No. 20M81

In the Supreme Court of the United States

THE STATE OF ARIZONA, ET AL.,

Movants,

v.

CITY AND COUNTY OF SAN FRANCISCO, ET AL.,

Respondents.

OPPOSITION OF THE STATES OF CALIFORNIA, MAINE, OREGON, PENNSYLVANIA, AND THE DISTRICT OF COLUMBIA TO MOTION FOR LEAVE TO INTERVENE

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STATEMENT

1. The Immigration and Nationality Act (INA) provides that a non-citizen is "inadmissible" to the United States if, "in the opinion of the" Secretary of Homeland Security, the immigrant is "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). The INA does not define the term "public charge," but it directs the Secretary to consider certain factors when making a public charge determination, including the non-citizen's age, health, family status, assets, resources, financial status, education, and skills. *Id.* § 1182(a)(4)(B)(i).

In 2019, the Department of Homeland Security (DHS) adopted a rule defining "public charge" to mean a non-citizen who receives one or more specified public benefits for more than 12 months in the aggregate within any 36-month period. *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,501 (Aug. 14, 2019). The specified benefits included cash assistance as well as certain federal non-cash benefits, such as for healthcare, housing, and nutrition assistance. *Id.* Under the 2019 rule, a "broader" and "expanded" group of non-citizens were potentially inadmissible to the United States than under the interpretation that had previously governed public charge determinations for two decades. *See id.* at 41,321, 41,348.

2. Shortly after DHS adopted the 2019 public charge rule, the States of California, Maine, Oregon, Pennsylvania and the District of Columbia sued on APA and constitutional grounds in the Northern District of California. Pet. App. 113. The district court heard the case with a similar suit filed by the City

and County of San Francisco and the County of Santa Clara. *Id.* at 112. Following briefing, it granted a preliminary injunction that was limited in scope to the territory of the plaintiff States and local governments. *Id.* at 300-307.

A motions panel of the court of appeals stayed the preliminary injunction pending appeal. Pet. App. 90-170. A separate merits panel later affirmed the preliminary injunction and also substantially affirmed a separate preliminary injunction entered by the Eastern District of Washington in a suit filed by a different group of States. *Id.* at 41-88.[1] The court of appeals concluded that the plaintiffs were likely to prevail on the claim that the 2019 public charge rule was contrary to law. *Id.* at 77. It also concluded that they were likely to succeed on the claim that the rule was arbitrary and capricious and adopted pursuant to a flawed rulemaking process. *Id.* at 77-85. It held that the district courts had properly entered preliminary injunctions, but vacated "that portion of the Eastern District's injunction making it applicable nationwide." *Id.* at 88. Judge Van Dyke dissented. *Id.* at 89.

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[1] In the Washington case, the district court had granted a preliminary injunction that was nationwide in scope. Pet. App. 308-368. The court of appeals consolidated the appeals of the preliminary injunctions in the California and Washington cases, as it had done with the stay proceedings. *Id* at 58.

On January 21, 2021, this Court docketed the federal government's petition for a writ of certiorari seeking review of the court of appeals' judgment affirming the preliminary injunctions. *See* No. 20-962 (Jan. 21, 2021).

3. Other courts also considered challenges to the 2019 public charge rule. In late 2019, district courts in the Southern District of New York, the District of Maryland, and the Northern District of Illinois concluded that the rule was likely unlawful and entered preliminary injunctions prohibiting its implementation.[2] Each of those preliminary injunctions was stayed pending further appellate proceedings, either by the court of appeals or by order of this Court. *See CASA de Maryland, Inc. v. Trump*, C.A. No. 19-2222 (4th Cir. Dec. 9, 2019); *Dep't of Homeland Security v. New York*, 140 S. Ct. 599 (2020); *Wolf v. Cook Cty.*, 140 S. Ct. 681 (2020).

The Second and Seventh Circuits then affirmed the district courts' orders granting a preliminary injunction. *New York v. Dep't of Homeland Security*, 969 F.3d 42, 87 (2d Cir. 2020); *Cook Cty. v. Wolf*, 962 F.3d 208, 234 (7th Cir. 2020). The federal government filed petitions for writs of certiorari in those matters. *Dep't of Homeland Security v. New York*, No. 20-449 (Oct. 7, 2020); *Wolf v. Cook Cty.*, No. 20-450 (Oct. 7, 2020). A Fourth Circuit panel concluded that the 2019 rule was likely valid, but the full court subsequently granted

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[2] *See New York v. Dep't of Homeland Security*, 408 F. Supp. 3d 334 (S.D.N.Y. 2019); *Make the Road New York v. Cuccinelli*, 419 F. Supp. 3d 647 (S.D.N.Y. 2019); *CASA de Maryland, Inc. v. Trump*, 414 F. Supp. 3d 760 (D. Md. 2019); *Cook Cty. v. McAleenan*, 417 F. Supp. 3d 1008 (N.D. Ill. 2019).

rehearing en banc and vacated the panel decision. *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 255 (4th Cir.), *reh'g en banc granted*, 981 F.3d 311 (4th Cir. 2020).

Separately, a district court in the Northern District of Illinois entered a final judgment vacating the 2019 rule. *Cook Cty. v. Wolf*, 2020 WL 6393005 (N.D. Ill. Nov. 2, 2020); *see generally* 5 U.S.C. § 706(2) (reviewing court shall "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). The Seventh Circuit granted a stay of that judgment pending appeal. *Wolf v. Cook Cty.*, C.A. No. 20-3150, Dkt. 21 (Nov. 19, 2020).

4. President Biden was sworn in on January 20, 2021. On February 2, he issued an executive order directing the Secretary of State, the Attorney General, and the Secretary of Homeland Security to evaluate their "public charge policies," identify "appropriate agency actions . . . to address concerns about the current public charge policies[]," and submit a report to the President on those matters within 60 days. Exec. Order No. 14,012, 86 Fed. Reg. 8277, 8278 (Feb. 2, 2021). A few weeks later, this Court granted the pending petition for a writ of certiorari in *Dep't of Homeland Security v. New York*, No. 20-449 (Feb. 22, 2021), seeking review of the Second Circuit's judgment.

As part of the review ordered by the President, the Department of Homeland Security determined in March 2021 that "continuing to defend" the

2019 public charge rule "is neither in the public interest nor an efficient use of limited government resources," and concluded that it would no longer pursue "appellate review of judicial decisions invalidating or enjoining enforcement" of the rule.[3] The parties to the three public charge matters then pending in this Court subsequently filed joint stipulations to dismiss the cases pursuant to Rule 46.1. On March 9, 2021, the Court dismissed those cases.[4]

Meanwhile, the Seventh Circuit dismissed the pending appeal of the judgment vacating the 2019 rule (also at the request of the parties) and issued its mandate. *See Cook Cty. v. Wolf*, C.A. No. 20-3150, Dkt. 24-1 (7th Cir. Mar. 9, 2021). As a result, that judgment took effect. Two days later, many of the States now seeking to intervene in this matter also moved to intervene in the Seventh Circuit, which denied the motion. *Cook Cty. v. Wolf*, C.A. No. 20-3150, Dkt. 26 (7th Cir. Mar. 15, 2021).

On March 15, 2021, the federal government issued a final rule implementing the district court's vacatur of the 2019 public charge rule. *See* Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. 14,221 (Mar. 15, 2021). As a result, the 2019 rule has been removed from

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[3] Dep't of Homeland Security, *DHS Statement on Litigation Related to the Public Charge Ground of Inadmissibility* (Mar. 9, 2021), https://www.dhs.gov/news/2021/03/09/dhs-statement-litigation-related-public-charge-ground-inadmissibility.

[4] On May 3, 2021, the Ninth Circuit issued its mandate in this case. C.A. No. 19-17214, Dkt. 180.

the Code of Federal Regulations and public charge assessments are presently controlled by guidance issued in 1999. *See id.*; Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (Mar. 26, 1999).[5]

Thereafter, this Court denied an application for leave to intervene related to the Northern District of Illinois proceeding "without prejudice" to the applicants seeking relief "before the District Court, whether in a motion for intervention or otherwise." *Texas v. Cook Cty.*, No. 20A150 (Apr. 26, 2021 order); *see also id.* (after "the District Court considers any such motion, the States may seek review, if necessary, in the Court of Appeals, and in a renewed application in this Court"). The same applicants recently filed motions to intervene and for relief from the final judgment in the Northern District of Illinois. *Cook Cty. v. Wolf*, D. Ct. No. 19-cv-6334, Dkt. 256, 259 (N.D. Ill. May 12, 2021).

5. In this proceeding, the movants are the State of Arizona and 12 other States. On March 11, they moved to intervene in the Ninth Circuit "so that they can file a petition for certiorari." C.A. Nos. 19-17213, 19-17214, 19-35914, Dkt. 166 at 1.[6] The court of appeals denied the motion on April 8, 2021, over

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[5] *See also* Dep't of Homeland Security, *DHS Secretary Statement on the 2019 Public Charge Rule* (Mar. 9, 2021), https://www.dhs.gov/news/2021/03/09/dhs-secretary-statement-2019-public-charge-rule.

[6] The initial motion in the Ninth Circuit was filed by Arizona and 10 other States; thereafter, two additional States joined Arizona's motion below. Pet. App. 13.

a dissent by Judge Van Dyke. Pet. App. 1-40. On May 6, the same States filed this motion for leave to intervene in this Court.

ARGUMENT

Movants ask the Court to allow them to intervene in order to file a petition for a writ of certiorari seeking review of the Ninth Circuit's judgment affirming preliminary injunctions regarding the 2019 public charge rule. Congress has authorized certiorari review only "[b]y writ of certiorari granted upon the petition of any *party* to any civil . . . case." 28 U.S.C. § 1254(1) (emphasis added). As others have recently explained at length, there is considerable uncertainty over whether, under these circumstances, movants could even qualify as a "party" for jurisdictional purposes under Section 1254(1). *See, e.g.*, U.S. Opp. 11-21, *Texas v. Cook County*, No. 20A150 (Apr. 9, 2021); *see generally* Shapiro et al., *Supreme Court Practice* § 2.5, pp. 2-19–2-21 (11th ed. 2019). In any event, there is no basis for this Court to "exercise [its] equitable authority" (Mot. 6) to allow movants to file their proposed petition.[7]

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[7] This opposition addresses the arguments for intervention raised in the "Motion for Leave to Intervene" in No. 20M81 that movants filed and served on May 6 (but that is dated April 30). *See* Certificate of Service (dated May 6, 2021); Mot. 16 (dated April 30, 2021). Respondents do not intend to respond to separate arguments raised in the proposed petition at this time; in the event that the Court grants the motion, respondents would expect to file a brief in opposition to the petition addressing those arguments. Nor does this opposition address any arguments movants might raise about "the question of the Ninth Circuit's denial of intervention," which movants have "acknowledge[d]" would need to be raised in "an independent petition." Letter from Brunn (Beau) Roysden III to Hon. Scott S. Harris (May 10, 2021).

1. Movants argue that the Court should grant them leave to intervene for the purpose of filing "a petition for a writ of certiorari to review the decision of the Ninth Circuit affirming a preliminary injunction enjoining the" 2019 public charge rule. Mot. 2. But there is no live dispute over whether the district courts in these cases should have preliminarily enjoined that rule during the pendency of the litigation. The rule at issue was vacated through a final judgment in a separate case. Consistent with the directives of the current administration, the federal government opted not to pursue appellate review of that judgment. The judgment took effect more than two months ago and is nationwide in scope. And the federal government has since issued a new rule to implement that judgment, removed the now-vacated 2019 rule from the Code of Federal Regulations, and reverted to prior (and long-established) field guidance governing public charge determinations. *See supra* pp. 4-6.

Given these developments, there is no longer a live case or controversy over whether the district courts in the California and Washington cases abused their discretion by enjoining the 2019 public charge rule. *See, e.g.*, *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 396 F.3d 416, 421 (D.C. Cir. 2005) ("'An appeal from an order granting a preliminary injunction becomes moot when, because of the defendant's compliance or some other change in circumstances, nothing remains to be enjoined through a permanent injunction.'"); *see generally Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021) ("[I]f in the course of litigation a court finds that it can no longer provide

a plaintiff with any effectual relief, the case generally is moot."); Shapiro, *supra*, § 19.3(a), p. 19-14 & n.21 ("A controversy may end if the statute that is the basis for the action is repealed or if the challenged conduct is modified."). Nor is there any reasonable prospect that the federal government will reinstate the 2019 rule, particularly in light of the public statements by the Secretary of Homeland Security that the rule was "not in keeping with our nation's values" or "[c]onsistent with the President's vision," and that continuing to defend it was "neither in the public interest nor an efficient use of limited government resources."[8]

In separate litigation related to the vacatur judgment entered by the Northern District of Illinois, this Court recently left open the prospect of further proceedings "before the District Court, whether in a motion for intervention or otherwise." *Texas v. Cook Cty.*, No. 20A150 (Apr. 26, 2021 order). But the possibility that the courts in that suit might ultimately allow intervention and further briefing regarding the judgment of the Illinois district court does not provide any persuasive reason for allowing the movant States to intervene in *this* proceeding. It is speculative (at best) to think that any continued litigation in the Illinois case would ultimately lead to the resurrection of the 2019 public charge rule that was preliminarily enjoined by

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[8] Dep't of Homeland Security, *DHS Secretary Statement on the 2019 Public Charge Rule* (Mar. 9, 2021), https://www.dhs.gov/news/2021/03/09/dhs-secretary-statement-2019-public-charge-rule.

the district courts in this case.[9] And such "speculative contingencies" are not sufficient to establish "a continuing case or controversy." *E.g.*, *Bd. of License Comm'rs of Town of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985).

In short, movants propose to seek review of an appellate judgment addressing a rule that no longer exists in the context of an appeal that has become moot. This is not the kind of situation where "the interests of justice demand or justify" allowing a movant to intervene "for the first time at the Supreme Court level." Shapiro, *supra*, § 6.16(c), p. 6-62. And the pending proceeding in the Illinois case, *supra* p. 6, only underscores why intervention in this case would be inappropriate. Movants have made clear that their real concern is the "partial final judgment and vacatur of the [2019] Rule issued by a district court in the Northern District of Illinois." Mot. 2; *see, e.g.*, *id.* at 9, 10, 11, 15. They acknowledge that "efforts at obtaining review of that vacatur are underway." *Id.* at 2; *see supra* p. 6. All but one of the movants here are participating in those efforts and have already sought to intervene in that case. In response to those efforts, the parties to the Illinois case have persuasively explained why intervention would be inappropriate. But to the extent this Court has any concerns about actions that "effectuat[ed] [the] partial final

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[9] Among other things, no one has argued that the 2019 rule is the *only* proper way to implement the public charge statute. *See, e.g.*, Br. for Appellants 26, C.A. No. 19-17214, Dkt. 35 (Dec. 4, 2019) (conceding that 1999 Guidance is a permissible interpretation of the public charge statute). As a result, further proceedings in other courts could not reasonably be expected to compel the federal government to permanently restore the vacated rule.

judgment" in the Northern District of Illinois, Mot. 2, that is a reason for preserving the possibility of further proceedings in the context of *that* case, *see Texas v. Cook Cty.*, No. 20A150 (Apr. 26, 2021 order)—not for granting intervention in *this* one.

2. Movants make no effort to address the jurisdictional or practical implications of the vacatur judgment in the Illinois case for their proposed petition in this case. And the arguments they do offer in support of their request that the Court "exercise its general equitable powers and grant [intervention]" (Mot. 16) are unpersuasive.

They principally contend that their "interests are adversely affected by the United States' failure to defend the" 2019 public charge rule, pointing to purported state fiscal savings that they claim would have resulted from that rule. Mot. 7; *see id.* at 7-9, 15.[10] Putting aside that those claimed fiscal effects are speculative and disputed, movants do not connect their asserted interests to the specific Ninth Circuit judgment that they want this Court to review. That judgment affirmed the district courts' preliminary injunctions; it did not vacate the 2019 public charge rule or permanently enjoin the rule's implementation in a way that would have negated the long-term fiscal

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[10] As the federal government has explained, "[r]eal-world experience with the 2019 Rule" did not bear out the "speculation that the Rule would substantially reduce the number of noncitizens eligible for public benefits within [the applicant State] jurisdictions." U.S. Opp. 23-24, *Texas v. Cook Cty.*, No. 20A150 (Apr. 9, 2021); *see also id.* (three out of 47,500 applicants were denied admission based on adverse public charge determination in one-year period rule was in effect).

advantages predicted by movants. *Id.* at 7. Moreover, the preliminary injunction that the court of appeals affirmed in the California cases never applied to any of the movant States; and while the preliminary injunction in the Washington case was originally nationwide in scope, the court of appeals subsequently narrowed it so that it would no longer apply outside of the territory of the plaintiff States. *See* Pet. App. 87-88. It is the vacatur judgment in the Illinois case—not the preliminary injunctions or the appellate judgment in this case—that caused the federal government to stop enforcing the 2019 rule within the movant States.

Movants also assert a procedural interest in an opportunity to offer input during a rulemaking process "seek[ing] to amend, repeal, or replace" the 2019 public charge rule. Mot. 10; *see id.* at 9-12. That argument is somewhat surprising coming from these movants, because not one of them submitted comments with respect to the 2019 public charge rule during the notice and comment period for that rule. C.A. No. 19-17214, Dkt. 171 at 9, n.10.[11] In any event, the Ninth Circuit judgment that movants want this Court to review did not do anything to prohibit them from participating in any rulemaking process regarding the standard for public charge determinations. Here again, movants' concerns arise from the vacatur judgment entered by the Northern District of

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[11] Nor, until very recently, did movants try to assist in the defense of that rule. For example, none of the movant States submitted an amicus brief in support of the rule in the lower courts in this case; and none of them filed an amicus brief urging this Court to grant the petition arising out of this case that was docketed on January 21.

Illinois and the subsequent litigation decisions and orders by the parties and courts in that case, *see* Mot. 9-12—not from anything the Ninth Circuit did or did not do.

The present circumstances are entirely dissimilar from the few cases where this Court has allowed intervention "for the first time at the Supreme Court level." Shapiro, *supra*, § 6.16(c), p. 6-62; *see* Mot. 12 (citing *Pyramid Lake Paiute Tribe of Indians. v. Truckee-Carson Irrigation Dist.*, 464 U.S. 863 (1983), *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969), and *Banks v. Chi. Grain Trimmers Ass'n*, 389 U.S. 813 (1967)). In those cases, the intervenors were in "a practical sense" the "real party in interest in the judicial proceedings even if not formally named." Shapiro, *supra*, § 2.5, p. 2-22 & n.43 (quoting United States brief in *Banks*). And they had an ongoing interest that would be directly affected by this Court's reversal (or affirmance) of the lower court judgment. In *Pyramid Lakes*, the intervenor tribe sought review of a judgment diverting water from a river that flowed into a lake on its reservation. *See* U.S. Br. at 11-13, *Lake Paiute Tribe of Indians. v. Truckee-Carson Irrigation Dist.*, No. 82-1723 (Aug. 10, 1983). In *Banks*, the intervenor sought review of a judgment involving a worker's compensation award regarding her spouse's death. 390 U.S. at 462-465. And in *Hunter* the intervenor sought review of a judgment that removed his name from an election ballot. *See* Shapiro, *supra*, App. IV.FF (reproducing petition to intervene from *Hunter*). Movants cannot point to anything remotely similar in this case.

The respondent States brought this litigation because the 2019 public charge rule was contrary to law and arbitrary and capricious, and because it threatened to harm the States and their residents. The court below agreed in substantial part and preliminarily enjoined enforcement of the rule only within the territory of the respondent States. Because of actions by the courts and litigants in a separate proceeding, the rule has been vacated and removed from the Code of Federal Regulations, making the appeals of those preliminary injunctions moot. Under these circumstances, movants cannot establish the kind of "extraordinary" circumstances that have on "rare occasions" justified intervention before this Court in the first instance. Shapiro, *supra*, § 6.16(c), p. 6-62.

CONCLUSION

The Court should deny the motion for leave to intervene.

Respectfully submitted,

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