No. 19-17213, 19-17214, 19-35914

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY AND COUNTY OF SAN FRANCISCO; COUNTY OF SANTA CLARA,
Plaintiffs-Appellees,
v.
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, *et al.*,
Defendants-Appellants,
and
STATE OF ARIZONA,
Proposed Intervenor-Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
Case No. 4:19-cv-04975-PJH

MOTION TO INTERVENE BY THE STATES OF ARIZONA, ALABAMA, ARKANSAS, INDIANA, KANSAS, LOUISIANA, MISSISSIPPI, MONTANA, OKLAHOMA, TEXAS, AND WEST VIRGINIA.

MARK BRNOVICH
ATTORNEY GENERAL

Joseph A. Kanefield
Chief Deputy & Chief of Staff
Brunn ("Beau") W. Roysden III
Solicitor General
2005 N. Central Avenue
Telephone: (602) 542-8958
Drew.Ensign@azag.gov
Counsel for the State of Arizona

Drew C. Ensign
Deputy Solicitor General
Robert J. Makar
Assistant Attorney General

Dated: March 10, 2021

(additional counsel listed on signature page)

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INTRODUCTION

The States of Arizona, Alabama, Arkansas, Indiana, Kansas, Louisiana, Mississippi, Montana, Oklahoma, Texas, and West Virginia (the "States") respectfully move to intervene in this action, both as of right and permissively. The States seek intervention so that they can file a petition for certiorari seeking review of this Court's December 2, 2020 decision, which considered the validity of a 2019 Rule, Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) ("Public Charge Rule"). *See generally City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs. ("San Francisco")*, 981 F.3d 742 (9th Cir. 2020). Because invalidation of the Public Charge Rule will impose injury on the States—estimated at $1.01 billion in foregone savings in transfer payments for all states annually—and all of the requirements for intervention are met, this Court should grant this motion.[1]

The "cert. worthiness" of the States' potential petition is already apparent: the Supreme Court *already granted review* in a case involving identical issues. *See Dep't of Homeland Sec. v. New York*, No. 20-449, __ S. Ct. __, 2021 WL 666376, at *1 (Feb. 22, 2021). And this Court specifically stayed the mandate in this action "pending the Supreme Court's final disposition"

[1] The Plaintiffs in the three cases and the Federal Defendants oppose this motion.

of that petition and a petition in "*Wolf v. Cook County*, Illinois, petition for cert. pending, No. 20-450 (filed Oct. 7, 2020)." Doc. 139 at 3 (No. 19-17213).

But despite successfully convincing the Supreme Court to grant certiorari on February 22, Defendants suddenly shifted course and filed a joint stipulation of voluntary dismissal of their petitions on March 9, which was granted the same day by the Clerk of the Supreme Court. In essence, Federal Defendants have now effectively abandoned defense of the Public Charge Rule.

Because invalidation of the Public Charge Rule will directly harm the States, they now seek to intervene to offer a defense of the rule so that its validity can be resolved on the merits, rather than through strategic surrender. This motion is plainly timely, filed a *single day* after the Federal Defendants' *volte-face*, which made plain that the States' interests were no longer being adequately represented.

BACKGROUND

These appeals involve challenges to the 2019 final rule that defined "public charge" for purposes of federal immigration law, specifically 8 U.S.C. § 1182(a)(4)(A). Given this Court's familiarity with the background of this case, as evident from its 47-page slip opinion, the States will not belabor it here.

A few important facts are particularly salient for the instant motion,

however. As this Court noted, "The Rule itself predicts a 2.5 percent decrease in enrollment in public benefit programs[.]" *San Francisco*, 981 F.3d at 754 (citing Public Charge Rule, 84 Fed. Reg. at 41,302, 41,463). In addition, the federal government only pays a portion of the costs involved in the public benefit programs at issue:

> For example, the Federal Government funds all SNAP food expenses, but *only 50 percent of allowable administrative costs* for regular operating expenses. Similarly, Federal Medical Assistance Percentages (FMAP) in some U.S. Department of Health and Human Services (HHS) programs, like Medicaid, *can vary from between 50 percent to an enhanced rate of 100 percent in some cases*. Since the state share of federal financial participation (FFP) varies from state to state, DHS uses the average FMAP across all states and U.S. territories of *59 percent to estimate the amount of state transfer payments*.

Public Charge Rule, 84 Fed. Reg. at 41,301 (emphases added). DHS thus estimated that the Public Charge Rule would save all of the states "about *$1.01 billion annually*" in direct payments. *Id.* (emphasis added).

More generally, the Public Charge Rule will reduce demand on States' already over-stretched assistance programs. For example:

- In FY 2019, Arizona spent $3,059,000,000 on Medicaid benefits and $104,000,000 on administrative costs for Medicaid (as well as the Children's Health Insurance Program).[2] Increasing the

[2] Medicaid and CHIP Payment and Access Commission, *MACStats: Medicaid and CHIP Data Book* 45 (2020), https://www.macpac.gov/wp-

number of Medicaid participants would increase the State's spending on Medicaid (the costs of which typically exceed State general fund growth) and would require the State to make budget adjustments elsewhere.[3]

- In 2019, Arizona paid $85 million in maintenance-of-effort costs for the Temporary Assistance for Needy Families program ("TANF").[4] Because TANF resources are limited—in 2016, less than a quarter of impoverished families received this assistance[5]—admitting aliens into the United States who are not likely to utilize this resource will make this program more accessible to others who are in need.
- States incur administrative costs for each SNAP recipient.[6] For FY 2016, Arizona paid $77,730,088 in administrative costs for

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content/uploads/2020/12/MACStats-Medicaid-and-CHIP-Data-Book-December-2020.pdf

[3] Robin Rudowitz et al., *Medicaid Enrollment & Spending Growth: FY 2018 & 2019* 5 (2018), http://files.kff.org/attachment/Issue-Brief-Medicaid-Enrollment-and-Spending-Growth-FY-2018-2019

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

[5] Center on Budget and Policy Priorities, *Policy Basics: An Introduction to TANF* (2018), https://www.cbpp.org/sites/default/files/atoms/files/7-22-10tanf2.pdf

[6] Daniel Geller et al., AG-3198-D-17-0106, *Exploring the Causes of State Variation in SNAP Administrative Costs* 18–19 (2019), https://fns-

administering this program.[7] By admitting aliens who are unlikely to depend on this resource, the State will save money that would have otherwise gone to fund administrative costs for aliens who would depend on the program.

LEGAL STANDARD

This Court's consideration of a motion to intervene is governed by Federal Rule of Civil Procedure 24. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of America, AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965); *Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007); *see also Sierra Club, Inc. v. EPA*, 358 F.3d 516, 517-18 (7th Cir. 2004) ("[A]ppellate courts have turned to ... Fed. R. Civ. P. 24."); *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997) (same).

Rule 24(a) authorizes anyone to intervene in an action as of right when the applicant demonstrates that

> (1) the intervention application is timely; (2) the applicant has a "significant protectable interest relating to the property or transaction that is the subject of the action"; (3) "the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect

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prod.azureedge.net/sites/default/files/media/file/SNAP-State-Variation-Admin-Costs-FullReport.pdf

[7] Food and Nutrition Service, *Supplemental Nutrition Assistance Program State Activity Report Fiscal Year 2016* 12 (2017), https://fns-prod.azureedge.net/sites/default/files/snap/FY16-State-Activity-Report.pdf

> its interest"; and (4) "the existing parties may not adequately represent the applicant's interest."

Prete v. Bradbury, 438 F.3d 949, 954 (9th Cir. 2006); *see also* Fed. R. Civ. P. 24(a)(2). Rule 24(a) is to construed "'broadly in favor of proposed intervenors.'" *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011).

This Court's intervention analysis is "'guided primarily by practical considerations,' not technical distinctions." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001); *see also Wilderness Soc'y*, 630 F.3d at 1179 (reiterating importance of "'practical and equitable considerations'" as part of judicial policy favoring intervention). Courts are "required to accept as true the non-conclusory allegations made in support of an intervention motion." *Berg*, 268 F.3d at 819.

ARGUMENT

I. THIS COURT SHOULD GRANT THE STATES INTERVENTION AS OF RIGHT

A. The States' Motion To Intervene Is Timely

This Court has repeatedly explained that "the 'general rule is that a post-judgment motion to intervene is timely if filed within the time allowed for the filing of an appeal.'" *U.S. ex rel McGough v. Covington Technologies Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992) (quoting *Yniguez v. Arizona*, 939 F.2d 727, 734 (9th Cir. 1991) (alteration omitted)). The

Supreme Court has similarly held that where a party "filed [its] motion within the time period in which the named plaintiffs could have taken an appeal … the [party's] motion to intervene was timely filed[.]" *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 396 (1977).

Under 28 U.S.C. § 2101(c), parties generally have 90 days to file a petition for certiorari. That period has now been extended to 150 days as a matter of course during the coronavirus pandemic.[8] The deadline to file a petition for seek Supreme Court review here is thus May 1, 2021 (150 days after this Court's December 2, 2020 Opinion). This motion is filed *more than a month* before that deadline, and is therefore timely.

More generally, this motion presents no prejudice to the other parties. *See Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994) (holding that the "requirement of timeliness is ... a guard against prejudicing the original parties"). Intervention here only ensures that these cases and others will be resolved on *the merits*, rather than through abdication. Denying the parties a potential opportunity to obtain their desired ends through the contrivance of surrender inflicts no cognizable prejudice. Instead, the parties' positions will be "essentially the same as it would have

[8] March 19, 2020 Order, *available at* https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf.

been" had the State intervened earlier in the proceedings. *McGough*, 967 F.2d at 1395.

B. The State Has A Significant Protectable Interest In The Subject Matter Of This Action, Which Would Be Affected By Any Adverse Ruling That Stands.

As set forth above, the States' have a protectable interest in the continuing validity of the Public Charge Rule. It is estimated that the rule will save all of the states cumulatively $1.01 billion annually, and the moving States here would save a share of that amount. *Supra* at 2-5. And invalidating the Public Charge Rule[9] will deprive the States of those savings, thereby injuring them. More generally, the Public Charge Rule would reduce demands on States' already overstretched assistance programs and invalidating it will harm them accordingly.

In addition, the States have "quasi-sovereign interest[s] in the health and well-being—both physical and economic—of [their] residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982). The Public Charge Rule serves that interest by promoting self-reliance of their residents and encouraging immigration of non-citizens

[9] Although the preliminary injunctions at issue no longer directly apply in the States following this Court's vacatur of the nationwide injunction, *San Francisco*, 981 F.3d at 763, this Court outright held that the Public Charge Rule violates the Administrative Procedure Act. *San Francisco*, 981 F.3d at 762. As such, absent Supreme Court review, the district courts on remand will be required to enter judgment in favor of Plaintiffs on the merits, and vacatur of the Public Charge Rule is at least likely.

(including into the States) who are not dependent upon public resources. 84 Fed. Reg. 41,305. But invalidating the rule will injure the States by depriving them of these beneficial impacts.

C. Intervention By The State Now Will Ensure That The State's Interests Will Be Adequately Represented.

This Court has held that the "burden of showing inadequacy of representation is 'minimal' and satisfied if the applicant can demonstrate that representation of its interests 'may be' inadequate." *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)). The Court considers several factors, including

> (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.

Perry v. Proposition 8 Official Proponents, 587 F.3d 947, 952 (9th Cir. 2009).

Here, Federal Defendants have essentially abandoned their defense of the Public Charge Rule, and it is doubtful that they will make *any* further arguments in support of it, let alone willing to make "all of a proposed intervenor's arguments." *Id.* The States' protectable interests in the continued validity of the Public Charge Rule are thus not adequately represented by the Federal Defendants.

II. PERMISSIVE INTERVENTION IS WARRANTED HERE

Even if the Court declines to grant the States' timely motion to intervene as of right, this is precisely the type of case where permissive intervention is warranted. Federal courts may permit intervention by litigants who have "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Where a litigant "timely presents such an interest in intervention," the Court should consider:

> [T]he nature and extent of the intervenors' interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case[,] whether changes have occurred in the litigation so that intervention that was once denied should be reexamined, whether the intervenors' interests are adequately represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.

Perry v. Schwarzenegger, 630 F.3d 898, 905 (9th Cir. 2011).

As set forth above, this motion is timely and the States have a compelling stake in the outcome of these actions.

Moreover, the issues presented here are exceptionally important and hotly debated—as evidenced by the splits among four circuit courts and the Supreme Court granting certiorari. Those important issues should be

decided on the merits, rather than through surrender. The State's participation will "significantly contribute to ... the just and equitable adjudication of the legal questions presented." *Schwarzenegger*, 630 F.3d at 905. Moreover, a central issue in these cases was the costs imposed on the states. *City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs.*, 944 F.3d 773, 801-04 (9th Cir. Dec. 2019); *San Francisco*, 981 F.3d at 759-60. The presence of the moving States here will ensure that the broad perspective of the several states is represented.

A favorable exercise of discretion is therefore warranted.

CONCLUSION

For the foregoing reasons, the States' motion to intervene should be granted.

Respectfully submitted this March 10, 2020.

MARK BRNOVICH
ATTORNEY GENERAL

s/ *Drew C. Ensign*
MARK BRNOVICH
ATTORNEY GENERAL

Joseph A. Kanefield
Chief Deputy & Chief of Staff
Brunn ("Beau") W. Roysden III
Solicitor General
2005 N. Central Avenue
Telephone: (602) 542-8958
Drew.Ensign@azag.gov
Counsel for the State of Arizona

Drew C. Ensign
Deputy Solicitor General
Robert J. Makar
Assistant Attorney General

Dated: March 10, 2021

Also supported by:

STEVE MARSHALL
Alabama Attorney General

AUSTIN KNUDSEN
Montana Attorney General

LESLIE RUTLEDGE
Arkansas Attorney General

LYNN FITCH
Mississippi Attorney General

THEODORE E. ROKITA
Indiana Attorney General

MIKE HUNTER
Oklahoma Attorney General

DEREK SCHMIDT
Kansas Attorney General

KEN PAXTON
Texas Attorney General

JEFF LANDRY
Louisiana Attorney General

PATRICK MORRISEY
West Virginia Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 2020, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing and transmittal of a Notice of Electronic Filing to CM/ECF registrants.

s/ Drew C. Ensign
Drew C. Ensign