No. 22-592

# In the Supreme Court of the United States

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

*Petitioners*,

v.

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

*Respondents.*

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

## REPLY BRIEF FOR PETITIONERS


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## INTRODUCTION

This Court granted certiorari to decide this straightforward question of intervention: "Whether the State applicants may intervene to challenge the District Court's summary judgment order." *Arizona v. Mayorkas*, 143 S. Ct. 478 (2022). The answer to that question is plainly "yes." The holdings in *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002 (2022), and *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), confirm that the States timely intervened. Those cases ask (1) how quickly movants sought to intervene once existing defendants "ceased defending the [challenged] law," *Cameron*, 142 S. Ct. at 1012, and (2) whether they sought to intervene "within the time period in which the [existing parties] could have taken an appeal," *United Airlines*, 432 U.S. at 395-96. Applied here, the States intervened quickly after the Federal Government failed to seek a stay pending appeal. That more than suffices. Likewise, this Court's precedents—including its unanimous standing holding in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019)—readily establish that the States have an interest and standing to intervene. And as for adequacy of representation, no party seriously contests anymore that the Federal Government's refusal to seek a stay pending appeal rendered its defense of the Title 42 program inadequate. In this case about how to lawfully wind down the Title 42 program, that failure to seek a stay pending appeal had the effect of conceding defeat and granting Plaintiffs ultimate relief. Absent the States' efforts, the program would have ended, and all of the resulting harms to the States would have occurred.

The States thus satisfy every intervention requirement in this Court's cases. Respondents,

however, would add a new intervention requirement. They contend States must be fortune-tellers, intervening based on a prediction about what the Federal Government will fail to do before it fails to do it. No such requirement appears in this Court's precedents (or anywhere else). Nor do Federal Respondents deny that their surprising failure to seek a stay pending appeal turned the underlying litigation upside-down, where the Federal Government embraced defeat and shunned victory—which it continues to avoid at all costs. Confirming the point, the intensity of the Federal Government's continued opposition to the States' intervention underscores just how badly it wants to surrender its way to victory.

Intervention requires predictable *ex ante* rules, not unpredictable standards based on fortune-telling. Under this Court's predictable rules, including those from *Cameron* and *United Airlines*, the States' intervention shortly after the Federal Government failed to seek a stay pending appeal was appropriate. Any other standard leaves the States and other would-be intervenors in a Catch-22—alternatively denied intervention for being too early or too late without any Goldilocks moment in which intervention can actually be obtained.

In contrast, Respondents' approaches are distinctly *un*workable. Federal Respondents insist (at 14, 20-21, 29) that the States must divine the Federal Government's future litigation strategy. They contend the States should have known that the Federal Government would have (wrongly) felt itself incapacitated from seeking a stay pending appeal. That standard is not only unworkable, it contradicts what actually happened: The Federal Government failed to seek a stay *even though* it had previously

sought such a stay in this very case. That failure arose from crabbed perceptions about the public's interest in a stay—arguments irreconcilable with what the Federal Government has long said about that stay factor and incompatible with this Court's precedents. Moreover, the Federal Government's failure to seek a stay—with the effect of acquiescing to a nationwide vacatur in an APA action—came mere weeks after telling this Court that APA-based vacaturs are *categorically unlawful*. *See* States Br.22-23. Federal Respondents' willingness to acquiesce to the immediate end of the Title 42 program within *hours* of an adverse decision should have surprised all but the most cynical observers.

At the eleventh hour, Federal Respondents again attempt to evade this Court's review. They suggest, but never affirmatively argue, that this case might become moot in May based on a press release issued after this Court granted certiorari. That suggestion of mootness is raised as background (at 11-12) and not as part of an actual legal argument section. "Such postcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye," *Knox v. SEIU*, 567 U.S. 298, 307 (2012), especially where, as here, a party cannot even commit to arguing mootness.

Even if mootness were properly raised as a legal argument, and not a mere background-section aside, it is unavailing. The government's non-binding press release that it *might* take some *future* action moots nothing. This Court could well decide this case before that announced action. Even after that future action, the case would not be moot. Whether the Federal Government lawfully terminated the Title 42 System would remain a live dispute if the agency failed to

adequately consider, *inter alia*, the harms to the States and their reliance interests, and once again refused to conduct notice-and-comment rulemaking. This case, moreover, contains textbook examples of issues "capable of repetition, yet evading review," *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 462 (2007), and voluntary cessation without any guarantee "that the allegedly wrongful behavior could not reasonably be expected to recur," *Friends of the Earth, Inc., v. Laidlaw Env'tl Servs., Inc. ("Laidlaw")*, 528 U.S. 167, 189 (2000) (quotations omitted). The question of intervention evaded this Court's review in *Arizona v. San Francisco*, 142 S. Ct. 1926 (2022), and it recurred the very next Term. Similarly, the underlying merits issues, including Plaintiffs' putative least-restrictive-means requirement, are likely to recur and evade review.

## ARGUMENT

### I. THE STATES' REQUEST TO INTERVENE WAS TIMELY

Respondents' primary argument—that the States' intervention was untimely—conflicts with *Cameron* and *United Airlines*. And Respondents' proposed alternative to *Cameron* and *United Airlines* would create a Catch-22, as the States have explained (14-16). Respondents have no answer to that argument beyond suggesting that States must burden multiple federal courts with *seriatim* requests to intervene.

#### A. Intervention Is Timely Here Just As It Was In *Cameron*

##### 1. Timeliness is assessed from when defendants cease defense

*Cameron* holds that timeliness "should be

*assessed in relation to th[e] point in time"* when defendants "ceased defending the [challenged] law." 142 S. Ct. at 1012 (emphasis added). Applying *Cameron*'s "point in time" legal standard, the States' motion to intervene was timely. The D.C. Circuit legally erred by applying a different standard, and thus abused its discretion. Respondents' attempts to distinguish *Cameron* or limit it to its facts are unpersuasive.

Respondents' arguments here repeat those rejected in *Cameron*. There, respondents "argue[d] that the attorney general should have realized," based on a change in administration, that the Governor's new cabinet secretary "might abandon the defense" of the law challenged there. 142 S. Ct. at 1012-13. This Court rejected that subjective standard. *Id.* at 1012. It should reject it again here. After *Cameron*, timeliness depends on when the government in fact ceased defending the state law. *Id.*

To the extent *Cameron* is factually distinguishable, it *supports* the States here. Unlike *Cameron*, where the Governor had a track record of refusing to defend abortion restrictions, Federal Respondents had an uninterrupted history of defending Title 42, including previously obtaining a stay and reversal on appeal. States Br.29-30. If a *specific history of non-defense* did not produce the need to intervene earlier in the case, Federal Defendants' prior *vigorous* defense of Title 42 could not have done so.

Also unavailing is Respondents' reliance on *Cameron*'s passing statement describing *NAACP v. New York*, 413 U.S. 345 (1973). *Cameron* explained that pleadings in the *NAACP* litigation, in contrast to

the secretary's defense in *Cameron*, "should have alerted the would-be intervenors about the United States' likely course of action." 142 S. Ct. at 1013. But Respondents gloss over what the United States' pleadings in *NAACP* actually said: "it was without information with which it could oppose the motion for summary judgment"—that is, that the United States would not oppose summary judgment and thereby accept defeat. *Id.* (quoting *NAACP*, 413 U.S. at 367).

Nothing of the sort exists here. The Federal Government's shifting policy preferences did not "alert" the States of the need to intervene. The government continued to defend the law. Specifically, policy preferences expressed in the Termination Order (and, before that, in Executive Order 14,010) did not "alert" the States that they were then compelled to seek intervention, any more than the Governor's known opposition to abortion regulations "alert[ed]" the Attorney General of his need to intervene in *Cameron*. *See id.* Tellingly, *neither* set of Respondents argues that the Termination Order or anything before it would have allowed the States to argue their interests were inadequately represented. In fact, they *both* argued the opposite in the courts below—that the States' arguments about inadequate representation were *still* insufficient.

In short, in *NAACP*, the Federal Government stated it had no basis to oppose a motion for summary judgment. 413 U.S. at 367. Here, in contrast, Federal Respondents vigorously defended the challenged policy in a summary judgment brief. J.A.-149-207. There is no basis for equating the two.

### 2. No intervenor would have predicted that the Federal Government would decline to seek a stay

The unworkability of Respondents' intervention standards, and the irreconcilability of those standards with *Cameron*, is best illustrated by Respondents' own arguments about what the States should have predicted. As the Respondents did in *Cameron*, Federal Respondents revert back to the argument that the States should have been fortune-tellers. According to Federal Respondents, the States should have "known for nearly eight months that the government would have no basis to seek such a stay [pending appeal]." U.S. Br.14. In their view, Federal Respondents "could not plausibly claim … that the public interest would be served by perpetuating a now-obsolete public-health measure." U.S. Br.29.

As the States explained in their reply in support of a stay, the argument that the States should have predicted the government's failure to seek a stay pending appeal is akin to an argument that the States should have predicted the government's "overly cramped view of the public interest," contrary to longstanding understandings of that stay factor. Stay Reply.15. Instead, the "public interest" was a broad enough concept to include "prevent[ing] an avoidable border catastrophe." *Id.*

The Federal Government's failure to seek a stay was contrary to past practice and thus could not have been predicted. In seeking (and obtaining) a stay pending appeal in *Huisha-Huisha I*, Federal Respondents *explicitly* relied on harms other than public health as part of their public-interest arguments. They contended that terminating Title 42

would improperly "requir[e] DHS to process all families under Title 8," "which would unduly strain already severely overburdened facilities, *irrespective of the public-health conditions on the ground*." Federal Defendants' Motion for Stay, *Huisha-Huisha I*, Doc. 1914728, at 21 (D.C. Cir. Sept. 17, 2021).

Nor could the States have predicted the government's failure to seek a stay given this Court's precedents. The government's newly cramped view of the public interest is contrary to this Court's precedents. In *Amoco Production Company v. Village of Gambell*, for example, this Court reversed the Ninth Circuit's view that "the interests served by federal environmental statutes, such as ANILCA, supersede all other interests." 480 U.S. 531, 545 (1987). This Court explained that courts were obliged to consider "competing public interests," including *non-environmental* concerns. *Id.* at 546. Similarly, this Court had no difficulty considering impacts on *national defense* as part of the public interest in *Winter v. NRDC*, even though such military concerns were beyond NEPA's scope. 555 U.S. 7, 23-31 (2008); *accord Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

So too here—nothing about the relevant statute displaces *all* other considerations save for public-health concerns. And it would be bizarre for the States to have predicted that the government would deem itself bound to exclude immigration considerations as part of the public-interest analysis when the statute pertains specifically to the regulation of *immigration*. States Br.45 n.12. Indeed, Federal Respondents have implicitly acknowledged as much by long maintaining a humanitarian exemption for Title 42—softening the policy by explicit consideration of *immigration-based*

hardships that have *nothing* to do with public health. *See also* States Answering Brief at 42-47, *Louisiana v. CDC*, No. 22-30303 (5th Cir. filed Aug. 31, 2022).

This Court should reject Federal Respondents' invitation for the States and future intervenors to make wild predictions that the government will depart from its past litigation history and this Court's precedents. That is not a workable rule, especially here where Federal Respondents' narrow view of the public interest would represent "a major departure from the long tradition of equity practice" under the traditional four-factor test, which "should not be lightly implied." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Federal Respondents cite *nothing* to establish that Congress has displaced those traditional equitable standards here.

For the same reasons, the States cannot be required to predict Federal Respondents' arguments (at 20) that they could not show irreparable harm. Nor are those arguments correct. Sovereigns "suffer[] a form of irreparable injury" whenever they are prevented from "effectuating statutes enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). The same principle applies to enjoining or vacating duly promulgated rules enacted under the President's supervision. Indeed, Federal Respondents just this Term told this Court that disruption of their (putatively lawful) agency actions regarding immigration policy constituted irreparable harm. U.S. Stay Application, *United States v. Texas*, No. 22-58, at 38. An intervenor cannot be faulted for expecting consistency.

In any event, termination of Title 42 will cause the Federal Government (and the States) to incur additional costs not recoverable from Plaintiffs. Such irrecoverable injuries are irreparable harm. *See*, *e.g.*, *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 677 (9th Cir. 2021).

For all these reasons, Federal Respondents are wrong that the States should have predicted that the Federal Government would deem itself to have "no basis to seek such a stay" pending appeal. U.S. Br.14. The Federal Government did have such a basis—a point underscored by the fact that the States successfully obtained just such a stay from this Court. The Federal Government simply *chose* not to do so.

### B. Intervention Is Timely Here Just As It Was In *United Airlines* When Intervention Was Sought Within the Time To Appeal

After four earlier briefs in three different courts (States Br.20), Respondents have now finally addressed this Court's rule in *United Airlines*: that "post-judgment intervention for the purposes of appeal" is timely when filed "within the time period in which the named plaintiffs could have taken an appeal." 432 U.S. at 395-96. Respondents' belated arguments about *United Airlines* are waived. *See*, *e.g.*, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). On the merits, those waived arguments are no better than their prior silence.

Federal Respondents argue (at 15, 23) only that *United Airlines* "adopted no such rule." That *ipse dixit* contradicts numerous circuit decisions holding that *United Airlines* did precisely that, including the Ninth Circuit's view that intervening within the time for an

appeal is dispositive. States Br.20. Respondents' *ipse dixit* also contravenes *Cameron*'s reasoning, which followed *United Airlines* by specifically relying upon the fact that Kentucky's request to intervene was filed "within the 14-day time limit for petitioning for rehearing en banc." *Cameron*, 142 S. Ct. at 1012; *accord* States Br.19.

Unlike Federal Respondents, Plaintiffs at least try to address circuit precedent applying *United Airlines*. But even their cherry-picked cases admit that *United Airlines* created a "general rule," albeit not an "inflexible" one. *Larson v. JPMorgan Chase & Co.*, 530 F.3d 578, 583-84 (7th Cir. 2008). That alone contravenes Federal Respondents' contention that *United Airlines* created "no such rule" at all. Whether that rule is dispositive (as in the Ninth Circuit) or a critical guidepost (as in the Third and Seventh Circuits), it is a rule nonetheless. Neither set of Respondents explains how it was not an abuse of discretion for the D.C. Circuit to ignore it altogether.

### C. Respondents' Remaining Arguments Are Waived and Meritless

**1. *Potential Prejudice.*** Respondents' prejudice arguments are largely waived. They were not raised below or in this Court in opposition to the States' request for certiorari and a stay. *See*, *e.g.*, *Sprietsma*, 537 U.S. at n.4; *cf.* S. Ct. R. 15(2). The word "prejudice" appears *nowhere* in Federal Respondents' prior briefs in the D.C. Circuit or in this Court, thereby waiving that issue for them entirely.

As for Plaintiffs, they previously contended only that they were prejudiced because they could not develop evidence to challenge the States' standing. Stay Opp.13-14. That ignores that Plaintiffs had

weeks to develop any such evidence during the agreed temporary stay in the court below while intervention was being briefed and could have agreed to a slightly longer stay if they thought it would lead to actual relevant evidence, instead of a mere talking point.

On the merits, the prejudice arguments are irrelevant to the intervention question. They largely fall into two categories: (1) inability to prevail by default and a resulting need to litigate the merits, and (2) the burden of opposing intervention itself. *Cameron* rejects the former concern. States Br.21-22. And the latter will *always* exist whenever intervention is opposed. Neither provides a useful way of separating timely motions from untimely ones.

**2. *Totality of the Circumstances.*** Both sets of Respondents advance a totality-of-circumstances standard but fail to fairly apply it. As an initial matter, a totality-of-circumstances standard does little work when, as here, both of the predictable timing rules from *Cameron* and *United Airlines* unequivocally confirm timeliness. But even if a motion timely filed under *Cameron* and *United Airlines* could somehow become *untimely* when considered in the totality of circumstances, Respondents fail to account for all the circumstances here. They ignore, for example, (1) the Federal Government's unbroken history of defending Title 42; (2) its earlier and successful request for a stay pending appeal; and (3) both sets of Respondents' repeated arguments that the Federal Government adequately represented the States after the district court's judgment.

If that weren't enough, a totality-of-the-circumstances approach would also have to account

for the Federal Government's position before this Court that the APA *categorically* bars vacaturs, State Br.22-23—a position incompatible with their near-instantaneous embrace of the district court's vacatur here. Federal Respondents try to answer that inconsistency (at 26) with little more than the truism that the Federal Government does not appeal every case. That sheds no light on why the Federal Respondents insist that *these* States cannot intervene to appeal *this* vacatur that harms *their* clear and concrete interests.

Finally, no Respondent answers the States' argument about the presumption of regularity—one of many factors that Respondents apparently would now have the Court ignore in assessing timeliness. State Br.31-32. That presumption vitiates Respondents' timeliness arguments. Most recently illustrated in *Cameron*, an intervenor is not required to predict *irregular* conduct by litigants, especially here when the litigant is the government. *See United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926) ("[I]n the absence of clear evidence to the contrary, courts presume that [public officials] have properly discharged their official duties").

### D. The Timeliness And Inadequate-Representation Requirements Must Be Read In Harmony

Neither set of Respondents grapples with the Catch-22 their arguments would create: if the States had tried to intervene earlier, that attempt would have failed because Federal Respondents were then adequately defending the Title 42 System. *See* State Br.15, 33-36. But when the States intervened once the Federal Respondents abandoned meaningful defense,

it was purportedly too late. If that were so, the States could *never intervene*, and the success of Federal Respondents' victory-through-surrender tactic was always a *fait accompli*. That approach contravenes Rule 24 and *Cameron*'s holding that timeliness "should be *assessed in relation to th[e] point in time*" where defendants "ceased defending the [challenged] law." 142 S. Ct. at 1012 (emphasis added)

Respondents couldn't have missed this argument in the States' brief, raised as an entire subsection (§I.C). But their answers range from cursory and unconvincing to non-existent.

Federal Respondents first. They not only ignore the States' Catch-22 argument but also fail even to *acknowledge* the requirement that a would-be intervenor establish inadequacy. Federal Respondents' complete "silence on that point" is what truly "speaks volumes" here. U.S. Br.21. That silence stands in marked contrast to their vigorous assertions, *pre*-certiorari, that they were *still* adequately representing the States' interests, despite their failure to seek a stay pending appeal. The necessary implication of that quietly dropped position is that the States' request to intervene was *still too early*, since Federal Respondents were then allegedly still adequately representing the States' interests, rather than *too late*.

Plaintiffs similarly ignore the need to harmonize the adequacy and timeliness requirements of intervention. They instead speculate that the D.C. Circuit's unreasoned denial of Texas's motion to intervene was based purely on a "heightened standard" for intervention on appeal, distinct from Rule 24, and thus the States therefore should have

sought to intervene in the district court on remand. Any such "heightened standard" fails for three reasons.

*First*, *Cameron* applied "the 'policies underlying intervention' in the district courts"—which would include timeliness and adequacy—not an unenumerated "heightened standard." 142 S. Ct. at 1010. In doing so, this Court necessarily rejected the Sixth Circuit's contrary approach, which relied heavily on the D.C. Circuit's heightened standard. *See EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 831 F. App'x 748, 750 (6th Cir. 2020), *rev'd by Cameron*, 142 S. Ct. 1002 (2022) (relying upon *Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 771 F.2d 1551, 1552 (D.C. Cir. 1985)). *Cameron* has thus rendered the D.C. Circuit's heightened standard "no longer good law." *Humane Soc'y of the United States v. USDA*, 54 F.4th 733, 737 n.1 (D.C. Cir. 2022) (Rao, J., dissenting).

*Second*, applying a heightened standard for appellate intervention but Rule 24 for district court intervention would make little sense. Intervention could (and should) be a single application of Rule 24's principles. But Plaintiffs could require resolution of intervention at least three times by multiple different standards: (1) in the court of appeals applying their "heightened standard," (2) followed by the district court's applying Rule 24, and then (3) appellate review of the district court's denial of intervention under Rule 24. Such multiplication of proceedings is unnecessary. And applying a "heightened standard" here but not in the district court is backwards. In an appeal like this, intervention adds but a brief or two. In contrast, intervenors in the district court become parties that may serve and receive discovery requests (and litigate

about their resolution), submit dispositive motions, file a wide variety of other motions, present evidence at trial, and otherwise inject complexity in a multitude of ways absent on appeal. If that choice is measured by Rule 24, so too should intervention on appeal.

*Third*, even under a "heightened standard," Respondents no doubt would have argued that the States lacked a basis to intervene after *Huisha-Huisha I*. That renewed request would have been met with arguments that it was even less timely, coming months after the first intervention request; and arguments that Federal Respondents, having successfully defended Title 42, were adequately representing the States' interests. Even Plaintiffs acknowledge (at 36) that such a renewed request may serve no function except to hold a place in line: if denied, there would then "be little basis to oppose a later, renewed motion as untimely." In Plaintiffs' view, a State must file at least two futile intervention motions just to preserve its ability to intervene a third time.

Judicial administration will not be enhanced by compelling parties to file futile motions merely to forestall future charges of untimeliness. That is hardly a solution to the States' Catch-22 arguments, but rather illustrates the States' concerns (at 35-36) about incentivizing *seriatim* intervention motions.

## II. PETITIONERS HAVE ARTICLE III STANDING AND PROTECTABLE INTERESTS

### A. The States Have Article III Standing

**1.** Article III traceability and redressability requirements are met here. Plaintiffs do not argue

otherwise. And Federal Respondents' contrary arguments are unavailing.

Contrary to Federal Respondents' arguments (at 47), this Court has recognized that the Administrative Procedure Act confers a "procedural right" to challenge agency action "as arbitrary and capricious." *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007); *accord Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1336 (Fed. Cir. 2008). As beneficiaries of that procedural right, the States have standing to assert that right and protect their concrete interests. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

That's true in any case but particularly here because of the "special solicitude" owed to States. *Massachusetts*, 549 U.S. at 520. While Federal Respondents contend (at 47) that the States' "special solicitude" is limited to asserting a "sovereign interest," *Massachusetts* directly holds that "special solicitude" is warranted when a State asserts "its quasi-sovereign interests," 549 U.S. at 520. And Federal Respondents do not deny such interests are harmed here. States Br.39, 42-44. In any event, the States have incurred sovereign injury too. *Id.* at 39.

**2.** As for Federal Respondents' assertion that the States—alone among *all* litigants—must assert "direct" injuries against the Federal Government, this Court held otherwise in *New York*. States Br.40. Federal Respondents have no meaningful answer. They note (at 45) in a parenthetical that *New York* was "(relying on federal funding)." Even if that were responsive, loss of federal funds is a financial injury that is no more "direct" than the nature of the injuries here. Nor does *New York*'s reasoning accord unique

Article III status to financial harms implicating federal funds.

**3.** In addition to the concrete harms that termination of the Title 42 System would cause the States, it is conceded that such a termination would destroy the rights that the States enjoy under the *Louisiana* injunction. Respondents offer no meaningful explanation of how that, too, is not cognizable injury. And if Federal Respondents truly believed that the *Louisiana* injunction rested on obvious legal errors (U.S. Br.46), they could have sought a stay pending appeal in that case.

**4.** Plaintiffs alternatively argue (at 44) that the States' injuries are "highly speculative." Not so. Even DHS has confidently predicted that the termination of Title 42 will lead to an increase in illegal border crossing. *See* State Br.38-39; J.A.64-65, 110, 118-34. And the *mere prospect* (before this Court's stay) that Title 42 would be terminated caused an observed (and undisputed) surge to the U.S.-Mexico border. J.A.-76-114.

Plaintiffs' own speculation about what good might come (at 45-46) is not sufficient to dispute the States' standing. Plaintiffs have offered no evidence of such countervailing benefits. And in all events, "[o]nce injury is shown, no attempt is made to ask whether the injury is outweighed by benefits the plaintiff has enjoyed from the relationship with the defendant." *Wright & Miller*, 13A Fed. Prac. & Proc. Juris. §3531.4 (3d ed.).

### B. The States Have Protectable Interests That Could Be Impaired

The States' Article III standing should resolve any dispute about the States' interest for intervention. The States already anticipated the Respondents' reliance on *Donaldson v. United States*, 400 U.S. 517 (1971). States Br.44 n.12. Respondents offer no meaningful response and do not address extensive circuit precedent accepting far more attenuated interests. State Br.45. So too did this Court in *Cascade Nat. Gas v. El Paso Nat. Gas*, 386 U.S. 129, 135-36 (1967). *See* States Br.45.

More generally, Respondents' attempt to shoehorn adjectives like "substantial" and "direct" into the text of Rule 24—which contains nothing of the sort—is unavailing. State Br.44-46.

## III. Alternatively, This Court Should Grant Permissive Intervention

Alternatively, this Court should permit the States to permissively intervene.[1] Permissive intervention is particularly warranted here. Despite Federal Respondents' protestations (at 28), they are surrendering their way to their preferred victory—an end to the Title 42 program without notice-and-comment rulemaking. Their intense, insistent opposition to the States' intervention underscores those concerns. That all is compounded by what came before, when DHS secretly and illegally began implementing the 2022 Termination Order more than

[1] Federal Respondents wrongly contend (at 17 n.23) that the States' motion to intervene in the district court under Rule 24 is not on review here. That motion was necessarily carried up as part of the appeal, and the D.C. Circuit could only have denied intervention by denying it too. States Br. 17 n.1.

a month before its effective date—while the States' motion for a preliminary injunction was pending. *See Louisiana* Docs. 24, 33, 37. DHS never informed the States of its actions. Press reports did. *Id.*

Federal Respondents' tactics here are tantamount to awarding Plaintiffs complete relief: absent a stay, Title 42 will be effectively terminated permanently and all the resulting harms to the States will come to pass. Federal Respondents are not merely deferring judicial review. They achieve completely a desired policy outcome by permanently enshrining their defeat and preventing even the possibility of prevailing on appeal. When victory-on-appeal is the worst imaginable outcome for a party, that is telltale sign that collusion is afoot, and intervention is warranted to thwart it.

The impropriety of Federal Respondents' actions is underscored by the fact that their efforts here represent their *second* attempt to terminate Title 42 without notice-and-comment, with the *Louisiana* injunction halting the first. *See also Arizona*, 142 S. Ct. at 1928 (Roberts, C.J., concurring) (explaining government "seized upon … a final judgment … as a basis to immediately repeal the [public charge] Rule, without using notice-and-comment procedures"). After this Court granted a stay, it merely triggered a *third* attempt to do so—by issuing a press release that Federal Respondents now suggest, in passing, moots this case, *infra*. Intervention is warranted.

## IV. FEDERAL RESPONDENTS' ATTEMPT TO MOOT THIS CASE IS UNAVAILING

Despite everything above, Federal Respondents are attempting to moot this dispute. Now comes the latest attempt to create a "mare's nest [that] could

stand in the way of [this Court] reaching the question presented." *Arizona*, 142 S. Ct. at 1928 (Roberts, C.J., concurring). Federal Respondents suggest in the background section of their brief (at 8, 11-12) that this case might become moot in the coming months. They point to a press release—issued after this Court granted certiorari—that says the Title 42 program will be brought to a lawful end on May 11, 2023. U.S. Br.10-11. That eleventh-hour suggestion of mootness is unavailing.

To begin, that non-binding promise about future events does not moot anything now. Even if the proposed agency action happens, and this Court has not already decided the straightforward question of intervention before May 11, it would not moot this case for four reasons.

*First*, for this case to be moot, the government must commit to arguing mootness. But here, the government merely suggests some future possibility of mootness in the background section of its brief. It is the government's "heavy burden" to assert mootness. *Adarand Const., Inc. v. Slater*, 528 U.S. 216, 222 (2000) (emphasis added); *Laidlaw*, 528 U.S. at 189 ("stringent"). Because Federal Respondents are not even willing to include mootness among their legal arguments, they could not possibly be deemed to have carried that burden.

*Second*, "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox*, 132 S. Ct. at 2287. Such a "concrete interest" remains here, and it is hardly small. States have already challenged the April 2022 Termination Order as unlawfully circumventing APA notice-and-comment rulemaking

requirements and failing to consider costs to the States and their reliance interests. *See generally Louisiana v. CDC*, 603 F.Supp.3d 406 (W.D. La. 2022). It would be "no small matter to deprive a litigant," including the States here, "of the rewards of its efforts, particularly in a case," or here related litigation, "that has been litigated up to this Court and back down again." *Adarand*, 528 U.S. at 224. As for the government's promised future action, that future action is likely to be challenged by one or more States. The States anticipate that Health and Human Services will commit the same APA violations.[2] For purposes of challenging any purported "fix" to the end of the Title 42 System, it will very much matter whether D.D.C.'s vacatur is in effect or not—that is, whether the Title 42 System remains in place or not. As a result, it is anything but "impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox*, 567 U.S. at 307.

*Third*, the Federal Government's announced actions would constitute voluntary cessation that precludes mootness. That is particularly true as "postcertiorari maneuvers designed to insulate a decision from review by this Court"—such as postcertiorari press releases—"must be viewed with a critical eye." *Id.*[3] If the government's promise to stop

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[2] Arizona takes no position as to the lawfulness of such future agency action by HHS.

[3] Here, for example, the government's postcertiorari press release declares an end to the public-health emergency for purposes of Title 42; meanwhile, the government relies on the same public-health emergency as a continuing basis for forgiving student debt. *See* U.S. Br. 34-35, *DoEd Dep't of Edu. v. Brown*, No. 22-535 (filed Jan. 4, 2023) (arguing that "the COVID-19

were enough to moot this case, "courts would be compelled to leave [t]he defendant ... free to return to his old ways." *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (quotations omitted). It must be "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 189; *see, e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (explaining that State's choice to open government program to petitioners did not moot legal dispute over lawfulness of the program). That test "is a stringent one," *Concentrated Phosphat*e, 393 U.S. at 203, where again the government bears the "heavy burden" to show that the unlawful conduct will not recur, *Adarand*, 528 U.S. at 222. Having failed to make any affirmative arguments about mootness thus far, the government cannot plausibly assert it has made that showing here.

*Finally*, for similar reasons, Federal Respondents cannot show that the issues presented here are not capable of repetition and avoiding review. *Laidlaw*, 528 U.S. at 190-91; *Wis. Right to Life*, 551 U.S. at 462-63. The very question presented here evaded review last Term. *See Arizona*, 142 S. Ct. 1926. Similarly, the underlying merits questions are bound to recur. In particular, Plaintiffs' argument that a least-restrictive-means standard governs Section 265 orders applies only in fast-moving pandemics and is likely to recur (as demonstrated by Plaintiffs' reliance on Ebola-related measures to challenge COVID-19 ones here). J.A.-27-34.

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pandemic is a 'national emergency declared by the President of the United States'" for purposes of 20 U.S.C. §1098ee(4)).

The procedural history of this and related cases belies any suggestion of mootness. As this Court observed in *Laidlaw*, "[t]o abandon the case at an advanced stage may prove more wasteful than frugal." 528 U.S. at 191-92. For that reason, dismissal for "mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought." *Adarand*, 528 U.S. at 224. There is nothing so "absolutely clear" here except for this: this Court has already had to dismiss as improvidently granted a petition presenting this same intervention question. The conduct has recurred. The intervention question warrants this Court's review now, whether the Federal Government makes good on its promise or not.

## CONCLUSION

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

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