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.**	**Case No. 1:23-CV-01843-TSC**

MOTION TO INTERVENE[1]

[1] Intervener States informed the parties of this motion. Defendants indicated they oppose the motion, and Plaintiffs take no position at this time pending review of the intervention motion.

A proposed answer (Exhibit C) and proposed order granting intervention are also submitted.

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

The States of Kansas, Alabama, Georgia, Louisiana, and West Virginia (Intervenor States) respectfully file this motion to intervene in this case as a matter of right or in the alternative be permitted by this Court to do so.

INTRODUCTION

As the D.C. Circuit has astutely noted, "a doubtful friend is worse than a certain enemy." *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 314 (D.C. Cir. 2015) (internal quotation marks omitted). In the arena of immigration, Defendants are more than just doubtful friends to the Intervenor States; they have taken deliberate actions that are hostile to the Intervenor States' interests. It is hard to dispute that the current illegal immigration crisis is seriously harming the United States. Those responsible for preventing and addressing the crisis—the Departments of Homeland Security ("DHS") and Justice ("DOJ"), Defendants in this case—have abdicated their responsibility over and over again. And they are heading down the same road in this matter too.

Defendants promulgated a Rule that, whatever its shortcomings, does marginally reduce immigration by those who cannot demonstrate a lawful asylum claim. But now, instead of vigorously defending the Rule, Defendants have chosen to stay the proceeding in order to negotiate a settlement that will not only affect the rule at issue but also unspecified "related policies." Worse, they plan to settle with parties they claim have no standing and without undertaking discovery. Based on the government's conduct in this case (combined with their actions toward the states in the past on immigration issues) there is ample reason to believe that Defendants cannot and will not adequately represent the Intervenor States' interests in either the litigation or the settlement negotiations. The States have no obligation to sit back and hope that a

doubtful friend will speak for them. They should be able to intervene in this case as a matter of right or, at a minimum, the Court should allow permissive intervention.

FACTS

A. Background

States have had a contentious relationship with Defendants on the issue of illegal immigration. Defendants have repeatedly failed to perform their most basic duty and secure the border, screen those who enter the country, and deport those who do not have a legal claim to be here. States are left to deal with the resulting chaos. Preempted from enacting their own immigration laws, states have turned to the courts for relief over and over again. Every time, Defendants drag out litigation, contest every issue, and fail to fix the problems, even when their own experts admit them. When states try and fix the problem by themselves, Defendants sue them to prevent it. However, when Plaintiffs here filed suit—and attempted to vacate one of the few rules that actually help states—Defendants were more than happy to negotiate a settlement, even though Defendants contest their standing.

The federal government's inability to control the illegal immigration at the southern border is well-documented but bears repeating. Since the repeal of the Title 42 order (which was effective in reducing illegal crossings), the number of illegal immigrants coming over the border surged to over 9,000 every single day claiming they are eligible for asylum.[2] Only a fraction of those who claim they are eligible for asylum will ultimately even file for asylum and an even

[2] *See* Quinn Owen, *Migrant Crisis Explained: What's Behind the Border Surge*, ABC News (Sep. 23, 2023), https://abcnews.go.com/Politics/migrant-crisis-explained-border-surge/story?id=103364219.

smaller number would have it granted. *See* Exhibit A–Public Declaration of Andrew Arthur ¶ 87.[3]

And once illegal aliens enter the country, Defendants utterly fail in their duty to remove them even if the aliens have no legal claim to remain. *See Florida v. United States*, No. 3:21CV1066-TKW-ZCB, 2024 WL 677713, at *3 (N.D. Fla. Feb. 20, 2024) (finding Defendants had deported at most eight of the 2,572 "parolee" illegal aliens it had released into the country). Defendants' malfeasance on the border led one federal court to conclude that "the evidence establishes that Defendants have effectively turned the Southwest Border into a meaningless line in the sand and little more than a speedbump for aliens flooding into the country." *Florida v. United States*, 660 F. Supp. 3d 1239, 1249 (N.D. Fla. 2023), *appeal dismissed*, No. 23-11528, 2023 WL 5212561 (11th Cir. July 11, 2023).

Worse, the federal government takes *no* responsibility for people once they are in the country. This leaves state and local governments to foot the bill, often causing them to make budget cuts on programs that benefited their own citizens. *Texas v. Biden*, 589 F. Supp. 3d 595, 607 (N.D. Tex. 2022) ("[T]he flow of migration directly impacts not only border communities and regions, but also destination communities and healthcare resources of both." (quoting Defendants' own *Public Health Reassessment and Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists*, 86 FR 42828-02)).[4] Instead of enacting measures to mitigate the crisis, the executive branch, including

[3] Although this and other exhibits were utilized in *Arizona v. Garland*, No. 6:22-cv-1330-DCJ-CBW, they public documents that are applicable in this case.

[4] *See also* Julia Ainsley & Didi Martinez, *A City of 710,000 Struggles to Cope with 40,000 Migrant Arrivals*, NBC News (Jan. 27, 2024), https://www.nbcnews.com/news/us-news/denver-struggles-cope-40000-migrants-rcna135555.

defendants, have dissolved into infighting and blame-games.[5] This has not gone unnoticed by the American people. A full 80% give the government failing marks over its handling of illegal immigration at the Southern Border.[6] Twenty-eight percent rank it as their most pressing concern, up from 20% just a month ago.[7] In fact, Defendant Mayorkas' poor handling of the immigration crisis resulted in him being impeached last month.[8]

Over and over again, states have had to sue the federal government to perform the basic duties required by the Immigration and Nationality Act and other immigration statutes. *See, e.g.*, *Arizona v. Garland*, 2022 WL 1267203 (Complaint filed Apr. 28, 2022); *Florida*, 660 F. Supp. 3d 1239; *Texas*, 589 F. Supp. 3d 595; *Arizona v. Mayorkas*, 143 S. Ct. 478 (2022); *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *as revised* (Nov. 25, 2015).

In *Arizona v. Garland*, Defendants dragged out discovery for nearly two years based purely on the standing of the Plaintiff states to file suit. This stands in sharp contrast to their approach in this case where Defendants denied most of the Plaintiffs had standing but skipped discovery and went straight to summary judgment. However, the discovery in *Arizona v. Garland* did yield illuminating testimony from the deposition of Rodney Scott, the 24th Chief of the United States Border Patrol, taken on December 5, 2023. Exhibit B. In particular, Chief

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[5] *See* Alex Thompson & Stef W. Knight, Exclusive, *How Biden Botched the Border*, Axios (Feb. 12, 2024), https://www.axios.com/2024/02/12/how-biden-botched-border (detailing how the Biden Administration has done everything but take steps to mitigate the unprecedent surge of illegal immigration on the border).

[6] Russell Contreras, *Most Americans Say the Feds Are Doing a Bad Job with the Migrant Crisis*, Axios (Feb. 15, 2024), https://www.axios.com/2024/02/15/migrant-crisis-biden-pew-research-center.

[7] *Immigration Surges to Top Concern for Americans, New Poll Finds*, Axios (Feb. 27, 2024), https://www.axios.com/2024/02/27/immigration-americans-top-problem-us-poll-election.

[8] *See* Andrew Solender, *Mayorkas Becomes First Cabinet Secretary Impeached Since 1876*, Axios (Feb. 13, 2024), https://www.axios.com/2024/02/14/mayorkas-cabinet-secretary-impeached.

Scott noted that very few illegal immigrants who cross the southwest borders stay at the border and instead go into other states. *Id.* at 98:20-99:1 He noted that statistically, some of them would have ended up in states like Louisiana. *Id.* at 100:4-6. Finally, Chief Scott noted that the Mexican cartel controls the entire southwest border and utilize migration as part of their business model. *Id.* at 121:5-13.

One might expect then that due to its own shocking failure to control illegal immigration, the federal government might allow states to pick up the slack to protect their own interests. One could not be more mistaken. For example, Defendants' documented efforts to prevent states from asserting their own interests were recently spelled out in shocking detail in *Texas v. Department of Homeland Security*, 88 F.4th 1127 (5th Cir. 2023).[9] Texas is a frequent point-of-entry for illegal immigrants. *Id.* at 1130. In order to secure its own border and aid the U.S. Border Patrol in curbing illegal, irregular immigration, Texas laid concertina wire at high-traffic illegal border crossings. *Id.* at 1130. Not only did Defendants oppose this effort, they actively interfered by cutting the wire down. *Id.* at 1131. They did so even after the district court granted Texas a temporary restraining order. In one notable incident, Border Patrol agents cut holes in the concertina wires and provided a climbing rope for migrants, an action which, the district court concluded, was for no apparent purpose except to make it easier for migrants to cross further inland. *Id.*

The federal government has even hauled states into court when they attempt to secure their own borders. In addition to installing concertina wire, Texas had placed buoys in the Rio Grande to discourage illegal immigrants from crossing through the river. *See United States v.*

[9] Although the Supreme Court lifted the injunction at issue in this case, it did not contradict any of the lower court's factual findings.

Abbott, No. 1:23-CV-853-DAE, 2023 WL 5740596, at *1 (W.D. Tex. Sept. 6, 2023), *aff'd*, 87 F.4th 616 (5th Cir. 2023), *reh'g en banc granted, opinion vacated*, 90 F.4th 870 (5th Cir. 2024). The federal government sued Texas to enjoin them from constructing or maintaining these barriers. *Id.* at *2.

B. The Rule

On May 16, 2023, DHS and DOJ finally took some steps to curb illegal immigration and issued a final rule entitled "Circumvention of Lawful Pathways." 88 Fed. Reg. 31,314 (the Rule). Among other things, the Rule creates a rebuttable presumption of ineligibility of asylum for any alien who enters the United States from Mexico at the southwest land border or adjacent coastal borders without documents sufficient for lawful admission if the entry was: (1) between May 11, 2023, and May 11, 2025; (2) after the end of the Title 42 public health order, and (3) after the alien traveled through a nation (other than one where they are a citizen) that is a party to the 1951 United Nations Convention relating to the status of refugees or 1967 Protocol relating to the Status of Refugees. 8 C.F.R. § 208.33(a)(1) (the presumption).

The Rule contains numerous exceptions to the rebuttable presumption, such as when an alien presents at a port of entry with a prescheduled appointed made via the CPB One smartphone app. *Id.* § 208.33(a)(2). An alien may also rebut the presumption by showing they face an acute medical emergency. *Id.* § 208.33(a)(3). If neither of these apply, an alien can still proceed with an asylum claim if they demonstrate a reasonable possibility of persecution or torture. *Id.* § 208.33(b)(2)(i). Despite those exceptions, at least 23,700 individuals were subject to removal between the period of May 12, 2023 and September 30, 2023, *see* Dkt. 53-1 (Declaration of Blas Nunez-Neto), including (allegedly) some of the Plaintiffs. It is likely that more individuals have been removed under these provisions since that date.

Prior to the adoption of the aforementioned presumption, an alien seeking asylum interviewed with an asylum officer, who would determine whether the alien had a "credible fear" of persecution if deported back to their home country. *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1965 (2020). If the alien was found to have a "credible fear," the alien would have been released into the United States while their claim was further processed.[10] Numerous individuals were released into the United States pending a decision on their asylum applications in the years prior to the promulgation of the presumption.[11] The average time to fully adjudicate asylum claims is approximately four years. 88 Fed. Reg. 31,336. The vast majority of asylum claims that originate with a credible fear interview are ultimately not granted.[12] Had the presumption not gone into effect, Plaintiffs and tens of thousands of other illegal aliens could have, and likely would have, been released into the United States while awaiting a final decision on their asylum application. *See* Dkt. 53-1 (Declaration of Blas Nunez-Neto). Some inevitably would have ended up in the States, *see* Ex. B, at 99-100, and would have stayed there for years while their claims were being considered. Many, if not most, would ultimately be found not to be eligible for asylum and would be subject to deportation.

C. Procedural History

On June 23, 2023, Plaintiffs filed a Complaint challenging the Rule under the Administrative Procedure Act (APA). Dkt. 1. They filed an Amended Complaint on July 10,

[10] *How the U.S. Asylum Process Works*, PBS News (May 13, 2023), https://www.pbs.org/newshour/politics/how-the-u-s-asylum-process-works.

[11] *See A Sober Assessment of the Growing U.S. Asylum Backlog*, TRAC Immigration (Dec. 22, 2022), https://trac.syr.edu/reports/705/.

[12] Executive Office for Immigration Review Adjudication Statistics, *Asylum Decision and Filing Rates in Cases Originating with a Credible Fear Claim* (May 15, 2018), located at https://www.justice.gov/d9/pages/attachments/2018/05/15/10_asylum_decision_and_filing_rates_w_cf_origin.pdf.

2023. Dkt. 19. The parties agreed via proposed scheduling order to proceed directly to summary judgement on most of the claims. Dkt. 29. By December 20, 2023, substantive briefing on the cross motions for summary judgement was complete. Dkt. 62. Defendants' briefing on the summary judgment included arguments challenging the standing of the plaintiffs. Dkt. 53. On February 5, 2024, after briefing on summary judgement was complete, the parties moved to hold the proceedings in abeyance to engage in settlement negotiations. Dkt. 66. These settlement talks anticipate not only addressing the underlying rule but "related policies." *Id.*

This case is not the only one challenging the validity of the Rule. Other states and private parties have brought suits across the country on various grounds, which are in various stages of resolution. *See E. Bay Sanctuary Covenant v. Biden*, No. 18-CV-06810-JST, 2023 WL 4729278 (N.D. Cal. July 25, 2023); *Indiana v. Mayorkas*, No. 23CV00106, 2023 WL 3821388 (D.N.D. filed May 31, 2023); *Texas v. Mayorkas*, No. 2:23-cv-00024 (N.D. TX. Complaint filed May 23, 2023).[13]

Up until recently, the federal government defended the validity of the Rule in all cases. However, the federal government effectively stopped litigating in *East Bay Sanctuary Covenant*, agreeing to hold that case in abeyance pending this settlement. *See E. Bay Sanctuary Covenant v. Biden*, No. 23-16032, 2024 WL 725502 (9th Cir. Feb. 21, 2024) (granting joint motion to hold claims in abeyance). Judge VanDyke dissented in the grant. While his dissent should be read in full, some particular observations are worth noting. Judge VanDyke observed the peculiar posture the federal government took. For example, "[u]less the government has grossly misrepresented the importance of its rule and the ramifications of vacating it in its prior filings

[13] Although the Intervenor States are not currently a party to any of these cases, they have filed a motion to intervene in *East Bay Sanctuary Covenant v. Biden*.

before this court, it seems that any prospect of settling this case by recession of the rule would be a nonstarter." *E. Bay Sanctuary Covenant v. Biden*, No. 23-16032, 2024 WL 725502, at *3 (9th Cir. Feb. 21, 2024) (VanDyke, J., dissenting from the grant of a stay).

He further observed that, given the importance of the Rule and the enormous public interest in upholding it, "it's hard to avoid any impression other than that the administration is snatching defeat from the jaws of victory—purposely avoiding an ultimate win that would eventually come later this year, whether from this court or from the Supreme Court." *Id.* He noted the federal government appeared to be going for a political win rather than seeking the best interest of the American people. It could facially appear to defend the Rule, but "by colluding with the plaintiffs, it can set the policy it actually wants with the other, all while publicly blaming the result—cloaked as it is in the language of a judicial 'settlement'—on the courts." *Id.* at *5. The upshot was that no one defending the Rule in *East Bay*.

But when states challenged the loopholes in the Rule—those that allow people to evade the presumption—the federal government has been more than happy to vigorously defend it. None of the cases brought by states have been held in abeyance and the litigating states have not been asked to participate in the settlement agreement.

ARGUMENT

I. The Proposed Intervenor States Have a Right to Join this Suit.

Intervention is as a matter of right is governed by Fed. R. Civ. P. 24(a)(2) and includes four prerequisites: "(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's

interests." *SEC v. Prudential Sec. Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998). Neither Rule 24, nor the Supreme Court, nor other circuits require it, the D.C. Circuit requires intervenor defendants to demonstrate Article III standing in addition to meeting the Rule 24(a)(2) factors. Regardless, the States meet all of the factors for intervention, to include standing.

A. The Intervention is Timely

Timeliness is a fact-specific inquiry that is to be judged "in consideration of all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980). The adequacy of representation bears a relationship to timeliness because until inadequacy of representation comes to light, a party may not have a strong reason to intervene. *Id.* at 1294. In any case, a court should be reluctant to deny an intervention motion on grounds of timeliness when intervention is sought as a matter of right. *Id.* at 1295. Simply put, it boils down to when the triggering event for intervention occurred and how quickly the Intervenor States acted when they found out.

Despite misgivings over the approach taken by Defendants on illegal immigration, the Intervenor States believed in good faith that Defendants were adequately representing their interest in this case. The Defendants' interest in upholding the Rule (the interest shared by the Intervenor States) was demonstrated in part by the extensive briefing on cross-motions for summary judgement and the challenges to Plaintiffs' standing. But that shared interest changed out of nowhere.

On February 5, 2024, Defendants (without explanation and without addressing standing) filed a joint stipulation to stay the proceedings in order to discuss a possible settlement with Plaintiffs, which would cover both the Rule and "related policies." Dkt. 66. The States do not believe this case should settle (especially not if such settlement involves changing unknown "related policies" that the States cannot even evaluate at this point); it should proceed into discovery because Defendants' dispute the Plaintiffs' standing (as Defendants have done in past cases involving the states). The fact that no discovery has been conducted and that settlement negotiations started not too long after the Defendants claimed most of the Plaintiffs do not have standing raise serious concerns about why the Defendants desire the settle this case with improper Plaintiffs. To the extent there are settlement negotiations, the Intervenor States should be able to participate in such discussions since the settlement has the potential to impact the States and possibly even bind a future presidential administration.

In that context, the States' motion is timely. The motion was filed within 30 days of the court staying the proceedings to allow the parties to enter settlement negotiations. Furthermore, the suit itself was only initiated approximately eight months ago. Dkt. 1. At this point all that has happened is the parties have filed cross motions for summary judgment and held the case in abeyance to negotiate a settlement. The States acted promptly when they identified the triggering event for intervention. *Compare Am. Tel. & Tel. Co.*, 642 F.2d at 1290 (timeliness found when party moved to intervene within weeks of the need arising), *with United States v. British American Tobacco Australia Servs, LTD*, 437 F.3d 1235, 1238 (D.C. Cir. 2006) (timeliness not found when party waited almost a year after a triggering event).

The existing parties also face no prejudice based on the timing of the States' intervention. There is no trial on the horizon and, in fact, the proceedings are stayed due to the settlement

negotiations. The only upcoming event is an update due to the court sometime in early April. Given that courts in general should be more reluctant to deny an intervention motion on grounds of timeliness if it is intervention as of right, *Am. Tel. & Tel. Co.*, 642 F.2d at 1295, there is no reason at all deny intervention in this case.

B. The States Have an Interest that Would be Impaired if Plaintiffs Prevail

The interest and impairment factors are related and can be addressed together. The States have multiple interests that would be impaired if Plaintiffs prevailed, including: (1) having to provide certain benefits to those unlawfully present, (2) encountering administrative burdens to comply with federal law by ensuring they are not providing state and local public benefits to ineligible illegal aliens, and (3) reduced political representation.

"[T]he civil rules [confirm] that in the intervention area the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Neusse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967). The States have regulatory and procedural interests that will be affected by the outcome of this litigation, including any possible settlement. *See id.*; *Virginia v. Ferriero*, 466 F.Supp.3d 253, 257 (D.D.C. 2020). An intervenor's interest is impaired if a party's success will interfere with that interest or will make it difficult or burdensome to assert that interest later. *Ferriero*, 466 F.Supp.3d at 258; *see also Liu v. Mayorkas*, No. 1:21-CV-1725 (TNM), 2022 WL 203432, at *2 (D.D.C. Jan. 24, 2022) (conceding intervenor's interest is impaired if positions the parties have taken threatens that interest).

The Intervenor States are beneficiaries of the Nation's immigration laws. While the States do "have some authority to act with respect to illegal aliens," Congress ultimately has "plenary authority" over immigration and naturalization. *Plyler v. Doe*, 457 U.S. 202, 225

(1982). So "Congress has developed a complex scheme governing admission to our Nation and status within our borders." *Id.* The federal government enacts and enforces these immigration laws to protect the States' interests, for example by not requiring States to provide benefits to certain illegal immigrants and by making illegal immigrants ineligible for certain federal benefits, which reduces the incentives for them to come. *See, e.g.*, 8 U.S.C. § 1601(2)(B) ("It continues to be the immigration policy of the United States that [] the availability of public benefits not constitute an incentive for immigration to the United States."). The Intervenor States have a recognized interest in ensuring immigration laws are upheld.

The Intervenor States also have an interest in this litigation. As Defendants repeatedly acknowledged prior to announcing their intention to settle, the United States is facing an unprecedented surge of illegal immigration over the Southern Border. *See* 88 Fed. Reg. at 31,315. Defendants acknowledged the problem would get worse once an order under the executive branch's Title 42 authority expired in May 2023. *See* Defendants' Cross-Motion for Summary Judgment at 8 (citing 88 Fed. Reg. at 31,331, which estimated 11,000 illegal immigrants would cross the border *every day* once Title 42 expired). To mitigate this problem, Defendants promulgated the Rule and the presumption of ineligibility.

In 2023, the United States granted asylum to only 5–24% of applicants from Plaintiffs' countries.[14] Applying these rates to Defendants' estimates of illegal border crossings, up to 10,450 people who will not ultimately be granted asylum could cross the border *every day* if not for the presumption. The people who cross the border illegally—whether or not they intend to apply for asylum or would qualify for asylum—must go somewhere. Some of them inevitably

[14] Executive Office for Immigration Review Adjudication Statistics, *Asylum Decision Rates by Nationality*, *located at* https://www.justice.gov/eoir/page/file/1107366/download.

go live in the Intervenor States while awaiting asylum application processing. And the States have a mandated duty to provide some government resources to them, regardless of lawful status. *See, e.g.*, *Plyler*, 457 U.S. at 230 (public education); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (publicly funded counsel); *Texas v. United States*, 555 F. Supp. 3d 351, 391 (S.D. Tex. 2021) (healthcare). The States have benefited by the Rule and the decreased border crossings and accompanying costs. They will be harmed if the Rule is vacated or the presumption is altered.

The States have also benefited by not incurring administrative costs and facing compliance issues even regarding benefits that States deny to illegal immigrants. For example, Kansas does not issue drivers licenses to anyone "[w]hose presence in the United States is in violation of federal immigration laws." Kan. Stat. Ann. 8-237(i). But the State must determine whether someone is eligible before issuing a license, which plainly requires some expenditure of administrative resources when illegal immigrants apply, even if the application is ultimately denied. They will be harmed if the Rule is vacated and they are forced to review more applications from ineligible illegal aliens. *See New York v. Scalia*, 490 F. Supp. 3d 748, 768 (S.D.N.Y. 2020).

Moreover, the States are required by federal law *not* to provide certain state or local benefits to illegal aliens. 8 U.S.C. § 1621(a). Asylum seekers (even those with work authorizations) do not have lawful status unless and until their asylum claims are granted. A surge in those with improper asylum claims present significant burdens in determining whether someone is eligible, whether they qualify for unemployment or housing assistance, and policing those who are working without permits in order to comply with the law. Any policy that controls how many people may enter the country—including and especially this Rule—benefits the

Intervenor States by at least reducing some of the asylum seekers who will not end up having valid claims.

Finally, the States have an interest in maintaining this Rule even if the majority of illegal aliens settle in other states. This is because of political representation. Illegal immigration is changing the face of the country in ways that Americans cannot comprehend at this stage. According to Defendants' own data, there have been over nine million border encounters since the current administration began.[15] Fiscal Year 2024 is on pace to be the highest on record: there have already been 1.2 million encounters from October 2023 through January 2024. *Id.* The volume of illegal aliens entering the country is important because they must be counted in the census. *See* Exec. Order No. 13,986, Fed. Reg. 7015 (Jan. 20, 2021). And the census affects apportionment, the electoral college, and federal funding for states.

Political representation is a zero-sum game. If one state gains population—and consequently gains representatives, electoral votes, and federal funding—another state must necessarily lose them. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019). Political representation is based on the number of residents in a state, not the number of citizens in a state. Because the census does not ask whether a person is a citizen or not, there is no way to know whether any given person in a state is a citizen or legally there or not. As many news organizations have reported, hundreds of thousands of illegal aliens are flocking *en masse* to New York, Illinois, California, and Colorado, bolstering their populations.[16] These states would

[15] U.S. Customs and Border Protection, *Nationwide Encounters*, *located at* https://www.cbp.gov/newsroom/stats/nationwide-encounters (last modified Feb. 13, 2024).

[16] *See* Ainsley & Martinez, *supra* n.3; Justo Robles, Alejandra Reyes-Velarde, & Wendy Fry, *Border Patrol Dropped 42,000 Migrants on San Diego Streets. Now County, Groups are Seeking Help*, Cal Matters (Dec. 4, 2023), https://calmatters.org/california-divide/2023/12/immigration-california-street-releases/.

naturally increase their political representation and federal funding while states such as the Intervenor States would lose out. The Intervenor States have a significant interest in preventing this.

The States not only have an interest in the current rule being maintained, this interest will be impaired if the Plaintiffs are successful in vacating it. The States expect to see monetary costs rise. In addition, the Intervenor States will also be injured if the rule is vacated because their political representation will be diminished. These losses are not speculative but based on what has already happened. As an example, West Virginia lost an electoral college vote due to the population trends from the 2020 census.[17] Population trends in Louisiana also present a real possibility that it too may lose an electoral vote in the 2030 census.[18] The Intervenor States' interests will be impaired if illegal immigration artificially alter the balance of political representation and federal funding to their detriment.

Furthermore, the States' interests may be impaired in ways that expand beyond the benefits they have received with the Rule in place. The settlement negotiations appear to go beyond the Rule at issue and extend into "related policies." Dkt. 66. No suggestion is given as to what those "related policies" are, and given the prior behavior of Defendants toward states that take border security seriously, there is ample cause for concern that such "related policies" will also impair the States' interests. This is especially a concern given that consent judgments that result from such negotiations have the effect of binding future executive branch officials well

[17] *See* Bailey Brautigan, *WV Officially Loses House Seat, Electoral College Vote*, 13 News WOWK (May 10, 2021), https://www.wowktv.com/news/west-virginia/wv-officially-loses-house-seat-electoral-college-vote/.

[18] United States Census Bureau, *State Population Totals and Components of Change: 2020-2023, located at* https://www.census.gov/data/tables/time-series/demo/popest/2020s-state-total.html#v2023.

into the future as evidenced by past settlements such as *Flores*. *See* Stipulated Settlement Agreement, *Flores v. Reno*, No. 85-CV-4544 (C.D. Cal. Jan. 17, 1997) ("1997 Flores Agreement"); *see also Flores v. Sessions*, 862 F.3d 863, 869 (9th Cir. 2017) (the agreement remains in effect). The Intervenor States would certainly have their interests impaired if the rule and related policies are subject to such a wide-ranging settlement agreement without their input.

Under these circumstances, the States have benefitted from the Rule and will suffer irreparable impairment of their interests if the Plaintiffs were to succeed in this litigation. As such, these factors of Rule 24 are satisfied.

C. The Defendants Cannot Adequately Represent the States' Interest

A showing of inadequacy of representation is a "minimal burden." *Crossroads*, 788 F.3d at 321. Intervenors "ordinarily should be allowed to intervene unless it is *clear* that the party will provide adequate representation." *Am. Tel. & Tel. Co.*, 642 F.2d at 1293 (emphasis added). This makes sense because an intervenor "should not need to rely on a doubtful friend to represent its interests[] when it can represent itself." *Crossroads*, 788 F.3d at 321. In this case, saying that Defendants are a doubtful friend to the States is a gross understatement.

It is "clear" that Defendants will *not* provide adequate representation of the States' interest in maintaining the Rule. As Judge VanDyke laid out, the federal government vigorously defended the Rule—until it didn't. It chose to settle with plaintiffs who are fighting the presumption (while arguing they do not have standing) but continue to litigate against the states. It is "impossible to know the government's exact motives for its current course of action because it hasn't even attempted to tell us," *E. Bay Sanctuary Covenant*, 2024 WL 725502, at *5 (VanDyke, J., dissenting), so it is impossible for the States to rely on Defendants to support their interests.

Further, the Intervenor States do not agree that settlement is appropriate at this juncture. The Rule is either legal or it is not. Settlement should not be used "to circumvent the usual and important requirement, under the Administrative Procedure Act, that a regulation originally promulgated using notice and comment . . . may only be repealed through notice and comment." *Arizona v. City & Cnty. of San Francisco*, 596 U.S. 763, 765 (2022) (Roberts, C.J., concurring). And settlement is especially inappropriate when negotiations anticipate addressing unknown related policies and the facts are heavily contested. At a minimum, the case should proceed to discovery to probe the factual basis for the Plaintiffs' standing and then the motions for summary judgment can be litigated. Any settlement that repeals the Rule (in whole or in part) or otherwise impairs the ability of the federal government to enforce other immigration policies is flatly against the interests of the Intervenor States. This serious divergence in the approach to the case demonstrates that the Intervenor States' interests will not be adequately represented by Defendants.

Finally, on the issue of immigration, Defendants have taken a hostile approach toward states that take border security seriously. Defendants have abdicated their responsibility toward securing the border as evidenced by record levels of illegal immigration and the impeachment one of the named defendants in this case. States have attempted to fill the void by taking measures into their own hands. Instead of supporting such efforts, Defendants have sought to actively harm those states both by frustrating their own attempts to protect the border (ignoring court orders in doing so) and by forcing the state to engage in costly (and unnecessary) litigation over discovery purely for standing (while settling with immigrant groups they do not believe have standing). While this may sound harsh, there is no other way to account for the Defendants' repeated pattern of malfeasance on this issue. There is every reason to believe

under these circumstances that the settlement negotiations will proceed in a manner where the Intervenor States' interests are not adequately represented.

Setting aside Defendants' malfeasance and their unwillingness to preserve the aspects of this Rule that actually deters illegal immigration, the Intervenor States' interest departs from the interest of Defendants in one other key respect: Unlike Defendants, the Intervenor States have no interest in preserving the exceptions to the Rule that, as noted above, limit the effectiveness of the presumption. Defendants, who are currently litigating these aspects in multiple other lawsuits, have to maintain a consistent position toward the Rule as a whole. This alone means Defendants are unable to fully represent the States' interest in limiting illegal immigration and imposing order on the southern border. In addition, prior to staying these proceedings, the Defendants agreed to hold certain claims in abeyance due to the ruling of another federal district court on the same rule. Dkt. 38. This posture was neither required nor explained, suggesting Defendants made this decision based on internal guidance. The Intervenor States are under no obligation to follow Defendants' guidance and would not take such a posture. In sum, the Intervenor States have different priorities in this litigation than Defendants and those priorities cannot be adequately represented by Defendants.

Fortunately, the law does not require the Intervenor States to sit back and hope that an inadequate representative will advocate for its interests. That is why the burden for this factor is "minimal" and that the default is to allow intervention unless it is clear that the current parties adequately represent the intervenors' interests. The Intervenor States do not need a doubtful friend to represent their interests. They can do it themselves and should be allowed to intervene as a matter of right.

D. The States Have Article III Standing to Intervene as Defendants

The D.C. Circuit requires would-be intervenors—whether plaintiffs or defendants—to show they have Article III standing. *Crossroads*, 788 F.3d at 316. This requirement is inconsistent with the purposes of standing and with other precedent for at least two reasons: The Intervenor States are seeking to intervene as defendants (without a separate counterclaim) and they seek the same relief as Defendants were when they defended the Rule.

The Supreme Court held in *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433 (2017), that "an intervenor of right must have Article III standing in order to pursue relief that is *different* from that which is sought by a party with standing." *Id.* at 440 (emphasis added). Nowhere does the Court, or, in fact Rule 24, require a proposed intervenor who is seeking the same relief as an existing party to demonstrate standing separate from the existing parties. And for good reason; only one party needs to establish standing for each claim brought. *Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023). Other circuits have noticed this, and found that proposed intervenors who are seeking the same relief need not independently show standing. *See, e.g.*, *Kane Cty. v. United States*, 928 F.3d 877, 887 (10th Cir. 2019).

Furthermore, courts require plaintiffs to show standing because plaintiffs are the ones who invoke the court's jurisdiction. It is odd to require a demonstration of standing from a defendant, the one hauled into court. This is particularly true when a proposed intervenor-defendant is not seeking any relief at all (such as a counterclaim) but simply seeking to maintain the status quo. Other circuits have noted this as well, and do not require intervenor-defendants to demonstrate standing. *See, e.g.*, *Pennsylvania v. President United States of Am.*, 888 F.3d 52, 57 n.2 (3d Cir. 2018).

The Fifth Circuit has stated it more bluntly: "[T]here is no Article III requirement that intervenors have standing in a *pending* case." *Newby v. Enron Corp.*, 443 F.3d 416, 422 (5th Cir. 2006) (emphasis in original). Because it would be directly inconsistent with other circuits' precedent and apparently inconsistent with Supreme Court precedent, the D.C. Circuit should not require intervenor-defendants who seek the same relief as another party to show standing, and, alternatively, should reconsider any case that requires standing of all defendant-intervenors. [19]

Regardless, the States can show they have standing for the same reasons they have an interest that will be impaired if Plaintiffs win. The Circuit's "cases have generally found a sufficient injury in fact where a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party's benefit." *Crossroads*, 788 F.3d at 317. As noted above, the States currently benefit from the rule at issue in this case for three primary reasons.

First, the States have benefited by saving on the costs of providing required services to illegal aliens who would otherwise reside here for a period of years without a meritorious asylum claim. *See generally United States v. Texas*, 599 U.S. 670, 676 (2023) ("Monetary costs are of course an injury."). These costs are self-evident as states are required to provide services such as public education and emergency healthcare services (even to illegal aliens) and some amount of asylum seekers would undoubtedly come into the Intervenor States absent the presumption portion of the Rule. For Louisiana, this would cost $4,015 per student for public education. Exhibit A, ¶ 105; see also Exhibit D, ¶ 5 (Declaration of Elizabeth Scioneaux). Louisiana has also provided medical benefits to 1,200 asylees and over 10,000 undocumented aliens every

[19] The States understand the Court cannot unilaterally overturn Circuit precedent and make this argument for preservation purposes should the Court find they do not have standing.

month in 2019 which have a heavy financial cost. Exhibit A, at ¶ 127. Second, the States will face difficulties complying with the law for benefits it *cannot* provide to illegal aliens if they have to screen out a higher volume of asylum seekers who apply for state and local public benefits. *Texas*, 599 U.S. at 676.

Third, the States have benefited by protecting their political representation from artificial distortion by having illegal aliens flood into other states. *See New York*, 139 S. Ct. at 2565 ("Several States with a disproportionate share of noncitizens, for example, anticipate losing a seat in Congress or qualifying for less federal funding if their populations are undercounted."). Releasing more illegal immigrants to enter the country after they illegally crossed the border leads to a significant increase of border crossings from the same group of individuals that in turn amplifies this pattern of artificial distortion. Exhibit B, 116:19-117:4. This rule at least marginally prevents some of this distortion.

All of these are concrete benefits that the States are receiving and that would be lost if Plaintiffs were to prevail, as the requested relief would involve vacatur of the entire rule. And, as with all APA claims, the States' interests are a justiciable. *Florida*, 2024 WL 677713, at *2–3. Claims brought under the APA are "traditionally thought to be capable of resolution through the judicial process" and "traditionally redressable in federal court." *See Texas*, 599 U.S. at 676. The States therefore have standing to intervene to defend the Rule.

II. The States Should Be Allowed to Intervene Permissively

Even if the proposed intervenors do not have a *right* to enter this case, they Court still can (and should) permit them to enter under Fed. R. Civ. P. 24(b). The D.C. Circuit takes a "flexible" approach to permissive intervention and affords "wide latitude" to the discretion of the district court. *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1045–46 (D.C. Cir. 1998). In

applying Rule 24(b), the Court considers whether the intervention is timely, whether there is an independent basis for jurisdiction, and whether the intervenor's claim or defense "shares a common question with the main action." *Id.* at 1408. The Court also considers whether the intervention "will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b).

For the reasons noted above, the Intervenor States have filed a timely motion and have demonstrated an independent basis for jurisdiction. The Intervenor States' defenses also are also identical to the main action. Mainly, the Intervenor States want the status quo preserved while the Plaintiffs want the rule to be vacated. Given circuit precedent that allows intervention when "claims" or "defenses" are difficult to find, there should be no doubt that the States satisfied this element. Finally, the intervention will not unduly delay or prejudice the adjudication of the original parties' rights. The reason for that is simple. The original parties have held the proceedings in abeyance indefinitely in order to engage in settlement negotiations. They are not seeking any sort of expedient resolution at this time and promised nothing more than an update to the court by early April. It is hard to imagine any prejudice to the original parties under these circumstances. Based on that, the Intervenor States should be allowed to permissively intervene in the event the court holds they cannot intervene as a matter of right.

CONCLUSION

For these reasons, the Court should grant the States' motion to intervene in this proceeding.

Respectfully submitted,

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***Appearing under Local Rule 83.2(g)*

CERTIFICATE OF SERVICE

This is to certify that on this 7th day of March, 2024, the above and foregoing was electronically filed with the Clerk of the Court by using the CM/ECF system, and a notice of electronic filing was sent via the CM/ECF system to all counsel of record.

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