No. 22-592

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,

Petitioners,

v.

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

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

JEFF LANDRY
Attorney General of Louisiana

ELIZABETH B. MURRILL
Solicitor General
J. SCOTT ST. JOHN
Deputy Solicitor General
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. Third Street
Baton Rouge, LA 70802
(225) 326-6766
murrille@ag.louisiana.gov

DREW C. ENSIGN
Special Assistant Solicitor General
Counsel of Record
202 E. Earll Drive
Suite 425
Phoenix, AZ 85004
(602) 492-5969
drew@ensignlawgroup.com

Counsel for Petitioner State of Louisiana
(Additional Counsel listed in signature block)

QUESTION PRESENTED

As part of its December 27, 2022 order granting a stay pending certiorari, this Court granted review on the following question:

Whether the State applicants may intervene to challenge the District Court's summary judgment order.

PARTIES TO THE PROCEEDINGS

Petitioners (proposed intervenor-defendants below) are the States of Louisiana, Missouri, Alabama, Alaska, Arizona, Kansas, Kentucky, Mississippi, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Tennessee, Utah, Virginia, West Virginia, and Wyoming.

Respondents are:

(1) Alejandro N. Mayorkas, Secretary Of Homeland Security, in his official capacity; Chris Magnus, Commissioner of U.S. Customs and Border Protection ("CBP"), in his official capacity; Pete Flores, Executive Assistant Commissioner, CBP Office of Field Operations, in his official capacity; Raul L. Ortiz, Chief of U.S. Border Patrol, in his official capacity; Tae D. Johnson, Senior Official Performing the Duties of the Director of U.S. Immigration and Customs Enforcement, in his official capacity; Xavier Becerra, Secretary of Health and Human Services, in his official capacity; Dr. Rochelle P. Walensky, Director of the Centers for Disease Control and Prevention, in her official capacity, Defendant-Appellants in the court of appeals and

(2) Nancy 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., and M.E.S.D.S., H.T.D.S.D.S.; Martha Liliana Taday-Acosta, and her minor children D.J.Z. and J.A.Z.; Julien Thomas, Fidette Boute, and their minor children D.J.T.-B. and T.J.T.-B.; Romilus Valcourt, Bedapheca Alcante, and their minor child, B.V.-A., Plaintiff-Appellees in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

REGULATIONS

OTHER AUTHORITIES

OPINIONS BELOW

The panel order denying intervention and a stay pending appeal are unreported and reproduced at J.A.1-7. The opinion and order of the district court granting both vacatur and a nationwide injunction with respect to the Title 42 System will be published, is available at 2022 WL 17957850, and is reproduced at J.A.8-53.

JURISDICTION

The judgment of the court of appeals denying intervention was entered on December 16, 2022. J.A.1-7. Petitioners filed an application for a stay pending certiorari on December 19, 2022, and also asked this Court to deem that application a petition for certiorari. This Court granted both requests on December 27, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

The text of Federal Rule of Civil Procedure 24 is reproduced in the appendix.

INTRODUCTION

This case presents a question of immense importance to the States and to the limits of executive power. In particular: When the Executive Branch colludes with nominally adverse parties to invalidate policies through litigation, thereby evading the requirements of the Administrative Procedure Act ("APA"), may States injured by the Executive's abdication intervene to defend their interests?

The question arises because Federal Respondents—after consistently defending the Title 42 System against the meritless claims in this case—suddenly stopped doing so once the district court vacated and enjoined the system. True, Federal Respondents appealed. But they declined to seek a stay pending appeal, thereby securing an effective repeal of the Title 42 System. Even worse, they intended to hold their appeal in indefinite abeyance and thereby ensure that the district court's errors were never corrected. These maneuvers allowed Federal Respondents to achieve one of the current Administration's policy goals—repeal of the Title 42 System—without going through the APA's sometimes-onerous procedures.

Within six days of learning of Federal Respondents' non-defense scheme, the State Petitioners moved to intervene. They did so to defend various State interests. Among other things, the non-defense strategy allowed Federal Respondents to negate an injunction the States won in another court—an injunction *requiring* Federal Respondents to follow the APA before repealing the Title 42 System. *See generally Louisiana v. CDC*, __ F.Supp.3d __, 2022 WL 1604901 (W.D. La. May 20,

2022). Further, an immediate repeal of the Title 42 System would inflict significant harms on the States.

Notwithstanding the States' interest and their speedy response, the D.C. Circuit refused to permit the States to intervene. Instead, it held that the States' motion was untimely, even though the States filed that motion just six days after learning of the United States' plan to suddenly abandon its theretofore-vigorous defense of the frivolous claims in this case.

That holding is untenable and contravenes this Court's precedents, principally *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 (2022). Under those precedents, the D.C. Circuit plainly erred in (1) holding that Petitioners were obliged to intervene before Federal Respondents abandoned meaningful defense, (2) refusing to consider whether the States intervened within the time permitted to appeal, (3) failing to consider potential prejudice, and (4) ignoring other important considerations, such as the unblemished record of robust defense preceding Federal Respondents' abrupt agreement with Plaintiffs. In addition, all other requirements for both mandatory and permissive intervention are met here.

The court of appeals' error presents an issue of immense significance. If the States' motion was untimely in this case, it is unclear if States will *ever* be permitted to intervene when the United States agrees with its nominal adversaries in ways that harm the States. After all, had the States moved to intervene *before* the United States opted against meaningfully defending the Title 42 System, their motion would have been denied on the ground that

Federal Respondents were already providing adequate representation. In fact, Texas's earlier intervention motion in this very case was rejected, likely on that very ground. J.A.222-23.

So if the States cannot intervene here, they likely will not be able to intervene in broad swaths of cases. And that will leave the federal government with little reason not to pursue the "tactic of 'rulemaking-by-collective-acquiescence.'" *Arizona v. San Francisco*, 142 S. Ct. 1926, 1928 (2022) (Roberts, C.J., concurring) (citation omitted). That gambit seeks to "leverage[]" a litigation loss "as a basis to immediately repeal the [unwanted] Rule, without using notice-and-comment procedures." *Id.* Such tactics are corrosive to the rule of law and the authority of federal courts. And if this Court blesses that gambit by affirming the D.C. Circuit, the Court and the country can expect to see the same tactic employed whenever a presidential administration decides it prefers to eliminate a preceding administration's rules without the hassle of APA rulemaking.

The Court should reverse the judgment of the court of appeals and hold that the States were entitled to intervene in this case.

STATEMENT

I. The Title 42 System and Orders

On January 31, 2020, in response to the then-emerging COVID-19 pandemic, the Health and Human Services Secretary declared a public health emergency under 42 U.S.C. § 247(d). That same day, the President suspended "[t]he entry into the United States, as immigrants or nonimmigrants, of all aliens who were physically present within the People's Republic of China ... during the [prior] 14-day period."

85 Fed. Reg. 6709, 6710 (Jan. 31, 2020). The President then issued similar suspensions for other countries. 85 Fed. Reg. 15,045 (Mar. 11, 2020); 85 Fed. Reg. 12,855 (Feb. 29, 2020). As COVID-19 continued to spread, the President declared a national emergency. *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, 85 Fed. Reg. 15,337 (Mar. 13, 2020). To address the threats posed by COVID-19, federal agencies issued several other travel restrictions, including limitations on "non-essential travel between the United States and Mexico," because it "pose[d] a specific threat to human life or national interests." 85 Fed. Reg. 16,547 (Mar. 24, 2020).

The Centers for Disease Control and Prevention ("CDC") acted too. Exercising its authority under 42 U.S.C. §265, CDC issued an interim final rule allowing it to prohibit the "introduction into the United States of persons" from foreign countries. *Control of Communicable Diseases*, 85 Fed. Reg. 16,559, 16,563 (Mar. 24, 2020). CDC then issued an order directing the "immediate suspension of the introduction" of certain noncitizens. 85 Fed. Reg. 17,060, 17,067 (Mar. 26, 2020). The excluded aliens were those "seeking to enter ... [ports of entry] who do not have proper travel documents, aliens whose entry is otherwise contrary to law, and aliens who are apprehended near the border seeking to unlawfully enter the United States between [ports of entry]." *Id.* at 17,060. The March 20 order was subsequently extended and expanded to cover both land and coastal ports of entry. 85 Fed. Reg. 22,424 (Apr. 22, 2020). In May 2020, CDC replaced the 30-day renewal requirement with internal reviews every 30 days. 85 Fed. Reg. 31,503 (May 26, 2020).

After complying with notice-and-comment procedures and receiving 218 comments, CDC issued a final rule "establish[ing] final regulations under which the [CDC] Director may suspend … the introduction of persons into the United States." *Control of Communicable Diseases*, 85 Fed. Reg. 56,424 (Sept. 11, 2020). CDC then issued orders under that final rule. *See*, *e.g.*, 86 Fed. Reg. 42,828 (Aug. 5, 2021); 87 Fed. Reg. 15,243 (Mar. 17, 2022). The processes adopted by the final rule and orders issued thereunder are referred to as the "Title 42 System" or "Title 42."

II. Initial Challenge to the Title 42 System (*Huisha-Huisha*)

On January 12, 2021, Plaintiffs, who allege that they are subject to expulsion, filed this suit. Plaintiffs alleged that the Title 42 System violates various statutory provisions and the APA. The district court granted class certification and a preliminary injunction prohibiting Federal Respondents from enforcing the Title 42 System. *Huisha-Huisha v. Mayorkas*, 560 F. Supp. 3d 146, 154-55, 177 (D.D.C. Sept. 16, 2021). That injunction was based on the district court's holding that 42 U.S.C. § 265 does not authorize expulsion of non-citizens. *Id.* at 166-71.

Federal Respondents appealed. The D.C. Circuit unanimously granted a stay pending appeal and subsequently rejected most of the district court's statutory holdings. *Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022). The court of appeals also held that "the Executive may expel the Plaintiffs, but only to places where they will not be persecuted or tortured." *Id.* at 735. That aspect of the decision is not at issue here.

III. Termination Order and the States' Challenge to It (*Louisiana v. CDC*)

In February 2021, President Biden signed Executive Order 14010, ordering that CDC "'shall promptly review and determine whether termination, rescission, or modification of the [Title 42 orders] is necessary and appropriate.'" 86 Fed. Reg. 8,267 (Feb. 5, 2021). Fourteen months later, CDC issued an order purporting to terminate the Title 42 System. 87 Fed. Reg. 19,941 (Apr. 6, 2022) ("Termination Order"). It did so without undergoing notice-and-comment rulemaking, and instead invoking the good cause and foreign affairs exceptions. *Id.* at 19,956.

The Termination Order delayed its effective date for 52 days "to provide DHS time to implement operational plans for fully resuming Title 8 processing." *Id.* at 19,955-56. It also extensively reasoned that any reliance interests by the States were not "reasonable or legitimate," before providing a conclusory assertion that those reliance interests were "outweigh[ed]" "even if such reliance were reasonable or legitimate." *Id.* at 19,953-54.

A coalition of States filed suit, alleging the Termination Order violated the APA because it was issued without notice and comment and was arbitrary and capricious. The States noted the Termination Order was "plainly at war with other policies of the Biden Administration," such as refusing to lift the mask mandate on airline travelers, refusing to repeal vaccination mandates, and insisting on discharging members of the military who sought religious exemptions from such mandates. *Louisiana* Doc. 1 ¶13. The States also argued that CDC failed to consider their reliance interests and the Termination

Order's immigration consequences, which even Administration officials acknowledged would lead to an "influx" of migrants and inflict a "surge on top of a surge." *Id.* ¶¶ 7, 30-31, 90. Ultimately, 24 States joined in the challenge and moved for a preliminary injunction.

The Western District of Louisiana granted the States' requested preliminary injunction on May 20, 2022. *Louisiana*, 2022 WL 1604901, at *23. That court first found that the States had standing to challenge the termination of Title 42. *Id.* at *10-15. The court explained that "the States have come forward with evidence that the Termination Order is likely to result in a significant increase in border crossings, [and] that this increase will [adversely] impact" the States in a manner traceable to the termination of Title 42. *Id.* at *14-15. On the merits, the district court held that CDC violated the APA's notice-and-comment rulemaking requirements and had not validly invoked any exception. *Id.* at *20. Although the court declined to reach whether the Termination Order was arbitrary and capricious, it suggested that CDC had failed to consider alternatives adequately. *Id.* at *22.

Federal Defendants appealed to the Fifth Circuit. They did not seek a stay pending appeal or to expedite the appeal. Briefing is now complete, and the case is tentatively set for oral argument the week of March 6-10, 2023. *See Louisiana v. CDC*, No. 22-30303 (5th Cir.).

IV. *Huisha-Huisha*: Vacatur and Nationwide Injunction on Remand

Following the D.C. Circuit's reversal and three months after the *Louisiana* injunction, Plaintiffs moved for summary judgment that "the regulation at

42 C.F.R. § 71.40 and all orders and decision memos issued by [CDC] … [were] arbitrary and capricious." *See* D.Ct. Doc. 141-3. In response, Federal Respondents filed a brief vigorously defending the Title 42 System. J.A.149-207. When Plaintiffs first briefed the standard for vacatur in their reply, Federal Respondents filed a sur-reply opposing vacatur. J.A.208-12.

The district court granted summary judgment to Plaintiffs on November 15, 2022, and issued both vacatur and a nationwide injunction. J.A.8-53. It did so on two bases. First, the court reasoned that CDC failed to employ a "least restrictive means" standard, which, in the court's view, applied to the Title 42 System of expulsions based on language in the preamble of a 2017 rule governing quarantine and isolation measures. J.A.27-34. Second, the court reasoned that CDC had failed to evaluate various impacts and alternatives adequately. J.A.34-45.

DHS estimates that the effect of the district court's judgment would be to increase the number of illegal crossings from around 7,000 per day to as much as 18,000 per day. J.A.64-65, 110, 118-34.

V. Federal Respondents' Effective Refusal to Defend the Title 42 System

No Respondent has identified any deficiencies in the government's defense of the Title 42 System before the district court's November 15 decision. But once that the opinion issued, things changed quickly. Within hours, Federal Respondents and Plaintiffs agreed to a five-week stay until midnight on December 21, 2022, and filed an unopposed request to that effect. J.A.213-17. That request made clear that "[t]he requested temporary stay … is not for the

pendency of appeal but rather for only a temporary period." J.A.215. It was premised on DHS's "need to resolve resource and logistical issues that it was unable to address in advance without knowing precisely when [the Title 42 System] would end." J.A.216.

In filings shortly thereafter in the Western District of Louisiana and the Fifth Circuit, Federal Respondents expressly stated that Title 42 would definitively end on December 21: "Once the five-week stay expires ... CDC's Title 42 orders will be vacated, and there will thus be no legal authority for the government to continue to enforce the Title 42 policy." J.A.238-39; *accord* J.A.253-54. The possibility of appeal was not mentioned in either notice. *Id.*

The effect of the agreement between Plaintiffs and Federal Respondents was to recreate the essential features of the Termination Order that was enjoined in the *Louisiana* case: (1) Title 42 would end, (2) after a substantial delay to permit DHS to plan for the resulting surge, and (3) compliance with notice-and-comment requirements would be avoided. The agreement between Plaintiffs and Federal Respondents also had the same effect as a stay pending appeal in the *Louisiana* case, which Federal Respondents had declined to seek. In short, they won through surrender in the D.C. Circuit what they were seeking to obtain in the Fifth Circuit through victory on the merits: repeal of the Title 42 System.

The district court granted the parties' agreed-upon request for a 5-week stay "WITH GREAT RELUCTANCE." J.A.57-58 (capitalization in original). It separately entered a Rule 54(b) judgment

on the relevant APA claims on November 22, 2022. J.A.54-55.

VI. States' Efforts to Intervene and This Court's Grant of a Stay and Certiorari

Because it appeared that Federal Respondents had agreed with Plaintiffs to recreate the Termination Order enjoined in *Louisiana*, 15 States moved to intervene in this action for the purpose of appeal. They did so on November 21—just six days after the adverse decision. Four more states joined the motion soon after. *See* D.Ct. Docs. 168, 171, 176. All 19 prospective intervenors were plaintiff States in the *Louisiana* case. Their motion was fully briefed on December 2. *See* D.Ct. Doc. 70.

After the States moved to intervene, Federal Respondents filed a notice of appeal on December 7, thereby transferring the case (and the States' unresolved motion to intervene) to the D.C. Circuit. D.Ct. Doc. 180. In an accompanying statement, Federal Respondents explained that although they were appealing, they "intend[ed] to move the D.C. Circuit to hold the appeal in abeyance" pending *inter alia* a "forthcoming rulemaking." J.A.219. If that request were granted, appellate review would never be exercised and the harms to the States and others resulting from the district court's judgment would occur with certainty even if they rested on legal errors.

Federal Respondents added that the "government respectfully disagrees with [the district court's] decision and would argue on appeal, as it has argued in [the district court], that CDC's Title 42 Orders were lawful, that § 71.40 is valid, and that this Court erred in vacating those agency action." J.A.219. The

requested abeyance would eliminate any need to make such arguments, however.

In an abundance of caution, the States renewed their motion to intervene in the D.C. Circuit on the day the government's appeal was docketed (December 9). J.A.241-46. The States then sought an emergency stay on December 12. The D.C. Circuit denied the States' motion to intervene on December 16 and, on that sole basis, also denied their request for a stay pending appeal. J.A.1-7. That court also denied the States' request for a seven-day administrative stay so that they could seek a stay pending certiorari from this Court in an orderly manner. J.A.7.

The court of appeals' denial of intervention was based purely on timeliness grounds. In the panel's view, the States' motion was untimely because "this litigation has been pending for almost two years," and "long before now, the States have known that their interests in the defense and perpetuation of the Title 42 policy had already diverged or likely would diverge from those of the federal government's should the policy be struck down." J.A.3-4. The panel further relied on Texas's attempt to intervene earlier in the first appeal. J.A.4. The court of appeals did not evaluate potential prejudice to the existing parties or whether intervention was sought within the time permitted for existing parties to appeal. J.A.1-7.

The States then filed an application for a stay pending certiorari with this Court and also asked that their application be deemed a petition for certiorari. This Court granted both requests on December 27 and ordered expedited briefing. This Court should now reverse the denial of the States' request to intervene.

SUMMARY OF THE ARGUMENT

The States' request to intervene was plainly timely under this Court's relevant benchmarks. *First*, this Court's decision in *Cameron* makes clear that timeliness "should be *assessed in relation to th[e] point in time"* where defendants "ceased defending the [challenged] law." 142 S. Ct. at 1012. Here, the States moved to intervene a mere six days after Federal Respondents abandoned meaningful defense of the Title 42 System. As in *Cameron*, this quick reaction to abandonment of defense is "the most important circumstance relating to timeliness," and establishes timeliness here. *Id.*

Second, the States' request to intervene was also timely under this Court's second "critical inquiry": whether they "acted promptly after the entry of final judgment" and "filed [their] motion within the time period in which the [existing parties] could have taken an appeal." *United Airlines*, 432 U.S. at 395-96. Here, the States filed their request to intervene *before* entry of final judgment and well within the time to appeal.

Third, intervention will not prejudice existing parties. The States do not seek to add any new arguments, but simply to pick up the defense that Federal Respondents have effectively abandoned. And *Cameron* makes clear that Plaintiffs' inability to win by default or collusive surrender "does not amount to unfair prejudice." 142 S. Ct. at 1014.

Fourth, additional considerations support the States' timeliness arguments under the totality-of-the-circumstances inquiry. *Cameron*, 142 S. Ct. at 1012. In particular: (1) neither set of Respondents has pointed to any evidence that Federal Respondents mounted a less-than-robust defense prior to

November 15 (the date of the district court's decision); (2) Federal Respondents' acquiescence in the district court's decision, which granted both vacatur and a nationwide injunction, was strikingly at odds with their prior arguments to this Court that *both* remedies are categorically unlawful; (3) Texas's prior unsuccessful attempt to intervene supports the States' arguments by showing that it was not possible to intervene earlier in this case; and (4) the magnitude of the district court's errors undercuts the panel's conclusion that the States should have anticipated both the Federal Government's loss and its willingness to acquiesce in those blatant errors.

The D.C. Circuit's opinion ignores or violates all these benchmarks. It failed to consider prejudice and the within-the-time-to-appeal guideposts, even though both were prominently raised in the States' briefing. It further contravened this Court's holding that the "need to seek intervention d[oes] not arise until the [defendants] ceased defending the [challenged] law," *Cameron,* 142 S. Ct. at 1012, and instead reasoned that the need arose much earlier. J.A.3-7. And it also ignored the other important factors listed above.

The court of appeals also failed to read the timeliness and inadequate-representation requirements for intervention as of right in harmony with each other, as this Court has. This Court properly recognizes that until defendants "cease[] defending the [challenged] law" the "need to seek intervention d[oes] not arise." *Cameron*, 142 S. Ct. at 1012. This approach makes perfect sense: until a motion to intervene could actually succeed, prospective intervenors are not being dilatory by not making a futile request.

The panel, however, reasoned that the States should have intervened significantly earlier: *i.e.*, when they learned that their interests "likely would diverge" from the Federal Government. J.A.3-4. But a mere divergence of interests is not sufficient to establish inadequate representation in cases where defendants are still vigorously defending the challenged policy. The approach of the court of appeals and Respondents thus creates a Catch-22: the States' request to intervene would be timely only when they are incapable of proving inadequate representation; and they could show inadequate representation only once their motion would be untimely. That cannot be—and is not—the law.

The remaining requirements for intervention as of right are also satisfied. The States have Article III standing based on the increased healthcare, education, law-enforcement, and drivers-license-related expenses that a termination of Title 42 would cause. That is particularly true as even Federal Respondents admit that termination will create enormous challenges. And while Federal Respondents have argued that the States' injuries are not fairly traceable and that the States are constitutionally barred from asserting "indirect" harms against the Federal Government, those contentions are squarely foreclosed by *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019) and *Massachusetts v. EPA*, 549 U.S. 497 (2007).

The States' Article III standing largely resolves the protectable-interest requirement, particularly as this Court and the courts of appeals have accepted far more attenuated and less concrete interests as sufficient. And here, potential impairment of those interests is obvious and appears to be uncontested.

The States have also satisfied their minimal burden of showing inadequate representation. The Federal Government's refusal to seek a stay pending appeal, agreement with Plaintiffs to acquiesce in the termination of Title 42, and efforts to ensure that the manifest errors in the district court's decision are *never* corrected all establish inadequacy. So too does Federal Respondents' implacable opposition to the States' efforts to protect their interests through seeking intervention and a stay.

In short, Federal Respondents admit the district court's decision is grievously wrong and do not contest that failure to correct those errors will cause the States substantial injuries. But they nonetheless seek to ensure that the States suffer those injuries because it serves their interest in circumventing the APA. That is *not* adequate representation of the States' interests.

Alternatively, this Court should grant permissive intervention. The panel denied the States' request for it based solely on its erroneous timeliness holding. The other requirement for permissive intervention—advancing a common factual or legal argument—is also readily satisfied. And a favorable exercise of discretion is warranted given (1) that intervention would vindicate important procedural requirements of the APA, (2) that intervention would prevent a collusive resolution of this important dispute and instead ensure that it is decided on the merits, and (3) the enormous inconsistencies in the positions of Federal Respondents, who simultaneously contend that both APA-based vacaturs and nationwide injunctions are categorically unlawful while furiously attempting to acquiesce in them.

For all these reasons, the court of appeals' denial of intervention should be reversed.

ARGUMENT

Courts assessing a party's motion to intervene as of right under Rule 24(a) consider four elements: (1) whether "the intervention application is timely"; (2) whether movants have a "protectable interest relating to the property or transaction that is the subject of the action"; (3) whether "the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest"; and (4) whether "the existing parties" "adequately represent the applicant's interest." *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011); *accord Berger v. North Carolina State Conf. of the NAACP*, 142 S. Ct. 2191, 2200-01 (2022). As set explained below, all these requirements are satisfied.[1]

I. The States' Request to Intervene Was Timely

A. This Court's Benchmarks All Support the States' Timeliness Arguments

This Court's precedents establish several benchmarks for evaluating the timeliness of a motion to intervene for purposes of appeal: (1) how quickly movants sought to intervene after defendants ceased

---

[1] The States' initial attempt to intervene was made in the district court and was carried, still unresolved, up to the court of appeals along with the rest of the case as a result of Federal Respondents' appeal. *See*, *e.g.*, *Doe v. Public Citizen*, 749 F.3d 246, 258 (4th Cir. 2014). That request should therefore be evaluated under Rule 24. But even if considered as a separate motion to intervene in the D.C. Circuit, the standard for appellate intervention evaluates the same essential considerations. *Cameron*, 142 S. Ct. at 1010.

defense of the challenged law, (2) whether the motion to intervene was made within the time available for existing parties to appeal or seek further review, (3) whether existing parties would suffer cognizable prejudice, and (4) the totality of the circumstances. *Cameron*, 142 S. Ct. at 1012-14; *United Airlines*, 432 U.S. at 392-96.

Here *all* those guideposts support the States, establishing that their motion was timely.

1. *Timing of Intervention After Abandonment of Defense.* In evaluating timeliness, the "critical fact" is how quickly would-be intervenors acted once it became clear the existing parties "would no longer" protect their interests. *United Airlines*, 432 U.S. at 394.

This Court's decision in *Cameron* puts a finer point on timing, and makes clear exactly when the applicable clock starts running: the "need to seek intervention *d[oes] not arise until the [defendants] cease[] 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).

Measured by that benchmark, the States' motion to intervene is plainly timely. Federal Respondents effectively abandoned defense of the Title 42 System on November 15, when they first signaled their intent to acquiesce in the district court's injunction and vacatur to terminate Title 42. J.A.213-17. The States moved to intervene a mere six days later.

Respondents have never denied that moving to intervene within six days of the relevant trigger is timely. They simply argue that the need to intervene

arose earlier when Federal Respondents sought to terminate Title 42 by administrative law making. *See also* J.A.3-7.

Cameron makes this untenable: the "need to seek intervention d[oes] not arise until the [defendants] ceased defending the [challenged] law." 142 S. Ct. at 1012. The States' motion to intervene was thus timely when judged under "the most important circumstance relating to timeliness." *Id.*

2. *Intervention Within the Time-To-Appeal Deadline.* The States also satisfied this Court's second benchmark for evaluating the timeliness of motions to intervene for purpose of appeal. "[T]he critical inquiry" is whether the intervenors "acted promptly after the entry of final judgment" and "filed [their] motion within the time period in which the [existing parties] could have taken an appeal." *United Airlines*, 432 U.S. at 395-96; *accord Cameron*, 142 S. Ct. at 1012 (reasoning intervention was timely because it was sought "within the 14-day time limit for petitioning for rehearing en banc").

Recognizing the centrality of the within-the-time-to-appeal factor, the Ninth Circuit treats satisfaction of it as dispositive, holding that such motions are "timely as a matter of law." *Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317, 1320 (9th Cir. 1997) (citing *United Airlines*, 432 U.S. at 394-95). Other circuits similarly treat this benchmark as highly relevant. *See*, *e.g.*, *Larson v. JPMorgan Chase & Co.*, 530 F.3d 578, 583 (7th Cir. 2008) (recognizing "general rule" to same effect); *Ross v. Marshall*, 426 F.3d 745, 755 (5th Cir. 2005).

The States' motion to intervene unequivocally satisfied this benchmark too. The States moved to

intervene *one day before* the district court entered judgment on November 22, J.A.54-55. rather than merely "promptly *after* the entry of final judgment." *United Airlines*, 432 U.S. at 395 (emphasis added).

The States' motion was also filed well "within the time period in which the [existing parties] could have taken an appeal." *Id.* at 396. Both the district court's November 15 injunction and November 22 judgment were appealable decisions. *See* 28 U.S.C. §§ 1291, 1292(a). And the States' motion to intervene was filed well within the applicable 60-day notice-of-appeal deadlines as it came only six days after the district court's injunction and one day before the final judgment was entered. Fed. R. App. P. 4(1)(B).

Indeed, this guidepost so emphatically supports the States that Respondents have *never* previously contested it. Federal Respondents never cited *United Airlines* or addressed its within-the-time-to-appeal standard in *any* of their prior briefs that collectively comprise 90 pages in the district court, court of appeals, and this Court. Similarly, while Plaintiffs have occasionally cited *United Airlines*, they too have *never* addressed its within-the-time-to-appeal guidepost.

3. *Potential Prejudice.* This Court also considers potential prejudice to the existing parties in evaluating timeliness. *Cameron*, 142 S. Ct. at 1013-14; *NAACP v. New York*, 413 U.S. 345, 369 (1973).[2]

---

[2] The courts of appeals widely do so as well. *See*, *e.g.*, *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994); *Banco Popular de Puerto Rico v. Greenblatt*, 964 F.2d 1227, 1232 (1st Cir. 1992); *Alt v. EPA*, 758 F.3d 588, 591 (4th Cir. 2014); *Stupak-Thrall v. Glickman*, 226 F.3d 467, 473 (6th Cir. 2000); *In re Fine Paper Antitrust Litig.*, 695 F.2d 494, 500 (3d Cir. 1982).

Here, there is no cognizable prejudice. The States do not seek to advance new arguments. Instead, they merely intend to raise the same defenses previously advanced by Federal Respondents. In doing so, the States are not seeking anything more (or less) than to have the dispute about Title 42's validity resolved *on the merits*, rather than through surrender. *See*, *e.g.*, *Foman v. Davis*, 371 U.S. 178, 181 (1962) (It is "too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of … mere technicalities."). The only "prejudice" that Plaintiffs would suffer is inability to prevail by surrender.

This Court rejected a nearly identical argument in *Cameron*. As in that case, Plaintiffs "may have hoped that [Federal Respondents] would give up the defense of" Title 42, and may even have had a "reasonable expectation" that it would do so. *Id.* at 1013. But "[t]he loss of this sort of claimed expectation does not amount to unfair prejudice." *Id.* at 1014. Instead, Plaintiffs have "no legally cognizable expectation" that Federal Respondents "would give up the defense … before all available forms of review had been exhausted." *Id.*; *see also id.* at 1019 (Kagan, J, concurring in the judgment) ("[A]n unrealized gain of that kind does not count as a legally cognizable harm.").

Nor will Federal Respondents suffer any cognizable prejudice. Their inability to engage in the "tactic of 'rulemaking-by-collective-acquiescence,'" is hardly prejudicial—particularly as it "raise[s] a host of important questions," including the "most fundamental [of] whether the Government's actions, all told, comport with the principles of administrative law." *San Francisco*, 142 S. Ct. at 1928. Federal

Respondents' failure to pull off their desired winning-by-losing strategy is not cognizable prejudice.

4. *Totality of the Circumstances.* Finally, this Court has stressed that "'timeliness is to be determined from all the circumstances.'" *Cameron*, 142 S. Ct. at 1012 (quoting *NAACP*, 413 U.S. at 366). Here, the totality of circumstances further supports the States' timeliness for four reasons.

First, there was not even a *hint* of inadequate representation prior to November 15. Indeed, neither set of Respondents has identified a single punch that Federal Defendants pulled before then. Respondents' suggestion that the States should have intervened at a time when Defendants' defense was not only adequate, but concededly vigorous, upends the Rule 24 standard.[3]

Second, timeliness is further supported by Federal Respondents' shifting positions. In the last year alone, the United States has unequivocally told this Court that (1) the APA does not authorize vacatur

[3] The States have identified one small exception, but it actually supports their position here. In the *Louisiana* case, the States faulted Federal Defendants for raising a committed-to-agency-discretion defense solely against them and not against Plaintiffs here. *Louisiana* Doc. 51-1 at 14. In response to that contention, Federal Defendants then raised that very defense in their subsequent summary judgment brief below. J.A.163-68. The Federal Government's rapid response to the sole deficiency identified by anyone is strong evidence that intervention before November 15 would have been impossible.

as a remedy[4] and (2) nationwide injunctions are impermissible.[5]

Given these representations, the States had every reason to believe that Federal Respondents would vigorously resist a nationwide injunction or vacatur. (In fact, *two days after* acquiescing in the district court's vacatur here, the United States continued to argue that the APA *never* authorizes vacaturs in its reply brief in *United States v. Texas*, No. 22-58, and it did so again 12 days later at oral argument.) Given Federal Respondents' positions, the States had no reason to think that they would acquiesce to a nationwide injunction and vacatur rather than vigorously appealing.

Third, Texas *did* try to intervene earlier in the case and was rebuffed. J.A.222-23. Given that prior refusal, the States reasonably waited for some objective evidence of inadequate defense to emerge before moving to intervene—and, when it did, promptly moved to intervene.

Fourth, the egregiousness of the legal errors that pervade the district court's decision supports the States' intervention. The States had little reason to believe that Federal Respondents' defense would fail. And they certainly had no reason to believe that Federal Respondents would acquiesce in so erroneous

---

[4] *See* Brief for Federal Defendants at 40-44, *United States v. Texas*, No. 22-58 (U.S. Sept. 12, 2022), *available at* https://bit.ly/3Uotirj (arguing that the APA "Does Not Authorize Vacatur").

[5] *See*, *e.g.*, Transcript, *San Francisco*, at 71 (statement of U.S. Deputy Solicitor General that the Federal Government has "pretty consistently" argued that "district courts lack the power to issue nationwide injunctions"), https://bit.ly/3VDDOfZ.

an opinion, thereby creating precedent that might undermine the government in future emergencies justifying the use of its Title 42 authority.

In particular, the centerpiece of the district court's decision is a putative "least restrictive means" standard that would require all emergency measures under 42 U.S.C. § 265 to pass strict scrutiny or be invalidated. In the district court's view, CDC imposed just such a limitation on its own authority, even though it would gravely undermine the agency's ability to combat future disease threats.

The reasoning producing that strange result cannot withstand even the slightest scrutiny. To begin with, the district court inverted the proper legal standard. Under the APA, "the government *does not have to show that it has adopted the least restrictive means*." *National Cable & Telecomms. Ass'n v. FCC*, 555 F.3d 996, 1002 (D.C. Cir. 2009) (emphasis added) (applying same standard for commercial speech and APA claims). Indeed, federal courts "require … the least restrictive means only when ... strict scrutiny applies." *United States v. Am. Libr. Ass'n, Inc.*, 539 U.S. 194, 207 n.3 (2003).

The district court based its holding on language in the preamble to a different 2017 rule governing quarantine and isolation, rather than expulsion. J.A.27-34. The district court's reliance on that 2017 language is obvious error as: (1) preambles are not binding, *National Wildlife Fed'n v. EPA*, 286 F.3d 554, 569 (D.C. Cir. 2002); (2) the preamble is from a *different rule*, J.A.28-34; (3) the 2017 language expressly limits itself to language to quarantine and isolation measures, 82 Fed. Reg. 6890, 6890 (Jan. 19, 2017)—which Title 42, as a policy preventing entry, is

not; (4) the language further limits itself to orders issued "under this [2017] Final Rule," which the Title 42 System unambiguously was not, *id*; and (5) the 2017 rule repeatedly discusses a "*less* restrictive" standard, *see*, *e.g.*, 82 Fed. Reg. at 6,972-73 (emphasis added); *id.* at 6914 (rejecting argument that legal requirements demand least-restrictive-means analysis be conducted at the time quarantine and isolation measures are imposed)—rather than a *least* restrictive one. *See also* J.A.178-85. The district court's decision thus suffers from multiple flagrant errors, each requiring reversal.

* * *

Under every benchmark that this Court's intervention precedents establish, the States' request to intervene was timely.

B. The Court of Appeals' Timeliness Holding Contravenes This Court's Precedents

Measured against this Court's precedents and benchmarks, the D.C. Circuit's conclusion that the States' motion to intervene was untimely is untenable.

1. The D.C. Circuit first reasoned that the States' motion was untimely because the case had been "pending for almost two years." J.A.3. But "that factor is not dispositive." *Cameron*, 142 S. Ct. at 1012. Indeed, the *Cameron* case had been pending for *more than* two years when intervention was sought, *id.* at 1007-108, but that fact did not preclude timeliness. And the *United Airlines* case had been pending for "*five years*." 432 U.S. at 390 (emphasis added). The court of appeals' heavy reliance on the "almost two years" ground was thus unsound.

The panel sought to bolster this "almost two years" reasoning by stating "the States have asked this court to allow them to intervene *for the first time in this litigation* when the case *is already on appeal*." J.A.3 (emphasis added). This appears to be a clear-cut error: the States first asked to intervene in *the district court* on November 21. That was sixteen days before Federal Respondents filed their notice of appeal—which likely was done in *response* to the States' attempted intervention.[6] The case was unambiguously not "already on appeal" when the States' made their "first" request to intervene "in this litigation." J.A.3.

Read charitably, the panel might have been referring to the fact that the States' renewed request to intervene now that the case was on appeal (J.A.241-46) was "first" made "when the case [wa]s already on appeal." J.A.3. That at least has the benefit of being factually correct. But it was obvious legal error to rely on a tautology like that.

To state the obvious, it is not possible to intervene *in an appeal* until the "case is already *on appeal*." J.A.3 (emphasis added). Placing any weight on the States' "failure" to intervene in an appeal that *did not yet exist* is unsound as a matter of both law and logic.

2. The court of appeals' reasoning violates the standards set forth in *United Airlines* and *Cameron*, as discussed above. It refused to consider whether the

---

[6] Federal Respondents previously told the Western District of Louisiana and Fifth Circuit that Title 42 would unambiguously end "at midnight on December 21, 2022"—without even *mentioning the possibility* that the government would seek to appeal. J.A.238-39, 253-54. Instead, those notices treat their declination to appeal as a foregone conclusion.

States' motion to intervene had been filed "within the time period in which the [existing parties] could have taken an appeal" and whether the States "acted promptly after the entry of final judgment" (or, here, even before). *United Airlines*, 432 U.S. at 395-96. It did not, for example, evaluate that factor and hold that it was outweighed. Instead, the panel ignored this "critical inquiry" entirely. *Id.*

In doing so, the court of appeals followed the lead of both Plaintiffs and Federal Respondents, who also refused to address this benchmark. *Supra* at 20. That alone was legal error and an abuse of discretion. *See Cameron*, 142 S. Ct. at 1012 (A lower court abuses its discretion "when it 'bases its ruling on an erroneous view of the law.'" (citation omitted) (cleaned up)).

The panel similarly refused to consider prejudice. The word "prejudice" cannot be found anywhere in its order. J.A.1-7. Nor can any relevant analysis. *Id.*

Even more fundamentally, the D.C. Circuit squarely violated *Cameron*'s holding that parties' "need to seek intervention *d[oes] not arise until [existing defendants] ceased defending the [challenged] law*, and the timeliness of [their] motion should be assessed in relation to that point in time." 142 S. Ct. at 1012 (emphasis added).

Ignoring this clear directive, the D.C. Circuit instead held that the States needed to seek intervention as soon as they knew "that their interests in the defense and perpetuation of the Title 42 policy had already diverged or likely would diverge from those of the federal government's." J.A.3-4. But *Cameron* is clear that mere awareness of possible divergence of interests does not trigger the need to intervene—only defendants' "ceas[ing] defen[se of] the

[challenged] law" does. 142 S. Ct. at 1012. Nor did the panel make any attempt to "assess[] [timeliness] in relation to *that point in time*." *Id.* (emphasis added), Instead, the panel started its timeliness clock far earlier. J.A.3-7.

The panel further did not consider that Respondents had not pointed to *any* evidence of inadequate defense prior to November 15. Far from outright ceasing defense or prosecution, as in *Cameron* and *United Airlines*, Federal Respondents had done nothing to suggest they would mount a less-than-vigorous defense in response to an adverse ruling by the district court—as they had done the first time that the same district court had enjoined Title 42. *Huisha-Huisha*, 27 F.3d at 726-31.

The panel's approach not only contravened *Cameron*, but raises significant problems when viewed through the lens of federalism. Our "Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Under that system, the interests of the federal and state governments almost invariably "diverge" from each other—often by intentional constitutional design.

In many cases their respective powers are either mutually exclusive or intentionally overlapping and antagonistic, with the Constitution creating "a healthy balance of power between the States and the Federal Government. *Id.* at 458. That "balance of power" presupposing that the Federal Governments and States *will frequently* have divergent interests on a broad range of issues.

That divergence of interests is particularly acute in the immigration context, where preemption is

pervasive and the Federal Government imposes unfunded mandates on the States, often resulting from its failure to enforce federal immigration laws. *See*, *e.g.*, *Arizona v. United States*, 567 U.S. 387 (2012). If the bare existence of divergence of interests triggers the States' need to intervene, the States could need to intervene at the outset of every immigration case, as well as cases in countless other contexts where the Constitution intentionally places the interests of the Federal Government and states in tension.

3. Rather than engage with the holdings of *Cameron* and *United Airlines*, the court of appeals sought to distinguish those cases purely on their facts. It reasoned that "this case bears no resemblance to *Cameron* or *United Airlines*." J.A.6-7. That distinction-on-the-facts-alone attempt fails even on its own terms. Both *Cameron* and *United Airlines* had been pending longer: over two and five years, respectively. *Supra* at 25.

More importantly, the evidence prior to November 15 that the States' interests "diverge[d] from those of the federal government's" is *far* weaker here than it was in *Cameron*. J.A.3. In particular, Governor Beshear, who was previously attorney general, not only "ran 'on a pro-choice platform'" but also specifically "had a 'history of refusing to defend abortion restrictions.'" *Cameron*, 142 S. Ct. at 1013-14 (citation omitted). Yet this Court still held that the attorney general could wait for actual abandonment of defense before seeking to intervene. *Id.* at 1012-14.

In stark contrast, Federal Respondents here never previously refused to defend Title 42 and actually had a history of doing so vigorously. The first time the

same district judge invalidated Title 42, Federal Respondents sought and obtained both an emergency stay pending appeal and then a unanimous reversal. *Huisha-Huisha*, 27 F.3d at 726-31. They then continued to defend Title 42 robustly on remand—until they suddenly didn't. J.A.213-17. *Cameron* thus demonstrates that the States' motion here was timely *a fortiori*.

More fundamentally, the panel's approach to distinguishing *Cameron* and *United Airlines* on their facts was unsound. Lower courts are obliged to apply the legal standards and holdings set forth in this Court's opinions in *all* cases and not merely those with close factual similarities. *See*, *e.g.*, *James v. City of Boise*, 136 S. Ct. 685, 686 (2016) (per curiam) ("[O]nce the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of [federal] law.").

In practice, this means that the court of appeals should have (1) applied *Cameron*'s holding that the clock on timeliness starts running with abandonment of defense, (2) considered timeliness under *United Airline*'s within-the-time-to-appeal benchmark, and (3) evaluated potential prejudice. *Cameron*, 142 S. Ct. at 1012-14; *United Airlines*, 432 U.S. at 395-96. The D.C. Circuit did none of these things.

4. The panel below also erred in conflating policy preferences with actual litigation conduct. Desiring a particular policy outcome is not remotely equivalent to employing collusive litigation tactics to achieve it. The President and his subordinates have a duty to "take Care that the Laws be faithfully executed." U.S. Const. art. 2 § 3 cl. 5. While he might prefer on policy grounds to change course vis-à-vis Title 42, the

President has a responsibility to continue defending the law as it exists until he can secure a legal change. The States could reasonably presume—and the presumption of regularity perhaps *required* them to presume—the President would change course only through legally appropriate avenues.

This distinction is borne out innumerable times in every federal administration. President Biden, for example, opposes the death penalty as a policy matter. But his Administration nevertheless sought, and obtained, a reinstatement of the death penalty for Dzhokhar Tsarnaev from this Court. *United States v. Tsarnaev*, 142 S. Ct. 1024 (2022). Similarly, the Administration likely disfavors hundreds of statutes enacted by Congress. But the Department of Justice still defends them in virtually every case in which a colorable defense exists. *See*, *e.g.*, 8 Op. O.L.C. 183, 193-96 (1984) ("It is generally inconsistent with the Executive's duty … to take actions which have the practical effect of nullifying an Act of Congress.").

Thus, just because the States knew that the Administration desired to end Title 42 as a matter of *policy* preference hardly indicates that they had knowledge that Federal Respondents would abandon meaningful *legal defense* of Title 42. Indeed, there was compelling evidence to the contrary, including the summary judgment brief robustly defending Title 42 filed *after* the D.C. Circuit believed those policy preferences were apparent. J.A.149-207.

The panel's decision also turns the presumption of regularity[7] on its head. Far from presuming that

---

[7] *See*, *e.g.*, *USPS v. Gregory*, 534 U.S. 1, 10 (2001). Many courts of appeals also apply a presumption of adequate representation

Federal Respondents' actions were regular and above board, the D.C. Circuit demanded that the States assume without evidence that Federal Respondents would engage in what amounts to a collusive settlement that circumvents the APA. J.A.3-7. That is effectively a presumption of *ir*regularity, and one that is apparently irrebuttable with objective evidence of robust defense.

5. Finally, the panel erred in relying on Texas's prior rejected attempt to intervene to deny the States' request here. That rejection in fact shows that it was not possible to intervene earlier—when Federal Respondents were still vigorously defending the Title 42 System—and that the States reasonably moved to intervene after receiving objective evidence that the robustness of that defense had eroded.

Notably, Texas tried to intervene *after* President Biden issued Executive Order 14,010, which specifically directed CDC to wind down Title 42. And Texas's initial efforts *still* failed. The D.C. Circuit never explained why the Federal Government's attempted termination in April 2022 added anything material beyond the prior indications that it intended to terminate Title 42. The panel nonetheless reasoned that Texas and the States should have renewed their request "to intervene in district court on remand." J.A.4. But that makes little sense.

As an initial matter, the D.C. Circuit's refusal to provide any grounds for denying Texas's motion to

---

of governmental parties as well. *See generally Berger*, 142 S. Ct. at 2204.

intervene (let alone any supporting reasoning) left the States with little guidance as to how to proceed.[8]

Ultimately that matters little here, however, because renewed intervention on remand would have been unavailing under all scenarios: (1) If the D.C. Circuit had denied Texas's motion on timeliness grounds, a renewed motion in the district court would have been even less timely. (2) If the court of appeals had held the States lacked a protectable interest, that would likely be incurable on remand. (3) And, as was most likely the case, if the D.C. Circuit had denied intervention because Federal Defendants were robustly defending Title 42 at that time, a renewed motion would do no good until there was actual evidence of inadequate representation—which is precisely when the States renewed their request here.

The court of appeals' reliance on the States not taking an action that would have been futile is thus unavailing.

C. Respondents' Proposed Standard Is Unworkable and Bad Policy

The approach of the court of appeals and Respondents suffers from another related flaw: it fails to read the timeliness and inadequacy-of-representation requirements of Rule 24 together as part of a harmonious whole, and rather treats then as "pebbles in alien juxtaposition." *King v. St. Vincent's*

---

[8] This Court may wish to instruct courts of appeals that they should explain their grounds of decision when denying motions to intervene. As the public charge rule cases and the denial of Texas's first motion makes clear, the circuit courts' practice of refusing to supply grounds of decision when denying intervention is pervasive, which frustrates this Court's review.

Hosp., 502 U.S. 215, 221 (1991). That approach is both bad law and bad policy.

This Court's approach in *Cameron* properly reads those requirements in tandem: the clock to intervene does not start ticking *until* the defendants actually "cease[] defending the [challenged] law." 142 S. Ct. at 1012. *That* is the date against which "the timeliness of [a] motion should be assessed." *Id.*

This approach properly reads the requirements of Rule 24 together and makes perfect sense: until the point in time where a motion to intervene would succeed, such a motion is necessarily premature. Timeliness should thus be judged in relation to the point at which the other requirements for intervention as of right could be satisfied.

In contrast, the D.C. Circuit started the clock on intervention much earlier: when the States merely had knowledge that their interests "would likely diverge" from Federal Defendants. J.A.3-4. But that court tellingly never held that a motion to intervene filed at that point in time would actually *succeed*. Texas's rejected intervention attempt is strong evidence that an earlier attempt by the States to intervene would have failed. J.A.222-23.

The court of appeals' and Respondents' approach thus creates a Catch-22 when the Federal Government abandons defense reasonably far into a case. Any motion to intervene filed earlier in the case will be denied given that the Federal Government is *then* defending its challenged actions or laws. And any motion filed after the abandoned defense, even if *mere days* after that abdication, will be denied as untimely.

This case exemplifies this Catch-22: Texas tried earlier and was denied, likely on adequacy-of-representation grounds. Then, once the States obtained proof of abdication, their motion was denied on the ground that it came too late. This unwinnable paradox results from failing to read the parts of Rule 24 as a "harmonious whole.'" *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012).

That approach is bad policy too. Such a standard would encourage anticipatory intervention in thousands of cases when there is a change in administration or administrative policy so States and other entities can protect their interests against unforeseen reversals. That would be a tremendous waste of resources for both courts and parties. And if courts denied those motions, interested parties would then presumably need to keep filing seriatim motions to intervene upon any new hint of inadequate representation lest failure to do so later yield a finding of untimeliness.

The incentives placed on the Federal Government by the lower courts' approach are even worse. That standard would incentivize—and effectively bless—the "'rulemaking-by-collective-acquiescence'" ploy that this Court has properly expressed concerns about. *San Francisco*, 142 S. Ct. at 1928 (citation omitted).

Adopting the D.C. Circuit's approach would be particularly problematic now. The current Administration has signaled its taste for collusive tactics by systematically dismantling administrative barriers to sue-and-settle tactics. For example, EPA in 2022 revoked a 2017 memorandum that directed

the agency not to engage in sue-and-settle practices.[9] Similarly, the Department of Interior not only rescinded an order (Secretary Order 3368) that was designed to restrict sue-and-settle tactics, but also eliminated a related transparency measure by specifically directing that the "Solicitor shall remove the litigation web page" where such information was posted. *See* Secretary Order 3048 (June 17, 2022), https://on.doi.gov/3X8ocBu.

This appetite is confirmed through litigation too. The simultaneous, multi-court surrenders in the public charge cases were carried out "with military precision to effect the removal of the issue from [this Court's] docket and to sidestep notice-and-comment rulemaking" for repealing the unwanted rule.[10] *See also San Francisco v. U.S. Citizenship & Immigr. Servs.*, 992 F.3d 742, 743-55 (9th Cir. 2021) (VanDyke, J., dissenting).

Even outside the immigration context, the United States has collusively worked with its nominal adversaries to evade judicial review. For example, shortly after successfully persuading the Court to consider the validity of rules governing the Title X family planning program, the United States and the other parties agreed to dismiss the case. Put differently, the United States agreed to dismiss a case it had just recently convinced the Court to hear. It did so only once a group of States attempted to

---

[9] *See EPA revokes Trump-era 'sue and settle' memo*, Greenwire (Mar. 24, 2022), https://bit.ly/3GPr5lb.

[10] Transcript at 45-46, *San Francisco*, (Alito, J.); *see also id.* at 48 ("The real issue to me is the evasion of notice-and-comment. And, I mean, basically, the government bought itself a bunch of time [through the acquiesced-in vacatur] where the rule was not in effect.") (Kagan, J.).

intervene—apparently out of concern that the States might succeed in defending rules that the United States hoped to abandon. *See AMA v. Becerra*, No. 20-429, Letter Brief of Ohio, et al. (May 10, 2021).

The Court should not adopt intervention standards that deprive interested parties of the means to stop these practices.

II. The Remaining Requirements For Intervention as of Right Are Established Here

All of the other requirements for intervention as of right are satisfied here too: the States have Article III standing to challenge, and protectable interests relating to, the district court's judgment. And Federal Respondents have stopped adequately representing the States' interests, and instead are acquiescing in a decision that they know will inflict significant injuries upon the States, which they openly admit is premised on flagrant legal errors.

A. The States Have Article III Standing to Challenge the Termination of the Title 42 System

1. The evidence submitted by the States in support of intervention here includes (1) the evidence establishing standing to challenge termination of the Title 42 System, *Louisiana*, 2022 WL 1604901, at *10-15, (2) the evidence establishing standing to challenge the partial repeal of Title 42 as to unaccompanied minors, *Texas v. Biden*, 589 F. Supp. 3d 595, 610-13 (N.D. Tex. 2022), and (3) the Deposition of Border Patrol Chief Raul Ortiz, who provided party admissions against Federal Respondents. *See* J.A.258-75; D.Ct. Doc. 168 & Exhibits. This evidence demonstrates that termination of Title 42 will cause

the States to incur additional healthcare, education, law-enforcement, and drivers-license-related expenditures. *Louisiana*, 2022 WL 1604901, at *10-15; *Texas*, 589 F.Supp.3d at 611-13. Those expenses establish Article III standing, particularly as monetary harms are one of the "most obvious" and "traditional" forms of injury, which "readily qualify … under Article III." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021).

Respondents have not meaningfully contested that the district court's decision will cause the States to suffer injuries-in-fact. Nor do they deny that reversal of that judgment would redress those injuries. But they appear to challenge the legal cognizability of the States injuries, arguing that they are neither traceable to termination of Title 42 nor sufficiently "direct" to establish state standing. These contentions fail.

2. The traceability requirement of Article III is readily satisfied under *Department of Commerce v. New York*. There, this Court unanimously held that "Article III 'requires no more than de facto causality,'" and that traceability can be established by "the predictable effect of Government action on the decisions of third parties." *New York*, 139 S. Ct. at 2566.

Here Federal Respondents themselves have confidently predicted that termination of Title 42 will drastically increase the number of migrants illegally crossing into the United States. J.A.64-65, 110, 118-34. *Louisiana*, 2022 WL 1604901, at *4-5. And from that influx inexorably flows increased expenses for the States, including added healthcare and education expenses. *Louisiana*, 2022 WL 1604901, at *10-15;

Texas, 589 F.Supp.3d at 611-13; *Texas v. Biden,* 20 F.4th 928, 969-73 (5th Cir. 2021) *rev'd on other grounds* 142 S. Ct. 2528 (2022).

Traceability is also readily established by comparison to *Massachusetts v. EPA*, where this Court accepted a *far* more attenuated causal chain. 520 U.S. at 516-26. There, the Bay State claimed injuries downstream of (1) unknowable EPA regulations that would issue if they prevailed (the contours of which are still fuzzy 16 years later), (2) immense amounts of time, as the asserted injuries would occur over the course of a century or more, (3) wild uncertainty as to the injuries, with no attempt made to quantify or locate the coastal lands that would allegedly be lost, and (4) the decisions of innumerable third parties (*e.g.*, drivers, foreign nations, and corporations). Massachusetts's causal chain was nonetheless sufficient. The soundness of the States' causal chain here follows *a fortiori*.

Termination of the Title 42 System would also cause the States sovereign injury, which is readily traceable. The "defining characteristic of sovereignty" is "the power to exclude from the sovereign's territory people who have no right to be there." *Arizona*, 567 U.S. at 417 (Scalia, J., concurring in part and dissenting in part). But the effect of leaving the district court's nationwide injunction and vacatur in place would be to compel the States to accept the presence of individuals with no lawful right to be within their borders, thereby inflicting sovereign injury upon them. *Id.*

3. In opposing a stay, Federal Respondents claimed that Article III restricts States to asserting "'direct injur[ies]'" against the Federal Government.

Stay Opp.35-36. That is squarely refuted by this Court's unanimous standing holding in *New York*, which did not involve *any* direct injuries. Instead, New York's injuries were indirect and downstream of projected illegal actions of third parties and complex federal funding formulas. 139 S. Ct. at 2565-66. It is also impossible to reconcile this proposition with *Massachusetts*, where the state's injuries were anything but direct. 520 U.S. at 516-26.

Similarly, Federal Respondents' arguments cannot be reconciled with the "special solicitude" that *Massachusetts* affords States. 549 U.S. at 520. Instead, it would replace that solicitude with what Justice Alito has properly recognized as "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."[11] If Federal Respondents wish to continue pressing their "direct injuries only" and special-hostility theories for state standing, they owe this Court an explicit argument that *Massachusetts* should be overruled and an analysis of the stare decisis factors supporting such a reversal.

Federal Respondents also attempted (Stay Opp. 25) to limit *New York* to cases involving decreased federal funding. But nothing in either *New York*'s reasoning or Article III itself gives special solicitude to losses of federal funding as compared to other financial injuries. 139 S. Ct. at 2565-66.

---

[11] Transcript at 12, *United States v. Texas*, No. 22-58 https://bit.ly/3uTYRPA. This Court's decision in *United States v. Texas* is likely to affect the standing and protectable-interest issues presented here.

4. The cognizablity of the States' injuries is underscored by the role of unfunded federal mandates here. Federal law requires the States to provide educational and healthcare services to immigrants regardless of immigration status. *Plyler v. Doe*, 457 U.S. 202, 230 (1982); 42 C.F.R. § 440.255 (c). Thus, when Federal Respondents take actions that predictably result in increased numbers of migrants entering into the States, the States are necessarily compelled to expend additional money under unfunded federal mandates.

The United States' traceability arguments thus run headlong into its own unfunded mandates, to which the States' injuries are readily traceable.

5. The States would also suffer another independent type of injury from the district court's judgment: the *de facto* destruction of the rights they enjoy under the injunction issued by the *Louisiana* court. *See*, *e.g.*, *NBA v. Minn. Pro. Basketball, Ltd. P'ship*, 56 F.3d 866, 871-72 (8th Cir. 1995) ("A preliminary injunction confers important rights."); *Institute of Cetacean Rsch. v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 949 (9th Cir. 2014).

Respondents do not deny that the district court's judgment here would effectively obliterate the *Louisiana* injunction by mooting that action. By vitiating legal rights that the States would otherwise possess, the States suffer injury-in-fact fairly traceable to the district court's judgment.

6. The States' standing is particularly apparent here as traceability and redressability requirements are doubly relaxed in this context. Standing is relaxed a first time because this case involves "procedural right[s]." *Lujan v. Defenders of Wildlife*, 504 U.S. 555,

572 n.7 (1992). Here Plaintiffs are asserting procedural claims, from which the States' injuries flow, and the States are also seeking to vindicate their own procedural rights to (1) notice-and-comment rulemaking and (2) having their reliance interests considered under the APA, *DHS v. Regents of the Univ. of Calif.*, 140 S. Ct. 1891, 1913 (2020).

Thus, just as the dam-adjacent resident in the *Lujan* example need not actually trace his dam-construction-caused harms through the deficient environmental analysis, the States similarly need not demonstrate that, if Federal Respondents conducted notice-and-comment rulemaking and promulgated an APA-compliant rule, the result would be any different. *Lujan*, 504 U.S. at 572 n.7. They need only show that the agencies *could* reach a different result post-compliance. *Id.* And DHS's insistence upon having significant time to plan for the termination of Title 42 underscores that there are good and bad ways to terminate that system. *See*, *e.g.*, J.A.213-17.

Standing requirements are relaxed a second time because the States are "entitled to special solicitude" in the standing analysis. *Massachusetts*, 549 U.S. at 520; *accord Texas v. United States*, 809 F.3d 134, 159 (5th Cir. 2015) *aff'd by an equally divided court* 579 U.S. 547 (2016) (applying *Massachusetts*'s relaxed "special solicitude" to conclude that the States' "causal connection [wa]s adequate"). While Federal Respondents have suggested that this solicitude does not apply because the States have not asserted sovereign injury (Stay Opp.36-37), that is incorrect. *Supra* at 39. Moreover, special solicitude was actually triggered in *Massachusetts* by the existence of *quasi-sovereign* interests. 549 U.S. at 520. And the States have such affected interests here. *Infra* § II.B.

B. The States Have Protectable Interests That Could Be Impaired

The States' standing largely resolves the protectable interest inquiry of Rule 24 as well. In particular, the avoidance of incurring economic injury is a classic protectable interest supporting intervention. *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004); *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d 1111, 1115 (10th Cir. 2002); *National Parks Conservation Ass'n v. EPA*, 759 F.3d 969, 976 (8th Cir. 2014). Similarly, the avoidance of sovereign injuries and destruction of the rights that the States enjoy under the *Louisiana* injunction readily qualify as interests "protectable under *some* law' … [for which] there is *a* relationship between the legally protected interest and the claims at issue.'" *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1180 (9th Cir. 2011) (en banc) (citation omitted) (emphasis added).

The States further have important, protectable interests in conserving their education, healthcare, and law enforcement resources for the benefit of "the health and well-being—both physical and economic—of [their] residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982). Indeed, DOJ's own Deputy Attorney General admitted that terminating Title 42 could cause an "'increase in illegal immigration' as well as 'human smuggling' and 'drug smuggling.'" J.A.146-48. Such impacts would directly harm the States' quasi-sovereign interests.

Beyond that, federal courts should be particularly sensitive to State interests in the immigration context. Congress, through preemption, has

substantially prevented States from protecting themselves from immigration-related harms by precluding them from enacting their own laws. *See Arizona,* 567 U.S. at 394 ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."). Given federal preemption, States frequently can protect their interests only by ensuring that the Federal Government complies with federal law, including the APA's procedural requirements. Denying intervention to the States in this context thus causes particularly acute harms, since it effectively forecloses one of the few (or only) avenues for the States to protect their interests. *See id.* at 397 ("The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States.").

In *San Francisco*, the Federal Government contended that only "direct" injuries sufficed under Rule 24. But the rule requires only "an interest," unmodified and unrestricted by any of the adjectives that the United States might try to shoehorn in, such as direct or substantial.[12] And this Court "do[es] not lightly assume that Congress has omitted from its

---

[12] Federal Respondents' reliance (Stay Opp.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 fraught with great risks." 7C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1908.1 (3d ed. 2021).

adopted text requirements that it nonetheless intends to apply." *Jama v. ICE*, 543 U.S. 335, 341 (2005).

This Court has thus held sufficient more attenuated interests, such as a State's abstract interest in healthy economic competition within its borders. *Cascade Nat. Gas v. El Paso Nat. Gas*, 386 U.S. 129, 135-36 (1967).[13] The States' interests are at least as direct and substantial as in *Cascade Natural Gas*. And consistent with this Court's holdings and the text of Rule 24, the courts of appeals have routinely accepted interests far more indirect or unconventional than those advanced by Petitioners. *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).

Once the existence of the States' protectable interests is recognized, the potential impairment of those interests appears to be undisputed. That much is unsurprising: given the unprecedented calamity that termination of Title 42 will cause under DHS's

---

[13] Federal Respondents also suggested (Stay Opp.30-31) that 42 U.S.C. § 265 "is concerned only with protecting the public health" and not with immigration consequences. But Section 265 operates in part by *regulating immigration* directly, and thereby preventing the "introduction of persons" into the United States. 42 U.S.C. § 265. It would be incoherent for Section 265 to be completely disinterested in immigration consequences when the only way that it could prevent "introduction of persons" is through *producing* immigration consequences.

own projections, the prospect that the States' interests here would *not* be impaired is fanciful. J.A.64-65, 110, 118-34.

C. Federal Respondents No Longer Adequately Represent the States' Interests

"[T]he burden of … showing" inadequate representation is "minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *accord Berger*, 142 S. Ct. at 2204. And the States have readily satisfied that "minimal" burden here.

The inadequacy of Federal Respondents' representation is largely established simply by summarizing their positions. They:

- Do not deny that, absent a stay, the district court's judgment would create a crisis at the southern border (or, rather, exacerbate an existing one), increasing daily unlawful crossings from 7,000 per day to as many as 18,000 per day. J.A.118-34.
- Do not deny that the resulting crisis will cause the States to incur significant additional expenses.
- Admit the district court's judgment is legally erroneous, thereby implicitly admitting that the harms caused by it to the States should never occur, and would not occur but for the district court's acknowledged legal errors. J.A.219.
- Nonetheless intended to ask the D.C. Circuit to ensure that these injuries would be inflicted upon the States by holding the case in indefinite abeyance (and planned to

do so even before this Court issued a stay). J.A.219-20.

Federal Respondents thus believe that the injuries the States will incur from the district court's judgments both (1) should never occur (as they are predicated on legal error) but (2) should nonetheless be visited upon them without possibility of appellate review to correct those acknowledged errors. That is not even conceivably adequate representation of the States' interests.

In addition, this Court expressly relied on the fact that existing defendants "declined to seek a stay" as supporting inadequate representation. *Berger*, 142 S. Ct. at 2205. And here Federal Respondents not only failed to seek a stay themselves, but have vehemently opposed the States' efforts to obtain one.

Also much like *Berger*, the States here wish to "defend[] the law vigorously on the merits without an eye to crosscutting administrative concerns" held by the existing defendants, which further supports the States' inadequate-representation arguments. *Id.* And the fact that much of Federal Respondents' "crosscutting administrative concerns" here largely consists of wanting to circumvent core APA requirements that protect the States' interests only further supports intervention.

Finally, the inadequacy of Federal Respondents' representation of the States' interests is made clear through the extraordinary lengths to which they have gone in opposing the States' motions to intervene and to stay a decision that Federal Respondents themselves consider wrong. The unrelenting hostility to the States' efforts to protect their own interests thus further supports granting intervention.

III. Alternatively, This Court Should Grant Permissive Intervention

In the alternative, the States' request for permissive intervention should be granted. The States' request was timely for all the reasons explained above. *Supra* § I. And because the States seek to defend the validity of the Title 42 System under the APA, they advance a "defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B).

A favorable exercise of discretion here is further warranted for three reasons.

First, permissive intervention would serve to vindicate core procedural protections of the APA: notice-and-comment rulemaking and reasoned decision-making that considers the reliance interests of affected parties.

The notice-and-comment requirement is particularly indispensable. It "guards against excesses in rulemaking." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring). It prevents "arbitrary changes." *See Hollingsworth v. Perry*, 558 U.S. 183, 197 (2010). It "gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1816 (2019). And it "affords the agency a chance to avoid errors and make a more informed decision." *Id.*

These requirements remain critical even though the COVID-19 pandemic has significantly abated. The consequence of having the Title 42 System in place for years—particularly when combined with this Administration's systematic dismantling of other

border control measures—is that there is a looming potential disaster that will result when Title 42 is terminated. J.A.64-65, 110, 118-34. Even Federal Respondents recognize as much. Stay Opp.2.

The hydraulic pressure built up by Title 42 can potentially be addressed (or ignored) in a myriad of ways—some disastrous and some much less so. Federal Respondents have backhandedly acknowledged as much by (1) requesting an administrative stay from this Court if the States' stay request were denied and (2) their insistence, both in the Termination Order, and in their agreement with Plaintiffs, on a significant delay of the effective date for any termination. In doing, DHS has recognized that sudden termination would be a particularly calamitous way to terminate Title 42.

Prior to this Court's stay, DHS's plans were at best a work in progress lacking details, with one DHS official saying (pre-stay) that December "21st [is] going to be a disaster" and "[t]here are so many things in the pipeline, but nothing is ready (to) go." J.A.131. Requiring compliance with notice-and-comment procedures will compel the Administration to consider possible alternatives offered by the States and the harms that the various options would cause them. This is particularly important as the April 2022 Termination Order did not consider those harms and overwhelmingly sought to delegitimize the States' reliance interests before offering a short *ipse dixit* that "even if such reliance [by States] was reasonable or legitimate … [it] would not outweigh CDC's conclusion." 87 Fed. Reg. at 19,944.

Because permissive intervention will help to ensure APA procedural requirements are satisfied,

and the resulting policy improved, a favorable exercise of discretion is warranted.

Second, and relatedly, permissive intervention would help thwart Federal Respondents' gambit to evade APA requirements. Permissive intervention would also ensure that a decision is made "on the merits," *Foman,* 371 U.S. at 181, rather than through the "tactic of 'rulemaking-by-collective-acquiescence.'" *San Francisco*, 142 S. Ct. at 1928 (citation omitted). That alone is a strong reason to grant the States' request.

Third, a favorable exercise of discretion is warranted given the tactics Federal Respondents employed here. Along with seeking a collusive end-run around APA requirements, their actions are incompatible with their solemn representations to this Court that nationwide injunctions are categorically unlawful and that the APA does not *ever* authorize vacatur. *Supra* at 22-23.

Given those categorical, *recent* assertions made to this Court, Federal Respondents had no business collusively agreeing to a decision that adopted *both* putatively illegal remedies. And they certainly should not have done so through agreement with the Plaintiffs within mere hours of that decision.

For all of these reasons, this Court should grant the States' request for permissive intervention.

CONCLUSION

The court of appeals' denial of intervention should be reversed and the case remanded for resolution on the merits.

January 18, 2023

Respectfully submitted,

JEFF LANDRY
Attorney General of
Louisiana

DREW C. ENSIGN
Special Assistant
Solicitor General
Counsel of Record
202 E. Earll Drive
Suite 425
Phoenix, AZ 85004
(602) 492-5969
drew@ensignlawgroup.com

ELIZABETH B. MURRILL
Solicitor General
J. SCOTT ST. JOHN
Deputy Solicitor
General
LOUISIANA DEPARTMENT
OF JUSTICE
1885 N. Third Street
Baton Rouge, LA 70802
(225) 326-6766
murrille@ag.louisiana.gov

Counsel for Petitioner Louisiana

ANDREW BAILEY
Attorney General of
Missouri

Michael E. Talent
Charles F. Capps
Deputy Solicitors
General
Supreme Court Building
P.O. Box 899
Jefferson City, MO
65102
(314) 340-4869

Counsel for the State of
Missouri

STEVE MARSHALL
Attorney General of
Alabama

Edmund G. Lacour Jr.
*Solicitor Genera*l
OFFICE OF THE
ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300

Counsel for the State of
Alabama

KRISTIN K. MAYES
Attorney General of Arizona

Brett W. Johnson
Tracy A. Olson
Cameron J. Schlagel
SNELL & WILMER, LLP
One East Washington Street, Ste. 2700
Phoenix, AZ 85004
(602) 382-6000

Counsel for the State of Arizona

TREG R. TAYLOR
Attorney General of Alaska

Cori M. Mills
Deputy Attorney General of Alaska
Christopher A. Robinson
Assistant Attorney General
ALASKA DEPARTMENT OF LAW
1031 W. 4th Avenue, Suite 200
Anchorage, AL 99501
(907) 269-5100

Counsel for the State of Alaska

KRIS KOBACH
Attorney General of Kansas

Anthony J. Powell
Solicitor General
OFFICE OF KANSAS ATTORNEY GENERAL
120 SW 10th Avenue, 3rd Floor
Topeka, KS 66612
(785) 368-8435

Counsel for the State of Kansas

DANIEL CAMERON
Attorney General of Kentucky

Marc Manley
Associate Attorney General
OFFICE OF THE ATTORNEY GENERAL
700 Capital Avenue, Suite 118
Frankfort, KY 40601
(502) 696-5478

Counsel for the Commonwealth of Kentucky

LYNN FITCH
Attorney General of
Mississippi

Justin L. Matheny
Deputy Solicitor General
OFFICE OF THE
MISSISSIPPI
ATTORNEY GENERAL
P.O. Box 220
Jackson, MS 39205
(601) 359-3680

Counsel for the State of Mississippi

AUSTIN KNUDSEN
Attorney General of
Montana

Christian B. Corrigan
Solicitor General
Kathleen L. Smithgall
Deputy Solicitor General
MONTANA
ATTORNEY
GENERAL'S OFFICE
215 N. Sanders St.
Helena, MT 69601
(406) 444-2026

Counsel for the State of Montana

MIKE HILGERS
Attorney General of
Nebraska

James A. Campbell
Solicitor General
OFFICE OF THE
NEBRASKA
ATTORNEY GENERAL
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682

Counsel for the State of Nebraska

DAVE YOST
Attorney General of
Ohio

Ben Flowers
Solicitor General
OFFICE OF OHIO
ATTORNEY GENERAL
DAVE YOST
30 E. Broad St., 17th Fl.
Columbus, OH 43215
(614) 728-7511

Counsel for the State of Ohio

GENTNER F. DRUMMOND
Attorney General of Oklahoma

Zach West
Director of Special Litigation
OKLAHOMA ATTORNEY GENERAL'S OFFICE
313 NE 21st Street
Oklahoma City, OK 73105
(405) 521-3921

Counsel for the State of Oklahoma

KEN PAXTON
Attorney General of Texas

Aaron F. Reitz
Deputy Attorney General for Legal Strategy
Leif A. Olson
Special Counsel
OFFICE OF THE ATTORNEY GENERAL OF TEXAS
P.O. Box 12548
Austin, TX 78711-2548
(512) 936-1700

Counsel for the State of Texas

ALAN WILSON
Attorney General of South Carolina

J. Emory Smith, Jr.
Deputy Solicitor General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3642

Counsel for the State of South Carolina

JONATHAN SKRMETTI
Tennessee Attorney General and Reporter

Andrée S. Blumstein
Solicitor General
Brandon J. Smith
Chief of Staff
Clark L. Hildabrand
Assistant Solicitor General
OFFICE OF THE TENNESSEE ATTORNEY GENERAL AND REPORTER
P.O. Box 20207
Nashville, TN 37202
(615) 253-5642

Counsel for the State of Tennessee

SEAN D. REYES
Attorney General of Utah

Melissa A. Holyoak
Solicitor General
160 East 300 South, 5th Floor
Salt Lake City, UT 84114
(801) 366-0260

Counsel for the State of Utah

JASON S. MIYARES
Attorney General of
Virginia

Andrew N. Ferguson
Solicitor General
Lucas W.E. Croslow
Deputy Solicitor General
OFFICE OF THE
VIRGINIA ATTORNEY
GENERAL
202 North 9th Street
Richmond, VA 23219
(804) 786-7704

Counsel for the Commonwealth of Virginia

PATRICK MORRISEY
Attorney General of
West Virginia

Lindsay See
Solicitor General
Michael R. Williams
Senior Deputy Solicitor General
OFFICE OF THE
WEST VIRGINIA
ATTORNEY GENERAL
State Capitol, Bldg 1,
Room E-26
Charleston, WV 25305
(681) 313-4550

Counsel for the State of West Virginia

BRIDGET HILL
Attorney General of Wyoming

Ryan Schelhaas
Chief Deputy Attorney General
OFFICE OF THE WYOMING
ATTORNEY GENERAL
109 State Capitol
Cheyenne, WY 82002
(307) 777-5786

Counsel for the State of Wyoming

APPENDIX

APPENDIX

TABLE OF CONTENTS

Federal Rules of Civil Procedure

Rule 24. Intervention

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

(1) ***In General.*** On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) ***By a Government Officer or Agency.*** On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) ***Delay or Prejudice.*** In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.