No. 20-1775

In the Supreme Court of the United States

STATE OF ARIZONA, ET AL., PETITIONERS

v.

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

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, provides that a noncitizen is "inadmissible" if, "in the opinion of the [Secretary of Homeland Security] at the time of application for admission or adjustment of status, [the noncitizen] is likely at any time to become a public charge." 8 U.S.C. 1182(a)(4)(A). In August 2019, the United States Department of Homeland Security (DHS) promulgated a final rule interpreting the statutory term "public charge" and establishing a framework by which DHS personnel are to assess whether a noncitizen is likely to become a public charge. In November 2020, the District Court for the Northern District of Illinois entered a final judgment vacating the rule. The rule is therefore no longer in effect. Petitioners are States that sought to intervene in March 2021 in an appeal concerning preliminary injunctions entered by district courts in California and Washington that had barred DHS from implementing the now-vacated rule.

The questions presented are:

1. Whether the court of appeals erred in denying petitioners' motion to intervene to challenge preliminary injunctions against enforcement of a federal rule that had already been finally vacated in a separate judicial decision at the time of petitioners' motion to intervene.

2. Whether petitioners' unsuccessful motion to intervene in March 2021 permits petitioners to seek this Court's review of the court of appeals' December 2020 decision on the merits.

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OPINIONS BELOW

The order of the court of appeals denying intervention (Pet. App. 1-40) is reported at 992 F.3d 742. The opinion of the court of appeals affirming in part the district courts' preliminary injunctions (Pet. App. 41-89) is reported at 981 F.3d 742. The district courts' orders granting plaintiffs' motions for preliminary injunctions (Pet. App. 171-307, 308-368) are reported at 408 F. Supp. 3d 1057 and 408 F. Supp. 3d 1191.

JURISDICTION

The order of the court of appeals denying intervention was entered on April 8, 2021. The opinion of the court of appeals affirming in part the district courts' preliminary injunctions was entered on December 2, 2020. The petition for a writ of certiorari was filed on

June 18, 2021. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that a noncitizen is "inadmissible" if, "in the opinion of the [Secretary of Homeland Security] at the time of application for admission or adjustment of status," the noncitizen "is likely at any time to become a public charge." 8 U.S.C. 1182(a)(4)(A).[1] In August 2019, the Department of Homeland Security (DHS) adopted a rule under which DHS would treat certain applicants for admission or adjustment of status as likely to become "public charge[s]" for purposes of that provision if it determined that they were likely to receive specified public benefits, including by participating in Medicaid or the Supplemental Nutrition Assistance Program, for more than 12 months (in aggregate) within any 36-month period. See 84 Fed. Reg. 41,292, 41,501 (Aug. 14, 2019) (2019 Rule or Rule). The 2019 Rule represented a significant departure from the definition and standards that U.S. Citizenship and Immigration Services (USCIS) had previously used in applying the public-charge ground of inadmissibility.

2. The 2019 Rule generated extensive litigation across the United States at all levels of the federal judiciary. Plaintiffs who had opposed adoption of the Rule (including 21 States and numerous local governments and nongovernmental organizations) filed suits in five district courts in four circuits alleging that the Rule was unlawful on numerous grounds.

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[1] This brief uses "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

a. All five district courts concluded that the 2019 Rule was likely unlawful, and they each entered preliminary injunctions in October 2019 barring the Rule from taking effect. See *Make the Road N.Y.* v. *Cuccinelli*, 419 F. Supp. 3d 647 (S.D.N.Y. 2019); *Cook County* v. *McAleenan*, 417 F. Supp. 3d 1008 (N.D. Ill. 2019); *Casa de Maryland, Inc.* v. *Trump*, 414 F. Supp. 3d 760 (D. Md. 2019); *New York* v. *DHS*, 408 F. Supp. 3d 334 (S.D.N.Y. 2019); Pet. App. 171-307 (N.D. Cal. 2019); Pet. App. 308-368 (E.D. Wash. 2019).

The government sought stays pending appeal of those preliminary injunctions. The Fourth and Ninth Circuits granted stays of the preliminary injunctions entered by district courts in their jurisdictions, see Order, *Casa de Maryland, Inc.* v. *Trump*, No. 19-2222 (4th Cir. Dec. 9, 2019); Pet. App. 90-170, while the Second and Seventh Circuits declined to do so, see *New York* v. *DHS*, No. 19-3591, 2020 WL 95815 (2d Cir. Jan. 8, 2020); Order, *Cook County* v. *Wolf*, No. 19-3169 (7th Cir. Dec. 23, 2019). This Court subsequently granted the government's motions for stays pending appeal of the preliminary injunctions entered in New York and Illinois. See *Wolf* v. *Cook County*, 140 S. Ct. 681 (2020); *DHS* v. *New York*, 140 S. Ct. 599 (2020).

b. DHS began implementing the Rule for the first time in February 2020. See *New York* v. *DHS*, 969 F.3d 42, 58 (2d Cir. 2020). The government's appeals of the preliminary injunctions proceeded, and the Second, Seventh, and Ninth Circuits affirmed the preliminary injunctions entered in their respective jurisdictions. See *id.* at 50, 88-89; *Cook County* v. *Wolf*, 962 F.3d 208 (7th Cir. 2020); Pet. App. 41-89. Although the Ninth Circuit affirmed the preliminary injunctions of the district courts in California and Washington, it narrowed

their scope to the plaintiffs' jurisdictions (*i.e.*, to the District of Columbia and 18 States that did not include petitioners). Pet. App. 87-88.[2] The government filed petitions for writs of certiorari seeking this Court's review of all three decisions. See *DHS* v. *New York*, No. 20-449 (filed Oct. 7, 2020); *Wolf* v. *Cook County*, No. 20-450 (filed Oct. 7, 2020); *USCIS* v. *City & County of San Francisco*, No. 20-962 (filed Jan. 21, 2021).

A divided panel of the Fourth Circuit initially reversed the preliminary injunction entered by the District of Maryland, see *Casa de Maryland, Inc.* v. *Trump*, 971 F.3d 220 (2020), but the en banc Fourth Circuit subsequently vacated that decision and set the case for re-argument, see 981 F.3d 311 (2020).

c. In November 2020, the District Court for the Northern District of Illinois entered a partial final judgment under Federal Rule of Civil Procedure 54(b), which vacated the 2019 Rule on a nationwide basis under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See *Cook County* v. *Wolf*, 498 F. Supp. 3d 999 (N.D. Ill. 2020). The district court concluded that the 2019 Rule did not represent a reasonable interpretation of the INA and that DHS had acted arbitrarily and capriciously in adopting it. See *id.* at 1003-1005.

The Seventh Circuit thereafter granted a stay pending appeal of the partial final judgment, and it placed the appeal in abeyance pending the disposition of the government's petitions for writs of certiorari in *DHS* v.

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[2] The Second Circuit likewise limited the geographic scope of the injunctions before it so that they applied only within the Second Circuit, and the preliminary injunction entered in the Northern District of Illinois was limited to the State of Illinois. See *New York*, 969 F.3d at 87-88; *Cook County*, 962 F.3d at 217.

New York, No. 20-449, and *Wolf* v. *Cook County*, No. 20-450. See 20-3150 C.A. Doc. 21 (7th Cir. Nov. 19, 2020).

3. On February 2, 2021, after the change in Administration, President Biden directed the Secretary of Homeland Security, along with the Attorney General, the Secretary of State, and other relevant agency heads, to "review all agency actions related to implementation of the public charge ground of inadmissibility * * * and the related ground of deportability." Exec. Order No. 14,012, § 4, 86 Fed. Reg. 8277, 8278 (Feb. 5, 2021).

4. On February 22, 2021, this Court granted the government's petition for a writ of certiorari in *DHS* v. *New York*, No. 20-449, which sought review of the preliminary injunctions issued in October 2019 by the U.S. District Court for the Southern District of New York. Approximately two weeks later, DHS announced that the government had determined that continuing to defend the 2019 Rule before this Court and in the lower courts would not be in the public interest or an efficient use of government resources. See DHS, *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. Consistent with that determination, on March 9, 2021, the government filed stipulations with the Clerk of this Court dismissing *DHS* v. *New York*, No. 20-449; *Mayorkas* v. *Cook County*, No. 20-450; and *USCIS* v. *City & County of San Francisco*, No. 20-962.

The government likewise filed motions to dismiss active public-charge-related appeals in the lower courts, including the government's appeal of the partial final judgment entered in the Northern District of Illinois

vacating the 2019 Rule and the government's appeal of the preliminary injunction entered by the District of Maryland. See 20-3150 C.A. Doc. 23 (7th Cir. Mar. 9, 2021); 19-2222 C.A. Doc. 210 (4th Cir. Mar. 9, 2021). The Seventh and Fourth Circuits granted the government's motions and dismissed the appeals. See 20-3150 C.A. Doc. 24-1 (7th Cir. Mar. 9, 2021); 19-2222 C.A. Doc. 211 (4th Cir. Mar. 11, 2021). Because the vacatur entered by the Northern District of Illinois had become final, DHS published a rule that removed the 2019 Rule from the Code of Federal Regulations. USCIS, DHS, *Inadmissibility on Public Charge Grounds; Implementation of Vacatur*, 86 Fed. Reg. 14,221 (Mar. 15, 2021).

DHS had anticipated before the 2019 Rule's implementation that the Rule would result in increased denials of lawful-permanent-resident status to applicants. See 84 Fed. Reg. at 41,348. In reality, it proved to have an exceedingly modest impact: During the roughly one year the Rule was in effect, DHS "issued only 3 denials and two Notices of Intent to Deny based solely on the basis of the INA § 212(a)(4) public charge ground of inadmissibility evaluated under the Rule's totality of the circumstances framework." 19-cv-6334 D. Ct. Doc. 269-1, ¶ 8 (N.D. Ill. June 15, 2021) (Declaration of Michael Valverde).

5. Following the government's dismissal of its pending cases before this Court and its active appeals in the lower courts, petitioners—a group of States that had not previously participated in any of the above-described litigation—filed a series of motions attempting to intervene in order to revive the litigation about the validity of the 2019 Rule.

a. Of most direct relevance here, petitioners sought leave to intervene in the Ninth Circuit appeal of the

preliminary injunctions entered in Washington and California. See 19-17213 C.A. Docs. 143 (Mar. 10, 2021), 145 (Mar. 11, 2021), 152 (Mar. 29, 2021). Although the Ninth Circuit had affirmed those preliminary injunctions in December 2020, the appeal remained pending before that court because it had stayed the issuance of its mandate in January 2021. See 19-17213 C.A. Doc. 139 (Jan. 20, 2021). On April 8, 2021, the Ninth Circuit denied petitioners' motion to intervene over a dissent by Judge VanDyke. See Pet. App. 1-40.

Overlapping groups of States filed motions to recall the mandate and to intervene in the Fourth and Seventh Circuits. See 19-2222 C.A. Docs. 213, 214, 215 (4th Cir. Mar. 11, 2021); 20-3150 C.A. Doc. 25 (7th Cir. Mar. 11, 2021). Both courts of appeals denied the motions without noted dissent. See 19-2222 C.A. Doc. 216 (4th Cir. Mar. 18, 2021); 20-3150 C.A. Doc. 26 (7th Cir. Mar. 15, 2021).

b. The States that had sought to intervene in the Seventh Circuit thereafter filed an application for a stay in this Court, which this Court denied. See *Texas* v. *Cook County*, No. 20A150, 2021 WL 1602614 (Apr. 26, 2021). This Court's order noted that it was "without prejudice to the States raising" arguments about DHS's dismissal of its appeal "before the District Court, whether in a motion for intervention or otherwise." *Id.* at *1.

The States subsequently filed a motion for relief from judgment under Federal Rule of Civil Procedure 60(b) as well as a motion to intervene in the district court. See 19-cv-6334 D. Ct. Docs. 256, 257, 259, 260 (N.D. Ill. May 12, 2021). The district court denied those motions on August 17, 2021. See *Cook County* v. *Mayorkas*, No. 19-cv-6334, 2021 WL 3633917 (N.D. Ill.).

It found that the States had been aware of the potential need to intervene long before the time for a notice of appeal had run in that case, and that their failure to make any attempt to do so until more than two months after the appeal deadline rendered their request for intervention untimely. See *id.* at *5-*16. The court further determined that even if the States were entitled to intervene in the case, they had not demonstrated their entitlement to a judgment under Rule 60(b) that would re-start the time for filing a notice of appeal or otherwise unsettle the court's November 2, 2020 final judgment. See *id.* at *16-*19.

c. On April 30, 2021, petitioners submitted to this Court a combined "Motion for Leave to Intervene and Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit." Presumably because the combined motion and petition violated this Court's Rule 12.4, it was never docketed. Instead, on May 6, 2021, 155 days after the Ninth Circuit's December 2, 2020 decision affirming the preliminary injunctions entered against the Rule in California and Washington, petitioners submitted a freestanding "Motion for Leave to Intervene" accompanied by a petition for a writ of certiorari that petitioners intended to file if this Court granted petitioners' motion. See Mot. for Leave to Intervene, *Arizona* v. *City & County of San Francisco*, No. 20M81.[3]

The government opposed petitioners' motion. See Gov't Resp., *Arizona* v. *City & County of San Francisco*, No. 20M81 (May 17, 2021) (Gov't Intervention

[3] Petitioners' motion was docketed with the date on which petitioners' original combined motion was submitted for review. The Certificate of Service docketed with petitioners' motion reflects, however, that the motion was not submitted until May 6, 2021.

Resp.). The government explained, among other things, that petitioners had not been "part[ies]" or otherwise participated in the court of appeals at the time that it issued its December 2, 2020 judgment affirming the preliminary injunctions, and that under 28 U.S.C. 1254(1) they accordingly could not petition for a writ of certiorari in connection with that judgment. See Gov't Intervention Resp. 11-17. The government further explained (*id.* at 16-17 & n.3) that under this Court's decision in *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America* v. *Scofield*, 382 U.S. 205 (1965), petitioners could petition for a writ of certiorari to review the Ninth Circuit's subsequent April 8, 2021 order denying their motion to intervene, but that any such petition could not properly extend to the Ninth Circuit's underlying decision about the merits of the preliminary injunctions.

On June 1, 2021, this Court entered an order holding petitioners' motion to intervene in abeyance "pending the timely filing and disposition of [a] petition for a writ of certiorari respecting the denial of intervention below." See Order, No. 20M81 (June 1, 2021).

6. On August 23, 2021, DHS published an Advance Notice of Proposed Rulemaking (ANPRM) with respect to the public-charge ground of inadmissibility. See USCIS, DHS, *Public Charge Ground of Inadmissibility*, 86 Fed. Reg. 47,025. That ANPRM solicits data and other information from the public, including States and other governmental entities, that DHS intends to use in a Notice of Proposed Rulemaking that will, among other things, provide a new regulatory definition of the statutory term "public charge." *Id.* at 47,028.

ARGUMENT

Petitioners renew (Pet. 15-21) their contention that the court of appeals should have permitted them to intervene in order to make arguments in defense of the 2019 Rule months after the court of appeals entered a decision affirming the preliminary injunctions at issue in this case. As the United States explained below and petitioners appear to concede (Pet. 31-32), however, this case had already become moot by the time petitioners sought to intervene. That reality provided a sufficient basis, by itself, to deny petitioners' motion. Even if this litigation had not already become moot, moreover, intervention would have been improper because petitioners' alleged economic interests in the Rule are insufficient to support intervention, and equitable considerations weigh strongly against granting their belated request to intervene in an appeal challenging preliminary injunctions that do not apply in their jurisdictions. Petitioners identify (Pet. 15-21) no decision of this Court or of any other court of appeals with which the Ninth Circuit's one-sentence order denying intervention conflicts, and the mootness of this case would make it a poor vehicle in which to address broader questions concerning intervention even if such review were otherwise warranted.

Petitioners separately contend (Pet. 21-31) that this Court should grant their petition for a writ of certiorari in order to review or vacate the Ninth Circuit's underlying December 2, 2020 judgment on the merits of the preliminary injunctions. But as the United States previously explained, and as petitioners do not dispute, this Court's decisions squarely preclude petitioners from leveraging their unsuccessful intervention motion in March 2021 into a grant of certiorari to review the court

of appeals' earlier judgment on the merits. In any event, petitioners' current petition is jurisdictionally out of time to the extent that it seeks to challenge the Ninth Circuit's December 2, 2020 judgment. See 28 U.S.C. 2101(c). Further review is not warranted.

1. The appeal in which petitioners seek to intervene is now moot. The court of appeals' decision on the merits concerned preliminary injunctions that temporarily barred DHS from enforcing the 2019 Rule. See Pet. App. 58, 65-66. But as petitioners acknowledge (Pet. 13), a district court in separate litigation has since "vacat[ed] the Rule in its entirety," that court's judgment has become final, and the Rule has accordingly been removed from the Code of Federal Regulations. The preliminary injunctions that petitioners seek to challenge consequently have no ongoing real-world effect, and an order setting those injunctions aside would provide them with no relief. See *University of Texas* v. *Camenisch*, 451 U.S. 390, 394 (1981) (When enjoined conduct has ceased, "the correctness of the decision to grant [the] preliminary injunction * * * is moot.").

Although the mootness of these appellate proceedings was the primary basis on which the government opposed intervention below (and thus presumably at least one basis for the court of appeals' denial of the motion to intervene), see Gov't C.A. Resp. 7-9 (Mar. 22, 2021), petitioners ignore mootness entirely in arguing (Pet. 15-21) that they should have been permitted to intervene. Petitioners do not dispute that they sought to intervene in a preliminary-injunction appeal that had already become moot; indeed, they appear to concede (Pet. 31-32) that the case is moot. Nor do petitioners identify any decision of this Court, or of any other court, holding that a court of appeals is required to permit

intervention in a case that is already moot at the time an intervention motion is filed. Because that ground was an independently sufficient basis for denial of petitioners' motion to intervene, this Court's review is not warranted.

2. Even if the preliminary-injunction appeal still presented a live case or controversy, the court of appeals' denial of intervention would have been appropriate on other grounds as well. Most fundamentally, the legal questions at issue do not implicate any substantive legal rights of States that petitioners can intervene to raise; the "defense for which intervention is sought," Fed. R. Civ. P. 24(c), is instead the *federal government's* legal defense of its exercise of authority under the INA, which petitioners have no independent right to assert. And additional case-specific considerations weigh heavily against petitioners' request for intervention here.

a. Intervention is the "legal procedure by which . . . a third party is allowed to become a party to the litigation." *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 933 (2009) (quoting *Black's Law Dictionary* 840 (8th ed. 2004)). And like any other "'party' to litigation," a person who intervenes in a case becomes "'[o]ne by or against whom [the] lawsuit is brought,'" *i.e.*, a plaintiff who brings, or a defendant against whom is brought, one or more claims for relief in the case. *Ibid.* (citation omitted; first set of brackets in original).

Where a litigant seeks only to assert legal arguments in support of a claim or defense belonging to an existing party to the case, intervention is generally inappropriate. Such a litigant may participate in the case as an amicus curiae, filing a brief that describes its "interest" as well as its argument on the merits. Fed. R. App. P.

29. But a litigant that does not assert its own legal claims or defenses has no entitlement to intervene as a party merely because it disagrees with the manner in which the existing parties have asserted their respective claims or defenses.

Federal Rule of Civil Procedure 24 strongly supports that understanding of intervention. Although Rule 24 does not apply directly in the courts of appeals, this Court has looked to it for guidance in assessing the appropriateness of appellate intervention. See *International Union, United Auto., Aerospace & Agric. Implement Workers of America* v. *Scofield*, 382 U.S. 205, 207 n.10 (1965)); see also Pet. 19-21 (relying on Rule 24 as a basis for intervention). As relevant here, Rule 24 provides that a putative intervenor's "motion to intervene * * * must * * * be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). "The words 'claim[] or defense[]' in Rule 24 "'manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit.'" *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623 n.18 (1997) (quoting *Diamond* v. *Charles*, 476 U.S. 54, 76 (1986) (O'Connor, J., concurring in part and concurring in the judgment)). And under Rule 8, a pleader that submits a responsive pleading "*must*" state "*its* defenses" to "each claim asserted against it." Fed. R. Civ. P. 8(b)(1)(A) (emphases added); see *Black's Law Dictionary* 419 (6th ed. 1990) ("Defense" means "[t]hat which is offered and alleged by the party proceeded against in an action or suit, as a reason in law or fact why the plaintiff should not recover or establish what he seeks."); *Black's Law Dictionary* 345 (1st ed. 1891) (same). The requirement of Rule 24 that a putative intervenor submit a

"pleading" setting out the "defense" it would assert if allowed to become a party defendant accordingly limits intervention to circumstances where the intervenor seeks to defend its own substantive legal rights in opposition to a claim in the pending action that could have been asserted against it. Fed. R. Civ. P. 24(c).

This Court's decision in *Donaldson* v. *United States*, 400 U.S. 517 (1971), confirms that conclusion. In *Donaldson*, the government petitioned a district court to enforce administrative summonses that the IRS had issued to Donaldson's former employer (Acme) and its accountant (Mercurio) to acquire testimony and documentary evidence about Donaldson's tax liability. *Id.* at 518-520. The employer and accountant, as the witness-respondents against whom the government sought judicial relief, had the right to "challenge the summons[es] on any appropriate ground," including the "defense[]" that they were issued for an "improper purpose." *Id.* at 526. But neither opposed enforcement, as both were willing to comply with any court order. *Id.* at 521 n.5, 531. This Court rejected Donaldson's claim that he was entitled to intervene because he "possesse[d] 'an interest relating to the property or transaction which is the subject of the [enforcement] action'" and sought to assert a defense that the witness-respondents themselves could have raised, *i.e.*, that the summonses were allegedly invalid because they "were not issued for any [proper] purpose." *Id.* at 521, 527 (second set of brackets in original); see *id.* at 530-531. The Court observed that Donaldson lacked either a "proprietary interest" in his employer's records or any legally recognized "privilege"; his "only interest" lay in the fact that the records at issue "presumably contain[ed] details" bearing on his tax situation. *Id.* at 530-531. And Donaldson's interest

in "counter[ing] and overcom[ing] Mercurio's and Acme's willingness, under summons, to comply and to produce records" notwithstanding the potential availability of a defense to production, the Court held, "cannot be the kind contemplated by Rule 24(a)(2)." *Id.* at 531.

Donaldson thus makes clear that a party seeking intervention under Rule 24(a)(2) must assert a "legally protectible" interest in the suit in which intervention is sought, not simply an interest in the potential downstream consequences of that suit. *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 315 (1985) (summarizing the holding in *Donaldson*). Applying that principle here, the States plainly do not assert a "legally protectible" interest of the sort that could support intervention. The preliminary injunctions at issue here rest on plaintiffs' arguments that DHS lacked authority under the INA and APA to implement the 2019 Rule, and accordingly that the government would violate the INA or APA if it continued to implement it. See Pet. App. 71-85. Petitioners do not identify any defense of their own to those claims that they would assert if permitted to intervene. Instead, they merely seek to assert a defense *for the federal government* that the challenged actions represented a lawful exercise of DHS's authority. See Pet. 19-21 (explaining the States' desire to present arguments on behalf of the federal government's authority to promulgate the Rule).[4]

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[4] In some circumstances where the government has granted legal rights to third parties, those third parties may be able to intervene as defendants in an APA action in which a plaintiff alleges that the government acted unlawfully in granting the third party those rights (and that the plaintiff was harmed as a result). Cf. *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 918 (2020) (granting petition for a writ of certiorari filed by a

Rule 24 does contain several enumerated exceptions that afford privileged status to States in certain circumstances, but the structure of those exceptions only confirms that petitioners were not entitled to intervene in the materially different circumstances here. First, Rule 24(a)(1) requires a court to permit intervention by anyone granted "an unconditional right to intervene by a federal statute." Fed. R. Civ. P. 24(a)(1). Under 28 U.S.C. 2403, therefore, a State may intervene whenever "the constitutionality of any statute of that State * * * is drawn in question." 28 U.S.C. 2403(b); see Rule 24(a) advisory committee's note (1937). Second, Rule 24(b)(2) provides that, "[o]n timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on: (A) a statute or executive order administered by the officer or agency; or (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order." Fed. R. Civ. P. 24(b)(2).

Those provisions sensibly ensure that States are able to control the defense of their *own* statutes and regulations—as indicated by the Rule's reference to "a statute or executive order administered by the officer or agency" seeking to intervene. Fed. R. Civ. P. 24(b)(2). They give States no special role in defending *federal* statutes and regulations. Instead, they grant only the federal government the right to intervene in defense of federal statutes or regulations administered by federal officers and agencies. See *ibid.*; 28 U.S.C. 2403(a)

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religious employer that intervened in the lower courts to defend interim final rules exempting it from certain otherwise-applicable legal requirements). Here, however, the agency action at issue did not confer any legal rights on States that petitioners may intervene to defend.

(providing for intervention by the United States in suits that call into question the constitutionality of an "Act of Congress").

Petitioners' approach to intervention, under which States may intervene as parties to make their own arguments in defense of a federal law whenever they allege that the law will have downstream economic or budgetary effects, see Pet. 20, would effectively eviscerate those limitations within Rules 24(a)(1) and (b)(2). Cf. *Mountain Top Condominium Ass'n* v. *Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3d Cir. 1995) ("A mere economic interest in the outcome of the litigation is insufficient to support a motion to intervene."); *New Orleans Pub. Serv., Inc.* v. *United Gas Pipe Line Co.*, 732 F.2d 452, 466 (5th Cir.) (en banc) (holding that "an economic interest alone is insufficient" to support intervention under Rule 24(a)(2), because "such intervention is improper when the intervenor does not itself possess the only substantive legal right it seeks to assert in the action"), cert. denied, 469 U.S. 1019 (1984).

In any event, petitioners' contention (Pet. 20) that they have a substantial economic interest in the 2019 Rule is, at best, speculative. As explained above, during the roughly one year that the 2019 Rule was in effect, DHS "issued only 3 denials and two Notices of Intent to Deny based solely on the basis of the INA § 212(a)(4) public charge ground of inadmissibility evaluated under the Rule's totality of the circumstances framework." 19-cv-6334 D. Ct. Doc. 269-1 at ¶ 8 (Declaration of Michael Valverde). Any suggestion that vacatur of the 2019 Rule will have a significant effect on petitioners' coffers by increasing the number of individuals eligible

for state-supplied benefits is thus at odds with the available evidence.

Petitioners also assert (Pet. 20) that they seek to intervene to protect "an important procedural right to comment on any new rulemaking under the APA." But a "'procedural right,' unconnected to [a] plaintiff's own concrete harm," is not enough to convey standing, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 573 n.8 (1992), and thus it cannot be sufficient to establish the more demanding legally protectable interest required for intervention, *Donaldson*, 400 U.S. at 530. In any event, DHS has initiated a new rulemaking process with respect to the public-charge inadmissibility provision. See p. 9, *supra* (discussing ANPRM soliciting information from public). Petitioners will have the opportunity to comment during that process. Thus, contrary to petitioner's contention (Pet. 17), the court of appeals' denial of their motion to intervene has not deprived them of their "right to submit input [on a new public-charge Rule] and to protect their interests before the agency."

b. Other considerations also support the court of appeals' denial of petitioners' request to intervene. Petitioners' request came late in the appeal, months after the court of appeals had issued its decision on the merits of the preliminary injunctions. Petitioners had not participated in the case in any way prior to that filing, even in an amicus capacity. Nor do petitioners assert that they provided comments on the Rule during the notice-and-comment period that preceded its issuance. See 84 Fed. Reg. at 41,305. And petitioners' lack of involvement or expressed interest persisted even after President Biden, in early February, directed the Secretary of Homeland Security and others to give fresh

consideration to the government's approach to public-charge determinations. See Exec. Order No. 14,012, § 4, 86 Fed. Reg. at 8278. Because petitioners did not "act[] promptly" (Pet. 20) to defend their alleged interests, despite having ample opportunity to do so, the court of appeals was well within its discretion to deny their motion to intervene. See *National Ass'n for the Advancement of Colored People* v. *New York*, 413 U.S. 345, 366 (1973) (holding that a court evaluating the timeliness of a motion to intervene may rule "in the exercise of its sound discretion," which "will not be disturbed on review" unless it is "abused").

The limited scope of the preliminary injunctions at issue further undermines petitioners' interest in intervening in this particular case. Although the court of appeals affirmed the preliminary injunctions, it narrowed the scope of those injunctions to the plaintiffs' jurisdictions, thereby rendering them inoperable in petitioners' jurisdictions (months before the final vacatur of the 2019 Rule ordered by the Northern District of Illinois took effect). Pet. App. 87-88. Accordingly, even if petitioners had a substantial protectable interest in the content of the 2019 Rule that might allow them to intervene in *some* case challenging the Rule's validity, but see pp. 12-18, *supra*, they would still have no basis for seeking further relief in an appeal of these specific preliminary injunctions.

3. Petitioners have also failed to demonstrate that the Ninth Circuit's one-sentence denial of intervention in this case presents any of the factors that this Court has identified as significant in deciding whether grant a writ of certiorari. See Sup. Ct. R. 10. Petitioners do not contend that the court of appeals has resolved a legal question in a manner that conflicts with a decision of

this Court or of another court of appeals. And while they contend (Pet. 21) that the question of when States may intervene to defend federal rules is an "important question[] that this Court should address," the circumstances of this case—in which petitioners sought to intervene in a preliminary-injunction appeal that had already become moot at the time of their motion—present the issue in an unusual posture that would make this an unsuitable vehicle even if that question otherwise warranted this Court's review.

4. Finally, petitioners also contend (Pet. 21-32) that this Court should grant certiorari not just to review the court of appeals' denial of intervention, but also to review or vacate the court of appeals' earlier decision affirming the preliminary injunctions in this case. That course is unavailable for at least two reasons.

First, as the government previously explained in opposing petitioners' motion to intervene in this Court (No. 20M81), petitioners cannot file a petition for a writ of certiorari to review or vacate that judgment because they were not "part[ies]" to the case "in the court[] of appeals." 28 U.S.C. 1254(1); see Gov't Intervention Resp. 11-18. The current petition does nothing to solve that problem. This Court has stated that "[o]ne who has been denied the right to intervene in a case in a court of appeals may petition for certiorari to review *that ruling*"—*i.e.*, the intervention ruling. *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 30 (1993) (per curiam) (citing *Scofield*, 382 U.S. at 208-209) (emphasis added). But the Court has made clear that "such a putative intervenor cannot petition for review of any other aspect of the judgment below." Stephen M. Shapiro et al., *Supreme Court Practice* § 6.16(c), at 6-62 (11th ed. 2019) (collecting cases); see,

e.g., *Scofield*, 382 U.S. at 209 (observing that while the Court could review "the orders denying intervention," the unsuccessful intervenor "would not have been entitled to file a petition to review a judgment on the merits"); cf. *Cameron* v. *EMW Women's Surgical Center, P.S.C.*, 141 S. Ct. 1734 (2021) (No. 20-601) (granting a writ of certiorari on the question whether intervention should have been allowed, but not on whether the court of appeals' judgment on the merits should be vacated). That principle, which petitioners ignore, squarely precludes a grant of a writ of certiorari to address the second and third questions presented in their petition. See Pet. ii.

Second, even if petitioners could have sought review or vacatur of the court of appeals' December 2, 2020 judgment, they waited too long to do so. Under 28 U.S.C. 2101(c), a petition for a writ of certiorari seeking review of a judgment of a court of appeals in a civil case must generally be filed "within ninety days after the entry of such judgment or decree," with a justice of this Court authorized to "extend the time for applying for a writ of certiorari for a period not exceeding sixty days." *Ibid.* By order of March 19, 2020, the Court had extended the deadline for all petitions for writs of certiorari to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing. But the present petition was filed on June 18, 2021, which was 198 days after the court of appeals entered its judgment on the merits of the preliminary injunctions. To the extent that petitioners seek relief from this Court with respect to that decision, therefore, their petition is jurisdictionally out of time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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