No. 22-592

IN THE

Supreme Court of the United States

ARIZONA, *et al.*,

Petitioners,

v.

ALEJANDRO MAYORKAS, SECRETARY OF HOMELAND SECURITY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DC CIRCUIT

BRIEF OF *AMICUS CURIAE* THE PROTECT DEMOCRACY PROJECT IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The Protect Democracy Project ("Protect Democracy") files this brief in support of Respondents out of concern for abuses of emergency powers that harm our democracy.

Protect Democracy is a nonpartisan nonprofit organization whose mission is to prevent our democracy from declining into a more authoritarian form of government. As part of that mission, Protect Democracy engages in various forms of advocacy aimed at preventing abuses of executive power, including abuses of emergency powers. Along with a cross-partisan co-counsel team, Protect Democracy filed a lawsuit on behalf of El Paso County and the Border Network for Human Rights to enjoin former President Trump's use of an emergency declaration to access federal funds to build a border wall in contravention of congressional appropriations decisions. It has also provided congressional testimony and otherwise advocated for reforms to the National Emergencies Act. *See* Testimony of Soren Dayton, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, House Judiciary Committee (May 17, 2022).

Concurrent with this brief, Protect Democracy filed a brief in support of the Respondents in *Biden v. Nebraska,* No. 22-506, and *Department of Education v. Brown*, No. 22-535, to urge the Court to review the student loan relief plan at issue, which relies on emergency authority

1. Pursuant to Rule 37.6, no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund this brief, and no person other than amicus and its counsel contributed money to fund this brief.

contained in the HEROES Act of 2003, by applying an analytic framework that effectuates the entirety of the statutory scheme applicable to congressional delegations of emergency powers. The purpose of that statutory scheme, like the one here, is to give the executive branch the ability to respond to unforeseen events with immediate short-term action that Congress is ill-suited to address, but not to authorize the executive branch to supplant Congress's constitutional role in addressing long-term problems.

Protect Democracy files this brief in support of Respondents, because the same principle applies to reviewing courts. Protect Democracy thus urges the Court to refrain from allowing a group of states to intervene in this litigation for the purpose of forcing the federal government to use Title 42 emergency powers even though the government has determined that there is no longer a public health justification for their use. While abuses of emergency powers most often occur at the hands of the executive branch—and the courts play a critical role in stopping them—the Court must take care not to assume the role Congress delegated to the executive by prolonging a state of emergency or extending the use of attendant emergency powers. This is especially so when the effect is to repurpose a state of emergency to achieve unrelated policy objectives. And that is exactly what is at risk of happening here, where the Petitioner States hope to intervene with the ultimate goal of preserving the existing Title 42 orders *and forcing the Biden administration to use them*—not to protect public health (which is what Title 42 orders are for), but to prevent a surge of migrants at the Southern border (which is what immigration policy is for).

SUMMARY OF ARGUMENT

Petitioner States seek to intervene in litigation concerning the lawfulness of orders issued by the federal government under 42 U.S.C. § 265—commonly known as Title 42—which allows the Centers for Disease Control and Prevention ("CDC") to limit traffic from foreign countries if CDC determines that doing so is "required in the interest of the public health" to prevent the "introduction of [a communicable disease] into the United States." CDC's Title 42 authority is an emergency power delegated by Congress to the executive branch. CDC began using that authority early in the Covid-19 pandemic to limit migration by certain people entering from Mexico and Canada and to supersede otherwise applicable laws governing entry into the United States. *See* Federal Respondents' Opposition to the Application for a Stay Pending Certiorari at 1. The Title 42 orders drew criticism from their inception on the ground there was no basis for limiting migration and displacing immigration laws to prevent the "introduction" of Covid-19 into the United States. Indeed, top CDC officials objected to the orders.[2] The Solicitor General is defending the lawfulness of the Title 42 orders as issued, but the administration also has determined that the pandemic no longer justifies them. *Id.* at 1-2. Indeed, in April 2022, CDC issued an order terminating its previous orders, stating:

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2. Camilo Montoya-Galvez, *Top CDC official told Congress migrant expulsion policy was not needed to contain COVID*, CBS News (Nov. 12, 2021), tinyurl.com/d6skkyy9; *Pence Ordered Borders Closed After CDC Experts Refused*, AP News (Oct. 3, 2020), https://tinyurl.com/2fjujh2c; *CDC Officials Objected to Order Turning Away Migrants at Border*, Wall St. J. (Oct. 3, 2020), https://tinyurl.com/ycke4x4f; *Inside the Fall of the CDC*, ProPublica (Oct. 15, 2020), https://tinyurl.com/2jtjz6c3.

> Based on the public health landscape, the current status of the COVID-19 pandemic, and the procedures in place for the processing of covered noncitizens . . . CDC has determined that a suspension of the right to introduce covered noncitizens is no longer necessary to protect U.S. citizens, U.S. nationals, lawful permanent residents, personnel and noncitizens at ports of entry (POE) and U.S. Border Patrol stations, and destination communities in the United States.[3]

The purpose of the States' attempt at intervention is ultimately to gain assistance from the federal judiciary in forcing the federal government to continue Title 42 emergency orders limiting immigration at the Southern border. As the States explain, they sued the United States in a separate case to enjoin the April 2022 termination order, not because there was a continuing public health crisis, but because lifting the Title 42 regime would lead to an influx of migrants. *See* Petitioners' Brief at 8-9. They wish to intervene here to pursue the same goal by seeking a stay (and then reversal) of the district court's order that CDC's Title 42-imposed restrictions on migration are unlawful. *Id.*

The Court should deny the States' attempt. The States lack a cognizable legal interest in seeking to use Title 42 as a "makeshift immigration control measure." *See*

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3. CDC, *Public Health Determination and Order Regarding the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists* 1 (Apr. 1, 2022) ("CDC Termination Order"), https://tinyurl.com/2j9pbpw7.

Federal Respondents' Opposition at 2-3, 30-31. In addition, it is inconsistent with Congress's purpose in delegating limited emergency powers to the executive branch for courts to require the federal government to prolong the exercise of those powers.[4] In so doing, courts engage in a function that rightfully belongs to the executive branch on an emergency basis and to Congress at all other times. As the Solicitor General has persuasively argued, the solution to long-term immigration problems cannot be to "extend indefinitely a public-health measure that all now acknowledge has outlived its public-health justification." *Id*. at 2-3. And the federal judiciary should not countenance an effort to enlist it to do so.

Courts do, however, have an important role to play in policing executive branch abuses of emergency powers, one that is tailored to the unique circumstances under which those powers were delegated. Congress delegates emergency powers to the executive for the purpose of enabling it to act quickly to address unforeseen situations that require an immediate response, but within constraints inherent in the concept of "emergency" actions. Because delegated emergency powers are necessarily broad in their language and structure, however, they are highly susceptible to abuse. For these reasons, and as Protect Democracy explained in its brief in *Biden v. Nebraska* (at 12-16), in order to construe emergency delegations

4. Amicus refers here only to judicial action to compel the executive branch's exercise of particular statutory emergency powers, which is distinct from courts themselves providing emergency judicial relief, *see, e.g.*, *Nken v. Holder*, 556 U.S. 418 (2009) (describing standard for judicial relief), or adjudicating claims that the executive is administering or withholding relief in ways that violate the Constitution.

consistent with congressional intent and the separation of powers, courts should apply a specially tailored analytic framework that weighs a set of factors to ensure the use of emergency powers is tied to the existence of actual emergencies and aimed at redressing them on a short-term basis.[5]

At the same time, courts should be wary of usurping the executive's role in addressing emergencies—by requiring the executive to declare or extend emergencies, or keep in place emergency policies. This is so whether the judicially-mandated extension of emergency policy is through a decision on the merits or through interlocutory orders resulting from third-party procedural maneuvers. And that is effectively what the States are pursuing here—intervention in the litigation to preserve their ability (in another case) to enlist the federal judiciary in compelling an extension of the Title 42 policy. Courts should be especially vigilant against late intervention efforts by third parties that have the intent or effect of extending a state of emergency. It is dangerous enough for the executive branch to abuse delegated emergency powers or prolong them unnecessarily. When courts, which are unaccountable to the electorate, are asked to continue emergency actions past the point when the executive branch is ready for them to end, the problem is compounded. As Justice Gorsuch wrote in dissenting from the grant of a stay and writ of certiorari here, "the current border crisis is not a Covid crisis. And courts should not be

5. *See also* Jed Shugerman, *Major Questions and an Emergency Question Doctrine: The Biden Student Debt Case Study of Pretextual Abuse of Emergency Powers* (Feb. 1, 2023), https://tinyurl.com/52j8t8h3.

in the business of perpetuating administrative edicts for one emergency only because elected officials have failed to address a different emergency. We are a court of law, not policymakers of last resort." *Arizona v. Mayorkas*, 143 S. Ct. 478, 479 (2022) (Gorsuch, J., dissenting).

ARGUMENT

I. Cases involving emergency executive actions require a judicial approach tailored to the purpose for which Congress delegated authority to the executive branch and separation of powers principles

The States seek to intervene to compel the executive branch to perpetuate CDC's Title 42 orders at the Southern border, an exercise of emergency authority delegated from Congress to the executive. Congress has recognized that without proper checks, emergency delegations can easily be abused and give rise to separation of powers concerns. Courts thus have a critical role to play in construing emergency statutory authorizations, such as Title 42, consistent with Congress's intent to prevent such abuse.

A. Congress has recognized that, unless properly checked, emergency powers are subject to abuse

Congress has long recognized that the normal legislative process is not well suited to address emergencies, which by common understanding are sudden unforeseen events that require immediate action. *See* Webster's New Collegiate Dictionary 372 (8th ed. 1976). It has thus delegated relatively broad authority to the president to act

in a variety of emergency situations. *See,* e.g., 50 U.S.C. §§ 1621-22; 42 U.S.C. § 247d; Testimony of Elizabeth Goitein Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, House Judiciary Committee at 3-4 (May 17, 2022) ("Goitein Testimony"). But as Congress has also recognized, emergency executive action—even when taken in good faith—poses a threat to the separation of powers.[6]

The provision of Title 42 at issue in this case was enacted in 1944 and confers authority on CDC to suspend "the introduction of persons or property" from foreign countries when allowing such persons and property into the country would increase the danger of introducing a communicable disease. 42 U.S.C. § 265. That broad authority is limited by the statute to "such period of

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6. American history provides numerous examples of the dangers posed by presidential abuse of emergency power, often at the expense of civil rights and liberties and in the interest of concentrating power in the executive branch. President Truman used the exigencies of the Korean War as justification to seize control of the steel industries during a strike in 1952, which this Court struck down in *Youngstown Sheet & Tube Company v. Sawyer*, 343 U.S. 579 (1952). President Roosevelt used the Japanese attack on Pearl Harbor as justification to round up Japanese Americans and place them in internment camps, a move this Court upheld at the time, *Korematsu v. United States*, 323 U.S. 214 (1944), but has since repudiated. *See Trump v. Hawaii*, 138 S.Ct. 2392, 2423 (2018). More recently, President Trump declared a state of emergency at the Southern border for the express purpose of accessing funding Congress had refused to give him to build a border wall, denigrating Mexican and Central American migrants, as well as Latino members of the American border community, in the process. *See* Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. Times (Feb. 15, 2019), https://tinyurl.com/3bn8xymy.

time as [CDC] may deem *necessary*" to defend against the danger. *Id.* (emphasis added). CDC itself explained that Title 42 orders "are, by their very nature, short-term orders authorized only when specified statutory criteria are met, and subject to change at any time in response to an evolving public health crisis."[7] And the Solicitor General recognized that the Title 42 authority at the border is an "emergency" authority. *See* Federal Respondents' Opposition at 8 ("As contemplated by CDC's regulation, and consistent with the exercise of an emergency authority, each of the Title 42 orders was issued without notice and comment.").

A separate section of Title 42, section 247d (section 319 of the Public Health Service Act), also enacted in 1944, authorizes the Secretary of Health and Human Services to declare a "public health emergency" if certain conditions are met. CDC's Title 42 order governing the border was predicated on the existence of a "public health emergency," as declared by the Secretary pursuant to that statutory authority.[8] A subsequent CDC order, accordingly, acknowledged that the end of the public health emergency would terminate the Title 42 policy at the border.[9]

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7. CDC Termination Order at 23.

8. *Id.* at 6 n.28 (citing Department of Health and Human Services, *Determination that a Public Health Emergency Exists* (Jan. 31, 2020), https://tinyurl.com/2s4dxyy2); CDC, *Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists* 3-4 (Mar. 20, 2020), https://tinyurl.com/3796y4bp; 42 U.S.C. § 247d.

9. CDC, *Public Health Reassessment and Order Suspending the Right To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists* (Aug. 2, 2021), https://

The statutory provision authorizing the Secretary to declare a public health emergency includes certain protections to guard against abuse. The authority is time-limited, expiring after 90 days unless formally renewed. 42 U.S.C. § 247d(a)(2). The Secretary is required to submit written notification to Congress of the emergency within 48 hours. *Id.* And the Secretary is required to provide Congress with annual reports on the use of certain funds unlocked by the public health emergency declaration. 42 U.S.C. § 247d(b)(3).

This approach to emergencies shares similarities with the National Emergencies Act of 1976 ("NEA"),[10] which Congress enacted in the wake of the Watergate scandal to limit the future use of emergency powers to only those situations "when emergencies actually exist, and then only under safeguards of congressional review." S. Rep. No. 94-1168, at 2 (1976). The point of the NEA is to prevent the president from "rul[ing] the country without reference to normal constitutional process," *id.*, and "to place limits on presidential use of emergency powers," Goitein Testimony at 4-5. As the legislative history makes explicit, "*The National Emergencies Act is not intended to enlarge or add to Executive power.* Rather the statute is an effort by the Congress to establish clear procedures and safeguards for the exercise by the President of emergency powers conferred upon him by other statutes." S. Rep. No. 94-

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tinyurl.com/yc5u5cyk ("This Order shall remain effective until [] the expiration of the Secretary of HHS' declaration that COVID-19 constitutes a public health emergency….").

10. Like Title 42's public health emergency provision, the NEA does not contain a definition of emergency, instead relying on the common meaning.

1168, at 3 (emphasis added). The NEA therefore did not grant the president any new or specific emergency powers, but instead made a series of changes to the process by which presidents could access those authorities in order to protect the separation of powers. *See* Brief of Protect Democracy at 10-11, *Biden v. Nebraska* (describing ways in which the NEA constrained the exercise of emergency authority).

Emergency statutory delegations—whether in the national emergency context or the public health context—reflect Congress's intent to enable the executive to act as necessary in an "emergency" (an unforeseen situation requiring immediate action) while also preventing the executive branch from seizing on emergencies to subvert the legislative process and the constitutional separation of powers.

B. Courts should weigh several factors to determine if executive emergency actions are consistent with congressional intent

As Protect Democracy explained in its amicus brief in *Biden v. Nebraska* (at 9-12), Congress did not intend to give the executive branch unlimited authority by means of emergency powers delegations or to allow the executive to subvert the separation of powers. Courts should therefore apply a framework for statutory interpretation that is tailored to the context of emergency powers in order to give full effect to congressional intent. Not all of the factors included in this analysis will be relevant in all emergency action cases, and courts will still need to exercise judgment in balancing them. But as explained in full in that brief, a tailored emergency actions analysis

best gives effect to the term "emergency" as well as to the separation of powers principles animating the history and structure of the statutory scheme. In these ways, the analysis offers both a textualist guide to interpretation and also preserves important constitutional values.[11] The factors courts should consider are:

1. Is the precipitating situation a qualifying emergency or crisis?

Cases involving statutes authorizing the executive to act in an "emergency" present a threshold question: is there a qualifying emergency? The term "emergency" as used in these statutes is best construed "in accordance with [its] ordinary meaning." *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013). Under dictionary definitions contemporaneous with the NEA and Title 42's public health emergency provision, as well as extensive case law, an "emergency" is "an unforeseen combination of circumstances or the resulting state that calls for immediate action." Webster's New Collegiate Dictionary, *supra*; *see* Webster's New International Dictionary of the English Language Second Edition (1942) (dictionary contemporaneous with the 1944 enactment of the public health emergency provision, defining "emergency" as an "unforeseen combination of circumstances which calls for immediate action"); American Heritage Dictionary 427 (1st ed. 1976) (defining "emergency" as "[a] situation or occurrence of a serious nature, developing suddenly and unexpectedly, and demanding immediate action."). *See also Van de Walle v. Am. Cyanamid Co.*, 477 F.2d

11. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 168 (2010).

20, 23 (5th Cir. 1973) (Because an employee's shift "was neither unfamiliar nor unexpected," it could "hardly be characterized as an 'emergency' as that term is commonly used."); *Taylor v. Bair*, 414 F.2d 815, 821 (5th Cir. 1969) (An "emergency" is "a condition arising suddenly and unexpectedly . . . and which calls for immediate action . . .without time for deliberation" (quoting *Goolsbee v. Texas & N.O.R. Co.*, 243 S.W.2d 386, 388 (Tex. 1951)).); *United States v. Gov't of V.I.*, 363 F.3d 276, 289 n.10 (3d Cir. 2003) (wastewater problem was not an "emergency" because it was longstanding and "could not be construed as surprising or unexpected"). This definition of "emergency" remains in force today and should be held to apply to the use of the term in public health statutes.

2. How close is the nexus between the emergency and the action taken?

Courts should evaluate the nexus between the executive action and the precipitating emergency. If there is a close nexus between the two, then it is more likely to be within the scope of what Congress intended to authorize—even if Congress has not said so explicitly. If the nexus is strained—and if the policy is broader in scope or longer in time than reasonably explained by the emergency—then it is less likely the executive is acting within the scope of legislative intent.

3. Does the context of the executive branch's actions suggest the invocation of the emergency is pretextual?

When Congress delegates emergency authorities to the executive branch, it does so in order that the executive

may act in an unforeseeable situation requiring urgent action. As such, it is highly unlikely that Congress intended for the executive branch to use an emergency power to implement a long-standing distinct policy agenda for which (absent an emergency) it would otherwise lack authority. Accordingly, if the executive branch has sought statutory authorization to take a particular action and Congress has affirmatively rejected it, and the executive then invokes an emergency authority to achieve the same outcome, that is an indication of pretext. Similarly, courts should consider the administrative and legislative record surrounding emergency executive action to assess whether the context indicates that the executive is seizing on an emergency as a pretext to do something it would have done regardless of the emergency. If so, it is less likely that the executive is acting in furtherance of legislative intent to respond to the emergency.

4. Does the action result in longer-term exercise of executive power or aggrandizement of power to the executive branch?

Finally, given that emergency powers are intended to respond to unforeseen events, courts can presume that Congress does not intend for emergency authorizations to enable the executive to take actions that shift power to the executive branch in long-term ways or allow the executive branch to implement long-term policy solutions. *Cf. Trump v. Mazars USA, LLP*, 140 S.Ct. 2019, 2033 (2020) ("Such a categorical approach would represent a significant departure from the longstanding way of doing business between the branches, giving short shrift to Congress's important interests in conducting inquiries to

obtain the information it needs to legislate effectively."). Longer-term shifting of power to the executive branch in an emergency could present in different ways. It could involve the executive taking an action that has a longer or indefinite duration, such as promulgating a permanent regulation, creating permanent physical infrastructure, or placing the executive branch in charge of decisions about government funds for a significant period of time. In these types of situations, it is less likely that Congress intended to authorize the executive action.

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In the ordinary emergency powers case, a court should weigh these factors to assess whether the federal government's challenged emergency actions are consistent with legislative intent. In this case, at this stage, none of these factors applies to what *the federal government* is doing. Indeed, the Biden administration has announced its intention to terminate the use of Title 42 powers at the border because the potential for spreading Covid-19 no longer justifies them (if it ever did).[12] Rather, it is the States' request to intervene that risks one of the serious dangers inherent in emergency powers—using an emergency in one context as a pretext to implement long-term policy to deal with a different situation altogether. And as Respondents correctly argue, the States have no cognizable legal interest in using a public-health emergency the executive branch wants to terminate for the purpose of addressing longstanding and recurrent immigration issues. *See* Federal Respondents' Opposition at 30-32.

12. *See* CDC Termination Order.

II. Courts should not assume the executive's policymaking role or facilitate third-party intervenors in prolonging the use of emergency powers

As described above, when Congress delegates authority to the executive branch to act in an emergency, it is for a specific and limited purpose—and reflects a judgment that Congress has made that the executive branch is well situated to respond in an urgent situation. Yet as Congress recognized, such delegations of emergency authority carry the risk of overreach and abuse, in particular when the executive unnecessarily prolongs an emergency or seizes on an emergency as a pretext to implement disparate policy goals that it could not achieve in the ordinary course. For this reason, courts play a critical role in carefully construing emergency statutory authorities to properly effectuate legislative intent and check executive overreach. *See* Brief of Protect Democracy at 12, *Biden v. Nebraska.*

At the same time, courts should not assume the executive's role of deciding how to address emergencies. To begin, as this Court has long recognized, in our constitutional structure it is not appropriate for the federal courts to exercise discretion reserved to Congress. *See, e.g.*, *Pereida v. Wilkinson*, 141 S. Ct. 754, 766-67 (2021) ("Our license to interpret statutes does not include the power to engage in such freewheeling judicial policymaking."). This is especially so in the context of emergency powers. Courts often lack the expertise to craft responses to unforeseen events and are not equipped to act quickly in doing so, which is the heart of what emergency powers are for. *See, e.g., W. Virginia v. Env't Prot. Agency,* 142 S.

Ct. 2587, 2643 (2022) (Kagan, J., dissenting) ("Congress knows about how government works in ways courts don't. More specifically, Congress knows what mix of legislative and administrative action conduces to good policy. Courts should be modest."). And of course, life-tenured Article III judges are not accountable to the public for their decisions, another reason policymaking rests with the political branches by constitutional design. *See* Federalist No. 78 (Hamilton). Beyond those constitutional and institutional factors, in cases involving emergency statutes, Congress has delegated authority to the executive branch—not the judiciary—to act in an emergency. So it risks undermining congressional intent and the separation of powers for courts themselves to direct the exercise of statutory emergency authorities. Justice Gorsuch recognized as much in his dissent from the Court's grant of a stay and writ of certiorari in this case (joined by Justice Jackson), noting that, "[w]e are a court of law, not policymakers of last resort." *Arizona v. Mayorkas,* 143 S. Ct. 478, 479 (2022).

In light of the risk of the federal judiciary itself exercising emergency powers, courts should be especially cautious about allowing third-party litigants to use procedural litigation maneuvers to require the executive branch to declare or prolong an emergency or to mandate that emergency orders remain in place beyond what the executive branch has determined is necessary. When the executive branch decides to cease the exercise of emergency powers, the courts' default position should be to accept the executive branch's judgment.

Similarly, courts should avoid enabling litigation that seeks to accomplish what would otherwise be an abuse of

emergency powers by the executive—using emergency powers authorized for a particular type of emergency to effectuate a different purpose altogether. As Justice Gorsuch explained, that is exactly what the States' effort to intervene in this case is about:

> The only plausible reason for stepping in at this stage that I can discern has to do with the States' second request. The States contend that they face an immigration crisis at the border and policymakers have failed to agree on adequate measures to address it. The only means left to mitigate the crisis, the States suggest, is an order from this Court directing the federal government to continue its COVID-era Title 42 policies as long as possible—at the very least during the pendency of our review. Today, the Court supplies just such an order. For my part, I do not discount the States' concerns. Even the federal government acknowledges "that the end of the Title 42 orders will likely have disruptive consequences." Brief in Opposition for Federal Respondents 6. But the current border crisis is not a COVID crisis. And 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.

Id.

Against that backdrop, the Court should be particularly skeptical of late-in-time efforts by a third party to intervene in litigation to prolong the use of

emergency authority. *See NAACP v. New York*, 413 U.S. 345, 369 (1973) (If a motion to intervene is untimely, it is "unnecessary for us to consider whether other conditions for intervention . . . were satisfied."). Given the dangers inherent in the delegation of emergency powers, a party seeking to intervene in litigation to *prolong* the use of such powers should be required to do so at the earliest possible point in time. And courts should be encouraged, as the court below did here, to reject untimely intervention efforts in these circumstances. *See Huisha-Huisha v. Mayorkas*, No. 22-5345 (D.C. Cir. Dec. 16, 2022) ("[T]he inordinate and unexplained untimeliness of the States' motion to intervene on appeal weighs decisively against intervention.").

For these reasons, Amicus Protect Democracy agrees with Justice Gorsuch and urges the Court to join his reasoning in denying the States' request to intervene.

CONCLUSION

Courts should be guardians *against* abuse and overreach of emergency powers—not themselves in the business of enabling them. This Court therefore should not allow Petitioner States to intervene for the purpose of achieving their policy goals by prolonging the exercise of an emergency authority that the executive branch is ready to end.

Respectfully submitted,

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