IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

M.A., *et al.*, Plaintiffs, v. Alejandro Mayorkas, *et al.*, Defendants, v. Kansas, et al., Proposed Intervenor-Defendants.	No. 1:23-cv-01843-TSC

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF FOR *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF THE STATES' MOTION TO INTERVENE

Movant Immigration Reform Law Institute ("IRLI") respectfully requests the Court's permission to file the attached brief as *amicus curiae* in support of the States' motion to intervene. Neither party opposes this motion for leave to file an *amicus* brief. Plaintiffs have stated in writing that they take no position on this motion, and the government "consents to a timely *amicus* brief."

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. IRLI seeks leave to file the attached *amicus* brief to bring several relevant matters to the Court's attention:

- The States' protectable interests in Emergency Medicaid costs, which would increase in the absence of the Rule due to a demonstrable increase in the number of aliens released into the United States.
- The States' procedural interests under the APA in participating in rulemaking.
- Administrative law principles that may be breached if the government abandons its defense of the Rule and settles the case by consent decree.
- The States' entitlement to "special solicitude" in the standing analysis with respect to their quasi-sovereign interest in immigration laws.
- The lower threshold for procedural standing with respect to immediacy and redressability.

These issues are relevant to this Court's decision on the motion to intervene, and thus the accompanying brief may aid the Court. For the foregoing reasons, IRLI requests that the Court grant this motion for leave to file the accompanying brief as *amicus curiae*.

DATED: March 18, 2024

Respectfully submitted,

/s/ Matt A. Crapo

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CERTIFICATE OF SERVICE

I certify that on March 18, 2024, I electronically filed the foregoing with the Clerk of the Court 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

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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 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 generally renders aliens who attempt to cross the border surreptitiously instead of appearing at a port of entry ineligible for asylum.

In its summary judgment briefing, the government argued that organizational Plaintiffs lack Article III standing to challenge the Rule. ECF Doc. 53 at 29-33.[2] The government also

[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.

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

asserted that the Rule had "been remarkably effective in preventing" "an imminent increases in encounters at the southwest border" and that vacatur of the Rule "would have seriously disruptive consequences, frustrating the public interest in effective measures to prevent the entry of noncitizens at the Nation's borders." *Id.* at 79-80; *see also id.* at 80 (noting that since the Rule had gone into effect through September 30, 2023, "encounters between ports of entry at the southwest border decreased by 49 percent").

After briefing on summary judgment was complete, the parties jointly stipulated to hold this case in abeyance. ECF Doc. 66. The parties represented that they were "engaged in discussions regarding implementation of the challenged rule and related policies" and suggested that "a settlement could eliminate the need for further litigation." ECF Doc. 66 at 2. Just one month after the court granted a stay in this case, the States of Alabama, Kansas, Georgia, Louisiana, and West Virginia (the "States") moved to intervene as a party in order to participate in settlement negotiations, and possibly object to any settlement that would weaken the effectiveness of the rule. ECF Doc. 67 at 16. 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. In this Circuit, intervention as of right depends on four factors:

> (1) the timeliness of the motion; (2) whether the applicant "claims an interest relating to the property or transaction which is the subject of the action"; (3) whether "the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest"; and (4) whether "the applicant's interest is adequately represented by existing parties."

Fund for Animals, Inc. v. Norton, 322 F.3d 728, 731 (D.C. Cir. 2003) (citation omitted). In addition to qualifying for intervention under FRCP 24(a)(2), "a party seeking to intervene as of right must demonstrate that it has standing under Article III of the Constitution." *Id.* at 731-32.

The States amply demonstrate that their motion is timely under the circumstances. ECF Doc. 67 at 15-17. The other factors and standing are addressed below.

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

In order to qualify for intervention as of right, the States must identify specific interests that would be impacted or impaired by the vacatur of the Rule or a settlement that would diminish the effectiveness of the Rule. This the States have done.

It is clear that, in general, states have strong interests in immigration policy. Though, as the States observe, ECF Doc. 67 at 17, 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 summary judgment pleadings filed in October 2023, stressed that in the absence of the rule, it "expects that encounters will increase even beyond peak levels and that foreign partners will be less inclined to assist in combatting irregular migration." ECF Doc. 53 at

80.

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* ECF Doc. 67 at 18-21 (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"). "[A] central purpose of notice-and-comment rulemaking is to subject agency decisionmaking to public input and to obligate the agency to consider and respond to the material comments and concerns that are voiced." *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612, 634 (D.C. Cir. 2020). If the government were to alter its implementation of the Rule via judicial settlement, it would evade one of the most fundamental requirements of the APA.

Ordinarily, 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."). In a word, the States have an added procedural interest, recognized in the

APA, in participating in agency rulemaking that will be harmed if their intervention is denied.

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

B. The States Interests are Sufficient to Establish Standing

Standing under Article III of the Constitution poses a tripartite test, requiring: (a) a judicially cognizable injury, (b) causation by the challenged conduct, and (c) redressability by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). The States have met this test.

First, as the States demonstrate, ECF Doc. 67 at 26-27, the Rule provides monetary benefits to the States. Absent the Rule, the States would be obligated to expend money on certain benefits (including Emergency Medicaid) to aliens who otherwise would have been prevented from entering the country.

Second, to the extent that such aliens (that is, those who would have been prevented from entering the country if the Rule were kept in place) settle in other states, the States' political representation in Congress may be adversely affected. *See* ECF Doc. 67 at 27 (citing *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019)). Thus, regardless in which state any alien who would have been prevented from entering the country by the Rule settles, the States suffer harm, either monetarily or politically. And there is little question that the Court can redress these injuries by upholding the Rule.

Finally, two other considerations bear mention. The Supreme Court has recognized that "States are not normal litigants for the purposes of invoking federal jurisdiction." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). To the extent that the various States surrendered sovereign prerogatives to the federal government upon entering the Union, States are afforded "special solicitude" in the standing analysis to protect such quasi-sovereign interests. The States' interest here is every bit as "sovereign" as the territorial interests in Massachusetts' waterfront. *See*

Landon v. Plasencia, 459 U.S. 21, 32 (1982) (excluding an alien seeking admission is an act of sovereignty). Just as Massachusetts could not "invade Rhode Island to force reductions in greenhouse gas emissions, [or] negotiate an emissions treaty with China or India, [or] in some circumstances … exercise of its police powers to reduce" a threat to public safety, *Massachusetts*, 549 U.S. at 519, the States generally must depend on federal law to protect them from illegal immigration. Accordingly, just as in *Massachussetts*, the States here should be afforded special solicitude in the standing analysis.

In addition, the States' procedural interest in any alteration in the Rule lowers the Article III threshold for immediacy and redressability.[3] *See Lujan*, 504 U.S. at 517-72 & n.7 (a procedural-injury plaintiff "can assert that right without meeting all the normal standards for redressability and immediacy"); *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998) (procedural claims are fully formed at the procedural violation and "can never get riper").

[3] To the extent that federal officers' actions in settling this case are *ultra vires* the APA, the States may have standing as *parens patriae* on behalf of their respective citizens. The D.C. Circuit has ruled that as a general matter, a State lacks standing as *parens patriae* to bring an action against the federal government under the so-called "*Mellon* bar." *Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 179 (D.C. Cir. 2019) (citing *Massachussetts v. Mellon*, 262 U.S. 447, 485-86 (1923)). In that case, the D.C. Circuit further held that the *Mellon* bar applies to APA cases. *Id.* at 180-81. But that case did not consider whether such standing is available where federal officials act *ultra vires*. Nothing in the *Mellon* line of cases prevents the States from acting as *parens patriae* to challenge unlawful actions by federal officers. Instead, federal officials acting *ultra vires* do not stand in the shoes of the federal government vis-à-vis the States. *See, e.g.*, *Ex parte Young*, 209 U.S. 123, 154 (1908) ("[A] suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of [the Eleventh] Amendment.") (interior quotation marks omitted); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949) (same for federal officers and federal sovereign immunity).

C. 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)). 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 them to participate in or object to any proposed settlement to 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 that would be harmed absent continued implementation of the Rule, the States' motion to intervene should be granted.

CONCLUSION

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

DATED: March 18, 2024

Respectfully submitted,

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[PROPOSED] ORDER GRANTING MOTION FOR LEAVE TO FILE BRIEF FOR *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF THE STATES' MOTION TO INTERVENE

Upon this Court's review and full consideration of the motion for leave to file brief for *amicus curiae* Immigration Reform Law Institute, it is hereby ORDERED that the Motion is GRANTED, and the attached proposed amicus curiae brief shall be docketed.

Dated: _____

_____
HONORABLE TANYA S. CHUTKAN
UNITED STATES DISTRICT JUDGE