No. 22-592

IN THE
Supreme Court of the United States

ARIZONA, ET AL.,

Petitioners,

v.

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

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF SCHOLARS OF FEDERAL CIVIL PROCEDURE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, listed in the Appendix, are scholars and teachers of the federal courts and procedure and have an abiding interest in the principles governing procedure in the federal courts. The issue of the law governing intervention on appeal, for which there is currently no Federal Rule of Appellate Procedure, is therefore of great interest to *amici*. The emergence of this issue as a frequent topic on the Supreme Court's docket makes all the more important a principled resolution of motions for intervention on appeal.

SUMMARY OF THE ARGUMENT

Intervention poses challenges to litigants and courts. It alters the control that parties have over their litigation and places judges in the difficult role of addressing unanticipated factual and legal issues. Motions to intervene in appellate proceedings—late in a case's lifecycle—magnify these concerns. The risks of disruption, strategic delay, and intrusion on the party-driven system of adversarial litigation demand a heightened showing to justify appellate intervention. Because of the costs of appellate intervention, the nonparty seeking it should bear a heavy burden.

While Federal Rule of Civil Procedure 24 provides a framework for intervention in district courts, no comparable rule governs intervention on appeal. This

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[1] Pursuant to Supreme Court Rule 37, *amici* state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amici* and their counsel made any monetary contribution toward the preparation and submission of this brief.

Court has entered the vacuum by looking to the policies of Rule 24 and providing case-by-case analysis. The courts of appeals have similarly formulated a variety of ad hoc approaches to address the issue of intervention.

A familiar route to deliberate guidance exists: the rulemaking process. The many complicated questions posed by appellate intervention are well suited to treatment by rules rather than ad hoc judicial standards. Rulemaking can take into account judicial decisions, litigants' experiences, academic studies, and input from the bar to generate a framework to apply across the circuits. The Advisory Committee on Appellate Rules has recently expressed its potential interest in considering this topic. With guidance from this Court's prior decisions and from the circuit court decisions involving intervention on appeal, the Advisory Committee on Appellate Rules is well situated to elaborate comprehensive standards on appellate intervention.

In view of that alternative route and the posture of this litigation, this Court need not, and should not, use this case to speak broadly to the range of interests that arise in the appellate intervention context. A restrained approach that looks to the rulemaking process is particularly appropriate in this case, where the untimeliness of petitioners' request for intervention is alone sufficient to support the court of appeals' decision. From the time when the CDC determined to end the Title 42 orders, petitioners were on notice of the divergence of their perceived interests from those of the United States—especially on the question of whether the government would seek a stay from an

adverse decision setting aside the Title 42 orders. A stay requires, *inter alia*, a showing that suspending a court's judgment is in the public interest. Petitioners could not have expected the government to argue that prolonging Title 42 was in the public interest after its expert agency had determined that it was not. Despite this notice, petitioners delayed seeking intervention until after the district court granted summary judgment, which resulted in leaving the question of intervention to the court of appeals. Given that timing, no first-line factfinder could learn about the parties' positions, assess the facts, and evaluate the question of prejudice. Under these circumstances, the court of appeals correctly determined that the intervention motion came too late and that petitioners could participate instead as *amici*. That balanced resolution was an appropriate exercise of discretion. This Court should affirm on that basis—leaving further definition of the standards for appellate intervention to the rulemaking process.

ARGUMENT

A. Appellate Intervention Poses Challenges To The Sound Administration Of Civil Litigation

"In our adversarial system of adjudication, we follow the principle of party presentation," relying "in the first instance and on appeal . . . on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (internal quotation marks omitted). For that reason and many others, party status is the critical building block for litigation in the Article III

courts. The original parties frame the lawsuit, conduct discovery and file motions, engage in settlement talks, and determine whether to appeal; intervention injects a new participant who can recast the litigation's structure. It follows that judges must assess the intervenor's claims to a seat at the table before displacing the authority of the original parties. The factual and legal challenges posed by intervention multiply when nonparties seek to intervene when a case is on appeal. This Court and the courts of appeals have grappled with these issues without comprehensively resolving them.

1. "A civil action . . . has usually been thought of as a private controversy between plaintiff and defendant." David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721, 721 (1968). And, "[i]n general, the plaintiff is the master of the complaint and has the option of naming only those parties the plaintiff chooses to sue, subject only to the rules of joinder [of] necessary parties." *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 91 (2005) (quoting 16 J. Moore et al., *Moore's Federal Practice* § 107.14[2][c], p. 107-67 (3d ed. 2005)).[2]

This system "draws important differences between the parties to a case and everyone else." Caleb Nelson, *Intervention*, 106 Va. L. Rev. 271, 273 (2020). Nonparties have avenues to make their views known

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[2] *See* Fed. R. Civ. P. 19(a)(1)(B)(i) (describing a person whose joinder as a party to an ongoing lawsuit is necessary when "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest").

in existing litigation. They may, for example, seek leave to participate as *amici*. *See, e.g.*, 7C Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ.* § 1913 (3d ed.) ("Wright & Miller"). And the United States may in cases implicating its interests file a statement under 28 U.S.C. § 517 without joining the litigation. *See New Lansing Gardens Hous. LP v. Columbus Metro. Hous. Auth.*, 46 F.4th 514, 520 (6th Cir. 2022) ("[T]he United States, a nonparty, filed a statement of interest under 28 U.S.C. § 517, though it maintained that it should not be made a party to the case."). Nonparties may also bring a lawsuit of their own. *See Martin v. Wilks*, 490 U.S. 755 (1989). What nonparties may not do is participate in litigation with full rights to seek discovery, file motions, participate at trial, have a role in settlement conferences, and file notices of appeal.

A narrow door to entry exists by seeking judicial permission to intervene. In the district court, a stranger to the case must demonstrate that it deserves access to all the rights and privileges enjoyed by parties. Federal Rule of Civil Procedure 24 governs intervention at the district court and permits intervention as of right in narrow circumstances: when a movant "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest" and existing parties do not "adequately represent that interest." Fed. R. Civ. P. 24(a). In all other circumstances, Rule 24 authorizes permissive intervention at the district court's discretion after it considers, *inter alia*, whether the intervenor's claims and defenses share with the action "a common

question of law or fact," and "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b). The rule has one requirement that applies to both forms of intervention: "under either branch of the rule," intervention "can only be had on a timely application." 7C Wright & Miller § 1913.

2. Because intervention—and the party-driven system that it disrupts—depends on evaluating the parties' relative interests in light of the history of the litigation and all of the facts and circumstances, district courts are best suited to evaluate intervention motions. *See NAACP v. New York*, 413 U.S. 345, 366 (1973). Such motions require factual determinations (*e.g.*, does the would-be intervenor have the requisite stake to warrant intervention, and are the intervenor's interests adequately represented?) and first-order resolution of questions of law (*e.g.*, does that intervenor satisfy the requirements for intervention of right or permissive intervention?). The intensely circumstance-specific nature of intervention is exemplified in this case. Here, petitioners' intervention motion relied on a 1,078-page submission that included more than a half dozen witness declarations, news clippings, and a deposition transcript. *See* Mot. for Leave to Intervene, *Huisha-Huisha v. Mayorkas*, No. 22-5325 (D.C. Cir. filed Dec. 9, 2022).

District courts have the knowledge, procedural flexibility, and ability to evaluate such motions. The presiding judge typically gains in-depth familiarity with the parties and issues and is better situated than are appellate judges to evaluate the potential for prejudice that an intervenor may pose. To the extent that

intervention motions require further factual development, district courts can take testimony and resolve contested assertions. And the judicial system benefits from the district court's determination of the facts and application of the law before appellate courts must address those issues. These considerations are especially true in public-law litigation, in which a district court's understanding of the ongoing litigation puts it in the best position to evaluate which among many competing interests should be elevated to party status. *See* Stephen C. Yeazell, *Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case*, 25 UCLA L. Rev. 244, 256-60 (1977).

By contrast, federal intermediate appellate courts are not well suited to addressing intervention motions. Appellate courts' customary role is to review deferentially the district courts' findings of fact and exercises of discretion, while conducting de novo review of legal issues in order to ensure uniform application of federal law within their circuits. *See* Alvin B. Rubin, *Views from the Lower Court*, 23 UCLA L. Rev. 448, 451 (1976). Courts of appeals lack the means to resolve "fact-intensive" questions that may be necessary for deciding intervention motions in the first instance. *McLane Co. v. E.E.O.C.*, 581 U.S. 72, 81 (2017) (observing those questions are "better suited to resolution by the district court than the court of appeals"). And intervention on appeal, which comes late in a case's lifecycle, has a unique potential to disrupt and delay litigation at the expense of the original parties. *See, e.g.*, Shapiro, *supra*, at 746 (recognizing that the "principal goal" of some intervenors may be "only to delay and obstruct"). Intervenors on appeal may offer potentially distracting arguments

that were not subject to adequate factual development in the lower court, and they may file briefs that are duplicative of or outside the scope of the issues appealed.

3. Notwithstanding the comparative advantages of district court intervention, intervention on appeal is sometimes warranted. Because of the challenges of allowing appellate intervention, this Court has had occasion in recent terms to review three cases in which lower courts denied intervention: *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1010 (2022); *Arizona v. City & County of San Francisco*, 142 S. Ct. 1926 (2022) (dismissed as improvidently granted); and this case, which came to the Court in the form of a request for an emergency stay. Recognizing that "[n]o statute or rule provides a general standard to apply in deciding whether intervention on appeal should be allowed," the Court has "considered the 'policies underlying intervention' in the district courts" in reviewing challenges concerning motions to intervene in appellate proceedings. *Cameron*, 142 S. Ct. at 1010 (citing *Auto. Workers v. Scofield*, 382 U.S. 205, 217 n.10 (1965)).

This Court has focused on three factors to determine whether a court of appeals has abused its discretion in deciding a motion to intervene in the first instance: (1) the timeliness of the intervenor's request, *Cameron*, 142 S. Ct. at 1012-13; (2) the nature and importance of the "legal 'interest' that a party seeks to 'protect' through intervention on appeal," *id.* at 1010 (citing Fed. R. Civ. P. 24(a)(2)); and (3) potential prejudice to existing parties, *id.* at 1013-14.

B. The Court Should Not Use This Case To Fashion A Comprehensive Standard For Appellate Intervention And Should Encourage Rulemaking Instead

Although this Court has developed guideposts for addressing intervention on appeal, the variety of recurring questions are not well suited to a comprehensive ruling in a single case. The route for developing a systematic approach is the rulemaking process provided in the Rules Enabling Act, 28 U.S.C. § 2072, and elaborated through the Judicial Conference of the United States. Responding to the recent set of cases addressing intervention on appeal, the Advisory Committee on the Appellate Rules ("Rules Committee") has before it a suggestion to draft an appellate counterpart to Federal Rule of Civil Procedure 24. In similar circumstances, the Court has recognized the importance of allowing the rulemaking process to run its course, and *amici* commend that approach to the Court here.

1. The rulemaking process can comprehensively consider the complex questions implicated by appellate intervention

A comprehensive approach to appellate intervention reaches well beyond the bounds of fact-specific litigation. Some of the many questions in need of consideration include:

- What kind of an interest must a party assert to be eligible to intervene on appeal? Does such an "interest" differ from those to be demonstrated at the district court? *See generally* Nelson, *supra*; Shapiro, *supra*.

- How should appellate courts deal with factual disputes that relate to legal arguments in appellate intervention? If the proposed intervention implicates material facts and cannot be resolved as a matter of law, should intervention be categorically disallowed? Or should the courts of appeals remand motions for intervention to district courts?
- Should the threshold for intervention on appeal be higher than that for intervention at the district court to prevent "procedural gamesmanship to skirt unfavorable standards of review"? *Richardson v. Flores*, 979 F.3d 1102, 1105 (5th Cir. 2020).
- Should States receive special solicitude in the analysis of interests? *See generally* Ann Woolhandler & Michael G. Collins, *State Standing*, 81 Va. L. Rev. 387 (1995) (analyzing the evolution of legally protected state interests in the context of standing); *see also* Cal. Code Civ. P. 902.1 ("[T]he Attorney General shall have the right to intervene and participate in any appeal taken [from an order or judgment in which a statute or regulation was found unconstitutional]. These rights shall apply regardless of whether the Attorney General participated in the case in the trial court."). Should governments in general? *See* Advisory Comm. on App. Rules, *Minutes of Fall 2010 Meeting* 23-24 (Oct. 7-8, 2010).[3]

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[3] https://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-appellate-procedure-october-2010.

- Should a rule preclude intervention in instances that raise questions of or undermine principles of estoppel? *See Cameron*, 142 S. Ct. at 1024 (Sotomayor, J., dissenting).
- What should happen when a court denies a nonparty's initial motion to intervene and the proposed intervenor does not later renew that motion?
- Should motions for intervention that meet some but not all of an appellate rule's criteria for intervention be considered as a motion for leave to participate as an *amicus curiae*? *See Atl. Mut. Ins. Co. v. Nw. Airlines, Inc.*, 24 F.3d 958, 961 (7th Cir. 1994).
- Should intervenors be allowed to supplement the record on appeal? *See Loc. 322, Allied Indus. Workers of Am., AFL-CIO v. Johnson Controls, Inc.*, 921 F.2d 732, 734 (7th Cir. 1991).
- Once a court of appeals grants intervention, should it be limited to that stage or should the grant of intervention travel with the remand if any? *See United States v. Laraneta*, 700 F.3d 983, 986 (7th Cir. 2012).
- Should an appellate rule mirror Rule 24 in contemplating both mandatory *and* permissive intervention?

These are but some of the questions that exist, and more will arise in the course of drafting a rule. These questions illustrate why rulemaking, not ad hoc decision making in individual cases, is well suited to producing the comprehensive guidance that courts need to resolve appellate intervention motions.

2. Case-by-case adjudication illustrates the need for a rule and can inform its contours

The experience of the courts of appeals confirms that case-by-case adjudication is not a substitute for structured guidance. Yet, as is familiar, rules are drafted with an eye to what precedes them. On one principle, the courts of appeals agree: appellate intervention should be "reserved for truly exceptional cases," *Richardson*, 979 F.3d at 1104. In *McKenna v. Pan American Petroleum Corp.*, 303 F.2d 778 (5th Cir. 1962), the Fifth Circuit held that "[a] court of appeals may, but *only in an exceptional case for imperative reasons*, permit intervention where none was sought in the district court." *Id.* at 779 (emphasis added); *see also In re Grand Jury Investigation*, 587 F.2d 598, 601 (3d Cir. 1978) (reciting and following the standard announced in *McKenna*); *Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 771 F.2d 1551 (D.C. Cir. 1985) (per curiam) (same); *Spring Constr. Co. v. Harris*, 614 F.2d 374, 377 n.1 (4th Cir. 1980) (same); *Richardson*, 979 F.3d at 1104 (same); *Craig v. Simon*, 980 F.3d 614, 618 n.3 (8th Cir. 2020) (same); *Hall v. Holder*, 117 F.3d 1222, 1231 (11th Cir. 1997) (same); *Synqor, Inc. v. Artesyn Techs., Inc.*, 410 F. App'x 336, 337 (Fed. Cir. 2011) (same).

Some circuits also require that would-be intervenors meet Rule 24's requirements. In those circuits, a movant must satisfy Rule 24 as well as supply an "imperative reason" why it should be permitted to intervene on appeal. *See Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997) ("Intervention on appeal is governed by Rule 24 of the Federal Rules of Civil Procedure. Intervention at the appellate stage is, of course,

unusual and should ordinarily be allowed only for 'imperative reasons.'" (citation omitted)); *Pub. Serv. Co. of N.M. v. Barboan*, 857 F.3d 1101, 1113 (10th Cir. 2017) ("Though we usually take a liberal view of Rule 24(a), when an applicant has not sought intervention in the district court, we permit it on appeal 'only in an exceptional case for imperative reasons.'" (citation omitted)).

The courts of appeals generally consider a lawsuit's timeline to evaluate the movant's failure to seek intervention at the district court. The Fifth Circuit allowed intervention when a movant's "lack of timely intervention below [was] justified by the district court's action without notice." *United States v. Bursey*, 515 F.2d 1228, 1238 n.24 (5th Cir. 1975). The Eighth Circuit denied a motion for leave to intervene on appeal "filed after expedited briefing was completed." *Craig*, 980 F.3d at 618 n.3. The Eleventh Circuit disallowed intervention because the motion "at this late stage" of litigation deprived the court of "the facts necessary to enable it to weigh the equities of injecting itself into a local dispute." *Hall*, 117 F.3d at 1231.[4]

[4] Other circuits have recognized their inherent authority to permit intervention on appeal but have not elaborated on their standards. *See, e.g., Drywall Tapers & Pointers of Greater N.Y. v. Nastasi & Assocs. Inc.*, 488 F.3d 88, 94 (2d Cir. 2007) (recognizing "authority for granting a motion to intervene in the Court of Appeals"); *Hurd v. Ill. Bell Tel. Co.*, 234 F.2d 942, 944 (7th Cir. 1956) (recognizing that its ability to allow intervention on appeal was within its "sound discretion").

3. The Court should leave the creation of a comprehensive standard to govern appellate intervention to the rulemaking process

a. This Court has recognized many contexts in which "rulemaking, not expansion by court decision," is the "preferred means" of addressing difficult procedural questions. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 113-14 (2009) (scope of collateral order doctrine) (internal quotation marks omitted); *see also Cunningham v. Hamilton Cnty.*, 527 U.S. 198, 209-10 (1999) (same); *Miner v. Atlass*, 363 U.S. 641, 651-52 (1960) (scope of admiralty discovery rules); *Lott v. United States*, 367 U.S. 421, 425 (1961) (time to appeal criminal judgments); *Harris v. Nelson*, 394 U.S. 286, 306 (1969) (Harlan, J., dissenting) (habeas discovery rules). Rulemaking "draws on the collective experience of bench and bar, and it facilitates the adoption of measured, practical solutions." *Mohawk*, 558 U.S. at 114 (citation omitted). And it is flexible: the rules committees are "left wholly free to approach the question of amendment of . . . the rules in the light of whatever considerations seem relevant to them," *Miner*, 363 U.S. at 651, and are not constrained by the "time pressures and piecemeal character of case-by-case adjudication," *Harris*, 394 U.S. at 306 (Harlan, J., dissenting).

An illustration from admiralty underscores the value of this approach. In *Miner*, the Court "held that a District Court sitting in admiralty had no power to order the taking of an oral discovery deposition"; the admiralty rules did not address the topic. *Harris*, 394 U.S. at 307 (Harlan, J., dissenting) (describing

Miner). The Court added that it had no view concerning the desirability of discovery depositions in admiralty cases and that it "hoped" the Advisory Committee on General Admiralty Rules would "give the matter their early attention" and "approach the question of amendment of the discovery provisions of the rules in the light of whatever considerations seem relevant to them." *Miner*, 363 U.S. at 651. The committee did just that—it "swiftly proposed new Admiralty Rules authorizing certain additional kinds of discovery, including oral depositions," which "went into effect a little more than a year after" the Court's referral. *Harris*, 394 U.S. at 307 (Harlan, J., dissenting).[5]

b. In this context, three key considerations counsel deference to the rulemaking process.

First, as in *Miner*, the absence of any statute or rule governing appellate intervention in cases originating in the district courts—and the courts of appeals' ensuing struggle to craft a standard to fill the

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[5] Likewise, following this Court's remark in *Lott* that it "hoped" the Judicial Conference would give its "early attention" to "problems" with then-Federal Rule of Criminal Procedure 37(a)'s time-to-appeal provisions, 367 U.S. at 425, the Advisory Committee on Criminal Rules proposed amendments expressly designed to resolve those problems, *see* Advisory Comm. on Crim. Rules, *Proposed Amendments to the Rules of Criminal Procedure for the United States District Courts* 44-47 (May 1965), https://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-criminal-procedure-may-1965 (committee note explaining that "the Supreme Court called attention to the conflict and expressed hope that the rule would be clarified"). The amendments were formally adopted in 1966. *See* Fed. R. Crim. P. 37 (1966).

void—calls out for involvement of the Rules Committee. *See Miner*, 363 U.S. at 651-52.[6]

Second, deference is warranted because the Rules Committee is beginning to "stud[y]" appellate intervention and "weigh[] various proposals" for a rule. *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1714 (2017). In 2010, the Rules Committee first considered drafting an appellate rule to govern intervention motions but decided against rulemaking at that time. *See* Advisory Comm. on App. Rules, *Minutes of Fall 2010 Meeting*, *supra*, at 23-24. The meeting minutes reflect discussion that

> [a]n Appellate Rule addressing intervention on appeal could cover a variety of topics, including the standards and timing requirements for permitting intervention (any such provision would need to be flexible); what entity (the clerk, a single judge or a panel) resolves requests to intervene; disclosure and briefing requirements for intervenors; argument time (if any) for intervenors; and the allocation of appellate costs.

Id. at 23. The Committee decided against rulemaking at that time out of "a concern that treating the topic explicitly might encourage belated requests to intervene" and that a lack of "substantive variations

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[6] The Federal Rules of Appellate Procedure currently contemplate intervention only in proceedings to review agency action, but that rule does not establish standards for granting intervention. *See* Fed. R. App. P. 15(d).

among the circuits concerning the treatment of requests to intervene on appeal" counseled against rulemaking. *Id.* at 23-24.

The Rules Committee is now poised to address the issue. In its most recent meeting, on March 30, 2022, the Committee indicated its openness to considering a rule about intervention on appeal given this Court's recent decision in *Cameron*. *See* Advisory Comm. on App. Rules, *Minutes of Spring 2022 Meeting* 19 (Mar. 30, 2022).[7] That shift may reflect that, in the decade since the Rules Committee last considered the issue, variations among the federal circuits have grown and the topic is arriving on the Court's docket with increasing frequency.

Finally, appellate intervention, like other procedural issues on which the Court has deferred to the advisory committee process, would benefit from systematic examination through rulemaking. The Rules Committee is well situated to craft a generally applicable rule because, unlike a court looking at one fact pattern at a time, the Rules Committee can consider a wider universe of fact patterns, the perspectives and experiences of diverse stakeholders, the dynamics that lend themselves to improper procedural gamesmanship, and the network of consequences that might flow from promulgation. *See, e.g., Mohawk*, 558 U.S. at 113-14.

In light of these considerations, the Court should exercise restraint, go no further than the facts of this case require, and defer a range of difficult questions

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[7] https://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-appellate-rules-march-2022.

implicated by appellate intervention to consideration by the Rules Committee on a clean slate.

C. This Case Can Be Resolved On Narrow Grounds And Should Not Be Used To Shape General Principles Of Appellate Intervention

Petitioners urge the Court to analyze a wide range of factors beyond those considered by the D.C. Circuit when it denied intervention. *See* Pet. Br. 37-50. Resolution of this case requires no such far-reaching inquiry. The D.C. Circuit correctly concluded that petitioners' request to intervene was untimely because it came months after they knew or should have known that their interests had diverged from those of the federal government. At a minimum, the D.C. Circuit did not abuse its discretion in finding the motion untimely. *See NAACP*, 413 U.S. at 366 (prescribing abuse of discretion standard for review of timeliness of intervention motion). This Court should affirm on that basis.

1. *The Court has recognized timeliness as a central consideration governing requests for appellate intervention*

A threshold and often dispositive consideration is whether an intervenor's request is "timely." *See Cameron*, 142 S. Ct. at 1012; *see also NAACP*, 413 U.S. at 365. The centrality of timeliness in this analysis arises from the context of the normal judicial structure: intervention on appeal is unusual and almost always disruptive. Even when a movant pursues intervention at the district court, timeliness plays a central role, *see* Fed. R. Civ. P. 24, and those concerns are heightened on appeal. *See supra* Part A.2. Requiring timely intervention avoids disruptions to appellate

proceedings that might harm the fair resolution of issues on appeal, *see NAACP*, 413 U.S. at 369, and protects important interests in judicial efficiency and finality, *see Cameron*, 142 S. Ct. at 1022 (Sotomayor, J., dissenting).

As the Court has recognized, assessing the timeliness of a request for intervention requires consideration of "all the circumstances." *NAACP*, 413 U.S. at 365-66. And because any motion for intervention filed in the courts of appeals will necessarily come late in a case's lifecycle, the Court has also recognized that "the point to which [a] suit has progressed . . . is not solely dispositive." *Id.* Rather, timing considerations reflect practical realities of notice, fairness, and efficiency. *See, e.g.*, *Auto. Workers*, 382 U.S. at 215-16 (permitting prevailing parties in agency proceedings to intervene in appeals of agency orders in part because timely intervention would, in practice, speed up the ultimate adjudication of the parties' rights and vitiate the need for duplicative proceedings); *see also Cameron*, 142 S. Ct. at 1019 (Kagan, J., concurring) (explaining that a timely request for intervention there did not ultimately delay the case's adjudication, and did not constitute an "an end-run around the timely-appeal rule").

As a general rule, a potential intervenor must act as soon as it knew or should have known that its interests diverged from those of the existing parties. *Cameron*, 142 S. Ct. at 1011; *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977). The proverbial "clock" for intervention starts once a potential intervenor "should have known" about the relevant divergence of interests. *See Cameron*, 142 S. Ct. at 1013.

In *McDonald*, for instance, the need to seek intervention ripened once the movant learned that existing class representatives would not appeal a judgment denying class certification. *McDonald,* 432 U.S. at 394. Intervention was justified there because the respondent reacted immediately and "promptly moved to intervene to protect [her] interests." *Id.*[8] Likewise, in *Cameron*, the "attorney general sought to intervene two days after learning that the secretary would not continue to defend [the relevant statute]." 142 S. Ct. at 1012. While the new Governor had ceased to defend other similar regulations before withdrawing from the defense of this particular statute, the Court credited the fact that the new administration "had continued to defend [that particular] law" until the very end, thereby blunting any criticism that "the attorney general should have known that the secretary would change course." *Id.* at 1013.

In contrast, the Court's decision in *NAACP* turned on the early notice that would-be intervenors had that the United States might opt not to defend the statute at issue after the government averred in a pleading that it "was without information with which it could oppose the motion for summary judgment." *NAACP*, 413 U.S. at 367. Accordingly, the Court held that the intervenors should have moved to intervene earlier because it was "obvious that there was a strong likelihood that the United States would consent to the entry of judgment." *Id*. That holding reflects that, as is typical with waiver and forfeiture generally, once a

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[8] The class certification context in which *McDonald* arose was "critical" to the Court's holding. *McDonald*, 432 U.S. at 394 & n.15.

litigant's basis for intervention arises, that litigant must promptly seek relief.

2. The D.C. Circuit correctly held that petitioners' request for appellate intervention was untimely

The D.C. Circuit denied petitioners' request to intervene based on "the inordinate and unexplained untimeliness of [their] motion." J.A. 3. The facts of this case confirm that the court of appeals correctly resolved this issue: petitioners either knew or should have known that the federal government would not pursue a stay of any adverse judgment in the district court litigation once the CDC determined that the pandemic-related exigency underlying the Title 42 orders was no longer sufficient to justify those orders. To protect their divergent interests at that point, petitioners should have moved to intervene immediately rather than waiting for the district court to enter judgment.

a. The D.C. Circuit based its timeliness decision on two factors. First, it noted that although the litigation had been pending for two years, petitioners did not attempt to intervene in the district court until after the court had ruled on the dispositive motion: petitioners filed their intervention motion on November 21, 2022, six days after the district court had granted the plaintiffs' partial summary judgment motion and vacated the federal Title 42 policy on November 15, 2022. J.A. 3. In fact, petitioners' attempt to intervene at the district court was so belated that the government's timely notice of appeal (filed December 7,

2022) deprived the district court of jurisdiction to even act on the motion. *Id.*

Second, the D.C. Circuit held that petitioners knew "long before" they sought intervention that "their interests in the defense and perpetuation of the Title 42 policy had already diverged or likely would diverge from those of the federal government's should the policy be struck down." J.A. 3-4. On April 1, 2022, the CDC had terminated the Title 42 orders after determining that "the danger of further introduction, transmission, or spread of COVID-19 into the United States from covered noncitizens, . . . [had] ceased to be a serious danger to the public health" and that the Title 42 orders were "no longer necessary to protect public health." 87 Fed. Reg. 19,941, 19,956 (Apr. 6, 2022).

The D.C. Circuit noted that the CDC's termination order "not only 'should have alerted the would-be intervenors' that the federal government's stake in perpetuating Title 42 differed from theirs, . . . it actually did alert them," as evidenced by petitioners' initiation of a different lawsuit in April 2022 seeking to enjoin the CDC's termination order. J.A. 5 (quoting *Cameron*, 142 S. Ct. at 1013) (citing petitioners' contemporaneous lawsuit challenging the CDC's order, *see Louisiana v. CDC*, 603 F. Supp. 3d 406 (W.D. La. 2022), *appeal pending*, No. 22-30303 (5th Cir.)). The States in the *Louisiana* case also received regular status updates from the government concerning the D.C. litigation; in August 2022, the government informed the States that the plaintiffs in the D.C. action had moved to vacate the Title 42 orders via summary judgment. *See* Notice of Defendants' Monthly Reporting for July

2022, *Louisiana v. CDC*, No. 22-cv-00885 (W.D. La. Aug. 16, 2022), ECF No. 154, at 6 n.2.

Despite notice of the asserted divergence of interests, petitioners never sought to intervene in the district court *before* the court granted summary judgment. And petitioners' failure to act promptly was even less excusable because one of petitioners (Texas) had previously moved to intervene in this action in the court of appeals, J.A. 276-98, which denied the motion because of Texas's failure "to meet[] the [heightened] standards for intervention on appeal." J.A. 222 (citing *Amalgamated Transit Union*, 771 F.2d 1551). Despite this notice that intervention on appeal required clearing a higher hurdle, Texas did not renew its motion after the case was remanded to the district court. *See Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022). And because petitioners "did not seek intervention 'as soon as it became clear' that the intervenor's interests would no longer be protected by existing parties," the D.C. Circuit correctly denied their intervention motion. J.A. 6 (citing *Cameron*, 142 S. Ct. at 1012).

b. Petitioners do not take issue with the general requirement of timeliness to intervene, but disagree about when they "should have known" that their motion for intervention was ripe. Petitioners contend that the government mounted a "vigorous defense" of the action until the district court's order, then "suddenly abandon[ed]" its arguments immediately thereafter. *See* Pet. Br. 3, 13, 18. That narrative misreads the record. Throughout the D.C. litigation, including after the CDC's termination order, the government has consistently defended its Title 42 orders, *see* J.A.

149-207, and it has appealed to challenge the district court's contrary legal ruling, J.A. 218-221.

The government did not, however, seek a stay of the district court's order pending resolution of the appeal. But while petitioners seek to paint that decision as a wholesale reversal, it was in fact wholly consistent with—and flowed directly from—the CDC's April 2022 determination that the pandemic-based justification for the orders had disappeared, rendering the orders unsustainable. At that point, it was or should have been evident to petitioners that the government could not argue for a stay pending appeal. A stay requires not only a likelihood of success on the merits but also a showing, *inter alia*, that a stay is in "the public interest." *See*, *e.g.*, *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). Petitioners should not have expected the United States to move to stay a district court order so that the Title 42 orders could remain in place once the government had officially determined that they should be rescinded; the government could not simultaneously maintain that an administrative action had lost its legal justification while also arguing that prolonging the action would serve "the public interest." *See* J.A. 3-4.

Petitioners also err in reading *Cameron* as establishing a per se rule that only when a party abandons a position previously taken *in litigation* does a motion to intervene become ripe. *See* Pet. Br. 27-28. The facts of *Cameron* differ markedly from those here, and the Court established no such formalism in *Cameron*. The litigation decision in *that* case was an abrupt about-face from previous positions. Here, the govern-

ment has not abandoned a *legal* position that petitioners now seek to advance. *Contra, e.g.*, Pet. Br. 21. Rather, the government has not sought a stay that petitioners think it should have requested. But it was or should have been obvious to them that the government could not do so once the CDC had determined that Title 42 was no longer authorized. And that position should have been particularly apparent since the government had appealed the Louisiana district court decision faulting the process the CDC used to make its determination. *See* Notice of Appeal, *Louisiana v. CDC*, No. 22-30303 (5th Cir. May 20, 2022), ECF No. 1; J.A. 160-161 (noting that appeal in opposing summary judgment in this case). If petitioners wanted to insert themselves into the D.C. litigation to argue for a stay, they should have afforded the district court the chance to evaluate the factual and legal elements of that claim once it became evident that the government could not be expected to seek a stay of any adverse decision. That moment arose on April 1, 2022, when the CDC concluded that the pandemic no longer provided sufficient justification for the use of Title 42.

c. As the D.C. Circuit held, the untimeliness of petitioners' requests for intervention is alone sufficient to resolve this case. J.A. 3-4. Contrary to petitioners' view, an appellate intervention motion is not per se timely when filed within the time that a notice of appeal would be due. *See* U.S. Br. 23-24. And the untimeliness of their requests underscores one of the major problems posed by appellate intervention: the district court is the tribunal best situated to evaluate the facts, question the parties about their positions, and determine how to accommodate the interests of

strangers to the litigation (*e.g.*, by *amicus* participation or placing appropriate limits on intervention). Yet the untimely application here cut the district court out of the process. *See supra* Part A.2; *see also Amalgamated Transit Union*, 771 F.2d at 1552-53 & n.3 (permitting appellate intervention only in "exceptional case[s] for imperative reasons," animated by the "unique problems caused by intervention at the appellate stage" (internal quotation marks omitted)). Petitioners' belated attempt to enter this litigation on appeal thus deprived the judiciary of the proper forum for gathering information.[9]

Petitioners instead had to make their intervention motion in the D.C. Circuit—asking that court and then this Court to address complex legal questions on an expedited basis, with an underdeveloped factual record. And underscoring the difficulties in resolving these issues on appeal, the factual circumstances have shifted again since the Court granted certiorari, now that the administration has determined to end the COVID-19 pandemic emergency declarations and has stated that "the end of the public health emergency will end the Title 42 policy at the border."[10]

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[9] Petitioners did initially file a motion to intervene in district court after the court entered judgment, but by that point, the motion came too late: the United States filed its notice of appeal before the district court could act on the motion. *See* J.A. 218.

[10] On January 30, 2023, the White House issued a Statement of Administration Policy detailing the administration's plan to terminate the operative national emergency and public health emergency effective May 11, 2023. Exec. Office of the President, *Statement of Administration Policy* (Jan. 30, 2023),

Petitioners ask this Court to sift through the facts and explore details about petitioners' standing and assertions of prejudice that were not addressed below. That is contrary to the Court's usual practice, *see Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."), and is not necessary here. Assuming that this case does not become moot, *see* U.S. Br. 12, this Court should resolve it based on the D.C. Circuit's sound reasoning. Here, the record supports the court of appeals' conclusion that petitioners' request is untimely. Excluding those latecomers from party status—while affording them the status of *amici*, J.A. 2—equitably balances the competing considerations.

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https://www.whitehouse.gov/wp-content/uploads/2023/01/SAP-H.R.-382-H.J.-Res.-7.pdf.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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