No. 20-1775

In the Supreme Court of the United States

ARIZONA, ET AL.,

Petitioners,

v.

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

Respondents.

BRIEF OF *AMICI CURIAE* STATES OF OHIO, ALASKA, KENTUCKY, AND NEBRASKA IN SUPPORT OF PETITIONERS

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STATEMENT OF *AMICI* INTEREST

This case calls on the Court to decide whether, and in what circumstances, States may intervene to defend federal law when the federal government refuses to do so. Because the Court's holding will have important ramifications for the States' ability to protect themselves from an Executive Branch that refuses faithfully to execute federal law, the States of Ohio, Alaska, Kentucky, and Nebraska submit this brief under Supreme Court Rule 37.4.

SUMMARY OF ARGUMENT

The Take Care Clause imposes important duties on the President. Reflecting the idea that the President holds the executive power only in trust, the President's duties resemble the fiduciary duties of a trustee. These fiduciary duties include a duty to enforce federal law in good faith, a duty faithfully to follow laws governing the Executive Branch's operation, and (arguably, at least) a limited duty to defend federal laws against suit.

Nowhere is the faithful carrying out of these duties more critical than in areas in which federal power has become exclusive. With respect to matters that the federal government alone has the power to regulate, the States depend wholly upon the federal government. They need Congress to pass laws and they need the President to enforce and defend them.

Lately, the Executive Branch has not been doing its job. That is especially so when it comes to immigration law. Under this Court's precedent, the federal government has exclusive authority to regulate immigration. *See Arizona v. United States*, 567 U.S. 387, 400–10 (2012). As a result, the States are pow-

erless to pass and enforce immigration laws themselves—they depend on the federal government to do so. Yet the federal government has not faithfully fulfilled its responsibilities in this area, violating the Take Care Clause.

Consider this case in particular. It began when a group of plaintiffs challenged an administrative rule governing the admission of immigrants who are "likely at any time to become a public charge." 8 U.S.C. §1182(a)(4)(A). The Department of Homeland Security issued this "public-charge rule" in 2019 under the previous presidential administration. The current administration has not disavowed the Department of Justice's longstanding policy to defend in court all laws and rules that can be defended with respectable arguments. *See* Seth P. Waxman, *Defending Congress*, 79 N.C. L. Rev. 1073, 1077–88 (2001). Nor has it denied that the 2019 rule could be defended with respectable arguments. Nonetheless, owing to its dislike of the rule on policy grounds, the administration has neither enforced nor defended the public-charge rule. Nor did the Executive Branch did even try to lawfully repeal and replace the 2019 rule through the onerous processes laid out in the Administrative Procedure Act. Instead, it effected a *de facto* repeal by collusively dismissing its appeals in all pending challenges to the public-charge rule, leaving in place a nationwide vacatur entered by a district court in Illinois. Thus, the administration's dismissal, in essence, gives the public-charge rule's challengers a permanent, nationwide injunction of the rule's enforcement.

None of this comports with the Take Care Clause. By collusively dismissing the case in order to insulate the nationwide vacatur from judicial review, the

Executive Branch breached its duty to enforce federal law in good faith. The dismissal also breached the Executive Branch's duty to follow the law, since its repeal-by-surrender strategy evades the Administrative Procedure Act's requirements governing the repeal of agency rules. Finally, by abandoning the defense of the rule for policy reasons, the Executive Branch breached even its limited duty to defend federal law in court. All told, the administration's handling of this matter caused it to violate the Take Care Clause—to breach multiple duties owed to the States in an area where the States are largely powerless to defend themselves.

These breaches of fiduciary duties justify permitting the States to intervene. The beneficiaries of the trust of presidential power are the people of the respective States. In the same way that courts have long permitted the beneficiaries of a trust to intervene in a lawsuit against a trustee who no longer represents their interests, this Court should permit the States to intervene in this lawsuit and defend their interests.

ARGUMENT

The Petitioner States' merits brief ably explains why, as a matter of doctrine, they should have been permitted to intervene in this case. Ohio and its fellow *amici* will not belabor that point. Instead, they will explore the degree to which the Executive Branch, when it blocks appellate review of lower-court decisions invalidating federal policies, breaches its duty to help the President "take care that the Laws be faithfully executed." U.S. Const. art. II, §3, cl. 5. By allowing States to intervene in these circumstances, the courts would enable the States to

protect themselves when the federal government breaches its fiduciary obligations.

I. The Executive Branch has a fiduciary duty to take care that the laws be faithfully executed.

1. In ratifying the Constitution, the American people entrusted the President with significant powers. Those powers come with responsibilities. And those responsibilities find their textual anchor in the Take Care Clause. This provision says that the President "shall take Care that the Laws be faithfully executed." US. Const. art. II, §3, cl. 5.

Two features of this language prove relevant to this dispute. First, the clause contains a command: the President "*shall* … execute[]" the laws. *Id.* (emphasis added). This creates an "obligation," to enforce federal law. *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 612–13 (1838); *see Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982). Second, the clause contains an adverb: the President must ensure that the laws are executed "faithfully." This prescribes the manner in which the Executive Branch must carry out the duty to execute the laws.

Both features of the Take Care Clause mattered to the generation that ratified it. Those who so recently gained their freedom from the crown understood the language to repudiate the power, sometimes claimed by English kings, to suspend or otherwise nullify the law. Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 Hastings Const. L.Q. 865, 873 (1994).

Indeed, the Founders would have connected the President's obligation of faithful execution with the fiduciary duties of a trustee. This follows for a few reasons. First, as a matter of political theory, influential thinkers considered executives "trustees of the people." The Federalist No. 46, at 315 (Madison, J.) (Cooke ed., 1961). Executives, in other words, held their power in "fiduciary trust." J. Locke, Second Treatise of Civil Government §156. *See generally* Evan J. Criddle, *Fiduciary administration: Rethinking Popular Representation in Agency Rulemaking*, 88 Tex. L. Rev. 441 (2010). Second, as a matter of language, the words "faithfully executed" would have evoked the law of offices that developed alongside the fiduciary law of trusts. *See* Andrew Kent et al., *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111, 2112, 2180 (2019); Ethan J. Leib, Andrew Kent, *Fiduciary Law and the Law of Public Office*, 62 Wm. & Mary L. Rev. 1297, 1300–05 (2021). Finally, as a matter of practical consequences, the delegation of executive power to the President leaves the people of the States "vulnerable" to abuses of that power in the same way that beneficiaries remain vulnerable to abuses of power by their fiduciary trustees. Tamar Frankel, *Fiduciary Law*, 71 Calif. L. Rev. 795, 810 (1983); *see* Ethan J. Leib, David L. Ponet, Michael Serota, *A Fiduciary Theory of Judging*, 101 Calif. L. Rev. 699, 706 (2013).

Nowhere are the People more vulnerable—and so nowhere is the fiduciary duty of faithful execution more important—than in areas where federal power is exclusive. Take immigration. Although immigration policy goes to the "*core* of state sovereignty," *Arizona v. United States*, 567 U.S. 387, 423 (2012) (Scalia, J., concurring in part and dissenting in part), this

Court has interpreted the Constitution and federal statutes to exclude state regulation of immigration. *See id.* at 400–10 (majority op.). It has therefore placed "the sovereign States at the mercy of the Federal Executive's refusal to enforce the Nation's immigration laws." *Id.* at 436 (Scalia, J., concurring in part and dissenting in part). The States, in short, depend upon the President faithfully to enforce the Nation's immigration laws even more than they depend on him to enforce laws on issues over which the States have concurrent jurisdiction.

2. The Take Care Clause imposes at least two, and likely three, fiduciary duties relevant to this case.

First, and most obviously, the Take Care Clause requires the Executive Branch to act in good faith. Kent et al., *Faithful Execution and Article II*, 132 Harv. L. Rev. at 2112; Josh Blackman, *The Constitutionality of Dapa Part II: Faithfully Executing the Law*, 19 Tex. Rev. L. & Pol. 213, 226, 229 (2015). This duty flows from the original public meaning of "faithfully." Kent et al., *Faithful Execution and Article II*, 132 Harv. L. Rev. at 2190–91; Evan D. Bernick*, Faithful Execution: Where Administrative Law Meets the Constitution*, 108 Geo. L.J. 1, 34–35 (2019). Today, a duty of good faith "attaches … in the context of both ordinary contractual relationships and fiduciary relationships." Bernick*, Faithful Execution*, 108 Geo. L.J. at 35. The same was true at the Framing. *Id.* "English ministers and other royal officials who engaged in self-dealing and other forms of maladministration were condemned for acting contrary to their oaths to execute their offices 'faithfully.'" *Id.* And the "duty of good faith performance has been recognized as a general principle of contract law

for centuries." *Id*. Those who ratified the Constitution understood this, and so understood the Take Care Clause as imposing a duty of good faith.

Second, and relatedly, the Take Care Clause requires the President to "follow laws regulating the executive branch." Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907, 1911 (2014). Faithful execution does not include lawless execution. Kent et al., *Faithful Execution and Article II*, 132 Harv. L. Rev. at 2191.

Third, and least definitively, the Take Care Clause requires the President to defend federal law against legal challenge. The duty to defend follows from the general duty to enforce the law. *See* Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 Mich. L. Rev. 1195, 1222–23 (2014); *see also* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541, 620–22 (1994). After all, enforcing the law sometimes requires overcoming obstacles to the law's enforcement. Those obstacles may appear in the form of rebellions. *See* Letter from George Washington to Alexander Hamilton (Sept. 7, 1792), available at https://perma.cc/2XF4-DNHE. Or, more frequently, they may appear in the form of lawsuits. Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 Yale L.J. 970, 970–71 (1983); *cf.* Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 Duke L.J. 1183, 1235 (2012). Either way, enforcing the law means defending the law.

This does not mean that the President must make a defense against every legal challenge. In our constitutional system, "an act of the legislature" or any other government actor that is "repugnant to the constitution, is void." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Thus, some have argued that the Take Care Clause *prohibits* the President from defending or enforcing a law he subjectively believes is unconstitutional. *See, e.g.*, Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 Colum. L. Rev. 507 (2012). There is, however, no need to engage with that debate here. For present purposes, it suffices to say this: At the very least, the President may not refuse to defend a law simply because he disagrees with it on policy grounds. Kent et al., *Faithful Execution and Article II*, 132 Harv. L. Rev. at 2131; Robert J. Delahunty & John C. Yoo, *Dream on: The Obama Administration's Nonenforcement of Immigration Laws, the Dream Act, and the Take Care Clause*, 91 Tex. L. Rev. 781, 808, 813, 837 (2013).

II. The Petitioner States validly seek to intervene to protect themselves from the federal government's failure to carry out its duties.

The federal government's handling of this matter breached the Take Care Clause. Because the President will not defend federal law, the States should be allowed to intervene to defend federal law themselves. This, in addition to giving the federal policy its day in court, enables the States to protect themselves from the Executive Branch's failure to fulfill the fiduciary duties it owes to the States and the People.

1. Recall the history of the present litigation. The Immigration and Naturalization Act deems "inadmissible" any applicant for admission or adjustment of status who is "likely at any time to become a public charge." 8 U.S.C. §1182(a)(4)(A). In 2019, the Department of Homeland Security issued an administrative rule governing the manner in which this "public charge" statute is enforced. *See Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41292-01 (Aug. 14, 2019).

The City of San Francisco, joined by a number of other plaintiffs, sued. The plaintiffs succeeded, at least at first, winning preliminary injunctions that the Ninth Circuit (largely) affirmed. *See* Pet.App.58, 88. The rule did not fare much better in other appellate courts. *See, e.g.*, *New York v. United States Dep't of Homeland Sec.*, 969 F.3d 42, 50 (2d Cir. 2020); *Casa De Md., Inc. v. Trump*, 981 F.3d 311, 314 (4th Cir. 2020) (vacating and granting rehearing *en banc* of decision vacating injunction of the rule). And a District Court in Illinois issued partial final judgment that vacated the rule, meaning it would have no effect anywhere in the Nation going forward. *Cook Cty., Ill. v. Wolf*, 498 F. Supp. 3d 999, 1004 (N.D. Ill. 2020).

This Court stayed some of the decisions enjoining the rule. *Wolf v. Cook Cty., Ill.*, 140 S. Ct. 681 (2020); *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020). Because likelihood of success is a key element in every stay decision, this Court's order suggested that the federal government would ultimately prevail in its defense of the public-charge rule.

In the aftermath of that stay ruling, the federal government petitioned for certiorari, hoping to se-

cure the merits-stage win that *Wolf* portended. Although the previous administration sought review, the current administration never withdrew the requests for review upon taking office. And, on February 22, 2021, this Court agreed to review the Second Circuit's decision. *See Dep't of Homeland Sec. v. New York*, 141 S. Ct. 1370 (2021).

Within weeks, however, the federal government suddenly and without notice changed course. It voluntarily dismissed all of its appeals—including the Supreme Court case it had just succeeded in convincing this Court to hear. *See* Joint Stipulation, *New York v. Dep't of Homeland Sec.*, No. 20-449 (U.S. March 9, 2021); *Mayorkas v. Cook Cty., Ill.*, No. 20-3150, 2021 WL 1608766, at *1 (7th Cir. Mar. 9, 2021); Joint Stipulation, *USCIS v. City & County of San Francisco*, No. 20-962 (U.S. Mar. 9, 2021); Order Dismissing Appeal, *Casa De Md.*, No. 19-2222 (4th Cir. Mar. 11, 2021). In light of the Northern District of Illinois' decision vacating the rule, these dismissals amounted to a nationwide injunction. With that decision in place and no prospect for a higher court to contradict it, the rule would be vacated and become unenforceable. The government thus gave the challengers everything they wanted without making them go through the hassle of defending the judgment on appeal.

States quickly moved to intervene in these cases, hoping to defend the public-charge rule. Without exception, every court denied their requests. *See, e.g.*, Order Denying Motions, *Wolf*, No. 20-3150 (7th Cir. Mar. 15, 2021); Order Denying Motions, *Casa de Md.*, No. 19-2222 (4th Cir. Mar. 18, 2021); Pet.App. 13a. This Court granted certiorari in this case to de-

cide whether one of those courts—the Ninth Circuit—erred.

2. The federal government's conduct in this case caused it to violate all three of the fiduciary duties discussed above.

First, the federal government breached the duty of good faith. In this case, the Executive Branch thwarted the execution of the immigration laws by engaging in a nationwide cascade of collusive settlements. It did so specifically to evade the Court's review of the 2019 public-charge rule—a rule the Court had signaled it would uphold, *see, Wolf*, 140 S. Ct. at 681; *New York*, 140 S. Ct. at 599—and to enshrine a single district court's nationwide vacatur as the law of the land. Pet. for Writ of Certiorari at 12–13. It did all of this in connection with an issue—immigration—with respect to which the people of the States are constitutionally dependent upon faithful federal enforcement. That is the opposite of good faith.

Second, the federal government breached its obligation to "follow laws regulating the Executive Branch." Kavanaugh, *Our Anchor for 225 Years and Counting*, 89 Notre Dame L. Rev. at 1911. The Administrative Procedure Act governs the manner in which administrative rules are promulgated and rescinded. When the Executive Branch disagrees with a rule that a previous administration issued through notice-and-comment rulemaking, the Administrative Procedure Act provides the road to resolving that dispute: new notice-and-comment rulemaking. 5 U.S.C. §553; *see Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 136 S. Ct. 2117, 2126–27, (2016); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015). That

is the road past Presidents have traveled. Pet. for Writ of Certiorari at 15–16. What the Act does not envision is the Executive's amending federal law through judicial decree. Pet.App.31a, 34a (Van Dyke, J., dissenting).

This administration took the road less traveled. It abandoned notice-and-comment for be-sued-and-settle. After locking in the lower-court ruling of its choice, it replaced the notice-and-comment-backed 2019 rule with the 1999 guidance documents that the rule replaced—all without the notice-and-comment rulemaking normally required to repeal or alter an administrative rule. *See Inadmissibility on Public Charge Grounds; Implementation of Vacatur*, 86 Fed. Reg. 14221-01 (March 15, 2021). "By deliberately evading the administrative process in this way, the government harmed the state intervenors by preventing them from seeking any meaningful relief through agency channels." Pet.App.31–32 (Van Dyke, J., dissenting).

Finally, the administration breached its duty to defend the public-charge rule by acquiescing in the rule's vacatur for policy-based reasons. In the current administration's own words, the public-charge rule is "neither in the public interest nor an efficient use of limited government resources." DHS Statement on Litigation Related to the Public Charge Ground of Inadmissibility (March 9, 2021), https://perma.cc/Z7JK-B8A5; *see also* Br. for the Federal Respondents in Opposition at 6. For that reason, it chose sabotage over defense.

The administration would have a better time defending its conduct here if it claimed that, because it thought the 2019 rule unconstitutional or otherwise

illegal, it had no choice but to drop its defense of the 2019 rule. As noted, one can plausibly argue that the Executive Branch is dutybound *not* to defend actions it concludes are illegal. Devins & Prakash, *The Indefensible Duty to Defend*, 112 Colum. L. Rev. 507. But the administration has not made that argument. Nor could it, because the Department of Justice has long taken the position that it has a duty to defend laws whenever there are respectable arguments for the laws' legality. Waxman, *Defending Congress*, 79 N.C. L. Rev. at 1077–88. Respectable arguments in favor of the previous administration's position on the public-charge issue exist, as evidenced by this Court's decision to grant the federal government's petition for a writ of certiorari in one of the now-dismissed lawsuits. *New York*, 141 S. Ct. 1370. Having succeeded in blocking the States from passing and defending immigration laws of their own, *see* Br. for the United States, *Arizona v. United States*, No. 11-182, 2012 WL 939048 (U.S., March 19, 2012), the least the federal government could do is either continue to defend rules like this one or else allow third parties to intervene and do so themselves.

All told, the administration's conduct in this case caused it to violate the Take Care Clause—to breach multiple duties owed to the States in an area (immigration) where the States are largely powerless to defend themselves.

3. The federal government's failure faithfully to execute the law justifies the States' request for intervention.

As discussed above, the President holds the executive power in trust. The beneficiaries of that trust include the people of the States. For only through

the "consent of the people of each individual State" did the President receive his powers. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846 (1995) (Thomas, J., dissenting); *see Craig v. State of Missouri*, 29 U.S. 410, 416, 7 L. Ed. 903 (1830); The Federalist No. 39, at 254 (Madison, J.) (Cooke ed., 1961). And the President exercises those powers on their behalf. *See* J. Locke, Second Treatise of Civil Government §149.

Now that the Executive Branch has breached its duty of faithful execution, proving it no longer adequately represents the States, the States may intervene in this lawsuit as beneficiaries of the trust of presidential power. The people of the States have authorized the attorneys general to litigate on their behalf. *See, e.g.,* Ariz. Const. art. V, §§1, 9; Ariz. Rev. Stat. §41-193. And courts have long allowed the "beneficiary of a trust … to intervene in an action … against the trustee" when there exists "reason to doubt the adequacy of the trustee's representation." Caleb Nelson, *Intervention*, 106 Va. L. Rev. 271, 306, 329–30 (2020). By analogy, this Court ought to allow Arizona and the other States to intervene in this lawsuit.

It is especially important to allow intervention here as a means for arresting a troubling trend: the Department of Justice's habit of policymaking through collusive settlements. "According to a joint congressional staff report," in 2011, after this Court granted a writ of certiorari "to address whether the Fair Housing Act created disparate-impact liability, then-Assistant Attorney General Thomas E. Perez … entered into a secret deal with the petitioners in that case … to prevent this Court from answering the question." *Texas Dep't of Hous. & Cmty. Affs. v. In-*

clusive Communities Project, Inc., 576 U.S. 519, 552 n.4 (2015) (Thomas, J., dissenting). "Perez allegedly promised the officials that the Department of Justice would not intervene in two *qui tam* complaints then pending against St. Paul in exchange for the city's dismissal of the case." *Id.* (citing House Committee on Oversight and Government Reform, Senate Committee on the Judiciary, and House Committee on the Judiciary, *DOJ's* Quid Pro Quo *With St. Paul: How Assistant Attorney General Thomas Perez Manipulated Justice and Ignored the Rule of Law*, Joint Staff Report, 113th Cong., 1st Sess., pp. 1–2 (2013)).

The Department took a similar tack earlier this year in three consolidated cases pending before this Court. *See American Med. Assoc. v. Becerra* ("*AMA*"), No. 20-429; *Becerra v. Mayor and City Council of Baltimore*, No. 20-454; *Oregon v. Becerra*, No. 20-539. Those cases, like this one, concerned the legality of an administrative rule promulgated by the previous administration. In those cases, as in this one, the previous administration petitioned for a writ of certiorari. *See* Pet. for Writ of Certiorari, *Baltimore*, No. 20-454 (Oct. 7, 2020). In those cases, as in this one, the new administration did not withdraw the petition. And in those cases, as in this one, this Court granted certiorari.

The States, fearing that the federal government might fail to defend the rule adequately, moved to intervene in this Court. *See* Motion of Ohio and 18 Other States for Leave to Either Intervene or to Present Oral Argument as *Amici Curiae*, *AMA*, No. 20-429 (Mar. 8, 2021). The government responded, four days later, by jointly stipulating with every adverse party to the dismissal of the action. *See* Joint Stipulation to Dismiss, *AMA*, No. 20-429 (Mar 12, 2021).

Its reason for doing so was plain: the government feared that the States might be allowed to intervene, that this Court might agree with the States regarding the legality of the previous administration's rule, and that an opinion along those lines might thwart the new administration's goal of adopting a rule contrary to the one the Court agreed to review. So, rather than litigating the case it had just convinced this Court to hear, the government entered a collusive settlement with nominally adverse parties. By stifling the development of the law in this area, the federal government left itself with more room to adopt a potentially unlawful policy.

Thus far, the federal government has faced no consequences as a result of this gamesmanship. Until it does, the Court and the country can expect more of the same. This case presents an opportunity to impose just such an incentive-shifting consequence. By making clear that courts must be receptive to intervenors in cases where the federal government refuses to defend federal law, the Court will dramatically reduce the government's incentive to collusively settle challenges to federal law. So, in addition to the fact that the States are entitled to intervene as a doctrinal matter, a decision saying so would prevent the government's non-defense policy from metastasizing. That would be good for those who depend on the federal government to faithfully carry out its duties. It would be good for the courts, which will no longer have to worry about appearing to acquiesce in collusive settlements. And it would be good for our constitutional system, which requires and depends upon an Executive Branch that takes seriously its obligation to faithfully execute the law.

CONCLUSION

This Court should reverse.

Respectfully submitted,

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