No. 20-1775

In the Supreme Court of the United States

THE STATE OF ARIZONA ET AL.,
Petitioners,
v.
CITY AND COUNTY OF SAN FRANCISCO ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES

RULES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

The United States strives to make its collusive maneuvers in this case look like just another day at the office. They were not. They were unprecedented. They undermined the rule of law. They evaded the APA. And they injured Petitioner States. By denying Petitioners the chance to protect their rights through intervention, the Ninth Circuit erred.

ARGUMENT

I. Petitioners Are Entitled To Intervene Here.

Petitioners satisfied Rule 24's standards for both mandatory and permissive intervention.[1] First, Petitioners satisfied every element in Rule 24(a)(2) to intervene as of right. Indeed, two of those requirements appear to be uncontested. No Respondent contests timeliness. *See, e.g.*, U.S.Br.34 n.10. Rightly so: Petitioners filed their motion *one day* after the United States abruptly changed course, which is plainly timely under *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394-95 (1977). Nor does any Respondent contest that no remaining party adequately represents Petitioners' interests. That too is unsurprising: When Petitioners moved to intervene, the United States had abandoned defense of the Public Charge Rule, leaving no party to defend Petitioners' interests.

Thus, Respondents contest only the existence of protectable interests and the potential for impairment

[1] No Respondent appears to dispute that although Federal Rule of Civil Procedure 24 is binding only on district courts, it properly guides appellate courts in deciding motions to intervene.

of those interests. Neither objection precludes intervention.

A. Petitioners Have Protectable Interests.

1. Contrary to the United States' contention (at 21-24), the considerable monetary harm that Petitioners face here is a significant protectable interest supporting intervention of right. In the Public Charge Rule itself, DHS estimated that States would save approximately $1.01 billion annually. JA 122. The judgments enjoining the Rule thus cost the States $1.01 billion each year that they otherwise would not spend. And because the APA provides no basis for vacating or enjoining *valid* rules, *see* 5 U.S.C. §706, Petitioners have a protectable interest in not incurring economic harms resulting from unlawful APA-based judgments.

Avoiding economic injury due to unlawful conduct by other parties is a quintessential form of protectable interest. Indeed, that is a central function of common law, including contract and tort law. This Court has thus recognized that for purposes of what injuries satisfy Article III standing requirements, "[t]he most obvious are traditional tangible harms, such as physical harms and monetary harms. If a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III." *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2204 (2021).

Consistent with those holdings, the courts of appeals widely permit economic harms to qualify as "protectable interests" supporting intervention as of right—without requiring the United States' newly minted, atextual "direct" qualifier. *See, e.g.*, *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d

1111, 1115-16 (10th Cir. 2002) (contract implications); *United States v. Albert Inv. Co.*, 585 F.3d 1386, 1397-98 (10th Cir. 2009) (potential for future tort contribution); *Nat'l Parks Conservation Ass'n v. EPA*, 759 F.3d 969, 976 (8th Cir. 2014) (potential judgment requiring EPA to promulgate a rule would cause economic harm to intervenor); *Arakaki v. Cayetano,* 324 F.3d 1078, 1084 (9th Cir. 2003) (potential judgment expanding pool of eligible lease applicants could cause economic harm to current applicants); *see also United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004) ("[A] non-speculative, economic interest may be sufficient to support a right of intervention.").

Indeed, courts of appeals have routinely accepted interests far more indirect or unconventional than those advanced by Petitioners. *See, e.g.*, *Grutter v. Bollinger*, 188 F.3d 394, 398-99 (6th Cir. 1999) (prospective admission to universities); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397-98 (9th Cir. 1995) (prior participation in administrative rulemaking); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527-28 (9th Cir. 1983) (same); *Coal. Of Ariz./N.M. Counties For Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 841 (10th Cir. 1996) (prior advocacy for protection of owls). And this Court has recognized a State's interest in healthy economic competition within its borders as sufficient to justify intervention as of right. *Cascade Nat. Gas v. El Paso Nat. Gas*, 386 U.S. 129, 135-36 (1967).

And "even those circuits that pay lip service to the [more stringent] test[s] often recognize, explicitly or implicitly, that [they] must yield to pragmatic concerns." *San Juan County v. United States*, 503 F.3d 1163, 1196 (10th Cir. 2007) (collecting cases).

2. While never disputing Petitioners' interests in avoiding $1.01 billion in expenditures that the Rule would prevent, the United States contends (at 14) that Rule 24 limits intervention to entities whose "legal interests are directly and substantially at issue in an existing suit." That position is inconsistent with the applicable text, precedents, and practice. And, tellingly, their fellow Respondents reject that contention. *See* State.Br.15-18.

The United States' proposed standard flouts Rule 24(a)(2)'s text. That rule requires only "an interest," unmodified and unrestricted by any of the adjectives that the United States now tries to shoehorn in: *i.e.*, "direct," "substantial," non-"speculative", non-"downstream." U.S.Br.14, 19, 22-23, 26-27. This Court "do[es] not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply." *Jama v. ICE*, 543 U.S. 335, 341 (2005). And Congress tellingly *has* at times required "direct" interests to intervene in particular contexts—but Rule 24 does not. *See, e.g.*, 42 U.S.C. §11046(h)(2) ("[A]ny person may intervene as a matter of right when such person has a *direct* interest which is or may be adversely affected by the action[.]") (emphasis added)).

Similarly, Rule 24(a)(2) embraces a broad concept of "interest," requiring only that it "relat[e] to the property or transaction that is the subject of the action," Fed. R. Civ. P. 24(a)(2)—without dictating any particular form of relationship. Yet the United States tries to rewrite that simple requirement to be more demanding, arguing that "legal interests [must be] *directly and substantially* at issue[.]" U.S.Br.14 (emphasis added). But "directly" and "substantially" are modifiers absent from Rule 24's text.

The United States' co-Respondents tellingly refuse to endorse—or even oppose quietly—this atextual approach. As Respondent States correctly recognize (at 3), the United States' interpretation "is at odds with the text of Rule 24 and with this Court's precedents." Also quite correct is Respondent States' contention (at 3) that the United States is advancing a "novel interpretation" and that it "did not even raise that interpretive theory in the court of appeals." The United States' construction is thus both meritless and unpreserved.

The United States further argues (at 16-17, 27) that intervention as of right is limited to circumstances where a party *must* be joined under Rule 19. But the United States never even hinted at this argument below or in its brief in opposition. Petitioners thus agree with Respondent States (at 36 n.16) that the United States waived this argument.

Waiver aside, this construction violates the "'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Under the United States' interpretation, intervention as of right is largely superfluous and worthless: would-be intervenors could *elect* to intervene only in circumstances where the existing parties were likely *compelled* to join them as an original matter under Rule 19—eliminating any purpose for intervention as of right in most contexts.

Beyond that, Rule 24(a)(2)(a)'s inadequacy-of-representation requirement would serve no purpose if the protectable-interest requirement were as strict as

Rule 19. If that were correct, plaintiffs would be compelled to join would-be intervenors *even if* existing parties represented them adequately.

This is not the law, as Respondent States correctly argue (at 36 n.16). Instead, "[t]he occasions upon which a petitioner should be allowed to intervene under Rule 24 are not necessarily limited to those situations when the trial court should compel him to become a party under Rule 19." *Smuck v. Hobson*, 408 F.2d 175, 178 (D.C. Cir. 1969).

3. To bolster its atextual construction, the United States relies on *Donaldson v. United States*, 400 U.S. 517 (1971), arguing (at 21) that the Court denied intervention even with Donaldson's "obvious, but indirect, monetary interest." But *Donaldson* cannot bear the weight the United States places upon it. *Donaldson* stands for the unremarkable proposition that a taxpayer cannot intervene in a tax case to protect "routine business records in which the taxpayer has no proprietary interest of any kind." *Donaldson*, 400 U.S. at 530-31. Indeed, "*Donaldson* … hardly can be read without giving thought to its facts.… [I]t seems that any attempt to extrapolate … from *Donaldson* rules applicable to ordinary private litigation is fraught with great risks." 7C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §1908.1 (3d ed. 2021); *see also San Juan County*, 503 F.3d at 1191 ("[I]t is appropriate to keep in mind the special context of *Donaldson* when one reads the [intervention] language most commonly cited.").

Similarly, the United States relies (at 21-22) on circuit cases holding that a bare economic interest in the outcome of a case does not suffice. But those cases

offer no support here—the insufficient economic interests discussed in those cases were untethered from the case's subject matter. *See, e.g., Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3d Cir. 1995) (holding insufficient purely economic interest in ensuring that defendant has resources to also satisfy potential judgments in other cases). Under the rejected rationales, for example, every patent holder could potentially intervene in every patent suit because the resulting decision might diminish the value of its patent (and all others). So even if a direct economic loss were required (which it is not), Petitioners here will suffer economic loss as a direct result of the Public Charge Rule's invalidation itself, and not based on any collateral impacts to other interests.

4. The United States' arguments also contravene established practice of the last several decades. As Petitioner States have already argued in seeking certiorari (Reply at 6), "this Court regularly grants petitions for certiorari filed only by intervenors seeking to vindicate federal programs when the United States refuses to seek review itself." In support of this argument, Petitioners cited *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010), and *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009). After certiorari was granted, Petitioners again contended (at 25-26) that "courts routinely allow intervention by a party that does not assert a unique claim or defense," and cited, *inter alia*, *Monsanto* and *Entergy*.

The United States does not acknowledge either *Monsanto* or *Entergy*. If it had any method of reconciling its support for petitioners in those cases—who were intervenors defending governmental actions

that produced only "indirect" and "downstream" benefits for them—with their objections here, surely the United States would have provided it. Instead, its "silence is most eloquent." *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979).

Entergy and *Monsanto* are hardly unique. To take just one example, this Court recently granted a petition for a writ of certiorari filed by intervenors seeking to vindicate challenged governmental action in *Food Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356 (2019).

In *each* of those cases, the United States supported the petitioners seeking to vindicate its agencies' actions after certiorari was granted. But under its arguments here, the United States instead should have argued for all those petitions to be dismissed as improvidently granted, since the only parties invoking this Court's jurisdiction were (under its theory) not proper parties at all. It never did so.

What's more, *Entergy*, *Monsanto*, and *Food Marketing Institute* span three successive Administrations. That only underscores how well established these principles were until the United States' sudden (but unacknowledged) reversal here. Similarly, if the United States consistently believed the position it espouses now, it should be able to point to dozens of briefs opposing certiorari on this very basis. Instead, it has not cited even one, and Petitioners are not aware of any.

B. Petitioners' Interests Could Be Impaired By The Outcome Of This Suit.

The non-federal Respondents do not argue that the States lack protectable interests. *See* State.Br.15-19; City.Br.13. That makes perfect sense since they regularly intervene in similar postures. *See, e.g.*, *California v. Texas*, 141 S.Ct. 2104, 2113 (2021). But those Respondents do dispute that the outcome here could impair Petitioners' protectable interests. They are mistaken.

1. Petitioners' interests are not rendered non-protectable by the geographic scope of the preliminary injunctions because courts routinely recognize that the effects of immigration policies cannot be confined to the States in which they operate. *See, e.g.*, *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015) ("[T]here is a substantial likelihood that a geographically-limited injunction would be ineffective because DAPA beneficiaries would be free to move among states[.]"). Furthermore, this litigation could still result in a second nationwide vacatur of the Rule, or new permanent injunctions against it, and has set binding circuit-wide precedent that impedes Petitioners' interests going forward. Indeed, under the Ninth Circuit's published opinion, it is difficult to see how plaintiffs could fail to prevail in any of the three underlying district court actions.

2. Similarly, the prospect that the Government might (or might not) soon enact another final rule does not render Petitioners' interests non-protectable. Notice-and-comment procedures exist to prevent rules from going into effect until *after* those procedures are complete. Petitioners' interests are harmed

continuously until the new rule is put into effect.[2] And Petitioners' protectable interests in the validity of the 2019 Public Charge Rule would continue after any new rule issued because the outcome of this litigation will alter the baseline against which a vacatur of the future rule would be implemented.

C. Alternatively, Petitioners Should Have Been Granted Permissive Intervention.

No set of Respondents defends the Ninth Circuit's actual reasoning as to why it denied permissive intervention. How could they? No such reasoning actually exists. Nor does any Respondent deny that the Ninth Circuit's failure to supply any reasoning was itself an abuse of discretion—particularly in light of the fulsome dissent to which the majority would not respond and this Court's prior grant of certiorari.

Because they cannot defend the Ninth Circuit's non-existent reasoning, Respondents are left positing hypothetical rationales that the Ninth Circuit *could* have offered and explaining why those would not have been an abuse of discretion. But just as the Ninth Circuit recognizes that "[a] district court's failure to exercise discretion constitutes an abuse of discretion,"

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[2] The States did not comment on the advanced notice of proposed rulemaking because they had no obligation to do so, other commenters expressed their objections, and DHS already has ample notice of their arguments. *See, e.g.*, *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1292 (D.C. Cir. 2004) (holding there was no waiver where the agency was aware of party's argument and had "a 'fair opportunity' to pass on" it). If there is an actual proposed rule (as opposed to advanced notice of a proposed rule), the States intend to comment on it and thereby preserve challenges to it.

Taylor v. Soc. Sec. Admin., 842 F.2d 232, 233 (9th Cir. 1988), the Ninth Circuit's own failure to engage in any apparent *exercise* of discretion here abused that discretion. The Ninth Circuit's own logic is reason enough to remand here.

Respondent States note (at 18) that many of them recently prevailed in *California v. Texas* after invoking this Court's jurisdiction purely based on their *permissive* intervention. Their suggestion that this case is somehow distinguishable is wrong. Just as in *California v. Texas*, because "federal defendants abandoned any defense," State.Br.18, permissive intervention was warranted here. Indeed, it is appropriate *a fortiori* here since California and the others intervened permissively in *California v. Texas* based on their mere speculation that the United States *might* abandon its defense of the Affordable Care Act ("ACA"). But here, that abdication was an accomplished fact when permissive intervention was sought.

The United States, in contrast, attempts to distinguish (at 26) *California v. Texas* because that case involved states "entitled to receive direct payments from the federal government." But that is simply another way of saying that California and other states would receive "downstream economic benefits," U.S.Br.11, *if—and only if*—the ACA remained valid. If the United States' newly minted position had applied in *California*, the Federal Government alone had a "direct, legally protectable interest" in the ACA remaining valid, making *everyone* else's interests "downstream" from that purportedly "direct" interest in the federal statute and hence not "protectable" under Rule 24. The United States thus not only invents new atextual

requirements here, but also fails to apply them coherently or consistently.

Of course, Petitioner States do not even require a protectable interest for permissive intervention, so the United States' effort to distinguish *California v. Texas* is inapposite.

II. Respondents' Mootness Arguments Remain Unpersuasive.

The judgments against the Public Charge Rule result in increased costs to the States collectively of over $1 billion every year and thereby injure Petitioner States. JA 122; *see also Cook County v. Mayorkas*, No. 19-C-6334, 2021 WL 3633917, at *4 (N.D. Ill. Aug. 17, 2021) (The "measurable financial cost" that the Rule's rescission imposes on the States "qualifies as an injury in fact[.]"). Upon intervening in this case, Petitioners will seek to have the underlying judgments against the Rule vacated or reversed. If Petitioners succeed here and in parallel cases, then the Public Charge Rule will be reinstated. That reinstatement will remedy Petitioners' injuries by restoring their budgets. *See Cook County*, 2021 WL 3633917, at *5 ("As for traceability and redressability, the Rule's vacatur causes the States' injuries, and restoring the Rule would redress them."). Accordingly, the case is not moot.

Yet Respondents reason that the case is moot because the United States has rescinded the Public Charge Rule. State.Br.20. But the United States predicated that rescission purely on the validity of the judgment against the original Rule. *See* Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. 14,221, 14,221 (Mar. 15, 2021). It was an automatic

"implement[ation]" of the Northern District of Illinois's judgment. *Id*. The United States does not contest that if the judgment Petitioners now challenge is vacated or reversed, it would withdraw that rescission. Tellingly, the United States contends that this case became moot not because of the rescission, but "as a result of a final judicial decree vacating the 2019 Rule." U.S.Br.36. That's because the rescission lives or dies with the judgment. If the underlying judgment is reversed or vacated, the Public Charge Rule will indeed "spring back to life[.]" State.Br.22.

Respondents correctly point out that this is not a conventional voluntary-cessation case. Both Respondent States and the United States reason that the rescission of the Rule was not "voluntary" because it was based on "compliance with a binding judgment of a federal court[.]" State.Br.21; U.S.Br.36. But this Court has held in many contexts that "compliance with a judicial decision does not moot a case if it remains possible to undo the effects of compliance[.]" *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S.Ct. 1652, 1661 (2019) (cleaned up). And it is hornbook law that when a government defendant "amend[s] an ordinance or regulation as required by an injunction," the "possibility of later repeal or revision defeats mootness." 13B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §3533.2.2 (3d ed. 2021). Here, the rescission easily can be repealed or revised—and will be if Petitioners prevail on their merits arguments. This case is thus not moot.

Respondent States therefore also err by contending (at 21) that the rescission cannot be "temporary" because "DHS has excised the rule[.]" A case is moot only if it is "absolutely clear that the

allegedly wrongful behavior could not reasonably be expected to recur," but not if the status quo may be temporary. *United States v. Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968). Yet here, if the judgment against the Rule is reversed or vacated, the Rule will come back into effect and the "allegedly wrongful behavior" will recur.

Respondents next contend that this case is moot because Petitioners' relief depends upon their eventual success in *both* this case and the Illinois litigation. State.Br.22-23. It is true that a reversal or vacatur of the injunctions underlying this appeal will not singlehandedly remedy Petitioners' injuries. But litigants often face multiple independent hurdles to relief. The United States itself did earlier in this litigation when it appealed four nationwide injunctions against the Rule. Though the United States' ultimate redress in having the Rule go into effect depended on what may have been described as "speculative contingencies" about its success in parallel litigation, *see* State.Br.23, the judiciary retained jurisdiction to hear each individual appeal. The same must be true here, or litigants will be stymied whenever they must step into the United States' shoes in two or more cases.

Importantly, while reversal or vacatur of the Illinois judgment is necessary to Petitioners' full relief, it is not sufficient. If the Illinois judgment is reversed or vacated, plaintiffs in the underlying cases here will continue challenging the Rule and seeking injunctive relief. Petitioners must be allowed to intervene here since they are the only entities committed to defending the Rule and their interests in it.

Respondents suggest that even if the Illinois judgment is vacated or reversed, the injunctions underlying this case do not injure Petitioners because of their geographical limits. City.Br.19 n.4; State.Br.25 n.12. But "there is no dispute that the rule, in fact, caused large numbers of individuals to … disenroll in public benefits," U.S.Br.45, and also presumably no dispute that those who will disenroll are now "free to move among states," *Texas*, 809 F.3d at 188. Accordingly, the injunctions' effects cannot be so neatly limited.

Finally, Respondents say that the case is not moot because they predict that they will win in the parallel Illinois litigation. Respondent States admit that if the Illinois judgment is reversed on the merits, it would "result[] in a live controversy" here, but say that such an outcome is so "speculative" that this case must be moot. State.Br.23. The United States (at 36) calls the possibility that it loses on the merits in the Illinois litigation "remote" because (it claims) the Seventh Circuit's holding in *Cook County v. Wolf*, 962 F.3d 208 (7th Cir. 2020), ensures otherwise. It acknowledges the possibility that "*this* Court might still take up the Northern District of Illinois litigation, reverse the district court's final judgment, and hold that the 2019 Rule was lawful." U.S.Br.36. Whether "this preliminary-injunction appeal [is] technically moot," the United States says, depends on "the odds of that occurring." *Id.*

As an initial matter, Respondents misjudge Petitioners' likelihood of success on the merits following a reversal here. If this Court reverses the Ninth Circuit's denial of intervention, then the Seventh Circuit will almost certainly reverse the Northern District of Illinois's denial of intervention.

Cook County v. Texas, No. 21-2561 (7th Cir. Aug. 24, 2021). As Intervenors in both cases, Petitioners might well win a vacatur or reversal of the underlying judgments on the merits—a conclusion bolstered by this Court's two stay rulings premised on a finding that injunctions against the Rule were likely to be reversed by this Court. *DHS v. New York*, 140 S.Ct. 599 (2020); *Wolf v. Cook County*, 140 S.Ct. 681 (2020); *see Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (stay requires "a fair prospect that a majority of the Court will vote to reverse the judgment below"). Beyond that, of course, this Court has already twice exercised its discretionary jurisdiction to review orders related to the same judgments that Petitioners would challenge here. *DHS v. New York*, 141 S.Ct. 1370 (2021); *Arizona v. City & County of San Francisco*, 142 S.Ct. 417 (2021).

More to the point, mootness does not depend on any party's predictions about the merits outcomes of future litigation. *See Chafin v. Chafin*, 568 U.S. 165, 174 (2013). It will be "for lower courts," and possibly this Court, "at later stages of the litigation to decide" whether Petitioners are "in fact entitled to the relief" that they seek. *Id.* at 177. What matters now is that the possibility of relief not be "so implausible that it may be disregarded" for purposes of jurisdiction. *Id.* A case is moot "only when it is *impossible* for a court to grant *any effectual relief whatever* to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (cleaned up) (emphasis added).

By themselves, this Court's multiple orders about *this same Rule* confirm that the possibility of eventual merits relief here is not implausible. Thus Respondents' probabilistic arguments necessarily fail.

At a minimum, even if the case were otherwise moot, Petitioners are entitled to intervene to seek *Munsingwear* vacatur. *Munsingwear* vacatur is a "flexible" equitable remedy available after a case has become moot on the merits. *Alvarez v. Smith*, 558 U.S. 87, 94 (2009). It is especially appropriate where, as here, the parties seeking vacatur played no role in causing the litigation to end. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994) (vacatur inquiry should focus on whether petitioner "caused the mootness" because "suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks"). Equitable considerations also favor vacating a judgment insulated from review by this Court, especially since this Court had already decided to review the Rule's merits. *Cf. Knox*, 567 U.S. at 307 ("postcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye").

The United States says (at 35) that Petitioners' suggestion of *Munsingwear* vacatur is "circular" because *Munsingwear* is a post-mootness remedy. If the United States' argument sounds familiar, that's because it's the same one that the *Bancorp* respondent raised and this Court rejected. In *Bancorp*, the respondent argued that "when no live dispute exists due to a settlement that has rendered a case moot," this Court may not continue the litigation for the purposes of vacatur. 513 U.S. at 21.

Not so, this Court held. "Article III does not prescribe such paralysis." *Id.* at 21. Although "a case must exist at all the stages" of litigation, "reason and authority refute the quite different notion that a federal appellate court may not take any action with regard to a piece of litigation once it has been

determined that the requirements of Article III no longer are … met." *Id.* Such a court "may make such disposition of the whole case as justice may require," including those "matters of judicial administration and practice" that are "reasonably ancillary to the primary, dispute-deciding function" of the judiciary. *Id.* at 21-22. Any other view was "contradicted whenever an appellate court … vacates [an underlying] decision" or "award[s] costs." *Id.* at 21.

Respondent States argue (at 29) that even if *Munsingwear* vacatur were otherwise proper, it can be awarded only upon the request of "existing parties" and that therefore Petitioners will be forbidden to seek it upon intervening. But courts vacate decisions based on *Munsingwear* even when no party moves for such relief. *See, e.g.*, *Weaver v. United Mine Workers of Am.*, 492 F.2d 580, 587 n.36 (D.C. Cir. 1973); *N. Cal. Power Agency v. Nuclear Regul. Comm'n*, 393 F.3d 223, 225 (D.C. Cir. 2004).[3] And Petitioners will seek vacatur only after this Court reverses the denial of intervention below. At that point, they will be "treated as ... an original party" and have "equal standing with the original parties." 7C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §1920 (3d ed. 2007).

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[3] Because courts may order vacatur *sua sponte*, Petitioner States cannot have forfeited it by not addressing it "until their reply brief" in their motion to intervene. *See* State.Br.29. And even if it could be forfeited, Petitioners did not do so because they raised the issue of vacatur at the earliest possible time: at the first moment when it became clear that anyone believed the case might be moot. *See, e.g.*, *Am. Fam. Life Assurance Co. of Columbus v. FCC*, 129 F.3d 625, 630 (D.C. Cir. 1997) (ordering vacatur even though issue was apparently first addressed in supplemental briefing).

In sum, when a prospective intervenor satisfies Rule 24, it may intervene to appeal a judgment that impedes its interests, so long as the reversal of that judgment is necessary to its complete relief. Even when its complete relief becomes impossible, such a prospective intervenor is entitled to intervene to seek *Munsingwear* vacatur of any underlying judgments that were shielded from appellate review by the original parties' manipulative litigation tactics.

III. Respondents' Defenses Of This Repeal Underscore The Importance Of Intervention.

Respondents contend that there was "nothing remotely unusual" about the United States' method of repealing the Public Charge Rule. City.Br.23. According to the United States, it was "hardly unprecedented" when—within one week's time—the Government dismissed all pending appeals, including a pending merits case in this Court, then rescinded the Rule without notice and comment based on one adverse district court judgment. U.S.Br.12. The United States tries to justify its conduct by emphasizing the Solicitor General's "authority to determine not just how but whether to pursue appellate review." U.S.Br.40-42. And it contends that it has followed this same course at least eleven times before. *Id.* 38-39.

But the universe of exemplars the United States cites after scouring 20 years of precedent are run-of-the-mill cases that do not remotely resemble what happened here. In three of its examples, the United States lost before courts of appeals and declined to seek certiorari. *See* U.S.Br.38 n.11 (citing *Merck & Co. v. HHS*, 962 F.3d 531 (D.C. Cir. 2020); *Chamber of*

Com. of U.S. v. DOL, 885 F.3d 360 (5th Cir. 2018); *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015)). It proceeded to rescind the underlying regulations, if at all, years later. *See* Conflict of Interest Rule—Retirement Investment Advice: Notice of Court Vacatur, 85 Fed. Reg. 40,589 (July 7, 2020) (rescinding regulation held unlawful in 2018).

In six of its examples, the United States lost before district courts, appealed to courts of appeals, and eventually dismissed those appeals. *See* U.S.Br.38 n.11 (citing *Linares v. Jackson*, 548 F.Supp.2d 21 (E.D.N.Y. 2008), *Boardley v. DOI*, 605 F.Supp.2d 8 (D.D.C. 2009), *Gonzales & Gonzales Bonds & Ins. Agency Inc. v. DHS*, 913 F.Supp.2d 865 (N.D. Cal. 2012), *Latif v. Holder*, 28 F.Supp.3d 1134 (D. Or. 2014), *Desert Survivors v. DOI*, 336 F.Supp.3d 1131 (N.D. Cal. 2018), *Tiwari v. Mattis*, 363 F.Supp.3d 1154 (W.D. Wash. 2019)). For example, in *Desert Survivors*, a district court held that the Department of Interior improperly withdrew a proposed regulation about the classification of a bird called the "greater sage-grouse" and should have given the proposal more consideration. 336 F.Supp.3d at 1133. The Department appealed but eventually dismissed its appeal. 18-17054, Doc. 9 (9th Cir. Nov. 13, 2018). Five months later, it implemented the district court order. 84 Fed. Reg. 14,909 (Apr. 12, 2019).

And in two of the United States' eleven examples, it lost before the district court and did not appeal its loss. *See* U.S.Br.38 n.11 (citing *Free Speech Coal., Inc. v. Holder*, 957 F.Supp.2d 564 (E.D. Pa. 2013), *NAACP v. DeVos*, 485 F.Supp.3d 136 (D.D.C. 2020)). For example, in *Free Speech Coalition, Inc. v. Holder*, the district court ruled for the United States on all claims except a Fourth Amendment challenge to a record-

inspections practice that the FBI had "dismantled" five years earlier and was "moribund." 957 F.Supp.2d at 570. The United States did not appeal that portion of the district court's judgment.

In no case cited by the United States had it already secured relief from the judgment against it when it stopped litigating. In other words, in each of these cases, the United States' abandonment did not affect the status quo as it did in this case. Likewise, in no case cited by the United States did it abandon its litigation while its certiorari petition was pending before this Court, let alone after this Court had granted it.

And in none of those eleven cases did the United States oppose motions to intervene. When parties moved to intervene to defend the challenged policies, the United States either consented or took no position. *See, e.g.*, Mot. to Intervene, *Nat'l Ass'n of Mfrs.*, No. 12-1422, at 1 (D.C. Cir. Nov. 19, 2012) ("The SEC consents to Amnesty International's intervention"); Mot. to Intervene, *Desert Survivors*, No. 3:16-cv-01165-JCS, Doc. 36 (N.D. Cal. Nov. 4, 2016).

In short, not one of those cases mirrors what happened below. Here, the United States won multiple stays—including two from this Court—of injunctions against the Rule. That left the United States free to enforce its regulation nationwide while litigating the Rule's validity on the merits—including in this Court. But without warning, it abandoned that ongoing litigation, including voluntarily dismissing its own successful certiorari petition. It thus effectively reimposed on itself the injunctions this Court had deemed unwarranted, and rescinded the Rule less than a week later on that basis alone. Not

one of the United States' cited cases comes close to demonstrating a similar broadly coordinated, multi-front rush to abandon its defense of a notice-and-comment rule when all objective indicators pointed to a likelihood of success. That the United States did all this while relentlessly staving off intervenors only further distinguishes the cited cases; not one of the United States' examples shows similar governmental strivings to preclude would-be rule defenders from vindicating their interests.

For similar reasons, the City and County Respondents' comparisons to past litigation miss the mark. *See* City.Br.23-27, 29-30. The litigation over the Department of Labor's salary rule resulted in a final injunction, but the United States appealed it. *Nevada v. DOL*, 275 F.Supp.3d 795, 808 (E.D. Tex. 2017). The United States did not immediately dismiss its appeal but instead moved to hold its appeal in abeyance until after it had repealed the rule through notice and comment. *Nevada v. DOL*, No. 17-41130 (5th Cir. Nov. 3, 2017 & Nov. 6, 2017). And the litigation over the Department of Labor's conflict-of-interest rule culminated in a Court of Appeals decision against the United States. *Chamber of Com. of U.S.*, 885 F.3d at 363. The United States then took another two years to rescind the rule. 85 Fed. Reg. 40,589. In short, the United States' abandonment of the Rule was unprecedented.

Even so, its impact would have been short-lived had the State Petitioners been granted intervention. As Intervenors, they could have preserved their rights by defending the Rule and requiring the United States to follow its traditional administrative repeal processes. But after the Ninth Circuit improperly refused to let Petitioners intervene to defend the Rule,

the United States' sole control over its turn-tail litigation strategy ripened into an APA-crushing scheme to repeal a notice-and-comment rule without notice and comment. Whatever the United States' prerogative to abandon its successful certiorari petitions, its discretion does not prevent other injured parties from intervening to protect their rights and carry the load the United States has dropped. The Ninth Circuit erred by concluding otherwise.

CONCLUSION

This Court should reverse the Ninth Circuit's judgment denying Petitioners' motion to intervene and remand with instructions to grant that motion.

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