Nos. 22A544

In the Supreme Court of the United States

STATES OF ARIZONA, LOUISIANA, MISSOURI, ALABAMA, ALASKA, KANSAS, KENTUCKY, MISSISSIPPI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, TENNESSEE, UTAH, VIRGINIA, WEST VIRGINIA, AND WYOMING.

Applicants,

v.

ALEJANDRO MAYORKAS, SECRETARY OF HOMELAND SECURITY ET AL.,

Respondents.

States' Reply In Support Of Their Application For A Stay Pending Certiorari

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REPLY

The D.C. Circuit's denial of intervention on timeliness grounds squarely violates this Court's decisions in *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977) and *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1011 (2022). In particular, neither Plaintiffs nor Federal Respondents make *any* attempt to reconcile that intervention denial with these unequivocal holdings of this Court:

- In evaluating whether a motion to intervene for purposes of appeal is timely, a central consideration is whether the "motion [to intervene] was filed *within the time period in which the named [parties] could have taken an appeal*." *United Airlines*, 432 U.S. at 396 (cleaned up) (emphasis added).
- The "need to seek intervention *d[oes] not arise until the [defendants] ceased defending the [challenged] law*, and the timeliness of his motion should be *assessed in relation to that point in time*." *Cameron,* 142 S. Ct. at 10012 (emphasis added).

Respondents simply do not have any response to those holdings and thereby concede the D.C. Circuit's error and conflict with this Court's precedents.

In addition, Federal Respondents do not deny that the denial of a stay here *will* occasion an enormous crisis at the southern U.S. border. Indeed, they explicitly *admit* (at 2) that a stay denial "will likely lead to disruption and a temporary increase in unlawful border crossings" and further do not even "seek[] to minimize the seriousness of the problem." That effectively concedes the States will suffer irreparable harm, as States "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012). It further largely concedes cert. worthiness, given the acknowledged national importance of the issues presented—especially when combined with the circuit splits created by the intervention decision below.

Federal Respondents also do not deny (at 2) that *both* the district court's *merits* and *remedies* holdings rest on patent errors, further militating in favor of a stay.

Finally, the border crisis that Respondents bizarrely and *eagerly* seek to cause would also inflict enormous harms to the States. This Court should thus grant a stay pending certiorari. It should further grant certiorari on intervention issues now so that these recurrent issues are resolved this Term and do not evade this Court's review again. *Cf. Arizona v. San Francisco*, 142 S. Ct. 1926 (2022). Such a grant of review is particularly warranted as the federal government continues to engage in "'this tactic of 'rulemaking-by-collective-acquiescence.'" *Id.* at 1928 (Roberts, C.J., concurring) (citation omitted). Indeed, Federal Respondents make little effort to conceal that they *prefer defeat to victory* here, which is a hallmark of collusion at work.

ARGUMENT

I. THE STATES HAVE ARTICLE III STANDING AND PROTECTABLE INTERESTS

As explained in the States' Application, the States have Article III standing under well-established precedents. In particular, neither set of Respondents squarely addresses this Court's holding in *Department of Commerce v. New York* that state standing may be premised on the "predictable effect of Government action on the decisions of third parties." 139 S. Ct. 2551, 2566 (2019). Plaintiffs ignore *New York* entirely. And Federal Respondents' suggestion (at 35) that *New York* is limited to purely to loss of federal funding lacks support from either the text of Article III or the reasoning of *New York* itself, which has no such limitation. *See id.* at 2565-66. It further contravenes *Massachusetts v. EPA*, which involved a *far* more attenuated causal

chain, spanning a century of time, unknowable regulations that EPA might issue, and the actions of innumerable third parties, including both domestic consumers and foreign regulators. 549 U.S. 497, 518-22 (2007). If the Massachusetts had Article III standing there, the States do here *a fortiori*.

The remainder of Federal Respondents' standing arguments consists of recycling arguments from *United States v. Texas*, No. 22-58. Those arguments have fittingly been described as proposing "a rule of special hostility to state standing," in which States are placed in a uniquely *demeaned* constitutional status "than [what] they would [enjoy] if they were a private entity or an individual."[1] Those arguments fail for the reasons explained by Texas and Louisiana in their merits brief, and other states in their amicus brief.[2]

Federal Respondents also recycle their arguments about protectable interests from *San Francisco*. As an initial matter, Federal Respondents pressing the very same contentions as in *San Francisco* underscores that certiorari is warranted here too. Those arguments fail for the reasons set forth more fully in the States' briefs in that case.[3]

In brief, avoiding economic injury due to unlawful conduct by other parties is a venerable protectable interest. Indeed, that is a central function of contract and tort law. For purposes of what injuries satisfy Article III standing requirements, "[t]he

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[1] Transcript at 12, *United States v. Texas*, https://bit.ly/3uTYRPA.

[2] Brief for Respondents at 12-23, *United States v. Texas*, https://bit.ly/3BR13Ls; Brief for Arizona et al. at 5-20, *United States v. Texas*, https://bit.ly/3WBpuoi.

[3] Brief for Petitioners, *San Francisco* at 24-26, https://bit.ly/3joDmna; Reply Brief for Petitioners, *San Francisco* at 2-8, https://bit.ly/3VcMKrp.

most obvious are traditional tangible harms, such as physical harms and monetary harms. If a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021).

Consistent with those holdings, the courts of appeals widely permit economic harms to qualify as "protectable interests" supporting intervention as of right—without requiring the United States' atextual "direct" qualifier (found nowhere in Rule 24's text).[4] Indeed, courts of appeals have routinely accepted interests far more indirect or unconventional than those advanced by Petitioners.[5] And this Court has recognized a State's interest in healthy economic competition within its borders as sufficient to justify intervention as of right. *Cascade Nat. Gas v. El Paso Nat. Gas*, 386 U.S. 129, 135-36 (1967). For these reasons, the States have both Article III standing to challenge the termination of the Title 42 System that the district court's judgment will occasion, and protectable interests in avoiding that outcome.[6]

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[4] *See, e.g.*, *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d 1111, 1115-16 (10th Cir. 2002) (contract implications); *United States v. Albert Inv. Co.*, 585 F.3d 1386, 1397-98 (10th Cir. 2009) (potential for future tort contribution); *Nat'l Parks Conservation Ass'n v. EPA*, 759 F.3d 969, 976 (8th Cir. 2014) (potential judgment requiring EPA to promulgate a rule would cause economic harm to intervenor); *Arakaki v. Cayetano,* 324 F.3d 1078, 1084 (9th Cir. 2003) (potential judgment expanding pool of eligible lease applicants could cause economic harm to current applicants); *see also United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004) ("[A] non-speculative, economic interest may be sufficient to support a right of intervention.").

[5] *See, e.g.*, *Grutter v. Bollinger*, 188 F.3d 394, 398-99 (6th Cir. 1999) (prospective admission to universities); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397-98 (9th Cir. 1995) (prior participation in administrative rulemaking); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527-28 (9th Cir. 1983) (same); *Coal. Of Ariz./N.M. Counties For Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 841 (10th Cir. 1996) (prior advocacy for protection of owls).

[6] Federal Respondents reliance (at 30) on *Donaldson v. United States*, 400 U.S. 517 (1971) is unavailing. *Donaldson* stands for the unremarkable proposition that a taxpayer cannot intervene in a tax case to protect "routine business records in which the taxpayer has no proprietary interest of any kind." *Id.* at 530-31. Indeed, "*Donaldson* … hardly can be read without giving thought to its facts.… [I]t seems that any attempt to extrapolate … from *Donaldson* rules applicable to ordinary private litigation is

II. THERE IS A REASONABLE PROBABILITY THAT FOUR JUSTICES WILL VOTE TO GRANT CERTIORARI

This dispute amply warrants this Court's review and there is thus "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam).

A. The Denial Of The States' Motion To Intervene Warrants This Court's Review

The D.C. Circuit's timeliness-based denial of intervention easily warrants this Court's review.

As an initial matter, neither set of Respondents denies that the D.C. Circuit completely failed to consider potential prejudice as part of its timeliness inquiry. *See* App.24-25. Nor do they deny that this refusal creates a square circuit split with (at least) the First, Third, Fourth, Fifth, and Sixth Circuits. *See* App.24. That undenied circuit split could alone warrant this Court's review.[7]

Similarly, neither set of Respondents address *whatsoever* this Court's holding in *United Airlines* that central to the timeliness inquiry is whether the "motion [to intervene] was filed within the time period in which the named [parties] could have taken an appeal." App.19 (quoting *United Airlines*, 432 U.S. at 396) (cleaned up). That direct violation of this Court's precedents alone warrants this Court's review, as does the square split it occasions with the Ninth Circuit, which would have conclusively

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fraught with great risks." 7C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1908.1 (3d ed. 2021).

[7] While not contending that the D.C. Circuit considered prejudice, Plaintiffs complain (at 13-14) about purported prejudice to them from expedited briefing. But Plaintiffs have only themselves to blame for that for two reasons: (1) By agreeing with Federal Defendants on a stay of only 35 days in length, they necessarily forced all intervention and stay issues to be considered in that short time; and (2) by refusing the States' proposal for short administrative stays to permit less expedited-briefing, Plaintiffs necessarily forced all briefing to be expedited.

regarded the States' motion to intervene as "timely as a matter of law." App.19 (quoting *Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317, 1320 (9th Cir. 1997)). That error further splits with the Fifth and Seventh Circuits. App.19.

This case also warrants certiorari for much the same reasons as in *Arizona v. San Francisco*. Respondents' denials misstate the nature of the tactics employed here, as discussed below. *Infra* § II.C.

B. The Underlying Merits Of The District Court's APA Reasoning Warrant Review

The underlying merits of the district court's judgment, if affirmed by the D.C. Circuit, would also warrant this Court's review. Federal Respondents do not bother to deny (at 19) that these issues would easily be cert. worthy if *they* sought review on these issues. The issues equally warrant review when raised by the States, particularly given the colossal injuries the States would otherwise suffer.

Federal Respondents also contend (at 19) that the policies at issue no longer warrant review because CDC "ha[s] already rescinded" them. But that is wrong for two reasons: *First*, these issues could easily recur and, left uncorrected, hamstring emergency responses in future epidemics. Indeed, that is precisely why Federal Respondents explained that they have taken an appeal. ADD-201–02. *Second*, much of the district court's reasoning involves regulations that are *not* rescinded. The centerpiece of the district court's reasoning is that an *unrepealed* 2017 regulation precludes CDC from adopting *any* immigration exclusion measures that are not the "least restrictive means." ADD-27–33. *Nothing* about that holding would end with the Title 42 System intact. And if the D.C. Circuit were to affirm that holding, it would plainly

warrant this Court's review.

The underlying merits also warrant this Court's review because the manmade disaster that failure to stay (and eventually correct) the district court's errors will cause is plainly an issue of great national importance. Federal Respondents do not genuinely deny that the enormous impacts here would warrant certiorari on their own. But they seek to conflate the two issues by contending (at 19) "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."

That is mixing-and-matching. The "practical significance of border-management issues" presented—*i.e.*, bureaucratese for "the impending border crisis that we intend to cause"—makes the underlying merits issues cert. worthy. And the intervention issues also merit review given (1) the square (and uncontested) circuit splits the D.C. Circuit's decision has created, (2) the violation of this Court's decision in *United Airlines* and *Cameron*, and (3) the enormous practical harms that could be avoided depending on how those intervention issues are resolved. Nor are the issues that the States present factbound; rather, they are purely legal and, for the most part, go unanswered by Respondents.

C. Federal Respondents' Tactics Here Are Collusive And Unprecedented

Much of Respondents' cert. worthiness arguments are premised on their contentions that the government's actions do not circumvent the APA, were not collusive, and are merely typical tactics routinely employed elsewhere. None of that holds true.

Circumvention of the APA. CDC's desire to forego notice-and-comment rulemaking *before* terminating Title 42 is both palpable and incorrigible. CDC's first attempt to do so was properly invalidated by a different district court. *Louisiana v. CDC,* __ F. Supp.3d __, 2022 WL 1604901 (W.D. La. May 20, 2022). This is CDC's second attempt, which substitutes "'rulemaking-by-collective-acquiescence.'" *San Francisco*, 142 S. Ct. at 1928 (citation omitted), for the prior "good cause" and "foreign affairs" rationales that did not withstand scrutiny.

While Respondents fight that description, there are strong reasons to believe that if the government sought a stay pending appeal, it would have received it. Notably, the D.C. Circuit did unanimously grant such a stay the first time around when the Federal Defendants challenged the district court's first choice grounds of decisions. *Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 726 (D.C. Cir. 2022). There is little reason to believe the district court's second-choice grounds—scraping ever deeper into the proverbial barrel—would fare any better, particularly given Federal Respondents' concessions about the enormous scale of the resulting challenges. The parties thus find themselves in this context precisely because Federal Respondents have, once again, engaged in rulemaking-through-strategic-surrender.

Plaintiffs suggest that no APA circumvention has occurred here because "the operative August 2021 Title 42 order was not promulgated through notice and comment, so that 'usual and important requirement' is not in play here." Not so: the Title 42 System was promulgated using notice-and-comment procedures, *see* 85 Fed. Reg. 56,424 (Sep. 11, 2020), and rescinding it should thus have been subject to them too.

See, *e.g.*, *Perez v. Mortg. Bankers* Ass'n, 575 U.S. 92, 101 (2015)) (APA "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.").

Collusive Agreement To Recreate Termination Order. This case also involves a collusive agreement. There is no doubt that there was such an agreement: it was reached mere hours after the district court's opinion (or perhaps before[8]). And that agreement recreated all of the essential features of the enjoined Termination Order: (1) terminating Title 42, (2) with a multi-week delay to allow DHS to prepare for the termination, and (3) without notice-and-comment compliance.

It is not genuinely denied that this agreement thus replicated in substance precisely what Federal Respondents had previously attempted but had been enjoined in *Louisiana* from obtaining. And such a replication was made possible only through *agreement* between the parties, in a manner that served both of their interests to the immense detriment of third parties, including the States. Federal Defendants are thus exploiting a litigation *loss* to achieve a long-sought policy *victory*. An agreement with opposing parties that makes *litigation defeat more attractive than victory* is the quintessential example of a collusive one.

Plaintiffs contend (at 3) this arrangement was not collusive, as in *San Francisco*, because it lacks "an additional aspect of [*San Francisco*]: the 'further step' of the government 'leverag[ing]' a court ruling against it as the justification for revoking the Rule without notice and comment procedures." But that characterization actually

[8] Neither Plaintiffs nor Federal Respondents deny that they had reached an agreement about jointly seeking a short stay *before* the district court had even issued its decision.

describes this case to a "T." Absent the "court ruling against it," CDC would have no path to "revoking the [Title 42 System] without notice and comment procedures" aside from winning its *Louisiana* appeal. Federal Respondents are thus "leveraging" their *loss* here to achieve a result that would otherwise require either (1) actual victory in other litigation or (2) actual notice-and-comment compliance. Again, when litigation loss is preferable to victory, the Federal Government is "leveraging" a court ruling against it to achieve its policy aims. *San Francisco*, 142 S. Ct. at 1928. And that is doubly true where the government is attempting to enshrine its defeat permanently through seeking an *indefinite* abeyance of appellate review, lest it inadvertently win.

Unprecedented Tactics. While Respondents seek to present Federal Respondents' actions here as routine use of mine-run tactics, they are anything but. Neither of the Respondents deny that the effect of the government's appeal-and-abeyance tactic will be to obliterate the effect of a separate injunction specifically entered against the Federal Government. Exploiting a loss in one case to achieve victory in another is no everyday, humdrum tactic.

Even more unprecedented is the calamity that will be unleashed by the tactics employed here. Unlike the more modest harms (if any) that would typically be occasioned by an abeyance, Federal Defendants do not deny that their refusal to seek a stay will occasion enormous border challenges. Indeed, DOJ's own Deputy Attorney General has indicated that the tactics that Federal Respondents are employing here could, if accepted by this Court, cause an "'*increase in illegal immigration*' as well as '*human smuggling*' and '*drug smuggling*.'" ADD-145 (emphasis added). Routine

abeyances do nothing of the sort.

III. THERE IS A FAIR PROSPECT THAT A MAJORITY OF THE COURT WOULD VOTE TO REVERSE THE ORDER BELOW

A. This Court Would Likely Reverse The D.C. Circuit's Timeliness Holding

This Court would also likely reverse the court of appeals' timeliness holding if review is granted for four reasons.

First, the D.C. Circuit failed to consider prejudice entirely. Nor is having this dispute resolved on the merits actual "prejudice." App.24-25.

Second, both sets of Respondents continue to ignore *entirely* this Court's holding that timeliness of motions to intervene for purposes of appeal are evaluated principally by whether they were "filed within the time period in which the named [parties] could have taken an appeal." App.19 (quoting *United Airlines*, 432 U.S. at 396) (cleaned up). In doing so, they concede the D.C. Circuit's error under *United Airlines*.

Third, Respondents ignore this Court's square holding in *Cameron* that the "need to seek intervention *d[oes] not arise until the [defendants] ceased defending the [challenged] law*, and the timeliness of his motion should be *assessed in relation to that point in time*." *Cameron,* 142 S. Ct. at 1012 (emphasis added). Respondents make no attempt to reconcile their arguments with this dispositive holding.

Fourth, Respondents' suggestion that the States should have intervened earlier is refuted by their inability to identify *any* inadequate representation prior to November 15, 2022. Neither Plaintiffs nor Federal Respondents have ever identified a single punch pulled prior to then. While Federal Respondents might have preferred a different *policy* earlier than then, Respondents' inability to demonstrate *any*

inadequacy in the government's *legal* representation prior to that date would have made any attempt to intervene earlier impossible. Indeed, it would turn the presumption of regularity on its head if the States were compelled to assume the *in*adequacy of Federal Defendants' representation in the teeth of uncontested, objective evidence that their representation was in fact quite adequate.

The D.C. Circuit thus plainly erred in holding that the States' putative delay was "inordinate and unexplained." ADD-2. The timing is easily explained and justified: prior to November 15, Federal Defendants were defending the Title 42 System robustly in a manner that would have made earlier intervention impossible. That is not mere speculation: Texas tried to intervene and was denied, with Respondents advancing these precise adequate-representation arguments. App.25-26 & n.6.

B. The District Court's APA Holdings, If Affirmed By The D.C. Circuit, Would Be Unlikely To Survive Review In This Court

The Federal Government's summary judgment brief below makes amply clear why the district court's decision is unlikely to be affirmed. ADD-148–93. Indeed, in a case where Federal Respondents and the States disagree about just about nearly everything else, they are in perfect agreement that the district court's merits reasoning is indefensible. And for good reason. In particular, the district court's opinion relies on a "least restrictive means" standard that cannot survive scrutiny.

Plaintiffs claim (at 19) that the preamble to the 2017 Final Rule establishes such a standard. But they never answer the States' argument that prambulatory language is not controlling. App.31. Plaintiffs also never explain how that 2017 preamble could establish a universal "least restrictive means" standard when that preamble

explicitly limits its applicability only to orders issued under "this Final Rule," 82 Fed. Reg. at 6,890—which the Title 42 System incontestably is not. Moreover, the preamble itself warns that in emergencies "it is [often] not immediately possible to explore all available less restrictive means." 82 Fed. Reg. at 6,914.

Even worse, the actual text of the 2017 Final Rule never once imposes a "least" restrictive means test, but merely a "less" restrictive test, and only in three specific circumstances not applicable here; it further only requires that such a test be applied *after* the fact, and only as related to individuals and not generalized health orders. *See id*. at 6,972–73, 6977 (adding 42 C.F.R. §§ 70.15(c), 70.16(j), (l), and 71.38(c)).

The remainder of their APA arguments are also unavailing. Plaintiffs engage in detailed quibbling about the CDC's consideration of treatment and processing alternatives and impacts to aliens. But that is merely Plaintiffs' invitation to substitute their own judgment for the CDC's. And while the district court obviously embraced that invitation, that flouts the deferential standard of review that the APA establishes—particularly as applied to expert judgments made in the course of an emergency. Plaintiffs' arguments fall far short of what would be required to show the CDC's August 2021 Order was arbitrary and capricious, as Federal Respondents have correctly argued. *See* ADD168-91.

IV. THE REMAINING REQUIREMENTS FOR A STAY ARE MET

A. The States Will Suffer Irreparable Harm Absent A Stay

The failure to grant a stay here will cause immediate, severe, and irreversible harms to the States. The irreparable harm requirement is thus readily satisfied, particularly as *no* party contests that DHS will be unable to reverse any of the resulting

injuries. *See*, *e.g.*, *San Diegans for the Mt. Soledad Nat'l War Mem'l*, 548 U.S. at 1302 (granting stay pending appeal where "[c]ompared to the irreparable harm of altering the memorial and removing the cross, the harm in a brief delay pending … expedited consideration [below] seems slight") (Kennedy, J., in chambers).

Federal Respondents' arguments largely recycle their legal cognizability arguments, which fail for the reasons set forth above and previously. Moreover, the tight secrecy surrounding DHS's purported plans to address the crisis—completely lacking in details—hardly inspires confidence that the States' harms could be even mitigated.

Plaintiffs' irreparable-harm arguments grasp at straws. They strangely contend (at 34) that the "States' threshold premise—that ending Title 42 will draw more noncitizens to this country—is speculative." Hardly. DHS and DOJ themselves have confidently predicted it in their expert judgment, App.3, 38, and the mere expectation that Title 42 might end soon has *already* caused a surge of migrants to the border, ADD-81–117. Indeed, the only unsupported speculation here is Plaintiffs' apparent belief that no meaningful crisis will occur if a stay is denied here—which tellingly is advanced without citation to any evidence at all.[9]

B. The Balance Of Equities Favors A Stay

The remaining stay considerations also favor the States. In particular, Federal

[9] Plaintiffs suggest (at 36) that the States delayed in seeking a stay pending appeal in the district court. Not so. The district court had already announced that "any request to stay this Order pending appeal will be denied," ADD-6, making any request demonstrably futile. In any event, the States did not seek a stay *pending appeal* until there was actually an appeal. Once there was, they sought Respondents' position the next day, and filed a stay request within 30 minutes of receiving Respondents' responses that they opposed such a stay. Similarly, Plaintiffs' suggestion (at 36-37) that the States' application here—filed the next business day following the D.C. Circuit's denial of intervention and stay pending appeal—was "leisurely" is unserious. Indeed, Plaintiffs (and Federal Respondents) notably insisted upon a schedule permitting them *nine days* to respond to the States' motion to intervene in the district court.

Respondents adopt an overly cramped view of the public interest. Contrary to their suggestion (at 38), CDC's view is not the sole voice on what the public interest is. And Respondents' apparent belief that the public interest is completely agnostic as to whether courts should prevent an avoidable border catastrophe is offered without citation. Federal Respondents' inexplicable preference for inflicting a border crisis—predicated entirely on a ruling that, in their own view, contains multiple legal errors—upon the States and the Nation does not render that preventable catastrophe in the public interest.

The harms that Plaintiffs fear would also not be caused by the stay sought here. Plaintiffs already possess an injunction that specifically prohibits expulsion to "places where they w[ould] be persecuted or tortured." *Huisha-Huisha II*, 27 F.4th at 735. That injunction will remain in force even if a stay is granted here. And, to the extent that Plaintiffs fear such harms will occur anyway, they should seek to enforce *that* injunction, rather than exploit Federal Respondents' alleged failure to abide by it as a basis for defeating an unrelated stay request here.

V. THIS COURT SHOULD CONSIDER GRANTING CERTIORARI NOW

Respondents do not appear to oppose this Court granting certiorari now if this case presents issues warranting this Court's review. As set forth above and previously, it does. This Court should therefore deem the States' application a petition for certiorari as to the intervention issues and grant it (along with the requested stay).

CONCLUSION

For the foregoing reasons, the States' emergency application for stay of the district court's vacatur and injunction should be granted.

Dated: December 21, 2022

Respectfully submitted,

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