IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY AND COUNTY OF SAN FRANCISCO, and COUNTY OF SANTA CLARA, Plaintiffs-Appellees, v. UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, et al., Defendants-Appellants.	No. 19-17213
STATE OF CALIFORNIA, et al., Plaintiffs-Appellees, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al., Defendants-Appellants.	No. 19-17214
STATE OF WASHINGTON, et al., Plaintiffs-Appellees, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al., Defendants-Appellants.	No. 19-35914

RESPONSE IN OPPOSITION TO MOTION TO INTERVENE

Arizona and eleven other States (collectively, Movants) seek to intervene in these appeals of two preliminary injunctions barring the Department of Homeland Security (DHS) from implementing its August 2019 public-charge rule (the Rule). *See City & County of San Francisco v. USCIS*, 981 F.3d 742, 753 (9th Cir. 2020). The motion to intervene should be denied.

These appeals no longer present a live controversy. On November 2, 2020, the District Court for the Northern District of Illinois entered a final judgment vacating the Rule nationwide. The government initially appealed, but recently voluntarily dismissed its appeal, such that the Illinois court's judgment is final; the Rule has been vacated nationwide; and DHS has accordingly removed the Rule from the *Code of Federal Regulations*. As a result, the Rule is no longer in effect, and the preliminary injunctions at issue in these appeals have no effect.

Even if the motion to intervene were not moot, intervention would not be proper. "In determining whether intervention is appropriate," this Court is "guided primarily by practical and equitable considerations." *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). Such considerations do not support intervention here. The preliminary injunctions at issue in this case do not apply in Movants' jurisdictions. *See City & County of San Francisco*, 981 F.3d at 763 ("vacat[ing] that portion of the Eastern District's injunction making it applicable nationwide"). Moreover, Movants have had ample opportunity to seek intervention to protect their interests in this litigation and in the numerous other suits involving the Rule while those suits were pending, but did

not do so. Indeed, before Movants' late-breaking motions to intervene, they had never participated in any capacity in the public-charge cases, even as amicus curiae. And if Movants favor a different public-charge policy, they can use well-established procedures to request one. Neither practical nor equitable considerations support permitting the States to belatedly intervene to defend the now-defunct Rule.

STATEMENT

1. On August 14, 2019, DHS published a final rule implementing the Immigration and Nationality Act's public-charge inadmissibility provision, 8 U.S.C. § 1182(a)(4)(A). Plaintiffs filed suits in this Circuit, and other plaintiffs filed suits in other Circuits challenging the Rule and seeking preliminary injunctive relief. District courts in California, Washington, Illinois, New York, and Maryland entered preliminary injunctions barring the Rule's enforcement. *See City & County of San Francisco v. USCIS*, 981 F.3d 742, 749-50 (9th Cir. 2020).

A motions panel of this Court granted the government's request for a stay pending appeal of the California and Washington preliminary injunctions, *see City & County of San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019), but in December 2020, after full briefing and argument, this Court affirmed the California and Washington preliminary injunctions against the Rule, while limiting their geographic scope to the plaintiffs' jurisdictions, *City & County of San Francisco*, 981 F.3d at 756-63. The merits panel concluded that plaintiffs were likely to prevail in establishing that the Rule was contrary to the INA and was arbitrary and capricious. *Id.*

One month later, in January 2021, the government filed a petition for a writ of certiorari from this Court's decision. *See USCIS v. City & County of San Francisco*, No. 20-962 (S. Ct.). In the petition, the government asked the Supreme Court to hold the case pending the resolution of petitions for writs of certiorari filed in other cases, described below.

2. The public-charge cases have proceeded on different paths in the other circuits. Like this Court, the Fourth Circuit issued a stay pending the government's appeal of the preliminary injunction entered by the district court in Maryland. A panel of the Fourth Circuit subsequently issued a decision reversing the Maryland preliminary injunction on the merits, *see CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 237 (4th Cir. 2020), but the full Court vacated that decision and granted rehearing in December 2020, *see* 981 F.3d 311 (mem.).

The Second and Seventh Circuits declined to issue stays pending the government's appeals of preliminary injunctions entered by district courts in Illinois and New York. *See City & County of San Francisco*, 981 F.3d at 750. The Supreme Court granted the government's request for stays of the injunctions pending disposition of any petitions for writ of certiorari in the Second and Seventh Circuit cases. *DHS v. New York*, 140 S. Ct. 599 (2020); *Wolf v. Cook Cty.*, 140 S. Ct. 681 (2020).

The Second and Seventh Circuits subsequently entered decisions affirming the preliminary injunctions on the merits (though, in the case of the Second Circuit,

limiting its geographic scope). *See New York v. U.S. Dep't of Homeland Security*, 969 F.3d 42 (2d Cir. 2020); *Cook County v. Wolf*, 962 F.3d 208 (7th Cir. 2020). On October 7, 2020, the government filed petitions for writs of certiorari in both cases. *See Department of Homeland Security v. New York*, No. 20-449 (S. Ct.); *Wolf v. Cook County*, No. 20-450.

Meanwhile, on November 2, 2020, the District Court for the Northern District of Illinois granted the plaintiffs' request for partial summary judgment and entered a Rule 54(b) judgment vacating the Rule on a nationwide basis. *Cook County v. Wolf*, 2020 WL 6393005 (N.D. Ill. Nov. 2, 2020). The government appealed the Rule 54(b) judgment and the Seventh Circuit stayed that judgment pending the Supreme Court's resolution of the pending certiorari petitions. *See Cook County v. Mayorkas*, No. 20-3150 (7th Cir).

3. On February 22, 2021, the Supreme Court granted certiorari in the Second Circuit case. *See Department of Homeland Security v. New York*, No. 20-449 (S. Ct.).

Two weeks later, on March 9, 2021, the parties to all three cases then pending in the Supreme Court—from this Court, the Second Circuit, and the Seventh Circuit case—filed joint stipulations in the Supreme Court to dismiss the cases. The Supreme Court entered orders dismissing all three cases.

In the Fourth Circuit, the government filed an unopposed motion to dismiss its appeal of the Maryland court's preliminary injunction, and the Fourth Circuit dismissed the case and issued its mandate. *See* Order, *CASA de Maryland, Inc. v. Biden*,

No. 19-2222 (4th Cir. Mar. 11, 2021). Prospective intervenors in this Court filed motions to recall the mandate and intervene in the Fourth Circuit case, but on March 18, 2021, the Fourth Circuit denied those motions without awaiting a response. *See* Order, *CASA de Maryland, Inc. v. Biden*, No. 19-2222 (4th Cir.).

The government also filed an unopposed motion to voluntarily dismiss its appeal of the Illinois district court's Rule 54(b) judgment. The Seventh Circuit granted the government's motion, dismissed the appeal, and issued its mandate. *See* Order, *Cook County v. Mayorkas*, No. 20-3150 (7th Cir. Mar. 9, 2021). Prospective intervenors in this Court filed motions in the Seventh Circuit asking the court to recall its mandate in the Rule 54(b) appeal, to grant them leave to intervene in that case, and to reconsider its order dismissing the appeal. The Seventh Circuit denied those requests on March 15, 2021, without awaiting a response. *See* Order, *Cook County v. Mayorkas*, No. 20-3150 (7th Cir. Mar. 15, 2021). On March 19, 2021, prospective intervenors applied to the Supreme Court for leave to intervene and for a stay of the Illinois district court's judgment pending a petition for certiorari from the Seventh Circuit's grant of voluntary dismissal. *See Texas v. Cook County*, No. 20A-___ (S. Ct.). In the alternative, prospective intervenors requested summary reversal of the Seventh Circuit's denial of their various motions to recall the mandate, allow intervention, and reconsider dismissal. *Id.*

DHS has published a rule in the *Federal Register* to "implement[] the district court's vacatur of the August 2019 rule, as a consequence of which the August 2019

rule no longer has any legal effect." Department of Homeland Security, *Inadmissibility on Public Charge Grounds; Implementation of Vacatur*, 86 Fed. Reg. 14,221, 14,221 (Mar. 15, 2021).

ARGUMENT

Prospective intervenors' motion to intervene should be denied. These appeals and the intervention motion do not present a live controversy. These appeals concern preliminary injunctions entered against the Rule. But another court has permanently vacated the Rule in a final judgment. Thus, a decision by this Court or the Supreme Court reversing the preliminary injunctions at issue here would not provide any party, including prospective intervenors, any relief. In addition, the preliminary injunctions at issue here no longer apply within Movants' jurisdictions because this Court narrowed them to apply only within plaintiffs' jurisdictions. Movants' belated request to insert themselves into this litigation is, in any event, improper on its own terms.

I. This Appeal Does Not Present A Live Controversy

"An appeal is moot"—and a motion to intervene properly denied—"if there exists no 'present controversy as to which effective relief can be granted.'" *West Coast Seafood Processors Ass'n v. Nat. Res. Def. Council, Inc.*, 643 F.3d 701, 704 (9th Cir. 2011) (quoting *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007)). This Court's decision in *West Coast Seafood* is illustrative. In that case, the plaintiffs challenged a regulatory action taken by the National Marine Fisheries Service. 643 F.3d at 703-04. The West Coast Seafood Processors Association moved

to intervene to defend one element of the Service's action. *Id.* The district court denied the intervention motion, and the Processors Association appealed. *Id.* While the appeal was pending, the district court entered final judgment against the Service and the Service did not appeal. *Id.* at 704. Because the underlying litigation was over, this Court concluded that there was no "effective relief" it could grant the Processors Association by allowing it to intervene. *Id.* It therefore dismissed the Processors' appeal as moot. *Id.* at 705.

As in *West Coast Seafood*, there is no "effective relief" this Court could grant Movants by allowing them to intervene now. These appeals concern two preliminary injunctions temporarily barring the Department of Homeland Security from implementing the Rule. *See City & County of San Francisco v. USCIS*, 981 F.3d 742, 753-54 (9th Cir. 2020). But those injunctions are not the reason that the Rule no longer applies in the States that now seek to intervene. The United States District Court for the Northern District of Illinois has issued a final judgment vacating the Rule nationwide, *Cook County v. Wolf*, 2020 WL 6393005 (N.D. Ill. Nov. 2, 2020), and the government's appeal from that ruling has been dismissed. It is that ruling, and not the injunctions at issue here, that has caused the government to stop enforcing the Rule in Movants' jurisdictions.

Movants have now asked the Supreme Court to stay the effect of the final judgment of vacatur, which would require the Supreme Court to conclude (among other things) that the Seventh Circuit had abused its discretion in refusing to recall the

mandate, that Supreme Court review of that supposed error was warranted, and that a stay of the underlying judgment is appropriate even though the government, whose interests the prior stays in these cases were designed to protect, no longer seeks a stay. Even if Movants were successful in those respects, moreover, they could still not establish that this appeal presents a live controversy, because this Court narrowed the scope of the preliminary injunctions at issue here to the plaintiffs' jurisdictions, such that the injunctions do not apply in Movants' jurisdictions at all. *City & County of San Francisco*, 981 F.3d at 763. Movants' speculation (Mot. 8 n.9) that one of the district courts may issue a judgment on remand that does apply within their jurisdictions is no substitute for a concrete interest in the preliminary injunctions that are at issue in these appeals.

Accordingly, even if this Court permitted Movants to intervene in this appeal, an order setting aside the preliminary injunctions at issue would provide them with no relief. The motion to intervene should therefore be denied.

II. The Motion To Intervene Should Be Denied In Any Event

Even if these appeals presented a live controversy, intervention would nonetheless be improper. Movants ask this Court to allow them to intervene either as of right or with the Court's permission. *See* Mot. 5-10; *see also* Fed. R. Civ. P. 24. A party seeking to intervene "in a pending federal action as a matter of right must satisfy four requirements, namely that: (1) it has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the

action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest." *S. California Edison Co. v. Lynch*, 307 F.3d 794, 802 (9th Cir. 2002). "[A] court may grant permissive intervention where the applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *Id.* at 803. "In determining whether intervention is appropriate," this Court is "guided primarily by practical and equitable considerations." *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998).

Neither practical nor equitable concerns justify intervention at this late stage in the litigation. Movants seek to intervene in these appeals so that they can petition the Supreme Court to review the preliminary injunctions at issue and opine upon the validity of the Rule. Mot. 5-6. For the reasons noted above, the Supreme Court's review of the preliminary injunctions at issue here would serve no practical purpose—in particular because the preliminary injunctions at issue do not apply in Movants' jurisdictions, and because the only mechanism by which the injunctions at issue here would be relevant to anyone would be if Movants could persuade the Supreme Court to hear their claims in a different case.

Moreover, the motion comes very late in this litigation. The government filed petitions for certiorari asking the Supreme Court to review parallel injunctions against the Rule in October 2020. Those petitions were pending for several months when, on

February 22, 2021, the Supreme Court granted certiorari to review the New York injunctions. Another two weeks passed before the federal government moved to voluntarily dismiss the case and the other pending certiorari petitions concerning the Rule. At no point in that time period did Movants ask the Supreme Court (or this Court or the district court) to allow them to intervene to defend their interests. Movants have also not previously participated in the cases, or any of the other related litigation, even in an amicus capacity. And their lack of involvement or expressed interest persisted even after President Biden, on February 2021, directed the Secretary of Homeland Security and other Executive Branch officials to give fresh consideration to the government's approach to public-charge determinations. *See* Executive Order 14012, 86 F3d. Reg. 8277 (Feb. 5, 2021). Having chosen not to participate in this (or related) litigation while it continued to present a live controversy, Movants cannot invoke equitable considerations in support of their attempt to intervene in the litigation now. *See Esta Later Charters, Inc. v. Ignacio*, 875 F.2d 234, 239 n.11 (9th Cir. 1989) ("[E]quity aids the vigilant, not those who slumber on their rights.").

Intervention is also inappropriate here because the prospective intervenors have other avenues available to protect their interests. *See, e.g.*, *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004) (affirming denial of motion to intervene because proposed intervenor had "other means by which [it] may protect its interests"). As noted, DHS has begun a review of its public-charge policies and must

complete that review by early April 2021. 86 Fed. Reg. at 8278. Movants can provide their views to the agency during that review or any time thereafter. They may also petition the agency for a new rule. *See* 5 U.S.C. § 553(e).

CONCLUSION

For the reasons discussed above, the motion to intervene should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation of Circuit Rule 27-1(d) because it contains 2,653 words.

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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2021, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. I also hereby certify that the participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

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