No. 22-592

In the Supreme Court of the United States

ARIZONA, *ET AL.*,

Petitioners,

v.

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

Respondents.

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

BRIEF OF CITIZENS UNITED, CITIZENS UNITED FOUNDATION, AND THE PRESIDENTIAL COALITION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Citizens United and Citizens United Foundation are dedicated to restoring government to the people through a commitment to limited government, federalism, individual liberty, and free enterprise. Citizens United and Citizens United Foundation regularly participate as litigants (*e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010)) and amici in important cases in which these fundamental principles are at stake (*See, e.g.*, Brief of Citizens United, Citizens United Foundation, and the Presidential Coalition as *Amici Curiae* in Support of Petitioner, *Percoco v. United States*, No. 21-1158 (U.S. Sept. 7, 2022); Brief of Citizens United, Citizens United Foundation, and the Presidential Coalition as *Amici Curiae* in Support of Petitioners, *Moore, et al. v. Harper, et al.*, No. 21-1271 (U.S. Sept. 6, 2022); Brief of Citizens United and Citizens United Foundation as *Amici Curiae* in Support of Respondent, *Securities and Exchange Commission v. Cochran*, No. 21-1239 (U.S. Jul. 7, 2022); Brief of Citizens United, Citizens United Foundation, and The Presidential Coalition as *Amici Curiae* in Support of Appellants and Petitioners, *Merrill, et al. v. Milligan, et al.*, Nos. 21-1086, 21-1087, 2022 WL 1432037 (U.S. May 2, 2022)).

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[1] No counsel for a party authored this brief in whole or in part. No person other than *amici curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief. Consistent with Rule 37.3, neither consent of the parties nor a motion for leave to file an *amicus curiae* brief is necessary.

Citizens United is a nonprofit social welfare organization exempt from federal income tax under Internal Revenue Code ("IRC") § 501(c)(4). Citizens United Foundation is a nonprofit educational and legal organization exempt from federal income tax under IRC § 501(c)(3). These organizations were established to, among other things, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

INTRODUCTION

This case is about whether the nineteen State Petitioners – the sovereign representatives of nearly 110 million people – can have their day in court.

The question before the Court concerns the impact of unlawful immigration but is not about immigration. States traditionally have a sovereign interest in health and immigration policy. Moreover, "[t]he problems posed to the State by illegal immigration must not be underestimated" as States like "Arizona bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 398 (2012). Given Petitioners unique role in our federal system and the direct impact of Title 42 on the States qua States, Petitioners should be permitted to intervene and make their case.

SUMMARY OF THE ARGUMENT

The Court of Appeals erred by not allowing Petitioners to intervene in this matter. Petitioners' motion to intervene was timely and intervention is consistent with the liberal intervention principles that underlie Federal Rule of Civil Procedure 24.

Petitioners' motion to intervene was timely. Petitioners moved to intervene in this matter within days of the federal defendants' decision not to seek a full stay of the district court's ruling. Notwithstanding the fact that at least one Petitioner tried to intervene earlier and was rejected, the Court of Appeals rejected Petitioners' proposed intervention based primarily on the timeliness of their motion. As the Court has stated in another context, "[t]his 'heads I win, tails you lose' approach cannot be correct." *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 471 (2007).

Moreover, Petitioners were similarly situated and satisfied the criteria for timely intervention set forth in *Cameron v. EMW Women's Surgical Center, P.S.C.*, 142 S.Ct. 1002 (2022).

In addition, the Court of Appeals' implication that Petitioners' slept on their rights by not accurately predicting that the Administration would decline to seek a stay sooner in the litigation proceedings is belied by the Administration's track record of inconsistent statements and policies relating to COVID-19.

Intervention by Petitioners is also consistent with the principles of intervention underlying Rule 24. As described in *Cameron*, the criteria for evaluating motions to intervene at the appellate level are derived from the principles of intervention in the district courts. The history and development of Rule 24 suggest that those principles should be understood in accord with an effort to liberalize intervention to promote the resolution of all issues in a single action.

Petitioners also have a clear interest in the action that is the subject of the dispute, the continuation of the Administration's Title 42 Orders:

- Petitioners have an interest in this matter in their capacity as structural checks on federal authority;

- Petitioners have a quasi-sovereign interest in immigration and health policy that supports intervention; and

- Petitioners will incur real, concrete costs as a consequence of the district court's decision.

Finally, Petitioners are so situated that their interests will be impeded if they are not permitted to intervene. Petitioners filed their own lawsuit against the Administration's repeal of its Title 42 policies, won, and obtained a preliminary injunction. Nevertheless, the value of that preliminary injunction would be undermined by an adverse decision in this action. Accordingly, participation in *this* matter is necessary to protect Petitioners' interests.

The Court of Appeals should be reversed and Petitioners should be permitted to have their day in court.

ARGUMENT

I. Petitioner's Motion to Intervene is Not Untimely

The Court of Appeals asserted that "the inordinate and unexplained untimeliness of the States' motion to intervene on appeal weighs decisively against intervention." *Huisha-Huisha, et al. v. Mayorkas, et al.*, No. 22-5325 at 2 (D.C. Cir. Dec. 16, 2022) (per curiam Order). This assertion is belied by the underlying facts and law:

- First, the Court of Appeal's order disregards the factual history of this case, where several states sought and were denied intervention earlier in the case;

- Second, it is contrary to the approach of this Court in *Cameron v. EMW Women's Surgical Center, P.S.C.*, 142 S.Ct. 1002 (2022); and

- Third, it disregards the Biden Administration's inconsistent approach to COVID-19 response measures, which makes forecasting future actions difficult.

A. The Court of Appeals' "Heads I Win, Tails You Lose" Approach to Intervention Cannot Be Correct

The Court of Appeals applies a Goldilocks standing to Petitioners' motion to intervene, requiring their timing to be just right. The crux of the Court of Appeal's denial of intervention is that Petitioners should have done it sooner. To wit, the Court of Appeals claimed "although this litigation has been pending for almost two years, the States never sought to intervene in the district court until almost a week *after* the district court granted plaintiffs' partial summary judgment motion and vacated the federal government's Title 42 policy," and asserted that "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." *Huisha-Huisha*, No. 22-5325 at 2.

These arguments functionally disregard the fact that one of the Petitioners *did* seek to intervene sooner. Texas sought to intervene in an earlier appeal in this matter over a year ago, in October 2021. *See* Motion to Intervene at 2, *Huisha-Huisha, et al. v. Mayorkas, et al.*, No 21-5200 (D.C. Cir. Oct. 11, 2021). Texas's motion was denied in a one-paragraph Order that lacks any analysis tying the facts to the law. *Huisha-Huisha, et al. v. Mayorkas, et al.*, No. 21-5200 (D.C. Cir. Oct. 26, 2021) (per curiam Order). While intervention standards in the D.C. Circuit may be

different on appeal and in the district court,[2] no large analytical leap is required to conclude that, absent a material change in the underlying factual circumstances, a motion to intervene in the district court would also be futile.

Certainly, having just had their motion to intervene denied less than a year before, Petitioners cannot reasonably be charged with "inordinate and unexplained untimeliness." Such a claim would effectively subject Petitioners to the sort of "heads I win, tails you lose" analysis that the Court has said "cannot be correct" in other contexts. *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 471 (2007).

B. The Court of Appeals' Approach to Timeliness is Contrary to *Cameron*

The approach taken by the Court of Appeals in assessing timeliness is contrary to the approach of the Court in *Cameron*. As described above, the Court of Appeals based its ruling on timeliness on two prongs:

- First, it noted that proceedings had been pending for nearly two years without a motion to intervene in the district court; and

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[2] *See Amalgamated Transit Union International, AFL-CIO v. Donovan*, 771 F.2d 1551 (D.C. Cir. 1985) (per curiam); *Richards v. Flores*, 979 F.3d 1102, 1104 n.1 (5th Cir. 2020); *but see generally Cameron v. EMW Women's Surgical Center, P.S.C.*, 142 S. Ct. 1002, 1011 (2022) (applying the policies underlying intervention in the district courts to assess intervention in the courts of appeal).

- Second, it noted that Petitioners were on notice that their interests diverged from that of the federal defendants "long before" filing their motion to intervene.

Both prongs are contrary to the reasoning in *Cameron*.

Cameron rejected the Court of Appeals' first prong — that too much water had already passed under the bridge for Petitioners' to intervene now. The Court of Appeals stated that "although this litigation has been pending for almost two years, the States never sought to intervene in the district court until almost a week *after* the district court granted plaintiffs' partial summary judgment motion and vacated the federal government's Title 42 policy." *Huisha-Huisha,* No. 22-5325 at 2 (D.C. Cir. Dec. 16, 2022) (per curiam Order). In *Cameron,* the Court rejected remarkably similar reasoning, stating "[t]he panel found that the attorney general's motion was not timely because it came after years of litigation in the District Court and after the panel had issued its decision, but its assessment of timeliness was mistaken." *Cameron*, 142 S. Ct. at 1012.

While "[t]imeliness is an important consideration," it "'is to be determined from all of the circumstances,' and the point to which [a] suit has progressed is . . . not solely dispositive.'" *Cameron*, 142 S.Ct. at 1012 (quoting *NAACP v. New York*, 413 U.S. 345, 365-366 (1973)). The Court of Appeals' first prong is not a separate independent and adequate basis for the Court of Appeals' ruling.

Instead, "the most important circumstance relating to timeliness is that the attorney general sought to intervene 'as soon as it became clear' that the Commonwealth's interests 'would no longer be protected' by the parties in the case." *Cameron*, 142 S. Ct. at 1012 (quoting *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977)).

In making this assessment, *Cameron* highlights that it is actual litigation positions that matter in assessing timeliness, not previous policy positions. It was not dispositive that a new governor took office who "ran 'on a pro-choice platform and . . . had repeatedly withdrawn from the defense of abortion restrictions when serving as Attorney General.'" *Cameron*, 142 S. Ct. at 1013 (quoting Brief for Respondents at 28). The inflection point for assessing timeliness was when the government defendant changed its position with respect to the defense of the underlying law. *See Cameron*, 142 S. Ct. at 1012 ("The attorney general's need to seek intervention did not arise until the secretary ceased defending the law, and the timeliness of his motion should be assessed in relation to that point in time.").

In this case, the inflection point came when the government declined to seek more than a "temporary" stay on appeal, which threatened to effectively moot the practical impact of the appeal. Prior to that time, the federal defendants were defending the Title 42 Orders notwithstanding known policy differences. *See Cameron*, 142 S. Ct. at 1013 ("But the new secretary whom [the governor] appointed after taking office as Governor had continued to defend the law on appeal,

and the respondents do not explain why the attorney general should have known that the secretary would change course after the panel's decision was handed down."). As in *Cameron*, the government continued to defend Title 42 in the district court and the Court of Appeals up until the time that it didn't.

Even if Petitioners *could* have successfully moved to intervene sooner (and given the Court of Appeals' prior ruling on Texas' motion to intervene, it is far from clear that they could have), intervention after the government adopted a new litigation position that was clearly contrary to Petitioners' asserted interests was timely.

C. The Administration's Inconsistent Approach to Covid-19 Emergency Measures Limits Petitioners' Ability to Predict the Administration's Approach to Litigation

The Court of Appeals makes much of the Biden Administration's efforts to administratively terminate its prior Title 42 Orders. First and foremost, this focus disregards the impact of the preliminary injunction in *Louisiana v. Centers for Disease Control & Prevention*, No. 6:22-CV-00885, 2022 WL 1604901 (W.D. La. May 20, 2022), which provided that even if the Administration *wanted* to terminate the Title 42 Orders, it was (at least temporarily) stymied in those efforts.

Second, it ascribes a degree of consistency to the Administration's approach to Covid-19 emergency measures that is not warranted. One court described

Calvinball, from the comic strip Calvin and Hobbs, as "the game that can never be played with the same rule twice," a game where "any player can change the rules at any point in the game, the score is kept without any logic or consistency, and penalties are given in any way deemed fit." *In re Gabriella A.*, 319 Conn. 775, 807 n.10 (Conn. 2015) (Robinson, J., dissenting). Such is an apt description for the Administration's Covid-19 policy.

On April 1, 2022, the Centers for Disease Prevention and Control announced that it was terminating its prior order under 42 U.S.C. §§ 265, 268 and 42 C.F.R. § 71.40, stating in part "[w]ith CDC's assistance and guidance, DHS has and will implement additional COVID-19 mitigation procedures. These measures, along with the current public health landscape where 97.1% of the U.S. population lives in a county identified as having 'low' COVID-19 Community Level, will sufficiently mitigate the COVID-19 risk for U.S. communities." *See CDC Public Health Determination and Termination of Title 42 Order*, CDC (Apr. 1, 2022), https://www.cdc.gov/media/releases/2022/s0401-title-42.html.

Yet, within a week, the CDC issued an Order that reaffirmed that noncitizens legally arriving in the United States must generally be vaccinated against Covid-19. *See* CDC, *Amended Order Implementing Presidential Proclamation on Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic*, 87 Fed. Reg. 20405 (Apr. 7, 2022); *see also* The White House, *A Proclamation on Advancing the*

Safe Resumption of Global Travel During the Covid-19 Pandemic (Oct. 25, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/10/25/a-proclamation-on-advancing-the-safe-resumption-of-global-travel-during-the-covid-19-pandemic/.

This is part of a larger pattern. For example, on September 18, 2022, President Biden declared "[t]he pandemic is over" during a national television interview. *See* Scott Pelley, *President Joe Biden: The 2022 60 Minutes Interview*, CBS News (Sept. 18, 2022), https://www.cbsnews.com/news/president-joe-biden-60-minutes-interview-transcript-2022-09-18/. Yet, less than a month later, the Department of Health and Human Services renewed the declaration of public health emergency relating to the Covid-19 pandemic for an additional 90 days. Xavier Becerra, *Renewal of Determination that a Public Health Emergency Exists*, Department of Health and Human Services (Oct. 13, 2022), https://aspr.hhs.gov/legal/PHE/Pages/covid19-13Oct2022.aspx.

President Biden's statement and subsequent renewal of the declaration of public health emergency followed a similar incident in spring 2022 involving the President's chief medical advisor, Anthony Fauci. During an interview with PBS News Hour, Dr. Fauci stated that the United States was "out of the pandemic phase," only to clarify that comment the next day, stating "by no means does that mean the pandemic is over." Xander Landen, *Biden Administration's Muddled COVID Messaging Just Got More Confusing*,

Newsweek (May 1, 2022), https://www.newsweek.com/biden-administrations-muddled-covid-messaging-just-got-more-confusing-1702465.

With respect to wearing masks on public transportation, the administration adopted a mandate, defended it in court, lost, appealed, and ultimately declined to seek a stay of the adverse ruling. Yet the Administration still continued to claim "[i]t is CDC's continuing assessment that at this time an order requiring masking in the indoor transportation corridor remains necessary for the public health." *CDC Statement of Masks in Public Transportation Settings*, CDC (Apr. 20, 2022), https://www.cdc.gov/media/releases/2022/s0420-masks-public-transportation.html; *see also Health Freedom Defense Fund, Inc., et al., v. Biden, et al*, 599 F. Supp.3d 1144 (M.D. Fla. 2022), appeal filed April 21, 2022, Case No. 22-11287.

In 2021, the Washington Post reported that "[t]he Biden administration has given some pretty conflicting advice on coronavirus boosters," noting that senior administration officials such as President Biden, Dr. Fauci, and CDC Director Rochelle Walensky advised all Americans 18 years and older to get a booster shot at the same time that the CDC itself issued guidance recommending that only those 50 years and older needed to do so. Theodoric Meyer and Jacqueline Alemany, *The Biden Administration Has Given Some Pretty Conflicting Advice on Coronavirus Boosters*, Wash. Post (Nov. 30, 2021), https://www.washingtonpost.com/politics/2021/11/30/

biden-administration-has-given-some-pretty-conflicting-advice-coronavirus-boosters/.

The Administration's approach to Covid-19 has been inconsistent at best, both in its legal orders and in its public statements. It is claiming too much to effectively argue that Petitioners slept on their rights by not moving to intervene following an announced policy that is in tension with other Administration policies and was subject to a preliminary injunction, particularly in light of the Administration's litigation position defending the original Title 42 Orders. Petitioners' motion was timely.

II. Intervention is Consistent with the Principles Underlying Rule 24

As the Court noted in *Cameron*, the Federal Rules of Appellate Procedure are largely silent on the question of intervention. *See Cameron*, 142 S. Ct. at 1010 ("The Federal Rules of Appellate Procedure make only one passing reference to intervention, and that refence concerns review of *agency* action."); *see also generally* Fed. R. App. P. 15.

As a result, the Court "consider[s] the 'policies underlying intervention' in the district courts . . . including the legal 'interest' that a party seeks to 'protect' through intervention on appeal." *Cameron*, 142 S. Ct. at 1010 (quoting *Automobile Workers v. Scofield*, 382 U.S. 205, 217 n.10 (1965)).

The policies underlying intervention under Rule 24 support Petitioners' intervention. Rule 24 itself is the product of a conscious effort to liberalize intervention

in the Federal courts. Moreover, Petitioners have a substantial interest in the continuation of Title 42 and are so situated that disposing of the action without their involvement will impede their ability to protect their interests.[3]

A. The History and Development of Rule 24 Counsels in Favor of a Liberal Approach to Intervention

The policies underlying intervention in the district court derive in part from the history of intervention in judicial proceedings that preceded the modern rules of civil procedure.

Scholars have traced the roots of modern intervention practice back to at least Roman law, where "[i]ntervention practice . . . was rather extensive." James WM. Moore & Edward H. Levi, *Federal Intervention I. The Right to Intervene and Reorganization*, 45 Yale L.J. 565, 568 (Feb. 1936). Ironically, given the posture of the Court of Appeals in this case, intervention under Roman law "seems to have taken place only at the appeal stage and then on the theory that the losing party might refuse to appeal or might not be vigilant in prosecuting the appeal and

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[3] The Court of Appeals appears to accept that the federal defendants are not adequately representing Petitioners' interests, instead criticizing Petitioners for not realizing and acting on that divergence *sooner*. *See, e.g.*, *Huisha-Huisha, et al. v. Mayorkas, et al.*, No. 22-5325 at 3 (D.C. Cir. Dec. 16, 2022) (per curiam order) ("Despite that 'palpable' divergence in interests that already existed in October 2021, neither Texas nor any of the States here moved to intervene in district court on remand from this court or during summary judgment proceedings.").

petitioner's interest thus be inadequately protected." *Id*. Moreover, as conceived in Roman law, standards for who could intervene were relatively liberal: "It was not always necessary to show that one would be bound by the proceeding.[] Nor was it always necessary that the intervenor show a legal interest; a humanitarian interest would suffice." *Id*. (citation omitted).

Moreover, modern civil procedure reflects a conscious effort to broaden the scope of who could intervene and under what circumstances.

The English Common law generally took a more restrictive view of who could intervene. "Indigenous to the old common law and tending to restrict the extension of rights of intervention, was an unusual concern that the plaintiff be enabled by the courts to control his action." *Id*. Under common law pleading, a "case was limited, theoretically at least, to supposedly a single issue, though even there the possibility of combining diverse claims in one action, theoretically limited, was in practice fairly extensive." Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 449 (Jul. 1936).

Equity courts, however, took a broader view. "In the equity suit the idea was to settle all matters in the issue." *Id*. Under Equity Rule 37, which preceded the adoption of the current Federal Rules of Civil Procedure, "[a]ny one claiming an interest in the litigation may at any time be permitted to intervene to assert his right by intervention, but the intervention shall be in subordination to and in

recognition of the main proceedings." Moore, *supra* at 578.

Rule 24 built upon and liberalized Equity Rule 37 rather than continuing the narrow scope of intervention under common law. *See* Armistead M. Dobie*, The Federal Rules of Civil Procedure,* 25 VA.L. REV. 261, 273 n.36 (Jan. 1939) ("[R]ule [24] liberalize[d] Rule 37."). Moreover, expanding access to the courthouse through intervention has been a consistent theme of subsequent amendments to Rule 24. *See generally Nuesse v. Camp,* 385 F.2d 694, 701 (D.C. Cir. 1967) (The 1966 Amendments were "obviously designed to liberalize the right to intervene in federal actions.").

If courts are to look at the policies underlying intervention in the district courts, they should also consider where those policies came from. Rule 24 reflects an effort to liberalize intervention to be more consistent with principles of equity, with an eye towards settling all matters in a single suit. A liberalized approach to intervention, along with an effort to settle all matters in a single case, supports Petitioners' efforts to intervene in this matter.

B. Petitioners have a Substantial Interest in the Continuation of Title 42

Petitioners have a substantial interest in the continuation of Title 42. First, States have a special role in our federal system as checks on the federal government that supports their involvement. Second, States have a special interest in matters impacting

public health and immigration policy stemming from the quasi-sovereign authority of the States as political institutions. Finally, Petitioners have an interest in avoiding the substantial costs that are likely to be incurred as a result of the end of Title 42.

i. States Have a Special Role in Our Constitutional System as Checks on Federal Authority

States have a special role in our constitutional system as checks on federal authority.

As Alexander Hamilton wrote, "[p]ower being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government." *The Federalist No. 28* (Alexander Hamilton). If the rights of the people "are invaded by either, they can make use of the other as the instrument of redress." *Id.*

In this role:

> the State legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough . . . to sound the alarm to the people, and to not only be the VOICE,

> but, if necessary, the ARM of their discontent.

The Federalist No. 26 (Alexander Hamilton). This is in part because "[p]rojects of usurpation cannot be masked under pretenses so likely to escape the penetration of select bodies of men, as of the people at large." *Id*. Instead, "[t]he legislatures will have better means of information. They can discover the danger at a distance; and possessing all organs of civil power, and the confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine all the resources of the community," including by "readily communicat[ing] with each other in the different States, and unit[ing] their common forces for the protection of their common liberty." *The Federalist No. 28* (Alexander Hamilton).

This is precisely what has occurred in this case. Several States, concerned about the impact of the exercise of federal authority, have communicated with each other and united their common forces to serve as both the voice and arm of discontent among their citizens in federal court. Having sought to do so, and in light of their unique role in our constitutional system, they should at least be permitted to have their day in court.

ii. States have a "Quasi-Sovereign" Interest in Immigration and Health Policy that Supports Intervention

"States are not normal litigants for purposes of invoking federal jurisdiction." *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 518

(2007); *see also Georgia v. Tennessee Copper Co.,* 206 U.S. 230, 237 (1907). "It is axiomatic that '[i]n America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.'" *Heath v. Alabama*, 474 U.S. 82, 92 (1985) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 410 (1819)). "When a State enters the Union, it surrenders certain sovereign prerogatives." *Massachusetts*, 549 U.S. at 519. Nevertheless, "the States 'are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.'" *Id.* (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)). Accordingly, States are often "entitled to special solicitude in [the Court's] standing analysis." *Id*. at 520. (footnote omitted).

Moreover, through the doctrine of *parens patriae*, States are able to access the federal courts to vindicate their "quasi-sovereign" interest. "[A] 'quasi-sovereign' interest . . . is a judicial construct that does not lend itself to a simple or exact definition." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel Barez*, 458 U.S. 592, 601 (1982). Nevertheless, the Court has recognized that "a State has a quasi-sovereign interest in the health and well-being – both physical and economic – of its residents in general." *Id*. at 607.

"An agency action may affect a quasi-sovereign interest if it is alleged to damage certain 'sovereign prerogatives [that] are not lodged in the Federal Government." *Texas v. United States*, 50 F.4th 498,

515 (5th Cir. 2022) (quoting *Massachusetts*, 549 U.S. at 519) certiorari granted *United States v. Texas*, No. 22-40367 (U.S. Jul. 21, 2022).

As Justice Scalia noted, "most would consider the defining characteristic of sovereignty[to be] the power to exclude from the sovereign territory people who have no right to be there." *Arizona v. United States*, 567 U.S. 387, 417 (2012) (Scalia, J, concurring in part and dissenting in part). Accordingly, "[t]here is no doubt that 'before the adoption of the constitution of the United States' each State had the authority to 'prevent [itself] from being burdened by an influx of persons.'" *Id*. at 418. (Scalia, J., concurring in part and dissenting in part) (quoting *Mayor of New York v. Miln*, 11 Pet. 102, 132-133 (1837)).

Over time, the Court has accepted that "[t]he Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens," to the point that now "[t]he federal power to determine immigration policy is well settled." *Id*. at 394-95. However, "[t]he pervasiveness of federal regulation does not diminish the importance of immigration policy to the States." *Id*. at 397. "In light of the predominance of federal immigration restrictions in modern time, it is easy to lose sight of the States' traditional role in regulating immigration — and to overlook their sovereign prerogative to do so." *Id*. at 422. (Scalia, J., concurring in part and dissenting in part).

Moreover, "[o]ne helpful indication" in assessing a quasi-sovereign interest "is whether the

injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607.. There is little doubt that several Petitioners would likely attempt to address the issues caused by the Administration's immigration and public health policies through their own sovereign powers. Indeed, they *have* tried to address these issues through their own authority and often met with opposition from federal authorities. *See e.g.*, Complaint, *United States v. Ducey*, 2:22-cv-02107-SMB (D. Ariz. Dec. 14, 2022) (seeking to enjoin the State of Arizona from installing a wall on federal lands along the southern border).

Accordingly, Petitioners have a quasi-sovereign interest in the disposition of the underlying litigation that supports intervention.

C. Petitioners have an interest in avoiding the substantial costs that are likely to be incurred as a result of the end of Title 42

Petitioners also have an interest in avoiding the substantial costs that are likely to be incurred as a result of the end of the Administration's Title 42 policy.

The Court has recognized "[t]he problems posed to the State by illegal immigration must not be underestimated" and that "Arizona bears many of the consequences of unlawful immigration." *Arizona*, 567 U.S. at 397-98.

Those consequences are large and increasing. U.S. Customs and Border Protection ("CBP") reports

that it had 2,766,582 total enforcement actions in Fiscal Year 2022 and an additional 561,291 enforcement actions as of early January in fiscal year 2023. *CBP Enforcement Statistics Fiscal Year 2023* (Jan. 6, 2023), https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics. This is up dramatically from past years. To wit, the year-to-date number for 2023 is larger than the total number of enforcement actions in all of fiscal year 2017. *Id*.

The result is that "no one is doubting the chaos and potential migrant surge that could be triggered" by the end of Title 42. Stephen Collison, *Everyone Can Now Agree – The U.S. has a Border Crisis*, CNN (Dec. 16, 2022), https://www.cnn.com/2022/12/16/politics/biden-immigration-crisis-title-42/index.html. As the Department of Homeland Security has acknowledged, ""[w]hen the Title 42 public health Order is lifted [DHS] anticipate migration levels will increase." U.S. Department of Homeland Security, *DHS Plan for Southwest Border Security and Preparedness*, Apr. 26, 2022, https://www.dhs.gov/sites/default/files/2022-04/22_0426_dhs-plan-southwest-border-securitypreparedness.pdf.

These increases are predicted to be dramatic: reportedly "[o]fficials now are preparing for the possibility of between 12,000 to 14,000 migrants attempting to cross every day." Second Declaration of James K. Rogers at Exhibit A, *Huisa-Huisha v. Mayorkas*, Case No. 22-5325 (D.C. Cir. Dec. 15, 2022). For comparison, "[e]ncounters with migrants at the

southern border are already at record levels, with the daily tally surpassing 9,000 three times in the first week and a half of December," *id*., while "the average for fiscal year 2022 – in which there were a record 2.3 million migrant crossings – was approximately 6,500 crossings a day." *Id*. at Exhibit B.

Much of the costs and impacts of this "chaos" will be borne by States and localities. To wit, "El Paso Deputy City Manager Mario D'Agostino told city leaders there is no way for their community to be prepared for the end of Title 42." Declaration of James K. Rogers at Exhibit D, *Huisha-Huisha, et al. v. Mayorkas*, Case No. 22-5325 (D.C. Cir. Dec. 12, 2022). This comes around the same time four Democratic members of the United States Senate warned "[t]his month, El Paso has seen over 700 migrants released directly onto city streets due to overcrowding. This is not safe, and creates a dangerous situation for migrants and communities." Letter from U.S. Senators Kysten Sinema, Mark Kelly, Margaret Hassan, and Jon Tester to Secretary of Homeland Security Alejandro Mayorkas (Nov. 18, 2022), https://www.sinema.senate.gov/sites/default/files/2022-11/LTR%20to%20Sec%20Mayorkas_KS%20MK%20MH%20JT_Post%20Title%2042%20Operations_111822.pdf (citing Kapp, Shelby, *Hundreds of Migrants Released on Streets of El Paso But They're Not Venezuelans*, KTSM 9 News (Nov. 10, 2022), https://www.ktsm.com/local/el-paso-news/hundreds-of-migrants-released-on-streetsof-el-paso-but-theyre-not-venezuelans/.

This same group of Senators, which includes Arizona's Democratic Senators, also warned that "[i]n Arizona, shelters have already been forced well beyond capacity." *Id.* (citing Rodriguez, Paola, *Local Migrant Shelter Reaching Capacity After Influx of Migrants in Tucson*, Ariz. Pub. Media (Sept. 29, 2022), https://news.azpm.org/p/news-topical-border/2022/9/29/213086-local-migrantshelter-reaching-capacity-after-influx-of-migrants-in-tucson/.

Under federal law, Petitioners are required to spend State taxpayers' money on Emergency Medicaid for aliens who are not lawfully in the United States. *See* 42 C.F.R. § 440.255(c). In the *Louisiana v. Centers for Disease Control & Prevention*, No. 6:22-CV-00885, 2022 WL 1604901 (W.D. La. May 20, 2022) litigation, Plaintiffs averred that the "Yuman Regional Medical Center ('YRMC') in Arizona was forced to provide $546,050 in unreimbursed medical care for unauthorized aliens during . . . the first six months of 2019, when border crossings were lower that even their current level." Memorandum in Support of Motion for Preliminary Injunction at 15, *Arizona v. Centers for Disease Control & Prevention*, Case No. 6:22-cv-00885-RRS-CBW (W.D. La. Apr. 14, 2022). Likewise, "'Missouri expended $361,702 in emergency medical care costs for treatment of ineligible aliens during Fiscal Year 2020,' and Missouri had to spend $30,114.11 just on database inquiries to 'verify unlawful individuals' lawful immigration status.'" *Id.* (citations omitted). Faced with these costs, the court in *Louisiana* concluded "the Plaintiff States have shown a legally cognizable injury at least with respect to healthcare costs and the Plaintiffs States' legal

obligation to subsidize healthcare for illegal immigrants." *Louisiana*, 2022 WL 1604901 at * 14.

Similarly, States are obligated to provide public education to school-age students who are not lawfully in the United States. *See Plyer v. Doe*, 457 U.S. 202, 230 (1982). Missouri spent "approximately $32 million to educate illegal aliens in Missouri during the 2019-2020 school year." Memorandum in Support of Motion for Preliminary Injunction at 15, *Arizona v. Centers for Disease Control & Prevention*, Case No. 6:22-cv-00885-RRS-CBW (W.D. La. Apr. 14, 2022).

Whether these requirements are good or compassionate, or whether they incentivize additional unlawful crossings is immaterial to the reality of their practical impact: they ensure that any large increase in unlawful immigration will result in a real increase in State healthcare and education costs.

In his dissent on the application for stay in this case, Justice Gorsuch noted "the current border crisis is not a COVID crisis. And the courts should not be in the business of perpetuating administrative edicts designed for one emergency only because elected officials have failed to address a different emergency." *Arizona v. Mayorkas*, 143 S. Ct. 478 (2022) (Gorsuch, J., dissenting).

Justice Gorsuch is correct that the immigration consequences of Title 42 do not sway the merits of the Title 42 Orders as public health policy. However, it does not follow that the immigration consequences cannot or do not establish Petitioners' interests for purposes of intervention. This distinction should not

be applied to analysis of Petitioners right to intervene in this case and assert their claims in court.

The immigration consequences of the Administration's Title 42 policy impose real impacts and costs on Petitioners. Petitioners should be permitted to intervene.

III. Disposing of the Underlying Action Will Impair or Impede Petitioners' Ability to Protect their Interests

Petitioners have done what can reasonably be expected of them to protect their interest in the continuation of Title 42. Petitioners brought their own affirmative lawsuit challenging the CDC's order terminating Title 42 restrictions. They won a nationwide preliminary injunction preventing the implementation of the CDC's blanket termination of its prior Title 42 Orders. *See Louisiana*, 2022 WL 1604901. Yet, it was not enough.

After losing this case in the district court, the federal defendants submitted an Emergency Motion for Temporary Stay of The Court's November 15, 2022 Order. Under the terms of that requested Order, Title 42 would already have been lifted absent the Court's grant of a stay. *See Arizona v. Mayorkas*, 143 S. Ct. (granting application for stay).

It is thus clear that Petitioners will not be able to adequately protect their interests described above unless they are participants in *this* matter.

CONCLUSION

Petitioners' motion to intervene is timely. Petitioners have significant interests, both as sovereign representatives of their citizens and entities that will incur significant hard costs as a result of any substantial surge in unlawful immigration. Petitioners cannot adequately seek to protect their interests unless they are a party to this litigation. Accordingly, the Order of the Court of Appeals should be reversed, and Petitioners should be permitted to intervene and have their day in court.

Respectfully submitted,

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