No. 23-1353

IN THE
Supreme Court of the United States

THE STATE OF KANSAS, ET AL.,
Petitioners,

v.

ALEJANDRO N. MAYORKAS,
SECRETARY OF HOMELAND SECURITY, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

This Court has already recognized that the types of "maneuvers" at play here "raise a host of important questions" warranting review. *Arizona v. City & Cnty. of S.F.*, 596 U.S. 763 (2022) (Roberts, C.J., concurring). Neither Article III nor intervention principles prevent this Court from taking up these questions and finally addressing States' rights to forestall the federal government's persistent manipulation of the rulemaking process.

I. This Court's review is needed to curtail the federal government's use of strategic surrender to advance favored policy outside the prescribed administrative rulemaking process.

Federal Respondents have the States right where they want them. Nothing to see here, they tell the Court—we have "no intention of acquiescing in the district court's decision." Gov't Opp.20. The States' intervention is thus inappropriate, they say, because the States' interests are adequately represented. *See id.* at 16-19. Yet if the States waited to intervene until the federal government acquiesced in the district court's decision by settling the case or withdrawing the appeal, they would assert that the States' intervention right is moot because the Rule is vacated. *See, e.g.*, Gov't Br. 10-11, *Arizona v. City & Cnty. of S.F.*, 596 U.S. 763 (2022) (No. 20-1775). Indeed, when asked by the Chief Justice at oral argument in *City and County of San Francisco* if "there's nothing that an affected State could do in [the government's] view" to challenge its regulation-by-capitulation strategy, counsel for the

United States answered that he "didn't think so." Tr. of Oral Arg. 66:12-13, 21, *City & Cnty. of S.F.*, *supra.*

This Hobson's choice is untenable. If any case presents a procedural sweet spot for intervention, this is it. Of course, the federal government has not yet completed its end-around of normal administrative requirements. But that is precisely the point. If the federal government acquiesces in a closed-door settlement—effectively letting public-interest groups dictate national immigration policy—the States will be deprived of their right to public participation in administrative rulemaking. *See generally* Henry N. Butler & Nathaniel J. Harris, *Sue, Settle, and Shut Out the States: Destroying the Environmental Benefits of Cooperative Federalism*, 37 Harv. J.L. & Pub. Pol'y 579, 613-14 (2014) (describing how "sue-and settle" usurps the States' role in the APA rulemaking process). This lack of transparency and public participation not only sidesteps the APA's rulemaking process but erodes traditional democratic values along with it. *See In re MCP No. 165, Occupational Safety & Health Admin., Interim Final Rule: COVID-19 Vaccination & Testing*, 20 F.4th 264, 269 (6th Cir. 2021) ("Shortcuts in furthering preferred policies, even urgent policies, rarely end well, and they always undermine, sometimes permanently," the "separation of powers.") (Sutton, C.J., dissenting from denial of initial hearing en banc).

Chiding the States for pointing to "just two examples" (Gov't Opp.19-20), Federal Respondents feign ignorance at the increasing frequency with which the federal government advances policy through strategic surrender—settling, dismissing, or otherwise resolving a case in a way that changes federal policy without

congressionally mandated procedures. Environmental groups have long used "sue and settle" tactics to manipulate the EPA, which plays a willing partner in circumventing the APA to impose burdensome compliance costs on the States. *See generally* William L. Kovacs, et al., *A Report On Sue and Settle: Damage Done 2013–2016*, U.S. Chamber of Com. (May 2017), https://www.uschamber.com/regulations/sue-and-settle-updated-damage-done-2013-2016. Other federal agencies have caught on too. *See* Amici Curiae States Br. 14-17, *Everglades Coll., Inc. v. Cardona*, 143 S. Ct. 1443 (2023) (No. 22A867) (recounting examples of the federal government using strategic surrenders to make policy in student-loan forgiveness, immigration, and Title X). That the basic "sue and settle" tactic has evolved into more sophisticated "maneuvers" is *more* troubling, not less.[1] *City & Cnty. of S.F.*, 596 U.S. at 766 (Roberts, C.J., concurring).

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[1] Federal Respondents play fast and loose with the procedural history in *Arizona v. City & County of San Francisco* and *Arizona v. Mayorkas*. *See* Gov't Opp.20. There, DHS issued a notice of proposed rulemaking for a new "public charge" regulation the day after this Court held oral argument. *See Public Charge Ground of Inadmissibility*, 87 Fed. Reg. 10,570 (Feb. 24, 2022). That hardly absolves the federal government's earlier "tactic"—"leverag[ing]" a nationwide vacatur "as a basis to immediately repeal the Rule, without using notice-and-comment procedures." *City & Cnty. of S.F.*, 596 U.S. at 765. And in *Arizona v. Mayorkas*, though the federal government appealed the district court order vacating the Title 42 public health orders at issue, they did not seek a stay pending appeal and had planned to ask the D.C. Circuit to hold the appeal in indefinite abeyance, acquiescing in defeat. *See* Pet. Br. 4-12, *Arizona v. Mayorkas*, 143 S. Ct. 478 (2022) (No. 22-595) (detailing the tortured procedural history and the federal government's about-face); East Bay.Opp.13.

At its core, unless and until this Court weighs in on this recurring issue, the Executive Branch will continue to engineer policy outcomes using the judicial process rather than through the one Congress intended. The States need not, however, sit on the sidelines while their interests get trampled: "Rule 24(a)(2) . . . does not require the State[s] to run the risk." *Mandan, Hidatsa & Arikara Nation v. United States Dep't of the Interior*, 66 F.4th 282, 286 (D.C. Cir. 2023).

II. Article III standing is not required to intervene at this stage, but the States nonetheless satisfy this burden.

The States need not establish that they have Article III standing to intervene to participate in settlement negotiations. But even if the States required Article III standing to intervene for this limited purpose, they satisfy it here.

1. This Court has held that a party not "invoking a court's jurisdiction" or seeking other relief need not make an independent showing of Article III standing. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 674 n.6 (2020) (stating that, because an "intervenor of right must independently demonstrate Article III standing if it pursues relief that is broader than or different from the party invoking a court's jurisdiction[,]" the appellate court "erred by inquiring into [the intervenor's] independent Article III standing" when it sought the same relief as the federal government); *see also Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 440 (2017) (holding that a party needs standing to intervene only when the party "pursue[s] relief that is different from

that which is sought by a party with standing"). Once a plaintiff presents the court with a case or controversy, Article III no longer impedes judicial power to reach the dispute.

The States seek to intervene to participate in settlement negotiations about the Rule. In this role supporting the federal government's original position, the States "are seeking to intervene *as defendants*, and are not invoking the Court's jurisdiction—let alone seeking 'relief that is broader than or different from the party invoking [the] [C]ourt's jurisdiction'—[so] they are not required to demonstrate that they have Article III standing." *Env't Integrity Project v. Wheeler*, 2021 WL 6844257, at *2 (D.D.C. Jan. 27, 2021) (K.B. Jackson, J.) (quoting *Little Sisters*, 591 U.S. at 674 n.6) (emphasis in original); *see, e.g.*, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 233 (2003) ("It is clear … that the [defendant agency] has standing, and therefore we need not address the standing of the intervenor-defendants, whose position here is identical to the [agency's]."), *overruled on other grounds*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *see also* Pet.22 n.6.

To skirt this Court's precedent relieving the States of their standing burden, Federal Respondents insist that the State's right to appeal an adverse decision on the Rule "*would* plainly require Article III standing." Gov't Opp.13 (emphasis added). Maybe so, but standing depends on the stage of the proceeding, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), so the cart need not be placed so far before the horse. No doubt, "an intervenor's *right* to continue a suit in the absence of the party on whose side intervention was permitted" requires Article III standing. *Diamond v.*

Charles, 476 U.S. 54, 68 (1986) (emphasis added). The States do not, however, seek to exercise that right today.

If the parties ask the court to appeals to lift the abeyance and *if* the court of appeals issues an adverse decision on the Rule and *if* the federal government abandons its defense of the Rule—something Federal Respondents insist they will never do—the States' standing to petition this Court in the federal government's place can be evaluated at that time. *See, e.g.*, *Va. House of Delegates v. Bethune-Hill*, 587 U.S. 658, 663 (2019) (noting that intervenor's participation supporting other existing defendants did not require invoking the court's jurisdiction, and thus did not require that it independently show standing until intervenor alone sought to appeal the district court's order). Until then, however, these "speculative event[s]" do not frustrate the States' right to intervene for the only available purpose—participating in settlement negotiations—and before it is too late. Gov't Opp.13.

2. Even if the States needed Article III standing to intervene, they have it. Federal Respondents mainly challenge (Gov't Opp.8) whether the states have shown a "legally and judicially cognizable" injury. *United States v. Texas*, 599 U.S. 670, 676 (2023) (citation omitted). To this end, Federal Respondents insist (Gov't Opp.10-11) that this case is just like *Texas*, but their analysis belies this claim.

In *Texas*, this Court addressed a "discrete standing question," which arose only thanks to "a highly unusual provision of federal law and a highly unusual lawsuit." 599 U.S. at 684; *see id.* at 686 (describing the case as an "extraordinarily unusual lawsuit" with "no

precedent"). Given this combination, this Court twice clarified that its decision resolved a "narrow" question and "simply maintains the longstanding jurisprudential status quo" that the States generally lack standing to sue the federal government to compel it "to alter its arrest policies so as to make more arrests." *Id.* at 684, 686. In keeping with this circumscription, several district courts have held that *Texas* did not bar state suits against the federal government involving immigration policies because the policies at issue did not involve "arrest or prosecution." *Id.* at 677; *see, e.g.*, *Gen. Land Off. v. Biden*, 2024 WL 1023047, at *5-6 (S.D. Tex. Mar. 8, 2024) (holding that Texas has standing to challenge federal government's decision to redirect funds intended for building a border wall); *Florida v. United States*, ___ F. Supp. 3d ___, 2024 WL 677713, at *2 (N.D. Fla. Feb. 20, 2024) (concluding that Florida has standing to sue the federal government for violating statutory detention mandates); *see also Texas v. Mayorkas*, 2024 WL 455337, at *2 (N.D. Tex. Feb. 6, 2024).

Even more so here. For their part, the States do not "contest the policies of the prosecuting authority" or seek to compel the Executive Branch to do anything, much less use the coercive power of a "lawsuit" to accomplish this agenda. Gov't Opp.9, 11 (citations omitted). Nor are the States motivated by the "fear that the Executive Branch will not prioritize the removal of noncitizens who petitioners believe should be removed from the United States." Gov't Opp.12. Rather, the States seek to intervene to provide another perspective at the settlement table to ensure that the Rule's main purpose—"discourag[ing] noncitizens" from using irregular migration—remains effective.

C.A. E.R. 40-41. At bottom, "[t]he fundamental principles" at work in *Texas* do not "apply equally in the circumstances of this case." Gov't Opp.11.

3. With *Texas* properly cabined, the States have standing to intervene. This Court has long recognized that the States "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012). Economic expenditures are one such consequence (Pet.24), and "[m]onetary costs are of course an injury," *Texas*, 599 U.S. at 676; *see, e.g.*, *Clinton v. City of N.Y.*, 524 U.S. 417, 430-31 (1998) (holding that adverse effects on the "borrowing power, financial strength, and fiscal planning" of a governmental entity can constitute a sufficient injury-in-fact to establish constitutional standing).[2]

That a "State's claim for standing can become more attenuated" when the State's injury takes the form of "indirect effects on state revenues or state spending" does not preclude standing either. *Texas*, 599 U.S. at 680 n.3. A threatened injury can result from a "predictable chain of events" involving "third parties [who] react in predictable ways." *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 383-85 (2024) (citation omitted). Here, the federal government knows well the correlation between changes in immigration policy and increases in the number of noncitizens trying to cross the border. *See Circumvention of Lawful Pathways*, 88 Fed. Reg. 31,314 at 31,445-46 (May 16,

[2] Unlawful immigration also inflicts a distinct sovereign injury on the States. The "defining characteristic of sovereignty" is "the power to exclude from the sovereign's territory people who have no right to be there." *Arizona*, 567 U.S. at 417 (Scalia, J., concurring in part and dissenting in part).

2023) (discussing immediate increases in border encounters following policy announcements and vacatur of other immigration initiatives). These undeterred noncitizens traveling to the United States and settling in any of the five petitioning States—"the predictable effect of Government action on the decisions of third parties," *Dep't of Com. v. New York*, 588 U.S. 752, 768 (2019)—is hardly speculative.

For example, this causal chain is no more attenuated than the one this Court approved in *Massachusetts v. EPA*, 549 U.S. 497 (2007). There, Massachusetts challenged the EPA's failure to use its civil enforcement powers to regulate greenhouse gas emissions that allegedly injured the Commonwealth. Massachusetts argued it was harmed because the accumulation of greenhouse gases would lead to higher temperatures; higher temperatures would cause the oceans to rise; and rising sea levels would cause the Commonwealth to lose some of its dry land—all taking place over hundreds of years. Still, this Court held that "EPA's steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both 'actual' and 'imminent.'" *Id.* at 521. The same logic applies even stronger here. *See Clinton*, 524 U.S. at 432 (requiring only a "sufficient likelihood of economic injury"). If not, the bedrock principle of Article III standing "is cheapened when the rules are not evenhandedly applied." *Murthy v. Missouri*, 144 S. Ct. 1972, 2008-09 (2024) (Alito, dissenting).

III. The States have a sufficient interest to intervene as of right.

The States also satisfied Rule 24(a)'s standard for intervention as of right. Just as the States' increased economic expenditures due to immigration are "of course an injury" that confer standing, *Texas*, 599 U.S. at 676, so too are they economic interests that confer a right to intervene. *See Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003) (finding a "threatened loss of tourist dollars, and the consequent reduction in funding for Mongolia's conservation program" sufficient to support intervention); *U.S. v. Albert Inv. Co.*, 585 F.3d 1386, 1398 (10th Cir. 2009) ("An interest in preventing an economic injury is certainly sufficient for intervention as of right.").

Donaldson v. United States, 400 U.S. 517 (1917) cannot bear the weight Federal Respondents place on it. Gov't Opp.14-15. *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." 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).

IV. There is no vehicle complication that prevents this Court from reaching the question presented.

Last, neither the Rule's sunset provision nor the federal government's recent immigration rule, *see Securing the Border*, 89 Fed. Reg. 48,710 (June 7, 2024) ("2024 Rule"), make this case a poor vehicle to consider the question presented. Although the Rule applies only to noncitizens who enter the country before May 11, 2025, *see* 8 C.F.R. § 208.33(a)(1)(i), the federal government has warned that should the Rule be "unavailable for any amount of time," the consequences would be dire. Gov't C.A. Mot. to Stay 10; *see* Pet.6. Nor can the 2024 Rule be regarded as a reliable failsafe. That rule was immediately challenged in court, and the parties have fully briefed cross-motions for summary judgment on its validity. *See Las Americas Immigrant Advoc. Ctr. v. Dep't of Homeland Sec.*, No. 1:24-cv-1702 (D.D.C.). Like its predecessor, the supposedly "more restrictive" 2024 Rule could be declared unconstitutional any day.[3] East Bay Opp.11.

[3] In not the least bit of irony, the organizational respondents' attorneys are representing the parties "challeng[ing]" the 2024 Rule. East Bay Opp.10 n.5; *compare id.* at 25, *with Las Americas*, No. 1:24-cv-1702, D. Ct. Docs. 4, 8, 13, 16–18. In other words, they simultaneously tell this Court that the Rule has been "superseded" by the 2024 Rule while leading the charge to make the 2024 Rule go away. East Bay Opp.7.

CONCLUSION

The Court should grant the petition.

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