to act so quickly that dismissals would obtain before anyone else could intervene.

But Existing Parties' attempted fast one was not quite fast enough, and the twelve moving states ("States") were able to file this motion to intervene before this Court's mandate could issue. Moreover, a similar group of states has moved to intervene in the Fourth and Seventh Circuits and subsequently sought a stay from the Supreme Court. *See Texas v. Cook County*, 22A150 (filed U.S. March 19, 2021).

Doubling down on their frantic attempt to avoid final resolution of these disputes *on the merits*, Existing Parties now advance dubious contentions in opposition to intervention and in service of effectuating their collusive, multi-front abdication. But those arguments violate controlling case law, which they overwhelmingly ignore.

Existing Parties' principal argument appears to be that the States' motions to intervene should be denied as moot because the underlying appeals are. But this Court has made clear that a motion to intervene is *not* moot where "a potential petition for rehearing or certiorari" could be filed. *Allied Concrete & Supply Co. v. Baker*, 904 F.3d 1053, 1066 (9th Cir. 2018) . That is true both in this case and in the *Cook County* case, where a group of States is currently seeking Supreme Court review. *Supra* at 1.

Moreover, Existing Parties remarkably ignore the *necessary result* if their mootness arguments were correct: this Court's opinion and the decisions below would both need to be vacated as moot. But Existing Parties remarkably ignore this inexorable result, seeking to apply mootness selectively only to the States' motion. If they truly believed these appeals were moot, they should be requesting vacatur of the panel and district court decisions under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). They tellingly aren't.

The States have also satisfied all requirements for intervention as of right. Although the States' motions were filed *the very next day* after Federal Defendants abandoned defense of the Rule, Existing Parties contend it is untimely. That violates both controlling precedent and common sense. In particular, the States' motions are plainly timely under *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977)—which is controlling

Supreme Court authority that both the Plaintiffs and Federal Defendants ignore.[1] If they had any way of answering or distinguishing *United Airlines*, they would have provided it. They don't, and instead silently ask this Court to violate it. In addition, because this suit previously involved a nationwide injunction and, although the injunction has been narrowed, it could still easily result in a nationwide vacatur were this Court to issue its mandate now. Because this result is possible, if not likely, under the panel opinion, the States readily satisfy the protectable interest/impairment requirements.

In any event, this Court should grant permissive intervention. The States' motion is timely and all relevant requirements are met. And a favorable exercise of discretion is particularly warranted here given the unprecedented machinations that led to the circumstances here.

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[1] Indeed, *today* the U.S. Supreme Court granted review in a case where the Sixth Circuit denied post-panel-opinion intervention by the Kentucky Attorney General. The petition and twenty-state amicus brief noted the circuit split between the Sixth Circuit and this Court on the intervention issue. *See* Petition for Certiorari at p. 21-30, *Cameron v. EMW Women's Surgical Center, P.S.C.*, No. 19-5516 (U.S. Oct. 30, 2020); Brief of Amici Curiae Arizona et al. at p. 11-12, *Cameron*, No. 19-5516 (U.S. Dec. 7, 2020).

ARGUMENT

I. THE STATES' MOTIONS ARE NOT MOOT

A. Because Judicial Review Of The Public Charge Rule Is Ongoing, The States' Motions Are Not Moot

The principal argument of both Plaintiffs and Federal Defendants appears to be that the States' motions are moot. But this Court has made clear that where the potential for future review exists, a motion to intervene is *not* moot. In *Baker*, for example, this Court held that the motion to intervene by a party whose side *just prevailed on the merits* was not moot because a "potential petition for rehearing or certiorari" could still be filed—even though the moving party could not obtain anything further beyond the complete relief that their side just won. 904 F.3d at 1066-67. This Court similarly recognized as much in *Canatella v. California*, 404 F.3d 1106, 1109 n.1 (9th Cir. 2005).[2]

Further review here is possible: it is undisputed that the time to file petitions for certiorari in these cases is still open. And to the extent that Existing Parties are relying on the Northern District of Illinois's vacatur, that too is currently being challenged in the Supreme Court. Thus, under

[2] Although Federal Defendants rely extensively (at 7-9) upon *West Coast Seafood Processors Ass'n v. NRDC*, 643 F.3d 701 (9th Cir. 2011), *Baker* specifically distinguishes *West Coast Seafood* on the basis that "the underlying litigation had concluded," 904 F.3d at 1066—unlike here where Supreme Court review is *currently* being sought in *Cook County*.

Baker the motions to intervene (and these appeals themselves given the potential for further post-intervention review) are not moot.[3]

Moreover, a finding of mootness would be particularly unwarranted here because "postcertiorari maneuvers designed to insulate a decision from review … must be viewed with a critical eye." *Knox v. SEIU, Loc. 1000*, 567 U.S. 298, 307 (2012). Here DOJ did not surrender until *after* its cert. petition was granted—and victory likely at hand. It hardly takes a particularly "critical eye" to observe that the unprecedented post-certiorari maneuvers here are nakedly collusive, and particularly unworthy of judicial blessing.

Moreover, a "case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Id.* (citation omitted). But here effective relief can be had if the Supreme Court grants review in the *Cook County* case—which is hardly "impossible" given that the Court has already granted review on *identical issues* already.

B. If The States' Motion Is Actually Moot, Then Vacatur Of The Panel's Opinion And Decision Below Is Required

Even if Existing Parties were correct that "intervening events have mooted these appeals" (Cal. Opp. at 1) and "[t]hese appeals no longer

[3] Federal Defendants also argue (at 9) that the now-narrowed scope of the injunctions precludes intervention. Those arguments fail. *Infra* at 8-9.

present a live controversy" (U.S. Opp. at 2), they gloss over the necessary result of that conclusion: this Court would be compelled to vacate its opinion and direct the district court to do the same on remand. *See Munsingwear*, 340 U.S. at 39. That result is inescapable under *Munsingwear*, but ignored by Existing Parties—who undoubtedly would prefer that Plaintiffs' victory remains on the books.

Existing Parties thus attempt to have it both ways: these appeals are too moot to justify intervention but not so moot as vacate their victory/now-welcomed-loss. But if these appeals are indeed moot such that intervention is not justified, then vacatur of *all* decisions is required under *Munsingwear*.

II. THE STATES ARE ENTITLED TO INTERVENE AS OF RIGHT

The Settling Parties concede, as they must, that the Federal Defendants do not adequately represent the States' interests. And how could they not? And the remaining requirements for intervention are also satisfied here.

A. The State's Motions Are Timely Under Controlling Supreme Court Precedent That Existing Parties Refuse To Address

As the States explained, under *United Airlines*—*i.e.*, controlling authority—their motion is timely because it is filed within the time to file a cert. petition. Mot. at 6-7. In response, Existing Parties say … *nothing at all*. They neither acknowledge *United Airlines* nor the certiorari petition

deadline because it is clear little could be said. *United Airlines* controls here and if any basis existed for distinguishing it, they would have provided it.

United Airlines further makes clear that timeliness is evaluated by when it "became clear to the [movants] that the[ir] interests … would no longer be protected by the [existing parties]." 432 U.S. at 394. The States moved to intervene *the very next day* after Federal Defendants' surrender, which is plainly timely under *United Airlines*. Moreover, this Court's precedents make clear that the Motions here are timely. *See Peruta v. City of San Diego*, 824 F.3d 919, 940-41 (9th Cir. 2016) (en banc); *Day v. Apoliona*, 505 F.3d 963, 964-66 (9th Cir. 2007); *DNC v. Hobbs*, No. 18-15845, Dkt. 137 (9th Cir. Apr. 9, 2020) (en banc court granting Arizona's post-decision motion to intervene by 10-1 vote), *cert granted* 141 S. Ct. 222 (2020); *supra* note 1.

Moreover, Existing Parties' timeliness arguments are particularly strange as Federal Defendants *declined* to dismiss their petition for certiorari after President Biden was sworn in. Federal Defendants' reliance (at 11) on President Biden's February 5 order is thus misplaced since they *continued to seek certiorari* after it. Indeed, if the States had tried to intervene then, Plaintiffs undoubtedly would have argued that the Federal Defendants adequately represented their interests given the then-pending petition. Nor do Existing Parties even bother to argue otherwise or deny the Catch-22 inherent in their arguments.

Existing Parties also do not deny the States' contention (at 7-8) that intervention will cause them no prejudice—which is the central concern of the timeliness inquiry. Without even any *asserted* prejudice, a finding of untimeliness would be untenable under *United Airlines*. *See also Day*, 505 F.3d at 965 (recognizing lack of prejudice from intervention after panel opinion was issued and stating "the practical result of [the State's] intervention—the filing of a petition for rehearing—would have occurred whenever the state joined the proceedings").

B. The States Have Protectable Interests That Could Be Impaired

The Federal Defendants do not dispute that the elimination of the Public Charge Rule will inflict financial harm on the States.[4] Nor do they genuinely dispute that this Court's opinion, if left intact, would be likely to result in a nationwide vacatur on remand if the *Cook County* vacatur is reversed. But they nonetheless contend that the scope of the injunction—which this Court modified to only include Plaintiff States—means that the States' can no longer satisfy the impairment prong.

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[4] Plaintiffs do dispute the States' potential financial injuries in a footnote (at 9 n.10). But the Public Charge Rule itself affirms this injury, Mot. at 2-5—which Plaintiffs ignore. In any event, courts are "required to accept as true the non-conclusory allegations made in support of an intervention motion." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 819 (9th Cir. 2001). The States' specific allegations—specifically backed up by the Rule and its underlying analysis—are plainly more than "conclusory."

Baker dispenses with this argument too. The *Baker* prospective intervenors—whose side in that case had lost below but then prevailed on appeal—obviously did not then stand to be *impaired* by the decision giving them complete victory. 904 F.3d at 1066-68. But the prospect of further judicial action that *could* impair their interests sufficed for intervention as of right. *Id.* So too here: the prospect of a future nationwide injunction or vacatur on remand easily satisfies the impairment prong.[5]

III. PERMISSIVE INTERVENTION IS WARRANTED HERE

Alternatively, the States should be granted permissive intervention. Aside from their timeliness arguments (which fail as set forth above), Existing Parties do not dispute that all requirements for permissive intervention are met. Plaintiffs recycle their protective interest argument

[5] Federal Defendants also contend (at 11-12) that there is no impairment because the States will have an "opportunity to comment" on future rulemaking (and implicitly that they somehow have a fair chance of persuading the Biden Administration to retain the Public Charge Rule through such comments). That suggestion is entirely self-serving and lacks any credible factual or legal foundation: the opportunity to comment on some speculative future rulemaking has *never*, to the States' knowledge, been held to be an adequate alternative to defending on the merits in court a rule that *has already been promulgated*. And the sole case cited, *Alisal Water Corp.*, certainly did not hold as much. If that contention were correct, intervention to defend a rule when the federal government will not should essentially *never* be granted. But that is manifestly not the law—and indeed Plaintiffs include several states who repeatedly and successfully intervened to defend Obama Administration rules.

(at 9-10). But a protectable interest is *not* a requirement for permissive intervention, and that argument fails in any event. *Supra* at 8-9.

Plaintiffs also appear to quibble with certiorari worthiness by disputing the existence of a circuit split and pointing (at 10) to the "Fourth Circuit … [granting] rehear[ing] the case en banc." But the Fourth Circuit did so two *months before* the Court granted certiorari on February 22. The Supreme Court has thus *already* determined that the case *still* warrants review notwithstanding the Fourth Circuit's rehearing.

Existing Parties do not address the States' argument (at 10-11) that permissive intervention is warranted so that the "important issues [can] be decided on the merits, rather than through surrender." Indeed, their overall response is telling: They don't deny that their conduct is blatantly collusive, but their astonishing defense instead is that they have already conclusively gotten away with it. But they're wrong about that: the States acted quickly to intervene pre-mandate and further are seeking relief from the Supreme Court in *Cook County*. More broadly, their brazen gamesmanship is hardly a reason to reward them with a favorable exercise of discretion.

CONCLUSION

The States' motions to intervene should be granted.

Respectfully submitted this March 29, 2020.

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