No. 22A544

IN THE SUPREME COURT OF THE UNITED STATES

ARIZONA, ET AL., APPLICANTS

v.

ALEJANDRO N. MAYORKAS, ET AL.

FEDERAL RESPONDENTS' OPPOSITION TO THE APPLICATION FOR A STAY PENDING CERTIORARI

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PARTIES TO THE PROCEEDING

Applicants (putative intervenors below) are the States of Arizona, Alabama, Alaska, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming.

Respondents (defendants-appellants below) are Alejandro N. Mayorkas, in his official capacity as Secretary of Homeland Security; Troy A. Miller, in his official capacity as Acting Commissioner of U.S. Customs and Border Protection (CBP); Pete Flores, in his official capacity as Executive Assistant Commissioner, CBP Office of Field Operations; Raul L. Ortiz, in his official capacity as Chief of U.S. Border Patrol; Tae D. Johnson, in his official capacity as the Acting Director of U.S. Immigration and Customs Enforcement; Xavier Becerra, in his official capacity as Secretary of Health and Human Services; and Dr. Rochelle P. Walensky, in her official capacity as Director of the Centers for Disease Control and Prevention.*

Respondents (plaintiffs-appellees below) also include Nancy

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* The complaint named as defendants David Pekoske, then Acting Secretary of Homeland Security; Norris Cochran, then Acting Secretary of Health and Human Services; Rodney S. Scott, then Chief of U.S. Border Patrol; and William A. Ferrara, then Executive Assistant Commissioner, CBP Office of Field Operations, all in their official capacities. Alejandro N. Mayorkas, Xavier Becerra, Raul L. Ortiz, and Pete Flores have been automatically substituted as parties in their respective places. See Fed. R. App. P. 43(c)(2); Fed. R. Civ. P. 25(d).

Gimena Huisha-Huisha, and her minor child I.M.C.H.; Valeria Macancela Bermejo, and her minor daughter B.A.M.M.; Josaine Pereira-De Souza, and her minor children H.N.D.S.; E.R.P.D.S.; M.E.S.D.S.; H.T.D.S.D.S.; Martha Liliana Taday-Acosta, and her minor children D.J.Z.; J.A.Z.; Julien Thomas, Fidette Boute, and their minor children D.J.T.-B.; T.J.T.-B.; and Romilus Valcourt, Bedapheca Alcante, and their minor child B.V.-A.; all on behalf of themselves and others similarly situated. Minor children are proceeding under pseudonyms pursuant to Federal Rule of Civil Procedure 5.2(a).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.D.C.):

Huisha-Huisha v. Mayorkas, No. 21-cv-100 (Nov. 22, 2022) (entering partial final judgment)

United States Court of Appeals (D.C. Cir.):

Huisha-Huisha v. Mayorkas, No. 21-5200 (Mar. 4, 2022) (affirming in part and reversing in part preliminary injunction)

Huisha-Huisha v. Mayorkas, No. 23-5325 (Dec. 16, 2022) (denying putative intervenors' motions to intervene and for a stay)

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On behalf of the federal respondents, the Solicitor General respectfully files this response in opposition to the application for a stay of the judgment issued by the United States District Court for the District of Columbia in this case.

From March 2020 until April 2022, the Centers for Disease Control and Prevention (CDC) responded to the COVID-19 pandemic by invoking 42 U.S.C. 265, which allows CDC to prohibit the "introduction of persons or property" from a foreign country suffering an outbreak of a "communicable disease" if CDC determines that such a prohibition is "required in the interest of the public health." CDC's "Title 42" orders suspended the entry and authorized the expulsion of certain noncitizens who would otherwise have been held in congregate settings while being processed under the immigration provisions in Title 8 of the U.S. Code.

The district court held that the Title 42 orders, as well as the underlying regulation, were arbitrary and capricious, enjoined their application to the plaintiff class, and vacated them nation-

wide. The government disagrees with that decision and remedy and has appealed. But the government has not sought a stay pending appeal because it could not plausibly do so: In April 2022, CDC terminated the Title 42 orders because it determined that they are no longer necessary to protect public health, and thus no longer authorized by Section 265. The government has been barred from implementing that termination by a preliminary injunction in separate litigation, which the government has appealed. But the government could scarcely have sought extraordinary relief to perpetuate a CDC-imposed public-health measure that CDC itself has concluded is no longer justified under the public-health laws.

Applicants are a group of States that unsuccessfully sought to intervene in the government's appeal to seek a stay. Applicants do not claim to be seeking to vindicate any interest in public health or slowing the spread of COVID-19. Instead, they candidly acknowledge that they wish to use the Title 42 orders as a makeshift immigration-control measure: They assert that a full return to the immigration rules Congress prescribed in Title 8 would cause a surge in border crossings, which would in turn lead applicants to expend more resources on social services and law enforcement.

The government recognizes that the end of the Title 42 orders will likely lead to disruption and a temporary increase in unlawful border crossings. The government in no way seeks to minimize the seriousness of that problem. But the solution to that immigration problem cannot be to extend indefinitely a public-health measure

that all now acknowledge has outlived its public-health justification. Instead, it is to rely on the immigration laws Congress has prescribed in Title 8. The government is prepared to do that, including by surging resources and invoking its Title 8 authorities to implement new policies in response to the temporary disruption that is likely to occur whenever the Title 42 orders end.

Rather than returning to the immigration system prescribed by Congress, applicants ask this Court to compel the government to continue relying on now-obsolete public-health orders as the Nation's de facto immigration policy. Applicants are not entitled to that relief unless they can show that the Court would likely grant certiorari and reverse the D.C. Circuit's denial of intervention; that the Court would likely grant certiorari and reverse a decision affirming the district court's judgment; and that the equities and public interest favor a stay. Applicants cannot make those showings for multiple independent reasons.

First, as the D.C. Circuit unanimously concluded, "the inordinate and unexplained untimeliness of the States' motion to intervene on appeal weighs decisively against intervention." Appl. Add. 2. Since at least April 2022, applicants have been on clear notice that their interests differ from the government's -- and that the government could not be expected to seek a stay pending appeal -- because CDC determined that the Title 42 orders are no longer necessary in the interest of public health and thus no longer authorized. Yet despite those "long-known-about differing

interests," applicants waited eight months to move to intervene, forcing the parties and the courts to scramble to address their motion on an emergency basis. Id. at 3. The D.C. Circuit did not abuse its discretion in finding applicants' motion untimely, and its factbound, unpublished decision does not warrant review.

Second, the States go badly astray in seeking to characterize this case as one involving "collusion" (e.g., Appl. 2) or as a successor to Arizona v. City & County of San Francisco, 142 S. Ct. 1926 (2022) (per curiam), in which the government dismissed appeals from decisions enjoining or vacating a policy it planned to revisit in the future but had not yet taken administrative action to repeal. Long before the district court's decision here, CDC terminated the Title 42 orders in compliance with the Administrative Procedure Act (although a district court erroneously enjoined that termination in a decision that the government has appealed to the Fifth Circuit). Despite CDC's termination, the government continued to vigorously defend the Title 42 orders in this litigation because those orders were lawfully issued. And the government is now doing precisely what many of the applicants maintained it should have done in Arizona: It has appealed the district court's decision and plans to ask "the court to hold the litigation in abeyance" pending CDC's forthcoming rulemaking addressing the Title 42 regulation vacated by the district court and the conclusion of litigation concerning CDC's termination of the Title 42 orders. Pet. Br. at 11, Arizona, supra (No. 20-1775). As those applicants

previously acknowledged, "[c]ourts routinely grant these [abeyance] requests," which avoid unnecessary litigation over policies "that will likely be repealed anyway." Ibid.

Applicants' disagreement with the government's decision to pursue the course applicants themselves previously advocated rather than seeking a stay does not justify intervention. Indeed, applicants recognized that point when the shoe was on the other foot: They joined the government in opposing intervention by an advocacy group that sought to stay the preliminary injunction preventing CDC from terminating the Title 42 orders.

Third, applicants do not have the sort of interest required to justify intervention, much less a stay. Applicants are not subject to the Title 42 orders or the Title 8 policies that will replace them. Instead, applicants assert that the end of the Title 42 orders will affect migration and the government's enforcement of the immigration laws, which will in turn cause widely shared societal costs and indirectly lead applicants to make increased expenditures on government services. Such derivative effects of a federal policy on the States' own governmental activities do not satisfy Article III or the standards governing intervention. And that is particularly true here because applicants' asserted interests relate solely to immigration; they are entirely divorced from the Title 42 orders' justification as a public-health measure aimed at stopping the spread of COVID-19. Applicants assert no interests even arguably within the zone protected by Title 42.

Fourth, the equities and the public interest would not favor a stay even if applicants were entitled to intervene. Again, the government recognizes that the end of the Title 42 orders will likely have disruptive consequences that will require a response under Title 8. But applicants' interest in avoiding those immigration consequences cannot justify extending a public-health measure that is no longer supported by public-health conditions. The public interest calls for respecting Congress's judgment about the legal framework that should govern the Nation's borders, which now lies in Title 8 rather than Title 42.

For all of these reasons, the Court should deny the application. In addition, the government respectfully requests that, if the Court denies the application before December 23, it leave the current administrative stay in place until 11:59 p.m. on December 27. If the Court denies the application on or after December 23, the government respectfully requests that it preserve the administrative stay until 11:59 p.m. on the second business day following its order. That brief continuation of the stay would allow the government to again prepare for a full return to operations under Title 8, with new policies tailored to the consequences of the end of the Title 42 orders -- a complex, multi-agency undertaking with policy, operational, and foreign relations dimensions that has been paused or partially unwound in light of the administrative stay.

STATEMENT

A. CDC's Title 42 Orders

1. In 1944, Congress enacted the Public Health Service Act, ch. 373, Pub. L. No. 78-410, 58 Stat. 682 (42 U.S.C. 201 et seq.), which provides in relevant part that whenever the Secretary of Health and Human Services (HHS) determines that "there is serious danger of the introduction of [a communicable] disease into the United States, and that this danger is so increased by the introduction of persons or property from [a foreign] country that a suspension of the right to introduce such persons and property is required in the interest of the public health," the Secretary "shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries and places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose." Tit. III, Pt. G, § 362, 58 Stat. 704 (42 U.S.C. 265).[1]

In March 2020, in light of the unprecedented COVID-19 pandemic, HHS and CDC issued an interim final rule under Section 265 to establish a procedure for CDC to temporarily suspend the introduction of certain noncitizens into the United States. 85 Fed.

[1] Section 265 refers to the "Surgeon General," but the relevant functions were transferred to the HHS Secretary (then known as the Secretary of Health, Education, and Welfare) in 1966. See Reorganization Plan No. 3 of 1966, § 1(a), 31 Fed. Reg. 8855 (June 25, 1966), 80 Stat. 1610. The HHS Secretary has delegated his authority to CDC. 42 C.F.R. 71.40.

Reg. 16,559 (Mar. 24, 2020). CDC also issued an order temporarily suspending the introduction of certain noncitizens traveling from Canada and Mexico. 85 Fed. Reg. 17,060 (Mar. 26, 2020).

In September 2020, HHS and CDC published a final rule. 85 Fed. Reg. 56,424 (Sept. 11, 2020) (42 C.F.R. 71.40). CDC later issued a new order suspending the introduction of covered noncitizens into the United States for reasons that substantially tracked the March 2020 order. 85 Fed. Reg. 65,806, 65,807-65,808 (Oct. 16, 2020). And in August 2021, CDC issued another order superseding the previous orders. 86 Fed. Reg. at 42,828. That order explained that "[u]pon reassessment of the current situation with respect to the pandemic and the situation at the U.S. borders," CDC had concluded that the Title 42 order "remains necessary" for single adults and family units, subject to recurring 60-day reviews. Id. at 42,830.[2] As contemplated by CDC's regulation, and consistent with the exercise of an emergency authority, each of the Title 42 orders was issued without notice and comment. See 42 C.F.R. 71.40(d).

2. The Title 42 orders apply to certain noncitizens arriving from Canada or Mexico who would otherwise have to be held in

[2] In February 2021, CDC had temporarily excepted unaccompanied noncitizen children encountered in the United States from the Title 42 orders. 86 Fed. Reg. 9942 (Feb. 17, 2021). CDC made that exception permanent in July 2021. 86 Fed. Reg. 38,717, 38,717-38,718 (July 22, 2021). The August 2021 order does not apply to unaccompanied noncitizen children.

a "congregate setting" at a port of entry or U.S. Border Patrol station, thereby risking the spread of COVID-19. 86 Fed. Reg. at 42,841. Under the orders, "covered noncitizens apprehended at or near U.S. borders" are "expelled" to Mexico, Canada, or their country of origin. Id. at 42,836. Noncitizens subject to the orders are not placed into immigration proceedings under Title 8 and are not eligible to seek asylum or other Title 8 benefits. As a result, they can be processed much more quickly -- in "roughly 15 minutes," as compared to "approximately an hour and a half to two hours" for noncitizens to be processed and issued a notice to appear for removal proceedings under Title 8. Ibid.

On the other hand, expulsion under Title 42 does not carry the same legal consequences as removal under Title 8. See, e.g., 8 U.S.C. 1231(a)(5) (providing for reinstatement of removal orders); 8 U.S.C. 1326 (making reentry after removal a felony). As a result, some noncitizens expelled to Mexico under Title 42 "have attempted to cross the border multiple times, 'sometimes 10 times or more.'" 560 F. Supp. 3d 146, 176 (2021). In addition, the government's ability to expel covered noncitizens under Title 42 is constrained by "a range of factors, including, most notably, restrictions imposed by foreign governments." 86 Fed. Reg. at 42,836. Those realities, and the exceptions in the Title 42 orders themselves, mean that many noncitizens have been processed under Title 8 even while the Title 42 orders have been in effect. See U.S. Customs & Border Prot., Nationwide Enforcement Encounters:

Title 8 Enforcement Actions and Title 42 Expulsions FY2022 (last modified Nov. 14, 2022).

B. Private Respondents' Suit And The Prior Appeal

Private respondents brought suit on behalf of a putative class of noncitizen families who are or will be subjected to the Title 42 orders. D. Ct. Doc. 57-1 (Feb. 5, 2021). In September 2021, the district court granted provisional class certification and a classwide preliminary injunction, holding that the Title 42 orders exceeded CDC's authority under 42 U.S.C. 265. 560 F. Supp. 3d 146. In March 2022, the D.C. Circuit affirmed the injunction in part and vacated it in part, holding that Section 265 likely authorized the expulsion of noncitizens, but that other laws bar the government from expelling a noncitizen to a country where he "will be persecuted or tortured," 27 F.4th 718, 722 (2022).

Meanwhile, in October 2021, while the government's appeal was pending, applicant Texas moved to intervene, asserting that the government might settle, dismiss the appeal, or otherwise drop its defense of the Title 42 orders. Appl. Add. 2-3. The D.C. Circuit denied the motion, holding that Texas had not satisfied the court's heightened standard "for intervention on appeal." Id. at 204 (citing Amalgamated Transit Union Int'l, AFL-CIO v. Donovan, 771 F.2d 1551 (D.C. Cir. 1985) (per curiam)). But neither Texas nor any other applicant sought to intervene in the pending proceedings in the district court.

C. CDC's 2022 Termination Of The Title 42 Orders

On April 1, 2022, CDC issued an order terminating the Title 42 orders. 87 Fed. Reg. at 19,941. CDC concluded that "the cross-border spread of COVID-19 due to covered noncitizens does not present the serious danger to public health that it once did, given the range of mitigation measures now available." Id. at 19,944. Among other things, CDC highlighted the widespread availability of tests, vaccines, and treatments. Id. at 19,949-19,950. Accordingly, CDC "determined that the extraordinary measure of an order under 42 U.S.C. 265 is no longer necessary." Id. at 19,944. And CDC emphasized "the statutory and regulatory requirement" that an order under Section 265 "last no longer than necessary to protect the public health." Id. at 19,956; see id. at 19,954-19,955. The termination was to take effect on May 23, 2022. Id. at 19,941.

Applicants and other States sued in the Western District of Louisiana to block the termination, and the district court issued a nationwide preliminary injunction prohibiting the government from implementing it. Louisiana v. CDC, No. 22-cv-885, 2022 WL 1604901 (W.D. La. May 20, 2022). The court did not question CDC's determination in April 2022 that the Title 42 orders are no longer necessary in the interest of public health. Instead, it relied solely on a procedural ground: It held that even though the Title 42 orders were emergency measures adopted without notice and comment, CDC was required to go through notice and comment to rescind them. 2022 WL 1504901, at *17-20. And although the plaintiff

States also raised arbitrary-and-capricious challenges, they did not seriously question CDC's public-health determination and instead focused on CDC's asserted failure "to consider the immigration consequences" of ending Title 42. Id. at *21.

The government has appealed the Louisiana injunction and the appeal is fully briefed. Louisiana v. CDC, No. 22-30303 (5th Cir.). The government did not, however, seek to stay the injunction pending appeal, and the Title 42 orders have thus remained in effect while the appeal has proceeded. An advocacy organization sought to intervene to seek a stay pending appeal, but the government, joined by the applicants here, successfully opposed intervention, arguing that the government's appeal would adequately represent the putative intervenors' interests despite the government's decision not to seek a stay pending appeal. See Gov't Opp. to Mot. 1-2, 11-15, Louisiana, supra (June 13, 2022); States' Consolidated Br. 94, Louisiana, supra (Aug. 31, 2022).

D. Proceedings Below

1. On November 15, 2022, the district court granted private respondents' motion for summary judgment on their claim that the Title 42 policy is arbitrary and capricious. Appl. Add. 7-57. The court concluded that CDC had failed to explain why it did not apply a "least restrictive means" test in deciding to issue the Title 42 orders, id. at 26-33; failed to consider the consequences for noncitizens expelled under those orders, id. at 33-36; failed to adequately consider alternatives, such as conducting immigra-

tion processing under Title 8 outdoors, id. at 36-43; and failed to show that the spread of COVID-19 by migrants was a "real problem," id. at 45-46. The court permanently enjoined enforcement of the Title 42 orders against class members and vacated the orders and the regulation authorizing them, 42 C.F.R. 71.40. Appl. Add. 5. The court added that it would not grant a stay pending appeal. Id. at 6.

Faced with the prospect of an abrupt end to the Title 42 orders, the government sought a temporary stay of the district court's injunction and vacatur to allow time "to help prepare for the transition from Title 42 to Title 8 [immigration] processing." Appl. Add. 199. The government emphasized that this additional time was "critical to ensuring that DHS can continue to carry out its mission to secure the Nation's borders and to conduct its border operations in an orderly fashion." Ibid. Although the private respondents did not oppose that temporary stay, id. at 197, the district court granted it only with "great reluctance," id. at 60 (capitalization altered). The court stayed its order for five weeks, or until December 21, 2022. Ibid.

The government filed a notice of appeal on December 7 and informed the district court that it would argue on appeal, as it had argued in district court, "that CDC's Title 42 Orders were lawful, that [42 C.F.R.] 71.40 is valid, and that [the district court] erred in vacating those agency actions." Appl. Add. 201. The government further explained that it planned to seek to hold

the appeal in abeyance pending (i) the appeal of the injunction barring CDC from terminating the Title 42 orders (which could moot this case) and (ii) a new rulemaking that HHS and CDC will undertake to reconsider the framework under which CDC may exercise its authority under 42 U.S.C. 265 (which could moot private respondents' challenge to Section 71.40). Appl. Add. 201-202.

2. Meanwhile, on November 21, 2022, applicants moved to intervene in the district court. D. Ct. Doc. 168. On December 9, after the government filed its notice of appeal, applicants moved for a stay of the district court's judgment. Appl. Add. 58. The district court denied the stay, ibid., and later deferred ruling on applicants' intervention motion because the case was already before the court of appeals, 12/14/22 D. Ct. Minute Order.

The D.C. Circuit denied applicants' motion to intervene. Appl. Add. 1-4. In a unanimous order, the court explained that post-judgment motions to intervene "will usually be denied where a clear opportunity for pre-judgment intervention was not taken." Id. at 2 (quoting Associated Builders & Contractors, Inc. v. Herman, 166 F.3d 1248, 1257 (D.C. Cir. 1999)). Here, the court found it unnecessary to consider the other requirements for intervention because "the inordinate and unexplained untimeliness of the States' motion to intervene on appeal weighs decisively against intervention." Ibid.

The court of appeals explained that "long before now," applicants "kn[ew] that their interests in the defense and perpetu-

ation of the Title 42 policy had already diverged or likely would diverge from those of the federal government[]." Appl. Add. 2. In reaching that conclusion, the court relied on applicants' "own prior filings." Id. at 3. The court observed that Texas had specifically informed the D.C. Circuit of that divergence "[f]ourteen months" earlier in a filing seeking to intervene in the preliminary-injunction appeal, but that "neither Texas nor any of the States here moved to intervene in district court on remand from" that proceeding. Id. at 2-3. The court also emphasized that "more than eight months ago" CDC "issued an order terminating the Title 42 policy"; that action, which "the same States seeking to intervene in this case" challenged in the Louisiana litigation, both "'should have'" and "actually did alert [the would-be intervenors]" that the federal government's stake in perpetuating Title 42 was different from theirs. Id. at 3 (quoting Cameron v. EMW Women's Surgical Ctr., P.S.C., 142 S. Ct. 1002, 1010 (2022)). Given that backdrop, the government's decision "not to pursue the 'extraordinary relief' of a stay pending appeal" should have "come as no surprise." Ibid. (citation omitted). The court further emphasized that applicants failed to "explain why they waited eight to fourteen months to move to intervene" or to identify reasons beyond "these long-known-about differing interests." Ibid.

"Given that record," the court of appeals explained that this case "bears no resemblance to Cameron or United Airlines, Inc. v. McDonald, 432 U.S. 385, 394 (1977)," where the would-be intervenors

sought to participate "as soon as it became clear" that the existing parties would no longer protect their interests. Appl. Add. 3 (quoting Cameron, 142 S. Ct. at 1012, and United Airlines, 432 U.S. at 394). For those reasons, the court denied the motion for intervention and dismissed as moot applicants' motion for a stay of the district court's order. Id. at 4.

ARGUMENT

The application for a stay should be denied. "To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." Hollingsworth v. Perry, 558 U.S. 183, 190 (2010).

In addition, a stay is an equitable remedy that is never "a matter of right, even if irreparable injury might otherwise result." Nken v. Holder, 556 U.S. 418, 433 (2009) (citation omitted). "It is instead an exercise of judicial discretion," and "the propriety of its issue is dependent upon the circumstances of the particular case," including "the public interest." Id. at 433-434 (citation and internal quotation marks omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." Ibid.

I. THIS COURT WOULD NOT LIKELY GRANT CERTIORARI ON THE INTERVENTION QUESTION OR THE MERITS OF THE TITLE 42 ORDERS

Applicants ask this Court to grant certiorari to review the D.C. Circuit's denial of their motion to intervene, but they seek a stay of the district court's underlying judgment on the merits. To justify that relief, they must show that the Court would likely grant certiorari to review both the order denying intervention and an eventual decision affirming the underlying judgment. See Hollingsworth, 558 U.S. at 190. Applicants cannot show that the Court would likely review either decision, much less both of them.

A. Applicants cannot seek a stay (or any other equitable relief) unless they are parties to the case. See Automobile Workers v. Scofield, 382 U.S. 205, 209 (1965). Accordingly, as applicants appear to acknowledge, they must seek a stay from this Court not pending the government's appeal of the district court's judgment, but pending their own petition for a writ of certiorari seeking review of the D.C. Circuit's order denying intervention. See Appl. 40 (inviting the Court to consider the application as "a petition for certiorari on the intervention questions"). For that reason, applicants must first demonstrate a reasonable probability that this Court would grant certiorari to decide whether the court of appeals abused its discretion by denying intervention. They cannot do so.

The D.C. Circuit's unanimous order applied well-established standards to unusual, case-specific circumstances. Among other

things, the court relied on applicants' "own prior filings," which "show[ed] that they did not seek intervention 'as soon as it became clear' that [applicants'] interests would no longer be protected by existing parties." Appl. Add. 3-4 (quoting Cameron v. EMW Women's Surgical Ctr., P.S.C., 142 S. Ct. 1002, 1010 (2022)). The D.C. Circuit thus agreed with applicants (e.g., Appl. 19-20) that this Court's decisions in Cameron and United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977), supply the governing legal standard; it simply concluded that, as a factual matter, "this case bears no resemblance" to those decisions because applicants delayed for months after it had "become clear" that their interests diverged from the government's. Appl. Add. 3-4. That factbound decision does not conflict with any decision of another court of appeals or otherwise warrant further review. Indeed, applicants do not even cite another decision considering intervention in circumstances like these.

Applicants also err in asserting (Appl. 17-18) that this case resembles other recent cases concerning intervention in which this Court has granted certiorari. In Cameron and Arizona v. City & County of San Francisco, 142 S. Ct. 1926 (2022) (per curiam), the Court agreed to consider standards for denying a motion to intervene when a party in the case declines to pursue further review. Here, by contrast, the government has appealed, applicants' position on the merits is aligned with the government's, and the denial of intervention did not turn on any broadly applicable principles

of intervention, but instead on a fact-specific timeliness determination.

Applicants also seek to analogize this case to United States v. Texas, No. 22-58 (argued Nov. 29, 2022), by invoking what they characterize as the "enormous national importance" of the end of the Title 42 policy (Appl. 18). But the practical significance of border-management issues does not give the factbound intervention question decided by the D.C. Circuit the type of legal significance that would warrant this Court's review. Texas, in contrast, did not present any question concerning intervention.

B. Even if applicants could show that this Court would likely review and reverse the D.C. Circuit's denial of intervention, a stay would not be warranted because the Court would not likely review a decision affirming the district court's underlying decision. To be sure, this Court often grants certiorari to review decisions invalidating important national policies. Here, however, CDC has already determined that the Title 42 orders are no longer justified as a public-health matter and has sought to terminate them. The Court would not likely grant review to consider the merits of a policy that the relevant agency had already rescinded.

II. THIS COURT WOULD NOT LIKELY REVERSE THE D.C. CIRCUIT'S ORDER DENYING INTERVENTION

There is no "fair prospect," Hollingsworth, 558 U.S. at 190, that if this Court granted a writ of certiorari, it would reverse

the court of appeals' denial of intervention. "No statute or rule provides a general standard to apply in deciding whether intervention on appeal should be allowed," and the resolution of such a motion "is committed to the discretion of the court before which intervention is sought." Cameron, 142 S. Ct. at 1010-1011. The D.C. Circuit did not abuse its discretion in determining that applicants' motion was untimely because it was based on "long-known-about differing interests" with the United States that applicants failed to defend by seeking to intervene in the district court proceedings when the differences first became apparent many months ago. Appl. Add. 3. The denial of intervention was also correct for three additional reasons, which the court of appeals had no occasion to reach: applicants' disagreement with the government's litigation decisions does not warrant intervention; applicants lack a cognizable interest relating to the subject of the action; and applicants lack Article III standing.

A. The Court Of Appeals Did Not Abuse Its Discretion In Denying Applicants' Motion As Untimely

The timeliness of a motion to intervene "is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review." NAACP v. New York, 413 U.S. 345, 366 (1973). The D.C. Circuit did not abuse its discretion in finding applicants' motion untimely.

1. Applicants waited nearly two years after the commence-

ment of the suit to seek intervention in the district court, even though they were well aware of the suit. See Appl. Add. 2. Of course, a long delay by itself does not necessarily defeat timeliness if the movant "sought to intervene 'as soon as it became clear' that [its] interests 'would no longer be protected' by the parties in the case." Cameron, 142 S. Ct. at 1012 (citation omitted). But here, applicants have long known that the government's interests diverge from theirs in precisely the way that applicants now contend justifies intervention.

Indeed, Texas -- one of the applicants here -- unsuccessfully sought to intervene in the court of appeals at the preliminary injunction stage in October 2021, citing its "concerns that the federal government would settle or otherwise not vigorously pursue preservation of its existing [Title 42] policy." Appl. Add. 2. The denial of that motion rested on the D.C. Circuit's heightened "standards for intervention on appeal" and thus posed no obstacle to intervention in district court. Id. at 204. But neither Texas nor any other applicant sought to intervene in the district court in the 12 months after that decision "or during the summary judgment proceedings." Id. at 2-3.

Applicants likewise failed to act when CDC "issued an order terminating the Title 42 policy" more than eight months ago. Appl. Add. 3. That development "'should have'" and, in fact, "actually did" alert applicants about the government's different interests concerning the continuation of the Title 42 orders. Ibid. (quoting

Cameron, 142 S. Ct. at 1013). Indeed, applicants themselves conceded in their filings that it was "clear" to them "[f]or most of 2022" that the government "wanted * * * to end Title 42." Ibid. The government's decision not to seek an emergency stay pending appeal in these circumstances could have "come as no surprise." Ibid. And applicants have offered no justification for failing to intervene "as soon as it became clear" that the government would have no plausible basis to seek emergency relief to preserve the orders that CDC has determined are no longer necessary for the public health and therefore no longer authorized by Section 265.

2. Applicants' contrary arguments are unavailing. Applicants assert (Appl. 1) that they acted with "extraordinary speed" by moving to intervene "a mere six days" after the government "abandoned meaningful defense" of the Title 42 orders. That assertion blinks reality. To begin with, the government has not abandoned defense of the orders. To the contrary, the government has vigorously argued throughout this case that CDC acted within its statutory authority, and not arbitrarily or capriciously, in issuing the orders and challenged regulation. See, e.g., Appl. Add. 168-191. And the government has appealed the district court's decision.

Accordingly, this is not a case where a defendant unexpectedly declines to appeal an adverse judgment and another party seeks to intervene to appeal in its stead. Instead, the changed circumstance that applicants identify is the government's decision not

to seek a stay pending appeal. But as the D.C. Circuit emphasized, the government's decision to forgo that "'extraordinary relief'" should have "come as no surprise" to applicants given CDC's determination that the Title 42 orders are no longer required to protect the public health, and thus no longer authorized under Section 265. Appl. Add. 3 (citation omitted). Applicants have no answer to that point, which was central to the D.C. Circuit's decision.

For similar reasons, the authorities applicants cite cut against them. Applicants rely (e.g., Appl. 19-21) on this Court's decision in United Airlines, which held that a putative class member's motion to intervene to appeal an order denying class certification was timely. 432 U.S. at 395. But there, the Court deemed it "critical" that "as soon as it became clear to the [would-be-intervenor] that the interests of the unnamed class members would no longer be protected by the [parties], she promptly moved to intervene to protect those interests." Id. at 394-395; see Cameron, 142 S. Ct. at 1012 (describing United Airlines as holding that the intervention motion "was timely because it was filed soon after the movant learned that the class representatives would not appeal"). The D.C. Circuit deemed applicants' motion untimely because they failed to make that showing.

The same is true for Cameron. The intervenor in that case, Kentucky's Attorney General, established what applicants did not, namely that he "sought to intervene 'as soon as it became clear'

that the Commonwealth's interests 'would no longer be protected' by the parties in the case." 142 S. Ct. at 1012. The Court observed that the opponents of intervention in that case did "not explain why the attorney general should have known that the [existing defendant] would change course." Id. at 1013. Here, in contrast, the court of appeals found, based in part on applicants' own representations, that they both should have known and "actually did" know that their interests diverged from the government's -- and, in particular, that the government's decision not to seek a stay pending appeal should have been "no surprise." Appl. Add. 3.

Applicants assert that, under the government's view "there almost certainly never was" a right time to intervene. Appl. Add. 26. That is incorrect. The divergence of interests on which applicants themselves rely in seeking to intervene has existed for at least eight months, yet applicants took no action until the eleventh hour. Applicants do not cite any decision from any court granting intervention to a party who delayed in the face of such notice of divergent interests.[3]

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[3] Applicants also contend that the court of appeals made a "factual error," suggesting that the court had the mistaken impression that applicants first moved to intervene only after the United States filed its notice of appeal. Appl. 24. Applicants misread the decision below. The court correctly explained that applicants' filing before the district court came "so late in the litigation process that the federal government's filing of a notice of appeal shortly thereafter, in the States' view, deprived the district court of jurisdiction even to act on the motion," Appl. Add. 2. In fact, the district court deferred its ruling on the motion in light of the notice of appeal. See Fed. R. Civ. P.

B. Applicants' Disagreement With The Government's Litigation Decisions Does Not Warrant Intervention

Applicants assert that they are entitled to intervene because the government is engaged in "underhanded litigation tactics," Appl. 26, in service of "'rulemaking-by-collective acquiescence,'" Appl. 22 (quoting Arizona, 142 S. Ct. at 1928 (Roberts, J., concurring)). Those allegations are entirely unfounded. Indeed, they directly contradict applicants' own prior arguments.

1. Applicants contend that this case resembles Arizona, in which the government dismissed appeals from orders enjoining or vacating a policy it planned to reconsider, thereby terminating the litigation. See 142 S. Ct. at 1928 (Roberts, C.J., concurring). But the procedural posture of this case differs in numerous respects.

Applicants are wrong to assert that the government seeks to "circumvent" APA requirements and rescind the Title 42 orders by acquiescing in the district court's nationwide vacatur. Appl. 1-2. Long before the district court entered its decision in this case, CDC terminated the Title 42 orders because they were no longer justified on public-health grounds. Although a separate nationwide injunction has prevented that termination from taking effect, the government has appealed that injunction to defend CDC's

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62.1(a)(1). And the court of appeals correctly explained that applicants were asking the D.C. Circuit to allow them "to intervene for the first time" before that Court. Appl. Add. 2.

lawful termination and to assert that it complied with the APA. At the same time, the government has continued to vigorously defend the Title 42 orders in this litigation because those orders were lawfully issued based on then-existing public-health considerations. The government disagrees with the district court's decision and remedy and has appealed the court's judgment. Applicants' heated rhetoric alleging a "calculated capitulation" rings hollow given this procedural history. Appl. 2.

Applicants object to the government's intent to seek abeyance of the appeal here pending CDC's forthcoming rulemaking and the completion of litigation over CDC's termination of the Title 42 orders. But in pursuing that course, the government is doing precisely what applicants themselves have previously argued that it should do in cases like this. The petitioners in Arizona (including many of the applicants) argued that the government should have asked the courts "to hold the litigation in abeyance" pending further rulemaking, asserting that abeyance properly "prevents litigation over a rule that will likely be repealed anyway, conserving the resources of the parties, the government, and the judiciary." Pet. Br. at 11, Arizona, supra (No. 20-1775). And in another pending case, most of the applicants have likewise asserted that the Executive Branch's "typical practice" is to ask courts to "abey litigation regarding administrative actions it no longer supports until it can rescind or otherwise terminate those actions." Pet. for Cert. at 5, Texas v. Cook County, No. 22-234

(filed Sept. 9, 2022). The government's adherence to that "typical practice" is in no way improper and does not supply a basis for intervention.[4]

Applicants also allege that the government engaged in improper "collusion" (e.g., Appl. 2) by seeking an unopposed five-week stay to prepare for a full return to Title 8 operations. That assertion is puzzling. Applicants have never attempted to explain how the government could have sought a stay pending appeal to perpetuate CDC orders that CDC itself had determined were no longer necessary or authorized. Nor do applicants deny that a brief stay was essential to allow the government to prepare for an orderly transition to Title 8 operations. See Appl. Add. 199. Indeed, the disruptive consequences that applicants themselves highlight would have been greatly exacerbated -- and applicants themselves could only have been worse off -- had the government simply allowed the district court's vacatur to take immediate effect. See ibid. And the government secured private respondents' non-opposition to its stay motion in order to maximize the chances that it would be granted by a district court that had expressed extreme skepticism of the Title 42 policy and had pre-emptively denied a stay pending appeal -- and that ultimately granted even a brief, unopposed stay

[4] As applicants themselves have previously recognized, "[c]ourts routinely grant these requests" for abeyance in recognition that continued litigation of an appeal is unwarranted when an agency is reconsidering a policy. Pet. Br. at 11, Arizona, supra (No. 20-1775); see Appl. Add. 202 (citing cases).

only with "great reluctance." Id. at 60 (capitalization altered).

2. More fundamentally, applicants' disagreements with the government's approach to this litigation do not justify allowing third parties to intervene and countermand the government's own decisions about how to conduct litigation in defense of government policies. Congress and the Executive Branch have chosen to "concentrate[]" such litigation decisions in a "single official," the Solicitor General, precisely because they require a "broader view of litigation in which the Government is involved" and turn on "a number of factors which do not lend themselves to easy categorization." FEC v. NRA Political Victory Fund, 513 U.S. 88, 96 (1994). Allowing intervention based on disagreement with a discrete litigation decision within a pending appeal would improperly "allow a third party to intervene not because an agency failed to move for additional review, but because the agency failed to move for review in the third party's preferred way." Humane Society v. Department of Agriculture, No. 20-5291, 2022 WL 17411257, at *2 (D.C. Cir. 2022) (Tatel, J., concurring).

That is particularly true of decisions about emergency stays, which implicate not only the government's interest in maintaining control over government litigation but also its interest in managing its operations -- interests that are heightened here because this case involves the management of the border, a matter with significant foreign-relations implications. "Stays pending appeal * * * are granted only in extraordinary circumstances," not as a

matter of course. Williams v. Zbaraz, 442 U.S. 1309, 1311 (1979) (Stevens, J., in chambers); see Nken, 556 U.S. at 427. The government's decision not to seek such extraordinary relief cannot be a basis for belated intervention by a third party claiming to be injured by the district court's judgment; such a ruling would open the door for intervention in countless cases where those who may be indirectly affected by litigation disagree with the government's chosen litigation strategy.

Applicants themselves previously recognized precisely those points in the Louisiana litigation challenging CDC's termination of the Title 42 orders. There, as here, the district court ruled against the government. There, as here, the government opted to appeal without seeking a stay pending appeal. There, as here, another party sought to intervene to seek a stay pending appeal. Doc. 516342383, Louisiana v. CDC, No. 22-30303 (5th Cir. June 2, 2022). And there, as here, the federal government successfully opposed intervention, arguing that its appeal would adequately represent the putative intervenor's interests even though the government had not sought a stay pending appeal. Gov't Opp. to Mot. 1-2, 11-15, Louisiana, supra (June 13, 2022). In that case, however, applicants -- all of whom are appellees in Louisiana -- agreed with the government that the putative intervenor had "failed to establish that Federal Defendants did not adequately represent their interests," notwithstanding the government's failure to seek a stay. States' Consolidated Br. 94, Louisiana, supra (Aug. 31,

2022). The same principle, neutrally applied, should defeat applicants' bid to intervene in this case.

C. Applicants Lack An Interest In The Subject Matter Of This Action

A party seeking to intervene on appeal must establish a cognizable "legal 'interest'" in the litigation -- what the rule governing intervention in district court describes as an "interest relating to the property or transaction that is the subject of the action." Fed. R. Civ. P. 24(a)(2). This Court has emphasized that the required interest is not merely some practical stake in the outcome of the suit, but "a significantly protectable interest" in the subject of the litigation. Donaldson v. United States, 400 U.S. 517, 531 (1971); see Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 315 (1985) (intervention requires a "legally protectible" interest). Even if applicants could establish Article III standing, but see Part II.D, infra, they would not have any such interest in defending CDC's public-health orders.

The "transaction that is the subject of th[is] action," Fed. R. Civ. P. 24(a)(2), is CDC's issuance of a regulation and orders under 42 U.S.C. 265 -- and, in particular, whether those actions were arbitrary and capricious. Section 265 is concerned only with protecting the public health by preventing the spread of disease. It hinges on CDC's finding of a "serious danger of the introduction of [any communicable] disease into the United States" -- and CDC's authority to suspend entry is expressly limited to "such period of

time as [it] may deem necessary" in order to protect "the public health." 42 U.S.C. 265. Congress thus made clear that public health is the touchstone for evaluating CDC's exercise of its authority -- which does not involve administering immigration laws -- to suspend the introduction of persons from foreign countries into the United States.

Applicants' asserted interests, by contrast, have nothing to do with public health. Indeed, they barely mention public health in their filings here. And although they recite a litany of additional expenditures that they will allegedly make and other incidental effects they will allegedly experience absent a stay, they notably do not include in that list a heightened risk of the spread of COVID-19. Applicants' "interest" thus does not "relat[e] to" the Title 42 orders that are "the subject of the action." Fed. R. Civ. P. 24(a)(2). Indeed, the immigration-control interests they assert are not even arguably within the zone of interests protected by 42 U.S.C. 265. And just as that divergence of interests should preclude applicants from challenging CDC's termination of the Title 42 orders, see Bennett v. Spear, 520 U.S. 154, 162 (1997), it also means that applicants lack a cognizable interest under Rule 24 to intervene to seek to retain a public-health order on the basis of asserted immigration interests. Cf. Deutsche Bank Nat'l Tr. Co. v. FDIC, 717 F.3d 189, 194 (D.C. Cir. 2013) (putative intervenors who were "neither parties nor third-party beneficiaries to [a] contract" lacked a legally protected

interest in intervening to enforce the contract).

In that respect, applicants are differently situated than the intervenors in Cameron and Berger, supra, who had a legal right -- and thus a cognizable interest -- to conduct the defense of the challenged law. In Cameron, for example, the putative intervenor (the state Attorney General) "shared" statutory authority to defend the state statute at issue with the state administrative official who had theretofore been conducting the litigation. 142 S. Ct. at 1011 (citing Ky. Rev. Stat. Ann. § 15.020). The same was true in Berger. 142 S. Ct. at 2202 (citing N.C. Gen. Stat. Ann. § 1-72.2(b)). Applicants have identified no such statute here. Quite the contrary: Congress has vested exclusive authority to conduct litigation on behalf of the United States in the Attorney General and Solicitor General, see 28 U.S.C. 509, 516-519, and this Court has recognized as much, see NRA Political Victory Fund, 513 U.S. at 96; United States v. Providence Journal Co., 485 U.S. 693, 699 (1988). Just as this Court gives "[a]ppropriate respect" to a State's decisions about who will be its "duly authorized representatives" to defend state law, Berger, 142 S. Ct. at 2201, it should give due weight to Congress's decision about who should conduct litigation concerning the validity of a regulation or order of general applicability.

D. Applicants Lack Article III Standing

Applicants appear to accept that in order to obtain the emergency relief they seek, they must establish Article III standing.

Appl. 14-15. As this Court has repeatedly made clear, "standing is not dispensed in gross," and instead must be demonstrated "for each claim" and "for each form of relief." TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208 (2021). Accordingly, "an intervenor must meet the requirements of Article III if the intervenor wishes to pursue relief not requested by a [party]." Town of Chester v. Laroe Estates, Inc., 137 S. Ct. 1645, 1648 (2017); see Arizonans for Official English v. Arizona, 520 U.S. 43, 65 (1997) (applying that principle to an intervenor-defendant); Wittman v. Personhuballah, 578 U.S. 539, 543-544 (2016) (same). Applicants are asking to intervene to seek a form of relief that no party has sought: an emergency stay of the district court's order. At a minimum, then, applicants must independently demonstrate Article III standing to seek a stay. Town of Chester, 137 S. Ct. at 1648. Applicants cannot make that showing.[5]

1. Applicants' principal asserted injury is that the vacatur of CDC's Title 42 orders will result in the federal government's resuming full immigration processing under Title 8, which

[5] Although applicants lack Article III standing, the Court need not resolve that question before addressing the other issues presented by applicants' stay application, including the propriety of intervention. Their entitlement to intervene is "the sort of threshold question that may be resolved before addressing jurisdiction" Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 431, (2007) (quoting Tenet v. Doe, 544 U.S. 1, 7, n.4 (2005)) (brackets, citation, ellipsis, and internal quotation marks omitted); see Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 585 (1999) (recognizing courts' authority "to choose among threshold grounds for denying audience to a case on the merits").

then "'will result in an increase in daily border crossings'" that, in turn, "will predictably cause the States to spend additional funds on law enforcement, education, and healthcare." Appl. 14-15 (citation omitted). Those assertions about widely shared societal costs resulting from a projected increase in the number of noncitizens -- and the derivative and incidental effects on the States -- do not constitute a "judicially cognizable" injury because the States have no "legally protected" interest in avoiding such incidental effects from the actions of the federal government. Raines v. Byrd, 521 U.S. 811, 819 (1997).

Instead, this Court has made clear that a State may sue the federal government only if it has suffered a "direct injury." Florida v. Mellon, 273 U.S. 12, 18 (1927). In our federal system, the United States and the States share sovereignty over the same territory and people, and the Constitution empowers the federal government to act on those people directly, rather than through the States. Murphy v. NCAA, 138 S. Ct. 1461, 1476 (2018). The United States and the States are thus "two orders of government, each with its own direct relationship * * * to the people." Printz v. United States, 521 U.S. 898, 920 (1997) (citation omitted). Federal policies regulating the people within a State will inevitably have derivative effects on the State itself. But the autonomy of the national and state sovereigns, acting directly upon individuals "within their respective spheres," ibid. (citation omitted), is inconsistent with the notion that a State has a

judicially cognizable interest in avoiding the incidental effects of federal policies.

Thus, in Florida v. Mellon, this Court held that Florida lacked standing to challenge the constitutionality of a federal inheritance tax. 273 U.S. at 18. Florida argued that the tax would cause the State financial harm by prompting the "withdrawal of property" and diminishing its tax base. Id. at 16. But the Court rejected that theory, explaining that Florida was required to show a "direct injury" and any harm caused by the tax was, "at most, only remote and indirect." Id. at 18.

Here, the vacatur of CDC's Title 42 orders and regulation, and resumption of immigration processing under the existing immigration laws, does not result in any "direct injury" to applicants. Florida v. Mellon, 273 U.S. at 18. The Title 42 orders do not require States to act or to refrain from acting, determine how much federal funding they receive, or deprive them of any legal right. See Department of Commerce v. New York, 139 S. Ct. 2551, 2565 (2019) (relying on federal funding). The resumption of full immigration processing under Title 8 merely tells federal officials how to enforce federal law in a field that the Constitution commits to the federal government. The indirect effects of that action on States do not qualify as "legally" and "judicially cog-

nizable" injuries. Raines, 521 U.S. at 819.[6]

2. Applicants also contend they have "enforceable rights" under the preliminary injunction issued by the Louisiana district court. Appl. 14. But it does not follow that applicants have a cognizable Article III injury caused by the judgment in this case. The Louisiana case involves the procedural validity of the April 2022 termination order. This case involves the substantive validity of an entirely different set of agency actions -- the September 2020 regulation and August 2021 order. The decision in this case would not alter the validity or scope of the injunction in the Louisiana case. To be sure, the vacatur of the underlying Title 42 orders would undermine the practical effect applicants hoped to secure in pursuing the Louisiana litigation. But such an indirect effect on separate litigation does not create a cognizable Article III injury, which is why non-parties lack standing to challenge the precedential impact of a decision in which they are not involved, no matter how much such a precedent would undermine the non-party's prospects of success in its separate case.

Contrary to applicants' assertion (Appl. 15), no "doubly relaxed standard" for standing applies here. The "special solicitude" in Massachusetts v. EPA, 549 U.S. 497, 520 (2007), applied where Congress had enacted a statutory procedural right to chal-

[6] This Court is considering related state-standing issues in Texas. See U.S. Br. at 10-24, Texas, supra (No. 22-58).

lenge the EPA's rejection of a rulemaking petition, id. at 516-518, 519-520, and the State alleged an injury to its interest in preserving its "sovereign territory," id. at 519. Applicants here assert no similar sovereign interest. Nor, are they asserting "procedural claims," Appl. 15: The district court's ruling, which intervenors seek to challenge, addresses the substantive question whether CDC's Title 42 regulation and orders were arbitrary and capricious. Applicants' lack of standing underscores their lack of an interest in the subject matter of this case for purposes of intervention and provides another reason they have failed to establish a "fair prospect" that the Court would reverse the D.C. Circuit's decision denying intervention.

III. THE PUBLIC INTEREST AND THE BALANCE OF THE EQUITIES DO NOT SUPPORT A STAY

Even if applicants could satisfy the other requirements for a stay, they cannot carry their "burden" to show that the public interest and other equitable factors "justify an exercise [of this Court's] discretion" to grant a stay. Nken, 556 U.S. at 434.

First, for the same reasons that they cannot establish Article III standing, applicants have not demonstrated that "irreparable harm will result from the denial of a stay." Hollingsworth, 558 U.S. at 190; see Graddick v. Newman, 453 U.S. 928, 933 (1981) (opinion of Powell, J.) (explaining that the "showing of a threat of irreparable injury" "to interests that [the stay applicant] properly represents" is "embraced by the concept of 'standing'").

And even if that were not true, any showing of harm that applicants might make is at minimum entitled to reduced weight in the balance of the equities because the interests that they are asserting have nothing to do with the public-health interests that Section 265 and the Title 42 orders were adopted to protect.

Second, the critical factor in weighing the government's equities and the public interest is CDC's determination -- which applicants do not contest -- that the Title 42 orders are "no longer required in the interest of public health." 87 Fed. Reg. at 19,942. Accordingly, there is no public interest in maintaining the Title 42 orders -- which, to reiterate, Congress has authorized the CDC Director to issue and maintain only "for such period of time as [s]he may deem necessary" to protect the public health, 42 U.S.C. 265. In fact, applicants do not claim to be seeking to vindicate any interest in public health or stopping the spread of COVID-19. See Appl. 13-40. The public interest requires respect for Congress's judgment regarding the statutory framework -- Title 8 -- that should govern to prevent or contain a potential surge in migration at the southern border now that the Title 42 orders are concededly no longer necessary for the public health.

Although the end of the Title 42 orders likely will likely lead to a temporary increase in border crossings, the government is prepared to address that serious problem under its Title 8 authorities, including by adopting new policies to respond to the temporary disruption that will occur whenever the Title 42 orders

end. If applicants are dissatisfied with the immigration system Congress has prescribed in Title 8, their remedy is to ask Congress to change the law -- not to ask this Court to compel the government to continue relying on an extraordinary and now obsolete public-health measure as de facto immigration policy.

IV. THIS COURT SHOULD LEAVE THE CURRENT ADMINISTRATIVE STAY IN PLACE FOR A BRIEF PERIOD TO ALLOW AN ORDERLY TRANSITION

If the Court denies the application, the government respectfully requests that the Court leave the current administrative stay in place for a brief period to allow the government to again prepare for a full return to operations under Title 8, with new policies tailored to the consequences of the end of the Title 42 orders. That transition is a complex, multi-agency undertaking with policy, operational, and foreign-relations dimensions. The government was in the midst of that transition when the administrative stay was granted yesterday afternoon and would require some limited time to resume its efforts for a new termination date.

For example, DHS has informed this Office that, because migrants who are being processed for Title 42 expulsion flights are generally in U.S. custody for two or three days, DHS shifted certain operations three days before it expected the stay to be lifted so as to avoid having to switch processing pathways mid-stream. That shift required different processes and procedures, different paperwork and data entry, and different movements of migrants. For example, DHS has informed this Office that whereas certain

migrants are moved to south Texas for Title 42 repatriation flights, those processed under Title 8 need to be moved to various screening and holding locations before removal. Absent a short window to complete already-commenced Title 42 expulsions, therefore, a termination of the Title 42 orders would require DHS to begin anew the processing of the affected migrants under Title 8, which would strain CBP's resources at a time when it is already experiencing significant capacity constraints.

In addition, DHS also had begun to bring in a large number of U.S. Citizenship and Immigration Services officers to assist with credible fear screening in expedited-removal proceedings under Title 8. The government has also had to work extensively over the past several weeks with foreign partners, many of whom have different requirements for accepting Title 8 removals versus Title 42 returns, as well as with local governments and non-governmental organizations in the United States that support noncitizens who are provisionally released pending removal proceedings.

Given the entry of an administrative stay, which imposed an obligation to continue processing migrants under Title 42 and does not have a definite end date, the government is pausing or reversing those transition efforts. Resuming those efforts will require a brief additional period of operations under Title 42. In addition, the necessary coordination within the government and with our foreign partners and non-governmental organizations would be especially challenging over the upcoming holiday weekend, a time

when many of these partners are operating with reduced staffing. The government therefore respectfully requests that if this Court denies the application before December 23, it preserve the administrative stay until 11:59 p.m. on December 27. If the Court denies the application on or after December 23, the government respectfully requests that it preserve the administrative stay until 11:59 p.m. on the second business day following its order.

CONCLUSION

The application for a stay pending certiorari should be denied. In addition, the Court should provide that the administrative stay entered by the Chief Justice on December 19, 2022, will remain in effect until 11:59 p.m. EST on December 27, if the Court denies the application before December 23, and otherwise will remain in effect until 11:59 p.m. EST on the second business day following this Court's order denying the application.

Respectfully submitted.

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Solicitor General

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