No. 23-16032

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EAST BAY SANCTUARY COVENANT, et al.,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, President of the United States, in his official capacity, et al.,

Defendants-Appellants,

STATE OF ALABAMA, et al.,

Intervenors - Pending.

BRIEF FOR *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF THE STATES' MOTION TO INTERVENE AND REVERSAL

Matt A. Crapo
Christopher J. Hajec
Immigration Reform Law Institute
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
Telephone: (202) 232-5590

Attorneys for *Amicus Curiae*
Immigration Reform Law Institute

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* Immigration Reform Law Institute makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

DATED: March 14, 2024

Respectfully submitted,

/s/ Matt Crapo

Matt A. Crapo
Immigration Reform Law Institute
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
Telephone: (202) 232-5590

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

MISCELLANEOUS

INTEREST OF *AMICI CURIAE*

Amicus curiae Immigration Reform Law Institute ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens, and also to assisting courts in understanding and accurately applying federal immigration law. [1] IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases, including: *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 599 U.S. 670 (2023); *Ariz. Dream Act Coalition v. Brewer*, 855 F.3d 957 (9th Cir. 2017); *Wash. All. Tech Workers v. U.S. Dep't Homeland Security*, 50 F.4th 164 (D.C. Cir. 2022); and *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016).

INTRODUCTION

Plaintiffs-Appellees challenge a final rule promulgated by the Department of Homeland Security ("DHS") and the Department of Justice on May 16, 2023. The final rule, Circumvention of Lawful Pathways ("the Rule"), creates a presumption that aliens who traveled through a country other than their own before entering the United States irregularly through the southern border with Mexico are ineligible for asylum. 88 Fed. Reg. 31314, 31449-52 (May 16, 2023). Thus, the Rule

[1] No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

generally limits asylum eligibility for aliens who attempt to cross the border surreptitiously instead of appearing at a port of entry. The district court ruled in favor of Plaintiffs and vacated the rule as contrary to law, arbitrary and capricious, and procedurally infirm. ER 10-33.

Defendants-Appellants appealed and successfully sought a stay in this Court. DktEntry ("DE") 21.[2] On appeal, the government contended that Plaintiffs lack Article III standing to challenge the Rule. Opening Brief, DE 32 at 28-32.[3] On the merits, the government stressed that in the absence of the rule, it "expects a 'surge in border crossings that could match—or even exceed—the levels seen in the days leading up to the end of' the Title 42 order." *Id.* at 64 (quoting ER 51-52). The government also argued that "for the government, for migrants and for the public," "the negative consequences of such an increase in migration" in the absence of the rule, "would be greater than the consequences of the pre-May 11 increase because 'Title 8 processes take substantially longer and are more operationally complex than' the Title 42 processes that were used before May 11." *Id.* at 64-65 (quoting ER 52).

---

[2] In granting the stay, the Court indicated that the government had made the requisite "strong showing" that it is likely to succeed in defending the rule. *Nken v. Holder*, 556 U.S. 418, 426 (2009).

[3] Citations to DE page numbers refer to the ECF header pagination rather than the internal document pagination.

After the case was fully briefed and argued, the parties suddenly asked the Court to hold the case in abeyance because the parties had "been engaged in discussions regarding the Rule's implementation" and suggested that "a settlement could eliminate the need for further litigation." DE 83 at 2. The States of Alabama, Kansas, Georgia, Louisiana, and West Virginia (the "States") now seek to intervene as a party in this case in order to participate in settlement negotiations, and possibly object to any settlement that would weaken the effectiveness of the rule. DE 86. The Court should grant the States' motion to intervene because the States have a protectable interest in the outcome of this case and the federal government may not adequately protect that interest.

ARGUMENT

The States' motion to intervene is governed by Federal Rule of Civil Procedure 24. *See Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007) (applying FRCP 24 to a motion to intervene at the appellate stage). Under FRCP 24(a)(2), applicants can intervene as of right if:

> (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 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) (citation and internal quotation marks omitted); *see also* Fed. R. Civ. P. 24(a)(2). This Court construes

FRCP 24 "broadly in favor of proposed intervenors." *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (en banc) (internal quotation omitted).

The States amply demonstrate that their motion is timely under the circumstances. DE 86 at 19-23. The other factors are addressed below.

A. The States have an Interest in the Continued Application of the Rule.

Because States do not seek to raise any new claims in this case and only seek to protect the effectiveness of the Rule, they need not demonstrate standing. *See Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011). Instead, the States must identify concrete interests that would be impacted by the vacatur of the Rule or a settlement that would diminish the effectiveness of the Rule. *Wilderness Soc'y*, 630 F.3d at 1176 (summarizing the "operative inquiry" as being "whether the interest is protectable under some law, and whether there is a relationship between the legally protected interest and the claims at issue") (internal quotations omitted). This, the States have done.

It is clear that, in general, states have strong interests in immigration policy. Though, as the States observe, DE 86 at 24, the federal government is generally responsible for the enforcement of immigration law, "[t]he pervasiveness of federal regulation does not diminish the importance of immigration policy to the States." *Arizona v. United States*, 567 U.S. 387, 397 (2012) (noting that "Arizona bears

many of the consequences of unlawful immigration"). These interests press the States here in concrete ways.

There is no dispute that the Rule prevents some aliens from being released into the country. An alien for whom the Rule's presumption applies cannot establish a credible fear of persecution and is therefore subject to expedited removal. *See* 8 C.F.R. § 208.33(b)(1)(i) (directing a negative credible fear finding); *see also* 8 U.S.C. § 1225(b)(1)(B)(iii) (requiring expedited removal if no credible fear of persecution is established). As noted above, the government, in its opening brief, which was filed in early September 2023, stressed that in the absence of the rule, it "expects a 'surge in border crossings that could match—or even exceed—the levels seen in the days leading up to the end of' the Title 42 order." DE 32 at 64 (quoting ER 51-52).

In fact, even with the Rule in effect, the number of encounters at the Southwest border has exceeded levels seen in the days leading up to the end of the Title 42 order. According to the government's own figures, encounters climbed from 212,000 and 207,000 in April and May 2023, respectively, to more than 230,000 each month from August through December 2023. *See* https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters (last visited March 13, 2024) (showing approximately 233,000, 270,000, 241,000, 242,000, and 302,000 encounters in the months August through December 2023).

Thus, even with the Rule in place, the number of encounters at the border, which dropped significantly in June and July 2023 following the implementation of the rule, have rebounded and continued to climb.

This is not to say that the abandonment of the Rule would not increase the flow still further. The number of aliens subjected to expedited removal increased substantially after the Rule became effective, going from fewer than 15,000 per month leading up to May 2023, to averaging more than 20,000 per month after implementation of the rule. *See* https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy2023 (last visited March 13, 2024) (expand U.S. Border Patrol – Dispositions and Transfers "tab"); *see also* https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics (last visited March 13, 2024) (for fiscal year 2024 numbers). If the Rule were abandoned via settlement or vacated by the Court, the number of aliens released into the country would necessarily go up even higher.

This increase would impact the States. For example, any alien released into the United States is eligible for Emergency Medicaid, and the States are required partly to fund Emergency Medicaid. 8 U.S.C. § 1611(b)(1)(A); 42 C.F.R. § 440.255(c). These costs are not fully reimbursed by the federal government or the aliens themselves. Accordingly, the States have a significant protectable interest in the continuing validity of the rule because invalidating the rule (or

altering its implementation via settlement) would inevitably cost the States money. *See also* DE 86 at 23-27 (discussing education and healthcare costs, administrative costs incurred in screening unlawfully present aliens from certain benefits, and their political interests that may be adversely affected in apportionment). Inasmuch as each additional alien released into the United States subjects the various States to certain educational and healthcare costs, the States have established significant reliance interests in the continued implementation of the rule.

In addition, the States have a strong interest in compliance with the procedural requirements of Administrative Procedure Act ("APA"). One of "the most fundamental of the APA's procedural requirements" is the requirement that "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments for the agency's consideration." *Transp. Div. of the Int'l Ass'n of Sheet Metal, Air, Rail, & Transp. Workers v. Fed. R.R. Admin.*, 988 F.3d 1170, 1180 (9th Cir. 2021) (citation and internal quotation marks omitted). If the government were to alter its implementation of the rule as a result of a settlement, it would evade one of the most fundamental requirements of the APA.

Indeed, a regulation originally promulgated through notice and comment—as the Rule was—may only be repealed through notice and comment. 5 U.S.C. § 551(5); *see Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 101 (2015). Here, in

the absence of intervention, if the government negotiates to settle the lawsuit challenging the Rule in a way that vitiates the Rule, it will undo or revise the Rule without providing other interested parties an opportunity to participate in a new rulemaking. 5 U.S.C. §§ 551(5), 553(c); *see also FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009) ("The statute [requiring notice and comment] makes no distinction, however, between initial agency action and subsequent agency action undoing or revising that action."). The States' interest in such participation is thus an added procedural interest, recognized in the APA, that will be protected by their intervention.

Accordingly, the States have a right to intervene to protect their interests.

B. The Government does not Adequately Represent the States' or the Public's Interest.

Now that the government has signaled its willingness to enter settlement negotiations in this and another related case, there is little question that the government cannot be trusted to represent the States' interests adequately.

The government has engaged in "this tactic of 'rulemaking-by-collective-acquiescence,'" before. *Arizona v. City & Cnty. of San Francisco*, 142 S. Ct. 1926, 1928 (2022) (Roberts, C.J., concurring) (quoting *City & Cnty. of San Francisco v. USCIS*, 992 F.3d 742, 744 (9th Cir. 2021) (VanDyke, J., dissenting)). Unlike in the *San Francisco* case, which involved the 2019 Public Charge Rule, the States have sought to intervene before the other parties can arguably claim that this case is

moot. *See San Francisco*, 992 F.3d at 751 ("[T]he federal government and plaintiffs have one main response: this case is moot because the court cannot offer adequate relief now that the 2019 rule has been vacated by a different federal judge in a different circuit."). Here, no other decision by a court outside this circuit has vacated the rule, and there is no basis to deny intervention on the basis of mootness.

As both Judge VanDyke and Chief Justice Roberts observed, whether the government can vitiate or modify a rule promulgated via notice and comment through settlement or consent decree raises the question of whether such "collusive capitulation" comports with the procedural requirements of the APA. *San Francisco*, 992 F.3d at 753; *see also* 142 S. Ct. at 1928 (questioning whether the government's "maneuvers" in that case "comport with the principles of administrative law"). Judge VanDyke suggested that the Supreme Court could clarify that vacatur of the lower court's ruling under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), may be appropriate in cases where the government abandons the defense of a rule so as to encourage future administrations to change rules "via the familiar and required APA rulemaking process Congress created for that purpose." *San Francisco*, 992 F.3d at 753. Intervention by the States at this point would enable other interested parties to participate in or object to any

proposed settlement and help ensure that the Court's resolution of this case comports with principles of administrative law.

Inasmuch as the States have pecuniary, procedural, and political interests "protectable under some law," and there is a direct relationship between these interests and the continued implementation of the Rule, the States' motion to intervene should be granted. *Wilderness Soc'y*, 630 F.3d at 1179.

CONCLUSION

For the foregoing reasons and those argued by the States, this Court should grant the motion to intervene.

DATED: March 14, 2024

Respectfully submitted,

/s/ Matt A. Crapo
Matt A. Crapo
Christopher J. Hajec
Immigration Reform Law Institute
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
Telephone: (202) 232-5590

Attorneys for *Amicus Curiae*

CERTIFICATE OF COMPLIANCE

1. The foregoing brief complies with the type-volume limitation of FED. FED. R. APP. P. 27(d)(2)(A) because:

This brief contains 2,225 words, including footnotes, but excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Times New Roman 14-point font.

DATED: March 14, 2024

Respectfully submitted,

/s/ Matt Crapo

Matt A. Crapo
Immigration Reform Law Institute
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
Telephone: (202) 232-5590

Attorneys for *Amicus Curiae*

CERTIFICATE OF SERVICE

I certify that on March 14, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Matt Crapo
Matt A. Crapo