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


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**TABLE OF AUTHORITIES—Continued**

## TABLE OF AUTHORITIES—Continued



**STATUTES**



**RULES**

## TABLE OF AUTHORITIES—Continued

### REGULATIONS



### OTHER AUTHORITIES

## INTRODUCTION

The undersigned States move to intervene for the purpose of filing a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in case numbers 19-17213, 19-17214, and 19-35914. *See City & Cty. of S.F. v. U.S. Citizenship & Immigr. Servs.*, 981 F.3d 742 (9th Cir. 2020) (affirming district courts' preliminary injunctions).

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

In light of the moving States' vital interests in the Rule discussed below and the collusive actions of the Respondents, the undersigned States respectfully move to intervene in order to file a petition for a writ of certiorari 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* Pet.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).[1] 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); Pet.App.90-170, and the remainder by this 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 Ninth Circuit, a divided panel affirmed the preliminary injunctions entered by the district courts, but concluded that the injunctions should not extend nationwide. Pet.App.41-89.

2. 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

[1] Cites to "Pet.App." reference the appendix to the petition for certiorari filed by the States in this case.

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.[2] That same day, the United States voluntarily dismissed the petitions for writs of certiorari in this case and the Seventh Circuit case,[3] as well as the pending case arising from the Second Circuit.[4] 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.[5] 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."[6]

3. 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,

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[2] 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/ 03/09/dhs-statement-litigation-related-public-charge-ground-inadmissibility.

[3] *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).

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

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

[6] 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.

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. Pet.App.14-40. Judge VanDyke determined that he 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." Pet.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. Pet.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 States' motion was also timely as they moved "within mere days of the federal government" announcing that it would no longer defend the Rule. Pet.App.30-31. He further concluded that the States' interests were no longer adequately represented because the existing parties were "now united in vigorous *opposition* to the rule." Pet.App.32. Finally, the 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." Pet.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." Pet.App.34.

## ARGUMENT

### I. The Court Should Grant This 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).[7]

Before March 9, the moving States' interests were adequately represented—there was no reason to intervene. Movants 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 movants attempted to intervene before that date, 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, movants sought to intervene *the very next day*—which is plainly timely.

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[7] The Ninth Circuit's denial of intervention was erroneous, and independently warrants review under Rule 10. A petition for certiorari on that question will also be filed at the same time as this motion should the Court prefer 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).

But now, absent the ability to intervene and seek a writ of certiorari, the moving States will be severely prejudiced by the United States' failure to defend the Rule. The moving 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 Moving States Have A Vital Interest In Defending The Rule.

The moving 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[.]" Pet.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. 41,292, 41,301 (Aug. 14, 2019) (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).[8] Increasing the number of Medicaid participants would increase the State's spending on Medicaid (the costs of which typically exceed State general fund growth[9]) and would require the State to make budget adjustments elsewhere.
- In 2019, Arizona paid $85 million in maintenance-of-effort costs for the Temporary Assistance for Needy Families program ("TANF").[10] Because TANF resources are limited—in 2019, less than a quarter of impoverished families received this assistance[11]—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.

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[8] *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.

[9] 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.

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

[11] *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.

- States incur administrative costs for each SNAP recipient.[12] For fiscal year 2016, Arizona paid $77,730,088 in administrative costs for administering this program.[13] 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.

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 The Moving States.

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 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

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[12] 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.

[13] *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.

"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. Pet.App.32 (VanDyke, J., dissenting).[14]

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.[15] 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 na-

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[14] *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).

[15] *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).

> tionwide 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. 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." Pet.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." Pet.App.28 (VanDyke, J., dissenting).

Granting the 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 moving 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).[16] 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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[16] *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 moving 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.").[17] 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 proposed intervenors.'" *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (citations omitted).

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[17] *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).

In light of the their swift response to the United States withdrawal and their significant interest in defending the Rule, the moving States easily satisfy the considerations of Rule 24.[18]

As to the first factor, under this Court's guidance, the moving 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 moving 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."[19] Furthermore, the 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 3-4. If the States had tried to intervene earlier, they would likely have been met with resistance. *See, e.g., Citizens for Balanced Use v. Mont. Wil-*

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[18] The same was true when the States moved to intervene in the Ninth Circuit. *See supra* 4-5.

[19] See Supreme Court Order (Mar. 19, 2020).

[20] *See supra* note 2.

*derness 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 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 5, the Rule itself estimates that it would save all of the states cumulatively $1.01 billion annually, and the moving 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 moving States' ability to protect their interests.

Additionally, appellate courts have looked to Rule 24(b)'s standard when considering permissive intervention, and the moving 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 movants 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 moving 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.

## CONCLUSION

For the foregoing reasons, this motion for leave to intervene should be granted.

April 30, 2021

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