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 CIRCUIT

BRIEF OF RESPONDENTS NANCY GIMENA HUISHA-HUISHA, ET AL.

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INTRODUCTION

The States claim there was not even a *"hint"* before November 2022 that the federal government might not take every possible step, including seeking a stay, to keep the Title 42 Policy in place. Pet. Br. 22. That is not credible. Texas (one of the proposed intervenors) asserted *in 2021* that there was a "palpable prospect" that the United States would cease defending the Policy. J.A.296. When that intervention motion was denied—a denial expressly based on the D.C. Circuit's heightened standard for "intervention on appeal," J.A.222—the obvious next step was to seek intervention in district court on remand. But neither Texas nor the other Petitioner States attempted to do so. Subsequent events, moreover, left zero doubt that the interests of the States and federal government diverged: CDC concluded in April 2022 that the Title 42 Policy had to end, and the States sued in Louisiana to challenge that decision, but still they did not seek intervention in this matter. Then, the federal government's August 2022 opposition to summary judgment below offered no argument that the public would suffer *any* concrete injury were the Policy halted. Yet the States still did not seek intervention. Instead, they inexplicably waited until after final judgment. The court of appeals acted well within its discretion in finding the States' motion untimely.

Given these facts, the States principally argue that the court of appeals erred by applying the settled test for timeliness: whether circumstances should have alerted the States to the risk that their interests might not be adequately protected. Instead, the States propose two essentially *per se* rules that would permit intervention regardless of how long

intervenors have been on notice that their interests might diverge: (1) Intervenors may wait until a party actually ceases its defense, and (2) intervenors need only move before the appeal deadline. But this Court's decisions and decades of lower court cases have long required intervenors to move when they have reason to believe their interests may be at risk. That longstanding rule avoids prejudice to the parties and provides courts with the necessary flexibility to manage litigation. The States' new proposals, in contrast, would encourage delay and saddle the courts of appeals with deciding inexcusably tardy motions in the first instance.

The States are also wrong that Plaintiffs have failed to show prejudice. The Title 42 Policy authorizes summary expulsion without access to asylum, even if individuals are vaccinated, test negative for COVID, and present themselves legally at a port of entry. As the court of appeals observed, it is not "credibly disputed" that these expulsions have resulted in a "stomach-churning" pattern "of death, torture, and rape." *Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 733-34 (D.C. Cir. 2022). Had the States moved earlier, intervention could have been decided before judgment. Instead, resolution of the intervention motion is resulting in substantial delay, with ongoing horrific consequences.

The States allege that the federal government engaged in underhanded tactics by failing to seek a full stay, thereby circumventing notice and comment and doing an end-run around the *Louisiana* litigation. But even if accurate, that would simply bolster the States' argument that the United States was not adequately representing their interests; it would not excuse the States' untimeliness. Indeed, Texas's *2021*

intervention motion raised this very same concern: that the United States would employ "strategic settlement [or] other underhanded litigation maneuvers" as a means of "bypassing the Administrative Procedure Act." J.A.301. The States were thus plainly on notice, especially after CDC ended the Policy in April 2022, that their interests were no longer aligned with the federal government's.

The States also do not merit permissive intervention. Even apart from their "inordinate and unexplained untimeliness," J.A.3 (decision below), the States' sole claim of harm is that ending the Policy might increase the number of noncitizens entering their jurisdictions. Even if that were enough to establish standing and a protectable interest—and it is not—their briefing makes clear that they agree with CDC that *COVID* does not justify maintaining the Title 42 Policy. But the Policy has *only ever* been justified by COVID. The statute on which the Policy is based is a *public health* law enacted in the late 1800s, which, prior to 2020, was never used to expel anyone. Whether or not, after more than a century, the federal government has rightly discovered statutory authority for this unprecedented expulsion power, there is no dispute that the Policy was never intended to be permanent and that its sole justification was COVID. The Court should not facilitate the States' effort to compel the federal government to pretextually exploit a public health Policy, which everyone agrees lacks a public health justification, as an immigration tool. *Arizona v. Mayorkas*, 143 S. Ct. 478, 479 (2022) (Gorsuch, J., dissenting) ("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").

STATEMENT

I. The Title 42 Policy

The United States established the Title 42 Policy under 42 U.S.C. § 265, asserting that it was an emergency measure to address the COVID-19 pandemic. The regulation was promulgated as an interim final rule in March 2020, and finalized in September 2020 after a brief notice and comment period. CDC has implemented Title 42 by issuing a series of orders under that regulation, without notice and comment. The orders seek to displace the immigration laws under Title 8, including expedited removal and the procedures for addressing asylum claims. Instead, they authorize immediate expulsion, without any inquiry into an individual's entitlement to asylum.

High-level CDC officials have explained that the Policy was issued in violation of established CDC practice. Dr. Anne Schuchat, second-in-command at CDC in March 2020, stated that CDC did not follow its practice of applying the "least restrictive means possible to protect public health." J.A.30. Dr. Martin Cetron, Director of CDC's Division of Global Migration and Quarantine, confirmed that CDC "jump[ed] directly to the most restrictive approach." See Huisha-Huisha Respondents' Stay Opp. 20-21.

The vast majority of migrants are expelled to Mexico. Others have been returned to the home countries they were fleeing, including some of the most dangerous in the world, such as Haiti. Huisha-Huisha, 27 F.4th at 733 (federal government

acknowledging "quite horrific circumstances" existing "in some of the countries that are at issue here"). The effect of these expulsions has been devastating.

As D.C. Circuit Judge Walker noted, the undisputed record shows that the Policy effectively forces vulnerable migrants "to walk the plank," *id.*, because Title 42 expulsions occur at "predictable locations at predictable times in areas where kidnappers and organized crime are rampant," D. Ct. ECF (hereinafter "ECF") 118-3 at 1; *see id.* ("many migrants are kidnapped immediately"); Human Rights First, *Human Rights Stain, Public Health Farce* 4 (Dec. 2022) (documenting 13,480 reports of "murder, kidnapping, rape, torture, and other violent attacks" against noncitizens subject to Title 42 since January 2021).[1] The record reflects numerous such instances, including a mother who "was raped in the street in Tijuana after DHS expelled her there with her three young children," and a seven-year-old girl who was, with her mother, "kidnapped immediately after DHS expelled them." ECF 118-4 at 3-4; ECF 118-3 at 6 ("CBP has routinely expelled my clients, including newborns, into the waiting arms of kidnappers"); ECF 118-5 at 3 (body of 15-year-old son found mutilated after expulsion).

II. District Court Preliminary Injunction and First Appeal

Plaintiffs are families who have been or will be subjected to Title 42. They filed suit in January 2021 and sought preliminary relief on the ground that § 265 likely did not authorize their expulsions. In

[1] https://humanrightsfirst.org/wp-content/uploads/2022/12/HumanRightsStainPublicHealthFarce-1.pdf.

September 2021, the district court issued a preliminary injunction on that basis, without the States having moved to intervene. J.A.18. The federal government appealed the next day and obtained a stay pending appeal. J.A.19.

On October 11, 2021, Texas sought to intervene before the court of appeals, arguing that its "interests diverge from [the federal government's]" and "intervention is necessary for its interests to be adequately represented." J.A.278. Texas warned that the federal Defendants might not take all possible steps to keep the Policy in place, asserting that "multiple specific recent actions have called into question whether Defendants will continue to defend the [Policy], or whether they might take action (*i.e.*, a settlement, failure to pursue an appeal, or otherwise) that would be adverse to Texas." J.A.279; *see also* J.A.301 (anticipating "strategic settlement [or] other underhanded litigation maneuvers" used to "bypass[] the Administrative Procedure Act"). Texas argued that it therefore satisfied the "'minimal' burden of showing that Defendants' representation '*may* be' inadequate." J.A.305.

Because Texas had not sought intervention below, Plaintiffs argued both that the motion failed the D.C. Circuit's heightened standard for intervention on appeal under *Amalgamated Transit Union International, AFL-CIO v. Donovan*, 771 F.2d 1551, 1553 (D.C. Cir. 1985), and, alternatively, that Texas could not satisfy even the more lenient Rule 24 standard for district court intervention. Texas joined issue, arguing that the heightened standard should not apply. J.A.310. The court of appeals denied the motion, citing *Amalgamated Transit* and explaining: "The State of Texas has not demonstrated that its

motion meets the standards for *intervention on appeal*." J.A.222 (emphasis added). The court did not address the alternative argument that the States failed to satisfy even the Rule 24 standard, nor did it foreclose Texas (or the other States) from seeking intervention in district court on remand, where the heightened appellate standard would not apply.

On March 4, 2022, the court of appeals affirmed the preliminary injunction in part and remanded for resolution of the merits. The court permitted expulsions to continue, but required screenings for "withholding of removal" and protection under the Convention Against Torture, forms of humanitarian relief that require a higher showing than asylum. *Huisha-Huisha*, 27 F.4th at 731-33. The court also characterized the Title 42 Policy as a "relic from an era with no vaccines, scarce testing, few therapeutics, and little certainty," and specifically directed the district court to address Plaintiffs' arbitrary-and-capricious claim on remand. *Id.* at 734-35; *see also id.* at 735 (stating that the Policy appeared no longer to serve "any purpose").

III. CDC's Termination Order and the *Louisiana* Litigation

On April 1, 2022, CDC terminated the Policy effective May 23, 2022, explaining that "the extraordinary measure of an order under 42 U.S.C. 265 is no longer necessary," and that as a result, it lacked statutory authority to continue the Policy. 87 Fed. Reg. 19941, 19944, 19954-55 (Apr. 6, 2022). Twenty-four states, including all the Petitioners here, sued the federal government in district court in Louisiana to enjoin the Termination Order, arguing that although none of the Title 42 *orders* (unlike the

underlying regulation) had been issued with notice and comment, CDC could not *terminate* those orders without notice and comment. The States also asserted that CDC's Termination Order was arbitrary and capricious because, *inter alia*, it did not fully take account of the States' interests in immigration enforcement. The United States opposed the motion, arguing that notice and comment was not required and that "[a]n injunction would unduly interfere with the judgment of the Nation's chief public health expert that a Title 42 order is no longer warranted given the public health circumstances." *Louisiana v. CDC*, No. 22-885 (W.D. La. Aug. 16, 2022), ECF 40 at 43.[2]

On May 20, 2022, the *Louisiana* court preliminarily enjoined CDC's Termination Order on notice-and-comment grounds. *Louisiana v. CDC*, 2022 WL 1604901, at *20, *23 (W.D. La. May 20, 2022). The federal government appealed, but did not seek a stay pending appeal, thereby leaving the Policy in place.

IV. Summary Judgment in This Case and the States' Intervention Motion

Three days later, on May 23, the court of appeals remanded this case to the district court, after delaying its mandate until the date the Policy would have ceased but for the *Louisiana* injunction. Plaintiffs sought partial summary judgment on August 15, arguing that the Policy was arbitrary and capricious. The States were formally notified of the filing the next day, including the specific relief sought, *Louisiana*, ECF 154 at 6 n.2, but still did not move to

[2] Filings in those district court proceedings are hereinafter cited as "*Louisiana*, ECF XX."

intervene in this case. The United States then opposed summary judgment, but offered no argument that an injunction would impose any concrete harms. J.A.204-06. Despite CDC's termination and the United States' position in briefing, the States still did not seek intervention.

On November 15, 2022, the district court granted Plaintiffs' motion for summary judgment on the arbitrary-and-capricious claim, and enjoined and vacated the Title 42 Policy. J.A.8-53. The district court also granted the United States' unopposed motion for a five-week stay to give Defendants time to transition to Title 8 immigration processing. J.A.58.

On November 21, 2022, the States finally filed a motion to intervene in the district court, which the court did not ultimately decide because of the federal government's subsequent appeal. J.A.3. The States accordingly sought to intervene in the court of appeals. *Id*. The court of appeals denied intervention as untimely without applying a heightened intervention standard, emphasizing the States' prior knowledge that their interests might diverge from the federal government's; Texas's 2021 intervention motion; CDC's April 2022 Termination Order; and the States' own representation that "*[f]or most of 2022*, it has been clear that CDC/DHS" sought "to end Title 42." J.A.3-5.

After this Court granted certiorari, the federal government moved to hold the case in abeyance pending rulemaking and the *Louisiana* appeal. The court of appeals rejected that request but ordered that the appeal be held pending this Court's ruling. Order, No. 22-5325 (D.C. Cir. Jan. 20, 2023).

SUMMARY OF ARGUMENT

I. Timeliness

A. The court of appeals did not abuse its discretion in finding the States' proposed intervention untimely. The court applied the correct legal standard under *NAACP v. New York*, 413 U.S. 345 (1973), and this Court's subsequent decisions: Intervenors must move promptly once the circumstances "should have alerted" them of the risk that their interests might diverge from the existing parties'. *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1013 (2022). The States' proposed rule—that intervenors may wait until the party ceases defending the suit—is contrary to *NAACP* and misreads *Cameron*, where it was critical that no circumstance "should have alerted" the intervenor of the risk before he sought intervention. The States' alternative rule—that, under *United Airlines, Inc. v. McDonald*, intervention to appeal is timely if filed before the appeal deadline—ignores that decision's emphasis that there was previously "no reason for the [intervenor] to suppose" her interests had diverged from the class representatives'. 432 U.S. 385, 393-94 (1977). Thus, both *Cameron* and *United Airlines* applied the traditional test from *NAACP* and found intervention timely on the *facts*. Adopting either of the States' proposals, moreover, would encourage intervenors to sit on their hands, increasing prejudice to the parties, undermining the courts' ability to manage litigation, and saddling the circuits with deciding unreasonably late intervention motions in the first instance.

B. On the undisputed facts, the court of appeals' untimeliness finding was amply warranted, and certainly not an abuse of discretion. In its 2021

intervention motion, Texas asserted that the federal government would not adequately represent it, and that the government might decline to appeal or "otherwise" defend the Title 42 Policy. J.A.279, 301. The States cannot claim to have been caught off-guard by the decision a year later not to seek a stay. While the States argue that the denial of that motion deterred them from moving in district court on remand, the court of appeals expressly denied Texas's motion based on its heightened standard "for intervention on appeal." J.A.222.

Moreover, the States' factual basis for intervention became stronger on remand, as (1) CDC chose to terminate the Title 42 Policy in April 2022; (2) the States sued and obtained an injunction in *Louisiana*; (3) the federal government repeatedly argued in briefing that the Policy had to end; (4) the government failed to argue below that an injunction would impose *any* concrete harm, contrary to the States' position; and (5) a new decision from this Court indicated that even "a different perspective" can establish inadequate representation. *Berger v. N. Carolina State Conf. of the NAACP*, 142 S. Ct. 2191, 2205 (2022). Yet the States still did not seek to intervene until *after* the district court issued a permanent injunction.

C. That delay was prejudicial. Had the States moved earlier, intervention could have been addressed before judgment; now, the Policy remains in place during this intervention litigation. Additionally, the States' delay deprived Plaintiffs of the opportunity to contest evidence regarding the proposed intervenors' basis for standing. And the States faced no "Catch-22." The obvious time to seek

intervention was on remand from the 2021 appeal, and nothing prevented them from doing so.

D. The States suggest the federal government engaged in underhanded conduct. But while the decision not to seek a stay pending appeal could reinforce the States' inadequacy arguments, it does not excuse their *untimeliness*. Indeed, Texas asserted in 2021 that the government might engage in "underhanded" tactics to evade the APA. J.A.301. In any event, the government's actions here did not constitute underhanded tactics or resemble the circumstances in *Arizona v. City & County of San Francisco*, 142 S. Ct. 1926 (2022).

E. Nor can intervenors excuse their untimeliness by claiming they wrongly predicted who would prevail on the merits below. Allowing delayed intervention on that basis would effectively gut the timeliness requirement and open the floodgates for eleventh hour interventions. In any event, the States' asserted confidence was wholly unfounded given that the court of appeals had expressly directed the district court to consider the arbitrary-and-capricious claim on remand and pointedly noted the Policy seemed to serve no public health purpose.

II. Standing and Protectable Interest

The States also lack standing and a protectable interest. Their limitless standing theory would permit any State to challenge virtually any federal initiative that might conceivably result, even indirectly, in increased costs for the State. That would eviscerate the "case or controversy" requirement. And the States' theory fails on the facts as well, because they have not established the Title 42 Policy is a stronger deterrent than ordinary Title 8 immigration law.

Indeed, the federal government has concluded that it is a *weaker* deterrent, because Title 42 expulsions impose no legal consequences on repeat crossers, whereas Title 8 procedures impose criminal penalties, among other consequences. And the effects of ending Title 42 depend on the complex future choices of noncitizens and the federal government. Because the federal government has ample authority under Title 8 to control the border, it is entirely speculative whether ending the Title 42 Policy will increase immigration or the States' costs.

III. Permissive Intervention

Permissive intervention is not warranted given that the States' inordinate untimeliness. Moreover, the States neither assert COVID concerns nor contest CDC's conclusion that such concerns no longer justify the Policy. That is unsurprising, as these States have long fought to end all other COVID restrictions. Rather, they candidly acknowledge they seek to maintain the Policy to limit immigration. The Court should not use its discretion to allow the States to pretextually prolong a COVID policy that *no one* believes is justified by COVID.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DENIED INTERVENTION AS UNTIMELY.

Rule 24 requires that intervention be "timely." Fed. R. Civ. P. 24(a)(1), (b)(2). If the motion "is untimely, intervention must be denied." *NAACP v. New York*, 413 U.S. 345, 365, 369 (1973). Although Rule 24 does not directly apply to appellate intervention, "'the policies underlying intervention' in the district courts" also guide appellate intervention.

Cameron v. EMW Women's Surgical Ctr., P.S.C., 142 S. Ct. 1002, 1010, 1012 (2022).

Intervention is timely when the totality of circumstances "should have alerted" intervenors of the risk that that their interests would diverge from the parties'. *Id.* at 1013. Applying that test, the court of appeals properly concluded that the circumstances here "not only 'should have alerted the would-be intervenors' that the federal government's stake in perpetuating Title 42 differed from theirs, *Cameron*, 142 S. Ct. at 1013 (citing *NAACP*, 413 U.S. at 367), it actually did alert them." J.A.5. That decision lies well within the discretion of the court of appeals, and "unless that discretion is abused, the court's ruling will not be disturbed on review." *NAACP*, 413 U.S. at 366.

The States offer five principal arguments: (A) The court of appeals applied the wrong timeliness test, (B) even if the test were correct, the States had no reason to anticipate that their interests might diverge until the United States declined to seek a stay pending appeal, (C) Plaintiffs suffered no prejudice, (D) the federal government circumvented the APA, justifying the delayed intervention, and (E) the merits justified the delayed intervention. None establishes that the court abused its discretion.

A. The Court of Appeals Applied the Proper Test: When the Circumstances Should Have Alerted Intervenors That Their Interests Might Not Be Adequately Protected.

1. Motions to intervene must be timely to avoid undermining the lower courts' ability to manage their dockets and reduce prejudice to the parties. The rule has long been, therefore, that intervenors may not wait until there is absolute certainty that their interests are inadequately protected, but must move as soon as the circumstances should have alerted them of that risk. And because intervenors must move when they have reason to believe their interests are at risk, the burden to show inadequacy is "minimal." *Berger v. N. Carolina State Conf. of the NAACP*, 142 S. Ct. 2191, 2203-04 (2022). In *Berger*, the Court held that the North Carolina executive did not adequately represent the legislative intervenors, even though they shared the goal of defending the state statute. The Court stressed that even where an intervenor's interests "might have seemed closely aligned," intervention is proper where the intervenors seek "to give voice to a different perspective." *Id.* at 2204-05 (noting inadequacy may be established where intervenors are not "burdened by misgivings about the law's wisdom"). Notably, Texas's 2021 intervention motion recognized the minimal required showing and claimed that it satisfied the standard because its interests "*may* be" inadequately protected. J.A.278, 305.

This Court has reiterated the rule that intervenors may not wait for absolute certainty on each of the three occasions that it has squarely

addressed the timeliness of intervention—in *NAACP*, *United Airlines*, and *Cameron*.

In *NAACP*, the Court upheld the district court's untimeliness finding even though the intervenors moved just days after the federal government ceased defending the lawsuit, holding that the intervenors should have previously anticipated that their interests might not be adequately protected. 413 U.S. at 360, 367. The case involved New York's lawsuit against the federal government seeking a declaration that the State's literacy voting tests were non-discriminatory. *Id.* at 349-52. Even though the intervenors moved just *four days* after the federal government *consented* to summary judgment, this Court upheld the untimeliness ruling because the federal government's Answer to the Complaint had stated that it "was without knowledge or information sufficient to form a belief as to the truth of the [State's] allegation that the literacy tests were administered" in a non-discriminatory way. *Id.* at 359-60, 367. In light of the Answer, this Court held that "appellants failed to protect their interest in a timely fashion," because "[i]t was obvious that there was a strong likelihood that the United States would consent to the entry of judgment since its answer revealed that it was without information with which it could oppose the motion for summary judgment." *Id.* at 367.

The Court reached this result even though the United States' Answer had not *conceded* the State's core allegations, but merely alleged a lack of information; indeed, the Justice Department was apparently still "investigat[ing]" the matter at that time. *Id.* at 360. Still, because the Answer had put the intervenors on notice of the *risk* that their interests would diverge, "it was incumbent upon the

appellants, at that [earlier] stage of the proceedings, to take immediate affirmative steps to protect their interests." *Id.* at 367. Notably, the Court deemed intervention untimely even though government lawyers had assertedly made "representations" that the United States *would* oppose summary judgment. *Id.* at 361, 368. The Court concluded that even if that were true, the intervenors should have moved to protect their interests "immediate[ly]" after learning of the United States' Answer. *Id.* at 367-68.

This Court's later cases have reaffirmed the *NAACP* standard. In *United Airlines, Inc. v. McDonald*, the Court found intervention timely because, unlike in *NAACP*, there was previously "no reason for the [intervenor] to suppose" that her interests might be inadequately protected. 432 U.S. 385, 394 (1977). And, most recently, in *Cameron*, the Court likewise found intervention timely because the respondents "d[id] not explain" why the intervenor should have anticipated a divergence of interests. 142 S. Ct. at 1013. Both decisions thus applied the *NAACP* legal test: Intervenors must move promptly once the circumstances "should have alerted" them of the risk that their interests might not be adequately protected. *Id.*

The courts of appeals have likewise long held that would-be intervenors may not sit back until there is certainty, but must move promptly when there is reason to believe that their interests *may* not be adequately protected. *See, e.g.*, *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223, 1232 (10th Cir. 2010) ("we join the other circuits that measure delay from when the movant was on notice that its interests *may not be protected* by a party already in the case") (emphasis added); *Amador Cnty.*

v. U.S. Dep't of the Interior, 772 F.3d 901, 904-05 (D.C. Cir. 2014) ("courts measure elapsed time from when the '*potential inadequacy* of representation [comes] into existence,'" and here intervenor was long aware "that the United States *might not* adequately represent [its] interest") (emphasis added); *Floyd v. City of New York*, 770 F.3d 1051, 1059 (2d Cir. 2014) (per curiam) (intervenors "should have known that their 'interests *might* not be adequately represented' far in advance of" settlement).

The cases relied upon by the States similarly explain that an intervenor may not "sit idly by and await the receipt of infinitely precise information" or "[c]omplete knowledge" about adequacy of representation, but "must move to protect its interest no later than when it" learns "that a measurable risk exists." *Banco Popular de P.R. v. Greenblatt*, 964 F.2d 1227, 1231 (1st Cir. 1992); *see also In re Fine Paper Antitrust Litig.*, 695 F.2d 494, 501 (3d Cir. 1982) (intervenors untimely where they "knew or should have known long before settlement that their interest was not protected").

2. The States nonetheless argue that the court of appeals erred in asking whether circumstances "should have alerted" them to the risk that their interests might diverge from those of the federal government. Instead, the States propose two effectively *per se* rules allowing intervention regardless of how long a litigant has been on notice that its interests might not be adequately protected. Both rules run afoul of this Court's decisions, decades of lower court practice, and the need for judicial flexibility and discretion to manage dockets.

The States' first proposed rule, which they claim is supported by *Cameron*, would allow intervenors to wait until the existing party "cease[s]" defending the lawsuit. Pet. Br. 18, 34. That rule is contrary to *NAACP* and misreads *Cameron*.

In *NAACP*, as noted, the intervention motion was filed just four days after the federal government consented to judgment. And the intervenors argued, just as the States do here, that their motion was timely because they acted promptly after the federal government ceased defending the case. *See NAACP* Appellants' Reply Br. 7-8 ("where, as here, intervention is sought because of" a "failure to defend the action," "intervention cannot be sought until that nonfeasance occurs"); Pet. Br. 13 (similarly arguing that the States' motion was timely because filed six days after the government allegedly "abandoned meaningful defense"). Yet in *NAACP* this Court deemed the motion untimely precisely because the intervenor was previously on notice of the risk that its interests might diverge from the government's.

Nor does *Cameron* support the States. There, the state health secretary defended a state statute in district court and on appeal. 142 S. Ct. at 1007. Shortly after the panel opinion invalidating the law, the secretary informed the state attorney general that he would not seek further review. *Id.* at 1008. The attorney general, who had been representing the secretary, then sought intervention in his own right to seek rehearing *en banc* and defend the state statute, as state law authorized him to do. *Id.* This Court concluded that under these circumstances the "attorney general's need to seek intervention did not arise until the secretary ceased defending the state law." *Id.* at 1012. But *Cameron* did not purport to

abandon the test set forth in *NAACP*. Rather, it cited *NAACP* and distinguished it factually, because it found no reason the circumstances "should have alerted" the attorney general that his interests might not be protected. *Id.* at 1013. The States do not address *Cameron*'s discussion of *NAACP*, or even squarely address *NAACP* despite the court of appeals' reliance on it below.

Instead, the States offer an altered quotation from *Cameron* to suggest it established a general rule that intervenors may wait until an existing party actually ceases its defense: "the 'need to seek intervention *d[oes] not arise until the [defendants] cease[] defending the [challenged] law*." Pet. Br. 18 (quoting *Cameron*, 142 S. Ct. at 1012) (emphasis and alterations added by the States); *see id.* at 27 (describing this as "*Cameron*'s holding"). But the sentence in the opinion, absent the States' alteration, is specific to the facts of the case and reads: "The attorney general's need to seek intervention did not arise until the secretary ceased defending the state law, and the timeliness of his motion should be assessed in relation to that point in time." *Cameron*, 142 S. Ct. at 1012. The secretary's choice to cease defending the lawsuit was thus the relevant "point in time" *in that case* precisely *because* there was no prior basis for the attorney general to "have known" the secretary might abandon the appeal. *Id.* at 1012-13.

Had *Cameron* actually adopted the States' proposed rule, it could have simply rejected as a matter of law respondents' argument "that the attorney general *should have realized"* that the secretary "*might* abandon the defense of" the statute. *Id.* at 1012-13 (emphasis added, cleaned up). Instead, the Court rejected that argument on *factual*

grounds, noting that "respondents do not explain *why* the attorney general *should have known* that the secretary would change course." *Id.* at 1013 (emphasis added). *Cameron*, in short, did not *sub silentio* discard the longstanding test applied in *NAACP* and *United Airlines*.

The States' second proposed rule is that, under *United Airlines*, intervention after judgment for purposes of appealing is timely if sought before the appeal deadline. Pet. Br. 19-20. But *United Airlines* did not alter the basic rule from *NAACP* that intervenors must move when they become aware of the risk to their interests. There, the district court denied class certification and the named plaintiffs sought interlocutory review, but the court of appeals rejected that effort, requiring any appeal to be filed after final judgment. 432 U.S. at 388 & n.4. Subsequently, one unnamed member of the putative class moved to intervene shortly after "learning that a final judgment had been entered" and "that despite their earlier attempt to do so the plaintiffs did not now intend to file an appeal" of the denial of class certification. *Id.* at 389-90. This Court held that the motion was timely: Because "the named plaintiffs had attempted to take an interlocutory appeal from the order of denial at the time the order was entered, there was *no reason for the [intervenor] to suppose* that they would not later take an appeal until she was advised to the contrary after the trial court had entered its final judgment." *Id.* at 393-94 (emphasis added). Like *Cameron*, then, *United Airlines* applied the same rule as *NAACP*—inquiring when the circumstances should have alerted intervenors that their interests might diverge—and simply reached a

different result based on different facts. *Id*. at 396 (citing *NAACP*).

The States emphasize (at 19) that *United Airlines* called it "critical" that the intervenor "acted promptly after the entry of final judgment," and noted she had "filed her motion within the time period in which the named plaintiffs could have taken an appeal" (which was jurisdictionally required). 432 U.S. at 396. But what was "critical" was that the intervenor had moved "promptly" *once she was on notice*. Indeed, if the States' reading of *United Airlines* were correct, the Court's entire discussion of when the intervenor had "reason . . . to suppose" her interests might be in jeopardy would have been irrelevant. *Id*. at 394.

The lower courts have repeatedly rejected the States' alternative reading of *United Airlines*. As the Seventh Circuit put it in a case on which the States rely, *United Airlines* did not create "an inflexible rule" that intervention for purpose of appeal "is always timely provided it is filed shortly after the final judgment," particularly where (as here) the putative intervenor is "a sophisticated litigant" with extensive prior knowledge and "no good excuse for failing to seek intervention" earlier. *Larson v. JPMorgan Chase & Co.*, 530 F.3d 578, 583-84 (7th Cir. 2008) (Posner, J.); *see also Floyd*, 770 F.3d at 1059 & n.23; *Ali v. City of Chicago*, 34 F.4th 594, 599-600 (7th Cir. 2022); *United States v. Jefferson Cnty.*, 720 F.2d 1511, 1516-17 (11th Cir. 1983); *In re Fine Paper*, 695 F.2d at 501.[3]

[3] *United Airlines* is also different from this case because it involved intervention to challenge the denial of class certification, and a contrary ruling would have induced

The States' proposed rule that post-judgment motions are timely if filed within the appeal deadline (like their proposed rule that intervenors may wait until the existing parties formally cease defending a suit) would make little sense, undermine Rule 24, and create perverse incentives. It would allow putative intervenors who were well aware that their interests may not be adequately represented to sit on their Rule 24 rights throughout the district court proceedings and then suddenly seek to intervene for the appeal. *Cf. Amalgamated Transit*, 771 F.2d at 1553 ("It would be entirely unfair, and an inexcusable waste of judicial resources, to allow a potential intervenor to lay in wait until after the parties and the trial and appellate courts have incurred the full burden of litigation before deciding whether to participate in the judicial proceedings.").

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numerous non-named putative class members "to file protective motions to intervene to guard against the possibility that the named representatives might not appeal from the adverse class determination." 432 U.S. at 394 n.15. "The result would be the very 'multiplicity of activity which Rule 23 was designed to avoid.'" *Id.* (quoting *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 551 (1974)). That concern is distinctive to intervention by putative class members in Rule 23 actions, which were created as an *alternative* to regular joinder of all class members. Notably, although the *United Airlines* dissenters criticized the Court for potentially creating a *per se* rule that abandoned *NAACP*, even they acknowledged that to the extent the Court had done so, the rule was limited to the unique context of a "motion to intervene for the purpose of appealing the denial of class status." 432 U.S. at 398 (Powell, J., dissenting); *see Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317, 1320 (9th Cir. 1997) (cited by States) (describing *United Airlines*'s holding as addressing the "limited purpose of intervention to appeal from denial of class certification").

In fact, the States' rule would likely incentivize even more delay: If potential intervenors worry they are too late to timely move in district court, they could simply *wait even longer* and then seek intervention for purpose of appeal instead. The rule would also burden the appellate courts with more of the often fact-intensive business of assessing intervention, as many of the increased number of post-judgment motions would end up (as in this case) decided in the first instance in the circuits, potentially on emergency schedules. Nothing in any decision from this Court suggests such an illogical rule. A post-judgment intervention motion, like any other intervention motion, is untimely if the circumstances previously "should have alerted" intervenors of the risk that their interests would not be adequately protected. *Cameron*, 142 S. Ct. at 1013.

B. The Court of Appeals Did Not Abuse Its Discretion in Finding That the Circumstances Here Should Have Alerted the States That Their Interests Might Diverge from the Federal Government's.

The States claim that they were caught completely by surprise by the federal government's decision not to seek a stay pending appeal and that previously "there was not even a *hint* of inadequate representation." Pet. Br. 22. The court of appeals correctly held, however, that the States not only should have known prior to judgment that their interests were dramatically different from the federal

government's, but did in fact know. The States cannot come close to showing an abuse of discretion.

1. The States have known about this case at least since August 2021, when the case was still at the preliminary injunction stage in district court.[4] And, in October 2021, after the United States appealed the preliminary injunction, Texas moved to intervene in the court of appeals. Texas argued that there was a "palpable prospect" of a divergence of interests between the State and the federal government; that the government had "used strategic settlement and other underhanded litigation maneuvers as a way of setting national immigration policy while bypassing the Administrative Procedure Act"; and that "Defendants here have recently given significant indications that they plan to do the same with the Title 42 Process." J.A.296, 301; *id.* at 291 (stating that Texas filed in the D.C. Circuit "shortly after circumstances made it apparent that there is a substantial likelihood that Defendants will not adequately represent Texas' interests").

The representations in the prior intervention motion dispose of the timeliness issue here: Texas recognized that it had only a "minimal burden of showing Defendants' representation *may* be inadequate"; asserted that a "substantial likelihood" of divergent interests existed by October 2021; acknowledged that failure to move then might render its motion untimely (as, it noted, had recently occurred in other litigation); and stated that it feared

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[4] *See Texas v. Biden*, No. 21-579 (N.D. Tex. Aug. 23, 2021), ECF 62 at 25; Amicus of Arizona, *et al.* at *2, *Texas v. United States*, No. 21-40618 (5th Cir. Aug. 31, 2021) (citing declaration from this case).

Defendants would decline to "pursue an appeal" or would "otherwise" cease "to defend the Title 42 Process" and engage in "underhanded litigation maneuvers," "while bypassing the Administrative Procedure Act." J.A.279, 291, 301, 305-07 (internal quotation marks omitted). In other words, Texas both acknowledged the standard that the court of appeals later applied in denying the States' current motion, and explicitly argued there was a "substantial likelihood" that the United States would not adequately protect its interests in each of the ways the States now claim took them completely by surprise more than a year later.

Recognizing Texas's filings directly refute their claims of later surprise, the States contend that the circuit's denial of Texas's 2021 motion failed to "provide any grounds," so they were left to assume that the ruling "most likely" reflected a finding that the federal Defendants were providing adequate representation, and that it was therefore "futile" to seek intervention even in the district court. Pet. Br. 32-33. But in denying the motion, the court of appeals stated specifically that "Texas has not demonstrated that its motion meets the standards for intervention on appeal," citing its decision in *Amalgamated Transit*, which imposed a heightened standard for intervention sought for the first time on *appeal*. J.A.222-23.

The States do not acknowledge *Amalgamated Transit* or the court of appeals' reliance on it. Yet the briefing on that intervention motion dispelled any doubt that the denial was based on the *Amalgamated Transit* heightened standard, not ordinary Rule 24 considerations. Plaintiffs' intervention opposition raised two distinct arguments. Plaintiffs'

Intervention Opp., No. 21-5200 (D.C. Cir. Oct. 15, 2021). First, Plaintiffs relied on *Amalgamated Transit* to argue at length (at 3-10) that Texas did not satisfy the D.C. Circuit's heightened standard for appellate intervention: "A court of appeals may allow intervention at the appellate stage where none was sought in the district court 'only in an exceptional case for imperative reasons.'" 771 F.2d at 1552; *see also* U.S. Intervention Opp. 10 (making same argument based on *Amalgamated Transit*). Texas expressly joined issue and argued that *Amalgamated Transit* was inapplicable. J.A.310 (acknowledging Plaintiffs' argument and discussing *Amalgamated Transit*). Plaintiffs also made a separate argument, under a separate heading, that Texas did not satisfy even the regular Rule 24 standard, but the court of appeals did not reach that argument. It held only that Texas failed to satisfy "the standards for intervention on appeal," citing *Amalgamated Transit*. J.A.222. The grounds for the denial were thus clear, and did not include any conclusion that the federal government's representation was adequate under the normal Rule 24 standard. No litigant, much less a sophisticated litigant, could reasonably have believed it was "futile" to then seek intervention in the *district* court.

2. In any event, as the court of appeals properly found, the States cannot plausibly claim that *subsequent* events failed to alert them to the *additional* reasons why they should have known their interests were at odds with the federal government's.

CDC's April 2022 Termination Order could not have been clearer that the agency believed the Policy had to end given the changed public health landscape. 87 Fed. Reg. 19955 (the statute "makes clear that this authority extends only for such period of time deemed

necessary to avert the serious danger of the introduction of a quarantinable communicable disease into the United States"). Thus, even *if* the court of appeals had denied intervention in 2021 on adequacy grounds under the regular Rule 24 standards, CDC's April 2022 termination of the Policy provided incontrovertible evidence that the federal government's interests would almost certainly diverge from the States'.[5]

Indeed, their positions were so patently divergent that these States sued the United States in *Louisiana* to block CDC's Termination Order, making them formal adversaries. And if the States were *still* unaware of the almost certain risk of divergent interests, the United States' positions in court could not have left the States guessing. The United States defended CDC's Termination Order and repeatedly emphasized that "forcing CDC to continue an extraordinary public-health measure that it judged is no longer warranted under the governing statute would harm the government and be contrary to the public interest." *Louisiana*, ECF 40 at 4. The subsequent *Louisiana* injunction requiring the federal government to maintain the Policy at the adversarial behest of the States, and the government's appeal of that injunction, only deepened the obvious divergence of interests.

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[5] The States dispute that the Termination Order "added anything material" to put them on notice, pointing to an earlier Executive Order which, they assert, "specifically directed CDC to wind down Title 42." Pet. Br. 32. But that is not what the Executive Order did, as their brief elsewhere makes clear. *Id.* at 7 (Order directed CDC to "*review* and determine *whether* termination, rescission, or modification of the [Title 42 orders] is *necessary and appropriate*") (emphasis added).

These facts would have given the States a clear basis to move to intervene on remand—as their own cases underscore. For example, *Citizens for Balanced Use v. Montana Wilderness Association* found the government's representation inadequate in strikingly similar circumstances: The government had adopted a policy "under compulsion of a district court decision" obtained by the intervenor, while "simultaneously appealing the decision," thereby demonstrating "fundamentally differing points of view." 647 F.3d 893, 899-900 (9th Cir. 2011).

Nor could it have been surprising that Plaintiffs in this litigation would seek relief on their arbitrary-and-capricious claim given that the court of appeals expressly directed the district court to consider that claim on remand. 27 F.4th at 734-35. Yet even after the federal government formally notified the States the day after Plaintiffs sought summary judgment, the States still not did not move to intervene, despite knowing that a ruling invalidating the Policy in this case would moot the *Louisiana* litigation.

And, as in the *Louisiana* litigation, the summary judgment briefing below reaffirmed the divergence of interests. The federal government's response to Plaintiffs' request for injunctive relief was especially telling. It invoked the general proposition that "the government and the public have an interest in protecting the integrity of [the] government's valid orders," but cited *no* concrete harms that might flow from the end of the Policy, and acknowledged, as it did in the *Louisiana* litigation, that "the public health conditions underlying the [Policy] no longer exist." J.A.206. That position was in dramatic contrast to the States' position, earlier articulated in their *Louisiana* papers (and reprised in their later stay applications),

that the end of Title 42 would impose "calamitous immigration consequences" on the country. *Louisiana*, ECF 13-1 at 41.

The United States' decision not to claim any concrete harm if the Policy ended obviously should have further set off the States' alarm bells, given that the factors for an injunction and a stay pending appeal both require an assessment of the public interest and irreparable injury. *Nken v. Holder*, 556 U.S. 418, 434 (2009) (noting "overlap" of stay and injunctive factors). So, while the States applaud the federal Defendants' "unblemished record of robust defense" below, Pet. Br. 3, the federal government's explicit admission that there was no longer a basis for the Policy, as well as its failure to cite *any* concrete injury from ending the Policy, plainly should have alerted the States that it might not seek a stay pending appeal.

The States also argue that they would have expected the federal government to seek a stay pending appeal to challenge the scope of the district court's relief: vacatur and a nationwide injunction. Pet. Br. 22-23. But, as explained, the federal government was in no position to meaningfully argue that the equities weighed against such relief, given the lack of any public health justification and CDC's own Termination Order.

The States wrongly claim that the evidence of likely divergence "is far weaker here than it was in *Cameron*." Pet. Br. 29. The *Cameron* respondents' relied on campaign statements made by the *Governor* (who was not himself party to the litigation), and his prior litigation decisions. But, *Cameron* explained, "the new secretary whom he appointed after taking office as Governor had continued to defend the law on

appeal." 142 S. Ct. at 1013. Indeed, as Kentucky (one of the proposed intervenors here) noted, "less than three weeks after [the Governor] took office, his new Secretary hired the Attorney General's office"—the later intervenor—"to represent him" in the litigation, and then "made the same arguments as his predecessor." *Cameron* Pet. Reply Br. 15-16. Moreover, "campaign statements are not litigation positions." *Id.* at 15. The Court thus held that the respondents there had failed to "explain why" in these unusual circumstances "the attorney general should have known that the secretary would change course after the panel's decision was handed down." 142 S. Ct. at 1013. Here, for all the reasons stated above, there was far more, including CDC's *Order*, *court* filings, and the fact that the federal government did not make, and could not have been expected to make, the equities arguments the States would have asserted (and eventually did assert in favor of a full stay).

In short, the court of appeals did not abuse its discretion in finding that the circumstances here "not only 'should have alerted the would-be intervenors' that the federal government's stake in perpetuating Title 42 differed from theirs, *Cameron*, 142 S. Ct. at 1013 (citing *NAACP*, 413 U.S. at 367), it actually did alert them." J.A.5 (noting States' concession that "*[f]or most of 2022*, it has been clear that CDC/DHS wanted . . . to end Title 42").

C. The States' Untimeliness Is Causing Significant, Ongoing Prejudice to Plaintiffs.

1. Every day the Title 42 Policy continues results in more of the "stomach-churning" harms

noted by the court of appeals: "death, torture, and rape." *Huisha-Huisha*, 27 F.4th at 733. Had the States sought to intervene in the district court in 2021 when the case was filed, or on remand from the D.C. Circuit after the April 2022 CDC Termination Order, or when Plaintiffs sought summary judgment, or even when Defendants opposed, the district court could have decided the intervention issue well before judgment. If the States had been permitted to intervene, they would have been parties at judgment and their request for a stay pending appeal could have been decided within the five-week stay period the district court granted. If their stay request were denied, the Policy would have ceased on December 21; if the stay were granted, the parties (including the States) could have swiftly moved to briefing on the merits. Conversely, if the district court had denied a timely motion to intervene, the States could have sought review of the intervention issue *before* the district court ruled on Plaintiffs' summary judgment motion. *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 377 (1987) (intervention denial "subject to immediate review"). In either case, the resolution of the intervention issue would have been much less likely to delay the proceedings. But now, because of the States' last-minute request, resolution of the merits in this case is substantially delayed, imposing serious hardship on Plaintiffs.[6]

The States' delay additionally prejudiced Plaintiffs by denying them a fair opportunity to

[6] At the stay stage, the States misapprehended Plaintiffs' arguments, suggesting Plaintiffs complained only about "expedited briefing." Stay Reply 5 n.7. The States argued that to avoid such rapid briefing Plaintiffs should have agreed to a

contest intervention on the facts. If Plaintiffs had sought jurisdictional discovery below to contest the evidence the States submitted in support of standing, nearly all of which was taken from other litigation in which Plaintiffs were not parties, it would have delayed proceedings even further. *See infra* Section II (discussing standing). In fact, when Texas raised similar standing claims in its prior appellate intervention motion, Plaintiffs made clear they would seek to probe such claims in district court. Plaintiffs' Intervention Opp. 20-21, No. 21-5200 (D.C. Cir. Oct. 15, 2021); *cf., e.g.*, *Sherman v. Town of Chester*, 339 F. Supp. 3d 346, 350 (S.D.N.Y. 2018) (on remand from this Court, district court granted limited discovery to assess intervention motion). Yet because of the delayed intervention request, Plaintiffs lost that opportunity. *Cf. United Airlines*, 432 U.S. at 394 n.14 (indicating that loss of evidence because of delay would be prejudicial).

The States wrongly contend that Plaintiffs are advancing the same types of prejudice rejected by this Court in *Cameron* and *United Airlines*. Pet. Br. 21-22. In both cases, however, the Court rejected alleged prejudice from merely having to face arguments the original parties could have raised but did not. *Cameron*, 142 S. Ct. at 1013; *United Airlines*, 432 U.S. at 394. Plaintiffs here do not assert that having to contest a stay application is prejudice in itself, but rely instead on the concrete and irreparable harm caused by the *timing* of the States' late intervention, which has extended the illegal Title 42 Policy and the harms

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longer stay in district court or to an administrative stay on appeal. But that would have only exacerbated the prejudice to Plaintiffs because the Policy would have remained in effect during such stays.

it inflicts on Plaintiffs every day. In *Cameron*, the Court also rejected the argument that "intervention would unfairly deprive [the plaintiffs] of a 'reasonable expectation'" of finality. 142 S. Ct. at 1013-14. Again, Plaintiffs make no similar argument here.

2. The States contend that even if Plaintiffs were prejudiced, the court of appeals erred by not expressly discussing that prejudice. Pet. Br. 27. This Court, however, has never imposed any rigid prejudice requirement. And, even assuming prejudice is required, the Court has certainly never demanded that it be *explicitly* addressed in what are often expedited decisions. Indeed, in *NAACP*, the Court affirmed the denial of intervention even though it was "unaccompanied by any opinion." *Id*. at 348; *see id*. at 366 (surmising what conclusion the lower court "could reasonably have" reached). In this case, moreover, any failure to explicitly discuss prejudice was harmless since the prejudice was manifest.[7]

3. The States claim that the court of appeals' holding places them in a "Catch-22": "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

[7] None of the States' cases endorse their rigid position that failure to explicitly address prejudice warrants reversal, much less where the prejudice is obvious. *See*, *e.g*., *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472, 478-79 (6th Cir. 2000) (holding that denial of intervention on timeliness grounds was not an abuse of discretion even though district court gave almost no reasoning, and did not mention prejudice); *Banco Popular*, 964 F.2d at 1230 & n.3 (affirming denial of intervention on timeliness grounds, even though district court had not decided timeliness generally, or prejudice in particular) (both cited by States).

abdication, will be denied as untimely." Pet. Br. 34. But there was no Catch-22: The obvious time to intervene was on remand from the 2021 appeal.

Specifically, if the States had moved after remand, they could have asserted precisely what Texas originally argued before the court of appeals (but under no heightened appellate intervention standard): that they and the federal government had divergent interests and there was a risk that the federal government might cease to defend the Policy. And critically, the States also could have pointed to, among other things, CDC's intervening Termination Order; the United States' defense of that termination in the *Louisiana* litigation; and the intervening guidance from this Court regarding the minimal burden of showing inadequacy (*see Berger*, 142 S. Ct. at 2205, issued in June 2022). And if the district court had denied intervention, the States could have immediately appealed.

As importantly, had the States filed on a timely basis and informed the district court that they were concerned that the United States would either not appeal or would decline to seek a stay pending appeal—the very concern Texas articulated in 2021—the district court would have had the option (assuming the States could satisfy standing) to grant the motion if the federal government stated that it did not in fact intend to appeal or seek a stay pending appeal. And if the United States was unwilling to provide a definitive answer in advance of judgment, the district court could have either granted the motion on that basis, or held it in abeyance until the federal government informed the court of its plans. District courts are well equipped to take such common-sense steps in response to any uncertainty regarding

entitlement to intervene, but they can do so only if they are informed of putative intervenors' interests in a timely way.

Nor is there merit to the States' contention that putative intervenors would "need to keep filing seriatim motions to intervene" under the court of appeals' timeliness ruling. Pet. Br. 35. If the district court had denied intervention without prejudice on the ground that it was premature until the United States definitively stated its intentions, there would be little basis to oppose a later, renewed motion as untimely once the United States did so. In that circumstance, it would have been the district court and the United States that delayed resolution of the intervention question, not the States.

The States relatedly argue that finding intervention untimely here would force them "to intervene at the outset of every immigration case, as well as cases in countless other contexts." Pet. Br. 29. The intervenors in *NAACP* made the same argument, to no avail. *NAACP* Appellants' Br. 40 (warning that the NAACP "would be required to move to intervene in every one of the hundreds" of the federal government's civil rights cases). But here, as in *NAACP*, the court of appeals did not rely on general notions about the potential divergence of interests, but on highly specific circumstances particular to this case that put the States on clear, specific notice of the risk of divergence—including CDC's Termination Order and the very arguments Texas advanced in its first intervention motion. *See Floyd*, 770 F.3d at 1059 (rejecting similar argument).

Ultimately, the States' dire predictions ignore that for *decades* the lower courts have been using the

same test the court of appeals applied below. *See supra* Section I.A.1 (collecting cases). As that longstanding practice has shown, requiring intervenors to move when they have reason to believe their interests may diverge from the parties' interests provides the courts with essential flexibility to manage their dockets. *See*, *e.g.*, *Lefkovitz v. Wagner*, 395 F.3d 773, 778 (7th Cir. 2005) (Posner, J.) ("The aim" of the timeliness requirement "is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal; and so as soon as a prospective intervenor knows or has reason to know that his interests might be adversely affected by the outcome of the litigation he must move promptly to intervene.") (internal quotation marks omitted); *see also Alt v. EPA*, 758 F.3d 588, 591 (4th Cir. 2014) (cited by States) (similar); *Oklahoma*, 619 F.3d at 1232 (similar). And lower courts have long proven capable of assessing intervenors' prior knowledge fairly and applying common sense to permit intervention where warranted.

By contrast, it is the States' position that would upend decades of practice. It would leave courts at the mercy of intervenors, requiring them to admit movants with undisputable prior knowledge of the risks to their interests and no good excuse for delay. Here, the States' delay interfered with the ability of both the district court and the court of appeals to manage the litigation before them. Because the States waited until after judgment, the district court was not able to rule on the States' intervention motion. That, in turn, left the court of appeals to decide the motion on a highly expedited basis, without the benefit of fact-finding or the district court's

assessment in a case it had been overseeing for nearly two years.[8]

D. The States' Contention That the Federal Government Is Seeking to Circumvent the APA Is Both Irrelevant to Timeliness and Wrong.

Citing the concerns raised in Chief Justice Roberts' concurrence in *Arizona v. City & County of San Francisco*, 142 S. Ct. 1926 (2022) (dismissed as improvidently granted), the States argue the federal government's failure to seek a stay pending appeal, along with its request for an abeyance, is an effort to evade notice and comment and achieve a backhanded victory in the *Louisiana* litigation. But, even if true, that would mean only that the States might have a stronger argument that their interests are not adequately represented. It would not excuse the States' untimeliness, which is an independent and dispositive basis to deny intervention.

In *NAACP*, for instance, the federal government consented to the entry of a declaratory judgment—just the kind of abdication of which the States accuse Defendants here. And there were intimations of underhanded conduct in that case as well. 413 U.S. at 372 (Douglas, J., dissenting) ("the United States is an eager and willing partner with its

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[8] The States assert that the court of appeals committed "clear-cut error" by ignoring the fact that they first sought intervention in district court. Pet. Br. 26. But the court of appeals expressly noted that fact. J.A.3. The States then purport to give the court of appeals' reasoning a "charitable" gloss, Pet. Br. 26, but miss the court's point: Because the States delayed, the court of appeals had to decide intervention *in the first instance* after the United States appealed.

allies in New York" and the case "has all the earmarks of a cozy arrangement to suppress the facts"). Yet the Court upheld the denial of intervention solely on timeliness grounds. *Id.* at 347 ("the motion to intervene was untimely" and "[t]his makes it unnecessary for us to consider whether other conditions for intervention under Rule 24 were satisfied"). Here, notably, Texas's initial 2021 intervention motion expressly questioned (even before CDC's Termination Order) whether the federal government would "continue to defend the Title 42 Process" or would engage in "underhanded litigation maneuvers" to "bypass[] the Administrative Procedure Act." J.A.279, 301. Thus, even if the States were right that the federal government has engaged in "underhanded litigation maneuvers," Texas expressly identified that risk over a year ago, so the States cannot now claim surprise to excuse their delay.

In any event, this case is unlike *San Francisco* in multiple respects. Even accepting the States' view that the federal government has effectively abandoned its defense of the Policy—despite its ongoing appeal from the district court's judgment—that is a decision which the federal government is "entitled" to make. 142 S. Ct. at 1928 (Roberts, C.J., concurring). And here, unlike in *San Francisco*, the government did not take the "further step" of issuing a new Rule revoking the Policy and using the fact of a court order against it as good cause to excuse the lack of notice and comment. *Cf. id.* Rather, over a year into the current administration, CDC made a public health decision based on changed conditions, well before the district court's judgment. The federal government's later choice not to seek a stay pending

appeal was entirely logical and predictable given its inability to argue that maintaining the Policy was necessary to avoid public health harms.

The States argue that Plaintiff's non-opposition to the five-week stay "recreate[d] the essential features of the Termination Order that was enjoined in the *Louisiana* case" by providing a "substantial delay to permit DHS to plan." Pet. Br. 10. But the fact that Defendants sought, and Plaintiffs did not oppose, a limited stay to facilitate the transition from Title 42 to Title 8 processing, is neither surprising nor suspicious. The federal government asserted a need for time to ensure that the proper resources and protocols were in place, whether the transition resulted from agency termination or court order. And all of that was predictable when CDC terminated the Policy in April 2022. None of this explains or excuses the States' long delay.

E. The States' Attempt to Leverage the Merits to Justify Their Delay Fails.

Finally, the States argue that they did not intervene earlier because they "had little reason to believe that Federal Respondents' defense would fail." Pet. Br. 23. That extraordinary and novel argument, if accepted, would wholly undermine the timeliness requirement.

The States' merits prediction is no excuse for their untimely filing. As one of their own cases notes, where a party makes "a strategic decision not to" intervene "at an earlier stage, believing the court would" rule as the intervenor would prefer, later intervention is untimely. *Alt*, 758 F.3d at 591. "Stated plainly, [the intervenor] admits that it gambled and

lost . . . ." *Id.* Here, the prediction was especially unfounded given the D.C. Circuit's express direction to the district court to address Plaintiffs' arbitrary-and-capricious claim and its observation that it is "far from clear that the CDC's order serves any purpose." *Huisha-Huisha*, 27 F.4th at 734-35 (stating that the Policy was seemingly a "relic").

In any event, the district court did not err on the merits. The States take issue with just one of the district court's four independent grounds for holding the Policy arbitrary and capricious: its conclusion that CDC departed without explanation from its established least-restrictive-means standard for adopting public health measures. Pet. Br. 24-25. And even on that one holding, all their attacks fail.

First, contrary to the States' suggestion, the district court never suggested that the APA itself requires agencies to employ that standard, but rather held that CDC failed to acknowledge or explain a departure from its *own* agency practice of using the least-restrictive-means standard. J.A.27-28, 33-34 (applying this Court's precedent).

Second, the States incorrectly claim that the district court erred in relying on CDC's 2017 rulemaking, including its preamble. But the district court cited the preamble only as *evidence* of CDC's established *practice*, not as binding law. J.A.31-34. *See*, *e.g.*, *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 217-18 (2016) ("practice" reflected in agency handbook). The States are also wrong that the 2017 rule addressed only orders issued "under" that rule itself, and then only "quarantine and isolation" orders, not "entry" bans. Pet. Br. 24-25. But the 2017 rule specifically clarified that the least-restrictive-means

standard applied "in *all situations* involving quarantine, isolation, or *other public health measures*." J.A.32; *see id*. 30. Indeed, the 2017 rule explained that CDC previously applied the standard in considering an *entry* ban during the 2014-2016 Ebola outbreak. J.A.33. Notably, in *terminating* the Title 42 Policy, CDC applied the least-restrictive-means standard, leaving no doubt the standard applies to *this very Policy*. J.A.31. Yet the agency never acknowledged it in instituting and maintaining the Policy.[9]

Finally, the States ignore that CDC's practice of applying the least-restrictive-means standard was established by evidence other than the 2017 Rule, including statements by former CDC Principal Deputy Director Schuchat and Dr. Cetron. *See supra* Statement. The district court's conclusion that CDC's unexplained deviation from its prior practice of applying the least-restrictive-means standard was therefore correct, and certainly not so unforeseeable that it justified the States sitting out the district court proceedings.[10]

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[9] The States quibble that the 2017 rule describes certain measures as "less restrictive" (rather than "least restrictive"). But CDC failed to acknowledge *either* formulation. J.A.33-34. As for the States' suggestion that assessing the least restrictive means may sometimes be delayed in exigent circumstances, that could at most justify CDC's failure to explain the departure in the earliest days of the pandemic.

[10] The States assert concern about the effect of this district court ruling on "future emergencies." Pet. Br. 24. But the district court's narrow reasoning does not raise a constitutional or statutory barrier to further CDC rulemaking or Title 42 orders.

II. THE STATES LACK STANDING AND A PROTECTABLE INTEREST IN THE SUBJECT OF THIS ACTION.

1. The States must show standing. *Town of Chester, N.Y. v. Laroe Ests., Inc.*, 581 U.S. 433, 439-40 (2017). They principally speculate that ending the Policy will increase the number of migrants in their States, which in turn will cause them increased state "expenditures." Pet. Br. 37-38. But that theory would give states standing to challenge virtually any policy that might affect immigration, *e.g.*, an FBI decision to devote fewer resources to fighting smuggling; reduced enforcement against employers for hiring undocumented workers; or an agreement with Mexico on aid, trade, or immigration. Each of these decisions (any many others) might conceivably increase downstream costs that states bear vis-à-vis immigrants. And the same theory would apply to nearly every other kind of federal decision-making, such as budgeting or law enforcement. If effectively everything the federal government does provides states standing, the case-or-controversy requirement is meaningless.

In any event, the States' argument also fails as a factual matter, as it is based on speculation about various future decisions. *See Allen v. Wright*, 468 U.S. 737, 759 (1984) (denying standing where claimed injury depended on speculation about future decisions of multiple actors). For example, the States assert, without evidentiary support, that the Policy deters migration more than Title 8 immigration measures. But that surely depends on how Title 8 will be enforced in the absence of the Policy, about which the States can only speculate. *See, e.g.*, *Trump v. New York*, 141 S. Ct. 530, 535-36 (2020) (denying standing

where it was not yet possible to "predict[] how the Executive Branch might eventually implement" challenged policy); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 412 (2013) ("respondents can only speculate as to how [Executive officers] will exercise their discretion in determining which communications to target").

And indeed, the United States is currently engaged in various diplomatic and enforcement initiatives, including "increasing and enhancing the use of expedited removal." Dep't of Homeland Security, *DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes* (Jan. 5, 2023).[11] These ongoing efforts make predicting future migration numbers under Title 8 wholly speculative.

Moreover, not only is it highly speculative that lifting Title 42 would lead more noncitizens to migrate, but the federal government has explained that the opposite is true: The use of regular Title 8 removal procedures actually "has a greater deterrent effect" than Title 42. *Louisiana*, ECF 27-1 at 1. Unlike Title 8 removals, Title 42 imposes *no* legal consequences on repeat crossers. Under Title 42, the vast majority of migrants are expelled just across the border into Mexico, and can and do "repeatedly attempt to cross the border without immigration or criminal consequence and may eventually avoid detection." *Id.* In contrast, migrants removed under Title 8 are, among other things, subject to felony prosecution for re-entry under 18 U.S.C. § 1326(a).

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[11] https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and.

Further, under Title 8, migrants are returned to their countries of origin, not pushed back into Mexico, making it far more difficult for them to return. *Id.*; *see* 8 U.S.C. § 1231(b)(2)(B). As a result, the number of individuals who unlawfully entered and were not apprehended increased fourfold under Title 42. David J. Bier, *Title 42's End Won't Affect Most Border Crossers*, CATO Institute (Dec. 20, 2022).[12]

Nor does the record support the States' speculation that lifting Title 42 will increase migration. Rather, it shows that migration decisions are driven primarily by conditions abroad, not U.S. policy changes. *See*, *e.g.*, ECF 118-23 at 1, 16-17 (expert explaining that that "U.S. immigration policy had no significant impact on such individuals' decisions" to migrate). The district court thus properly rejected the assertion that ending Title 42 expulsions "would create a 'pull factor'" attracting more migrants. *Huisha-Huisha v. Mayorkas*, 560 F. Supp. 3d 146, 175-76 (D.D.C. 2021); *see also Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1015 (9th Cir. 2021) (Bybee, J.) (a party asserting standing based on an increase in migration must show that the particular policy change at issue "caused illegal immigration and was not merely one of the 'myriad economic, social, and political realities' that might influence an alien's decision to 'to risk life and limb to come to the United States'") (quoting *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015)).

The States seek to rely on evidence from other cases that Plaintiffs lacked an opportunity to probe.

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[12] https://www.cato.org/blog/title-42s-end-wont-affect-most-border-crossers

See supra Section I.C. Regardless, that evidence falls well short of rebutting the district court's finding in this case.[13]

Insofar as the federal government anticipates that the backlog from Title 42 will "lead to a *temporary* increase in border crossings," Federal Respondents' Stay Opp. 38 (emphasis added), nothing in the record establishes that whatever short-term influx occurs would not be offset by decreased migration from the greater deterrent effect of Title 8 procedures, especially if the federal government devotes increased resources to those measures.

2. The States alternatively contend that the "*de facto* destruction" of their *Louisiana* notice-and-comment injunction constitutes an "independent" injury adequate for standing. Pet. Br. 41-42. But whatever practical effect this case might have on the States' procedural rights in separate litigation, that cannot be the basis for standing in this case, where Plaintiffs challenge different CDC orders on different

[13] For example, the States rely on excerpts from a deposition of Border Patrol Chief Raul Ortiz taken in a non-Title 42 case. But Plaintiffs did not get to cross-examine Chief Ortiz. In any event, when squarely asked (in a portion of the deposition the States selectively omitted here), Chief Ortiz did not agree that "the number of aliens trying to illegally enter the United States will increase if the Title 42 order is rescinded," instead noting that "we have prepared for both higher and lower numbers." *Florida v. United States*, No. 21-1066 (N.D. Fla. July 28, 2022), ECF 78-3 at 42. And the portion of the deposition cited in the States' brief concerned a particular confluence of events that temporarily increased migration flows to Del Rio, Texas, while Title 42 was in place. The remainder of the States' evidence largely consists of cost projections untethered to this Policy, discussions of other policies, and mostly anonymous quotations in press accounts. Pet. Br. 37-38.

grounds. The States must show real-world injury in fact *in this case*. *Cf. Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) (the "deprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing"); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2213 (2021) (same). It is unsurprising, therefore, that the only citations the States can marshal for this argument are two inapposite circuit decisions. *Nat'l Basketball Ass'n v. Minn. Pro. Basketball, Ltd. P'ship*, 56 F.3d 866, 871-72 (8th Cir. 1995) (addressing narrow question whether a preliminary injunction is a "judgment" for purposes of the re-litigation exception in the Anti-Injunction Act); *Inst. of Cetacean Rsch. v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 948 (9th Cir. 2014) (addressing whether party can be held in contempt for violating a prior injunction).

3. The States also lack a "significantly protectable interest" related to this action. *Donaldson v. United States*, 400 U.S. 517, 531 (1971); *see Cameron*, 142 S. Ct. at 1010 (examining "legal" interest of intervenor; looking to Rule 24 for "guidance"); Fed. R. Civ. P. 24(a)(2) (requiring "interest relating . . . to the subject of the action"). Here, the States' immigration concerns are wholly unrelated to *public health*, and are thus insufficient to establish a protectable interest. *See, e.g.*, *United States v. Alisal Water Corp.*, 370 F.3d 915, 920 (9th Cir. 2004) (cited by States) (rejecting asserted interest "several degrees removed" from "public health" policy at issue); *Reid L. v. Illinois State Bd. of Educ.*, 289 F.3d 1009, 1019 (7th Cir. 2002) (rejecting asserted interest "far afield from the core concerns" of relevant statute).

In sum, the States have not established standing or a protectable legal interest related to this case. And the fact that they have sought to meet their burden based on untested evidence only underscores why timely intervention is critical.

III. THE STATES DO NOT MERIT PERMISSIVE INTERVENTION.

"Whether intervention be claimed of right or as permissive, . . . the application must be 'timely.'" *NAACP*, 413 U.S. at 365 (quoting Rule 24). Given the States' "inordinate and unexplained" delay seeking intervention, J.A.3, the States should not be allowed to intervene.

Beyond the delay, the harm to Plaintiffs in maintaining the Policy is literally a matter of life and death, as both lower courts found. *See* Fed. R. Civ. P. 24(b)(3) (requiring consideration of prejudice); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 73 (2d Cir. 1994) (permissive intervention denied where it would have delayed cleanup of Superfund site).

In contrast, the States candidly admit that they seek to maintain Title 42 solely for reasons other than public health. That is hardly surprising, as these States have long called for the elimination of all other COVID restrictions, and have filed multiple lawsuits seeking to block other COVID measures. *See, e.g.*, *Biden v. Missouri*, 142 S. Ct. 647 (2022); *Florida v. Walensky*, No. 22-718 (M.D. Fla. Mar. 29, 2022). And almost all of the proposed intervenors have ended their own COVID-related public health emergencies.[14]

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[14] *See* National Academy for State Health, *States' COVID-19 Public Health Emergency Declarations and Mask*

The States' transparent interest in Title 42 as a pretextual border enforcement tool does not merit permissive intervention.[15]

Finally, the States cite the inconsistency between the federal government's choices in this case and its prior resistance to nationwide injunctions and vacatur in other cases. Pet. Br. 50. But the States did not complain about the government's failure to contest (or seek a stay of) the nationwide injunction the States themselves obtained in the *Louisiana* litigation, or suggest that that failure warranted intervention.

In fact, in *Louisiana*, a legal services provider sought to intervene for the sole purpose of narrowing the injunction's geographic scope, and these very States joined the federal government in opposing intervention. The government stated that the choice not to "add a fallback scope-of-relief argument" was insufficient to "show divergent purposes" under Rule 24. Federal Government's Response to Proposed Intervenor's Opening Br. 5, 7, *Louisiana*, No. 30303 (5th Cir.). The States "agree[d] with CDC that [the intervenors] failed to establish that Federal Defendants did not adequately represent their interests for the reasons explained in CDC's Answering Brief." States' Consolidated Answering Br. 94. Yet here, they claim intervention is warranted because the United States failed to contest the very

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Requirements, https://www.nashp.org/governors-prioritize-health-for-all/ (last updated Feb. 6, 2023).

[15] Insofar as the States claim there will be a temporary increase in border crossings when Title 42 is lifted due to the backlog, that will likely happen whenever Title 42 ends—and even the States do not claim that Title 42 can lawfully remain in place forever.

same issue: the scope of relief. And, in any event, the States were long on notice that the government might not appeal at all in this case.

The Title 42 Policy has outlived its original public health justification. The States should not be allowed to keep it alive as a substitute for Congress's duly-enacted immigration laws.

CONCLUSION

The Court should affirm.

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