Nos. 22A__

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.

Applicants,

v.

ALEJANDRO MAYORKAS, SECRETARY OF HOMELAND SECURITY ET AL.,

Respondents.

Application to the Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court of the United States and Circuit Justice for the D.C. Circuit, For A Stay Pending Certiorari

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PARTIES TO THE PROCEEDING BELOW

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

Respondents are:

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

(2) Nancy Gimena Huisha-Huisha, and her minor child I.M.C.H.; Valeria Macancela Bermejo, and her minor daughter, B.A.M.M.; Josaine Pereira-de Souza, and her minor children H.N.D.S., E.R.P.D.S., and M.E.S.D.S., H.T.D.S.D.S.; Martha Liliana Taday-Acosta, and her minor children D.J.Z. and J.A.Z.; Julien Thomas, Fidette Boute, and their minor children D.J.T.-B. and T.J.T.-B.; Romilus Valcourt, Bedapheca Alcante, and their minor child, B.V.-A., Plaintiff-Appellees in the court of appeals.

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To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the D.C. Circuit:

Pursuant to this Court's Rule 23 and the All Writs Act, 28 U.S.C. § 1651, the Applicant States respectfully request a stay pending certiorari of the judgment issued by the U.S. District Court for the District of Columbia, which permanently enjoined and vacated the Title 42 System regulating immigration into the U.S. ADD-5–6.

This case presents yet another instance of the Federal Government employing "th[e] tactic of 'rulemaking-by-collective-acquiescence,'" which this Court has quite properly expressed concerns about. *Arizona v. San Francisco*, 142 S.Ct. 1926, 1928 (2022) (Roberts, C.J., concurring). To circumvent APA notice-and-comment requirements—and an injunction resulting from their notice-and-comment violation in their *prior* attempt to repeal the *very same rule*—Federal Respondents collusively agreed with Plaintiffs to recreate the enjoined order terminating the Title 42 System, with the same delayed effective date and same lack of notice-and-comment compliance as the enjoined rule. In doing so, the Federal Government once again sought to "leverage[]" a litigation loss "as a basis to immediately repeal [an unwanted] Rule, without using notice-and-comment procedures." *Id.*

As in *San Francisco,* the States acted with extraordinary speed after Federal Respondents abandoned meaningful defense of the rule at issue—moving to intervene a mere six days later. Despite this haste, the D.C. Circuit held the States' motion to

intervene for purposes of appeal to challenge this collusive arrangement was somehow untimely. ADD-2–4.

In *San Francisco,* this Court granted certiorari on this very intervention issue involving the same rulemaking-through-strategic-surrender gambit and State rapid-response attempt to intervene, but ultimately dismissed that case as improvidently granted given the "mare's nest" of other issues that complicated reaching the intervention issues presented. 142 S.Ct. at 1928.

No such complications are presented here, however, and this Court could (and should) resolve the intervention questions postponed in *Arizona* by granting certiorari here. There is thus more than "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). And that is particularly so in view of the ever-growing number of attempts to circumvent APA requirements through calculated capitulation, which is fundamentally corrosive to bedrock rule-of-law principles.

The scale of the collusion and contradictions in the United States' positions here can scarcely be gainsaid. In the *last year alone*, the United States has told this Court both that (1) the APA does not authorize vacatur as a remedy[1] and (2) nationwide injunctions are impermissible.[2] Yet the district court granted *both* a vacatur and a nationwide injunction. ADD-5–6, 54–55. And Federal Respondents have given every

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

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

indication that they intend to acquiesce in *both* of those remedies that they have simultaneously told this Court are *categorically* unlawful. Except, apparently, when the Federal Government favors entry of them.

The United States' "it's legal when we say it's legal" premise lacks any pretense of propriety. And its too-cute-by-half tactic of taking an appeal only after the States sought intervention, then moving to hold that appeal in indefinite abeyance, is not substantively different from outright capitulation. *See* ADD-201 (announcing intent to seek indefinite abeyance of appeal to the D.C. Circuit).

Cert. worthiness is further underscored by the national importance of this case even aside from the yet-another-instance of "'rulemaking-by-collective-acquiescence.'" *San Francisco*, 142 S.Ct. at 1928 (citation omitted). No one reasonably disputes that the failure to grant a stay will cause a crisis of unprecedented proportions at the border. DHS estimates that daily illegal crossings may more than double from around 7,000/day to 15,000/day once Title 42 is terminated. ADD-68, 73, 79, 114.

DHS is further seeking $3-4 billion in emergency funding to attempt to handle this crisis that the Federal Government is so eagerly embracing. ADD-66, 71, 78. (Of course, the Administration has not made any equivalent request to reimburse the States for their resulting costs.) The Deputy Attorney General herself has expressed alarm, telling CBS News that she is "'*concerned about the increase in illegal immigration*' as well as '*human smuggling*' and '*drug smuggling*'" that the termination of Title 42 will cause. ADD-145 (emphasis added). Realization of any *one* of these feared harms could be sufficient to warrant certiorari.

The scale of the impacts on the immigration system are thus *at least* as great as in *United States v. Texas*, No. 22-58, where this Court granted certiorari before judgment, necessarily concluding that the issues were of "imperative public importance … requir[ing] immediate determination in this Court." S. Ct. R. 11. Given the at-least-equivalent impacts here, this case readily satisfies the traditional standard for ordinary post-judgment certiorari.

For similar reasons, failure to grant a stay here will inflict massive irreparable harms on the States, particularly as the States "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012). Indeed, even California Governor Gavin Newsom recently declared that the termination of Title 42 will "break[]" California's ability to handle the influx. ADD-140.

That termination of Title 42 will cause enormous challenges is thus a view shared even by Federal Respondents' own lawyers and the Administration's most ardent supporters. And the idea that the States will not suffer substantial irreparable harm as a result of the imminent catastrophe that a termination of Title 42 will occasion is therefore fanciful. Indeed, a different district has squarely held otherwise. *Louisiana v. CDC,* 2022 WL 1604901, at *22 (W.D. La. May 20, 2022).

For all of these reasons, the States respectfully request that this Court grant a stay pending certiorari. In addition, given that the termination of Title 42 is currently set to take effect at 12:01 am on Wednesday, December 21, the States respectfully request an immediate administrative stay pending resolution of this stay request. Finally, in view of the exceptional importance of the issues presented and fast-

moving nature of the situation, this Court should consider deeming this application a petition for certiorari as to whether the denial of intervention was erroneous and grant review so that this case could be heard and decided this Term.

OPINIONS AND ORDERS BELOW

The district court issued a memorandum opinion and order granting vacatur and a permanent injunction against enforcement of the Title 42 System. ADD-5–55. Applicants promptly filed an emergency motion for stay pending appeal in the D.C. Circuit on December 12, which was denied four days later. ADD-1–4.

STATEMENT OF JURISDICTION

The district court issued its judgment vacating the Title 42 System and injunction on November 22, 2022. ADD-56–57. The court previously issued an opinion and order to similar effect on November 15. ADD-5–55.

The D.C. Circuit denied Applicants' motion to intervene on December 16, and, on that basis, denied their request for a stay pending appeal as moot. ADD-1–4.

This Court has jurisdiction over this Application pursuant to 28 U.S.C. §§ 1254(1), 2101(e), and it has authority to grant the Applicants relief under the Administrative Procedure Act, 5 U.S.C. § 705, and the All Writs Act, 28 U.S.C. § 1651(a).

STATUTORY PROVISIONS INVOLVED

This case involves a challenge under the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq.*, to regulations and orders issued under 42 U.S.C. § 265, which states in relevant part:

> Whenever the Surgeon General determines that by reason of the existence of any communicable disease in a foreign country there is serious

> danger of the introduction of such disease into the United States, and that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required in the interest of the public health, the Surgeon General, in accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose.

Specifically at issue is CDC's August 2021 Order. 86 Fed. Reg. 42828.

STATEMENT OF THE CASE

I. THE TITLE 42 SYSTEM AND ORDERS

On January 31, 2020, in response to the then-emerging COVID-19 pandemic, the Health and Human Services Secretary declared a public health emergency under section 319 of the Public Health Service Act, 42 U.S.C. § 247(d). That same day, the President sought to limit the spread of the spread of COVID-19 by suspending "[t]he entry into the United States, as immigrants or nonimmigrants, of all aliens who were physically present within the People's Republic of China ... during the 14-day period preceding their entry or attempted entry into the United States." *Proclamation 9984, Suspension of Entry*, 85 Fed. Reg. 6709, 6710 (Jan. 31, 2020). The President then issued similar suspensions of entry from the Republic of Iran, *Proclamation 9992, Suspension of Entry*, 85 Fed. Reg. 12,855 (Feb. 29, 2020), and the Schengen Area of Europe, *Proclamation* 9993*, Suspension of Entry*, 85 Fed. Reg. 15,045 (Mar. 11, 2020).

In suspending entry from these areas, the President explained that "the potential for widespread transmission of [COVID-19] by infected individuals seeking to enter the United States threatens the security of our transportation system and infrastructure and the national security." 85 Fed. Reg. at 12,855-56. He further explained

that CDC "along with State and local health departments, has limited resources, and the public health system could be overwhelmed if sustained human-to-human transmission of the virus occurred in the United States" on a large scale. *Id.* "Sustained human-to-human transmission has the potential to have cascading public health, economic, national security, and societal consequences." *Id.*; *see also* 85 Fed. Reg. at 15,045. As COVID-19 continued to spread, the President declared a national emergency. *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

To address the threats posed by COVID-19, federal agencies issued numerous additional travel restrictions, including restrictions on "non-essential travel between the United States and Mexico" because it "pose[d] a specific threat to human life or national interests." *Notification of Temporary Travel Restrictions*, 85 Fed. Reg. 16,547-01 (Mar. 24, 2020). Land crossings, for example, placed "the personnel staffing land ports of entry ... as well as the individuals traveling through these ports of entry to increased risk of exposure to COVID-19." *Id.* at 16,547.

CDC acted too. Pursuant to section 362 of the Public Health Service Act, 42 U.S.C. § 265, CDC issued an Interim Final Rule providing that it could prohibit the "introduction into the United States of persons" from foreign countries. *Control of Communicable Diseases*, 85 Fed. Reg. 16,559-01, 16,563 (Mar. 24, 2020) (effective date Mar. 20, 2020). CDC then issued an order under Title 42 directing the "immediate suspension of the introduction" of certain persons, referred to as "covered aliens." *Notice of Order Under Sections 362 and 365 of the Public Health Service Act*, 85 Fed.

Reg. 17,060-02, 17,067 (Mar. 26, 2020) (effective date March 20, 2020). "Covered Aliens" are those seeking to enter the United States through Canada or Mexico who "seek[] to enter ... [ports of entry] who do not have proper travel documents, aliens whose entry is otherwise contrary to law, and aliens who are apprehended near the border seeking to unlawfully enter the United States between [ports of entry]." *Id.* at 17,060. The March 20 Order was extended on April 20, 2020, *Extension of Order*, 85 Fed. Reg. 22,424-01 (Apr. 22, 2020) (effective date April 20, 2020), and it was amended to cover both land and costal ports of entry and Border Patrol Stations on May 26, 2020, *Amendment and Extension of Order*, 85 Fed. Reg. 31,503-02 (May 26, 2020) (effective date May 21, 2020).

After receiving public comments, CDC issued a Final Rule pursuant to 42 U.S.C § 265 "establish[ing] final regulations under which the [CDC] Director may suspend the right to introduce and prohibit, in whole or in part, the introduction of persons into the United States." *Control of Communicable Diseases*, 85 Fed. Reg. 56,424-01 (Sept. 11, 2020). CDC also extended its suspension of the introduction of Covered Aliens. 85 Fed. Reg. 65,806-01 (Oct. 16, 2020); 86 Fed. Reg. 38,717-01 (July 22, 2021); 86 Fed. Reg. 42,828-02 (Aug. 5, 2021); 87 Fed. Reg. 15,243-01 (Mar. 17, 2022) (collectively, the "Title 42 Orders"). The process developed by CDC and implemented by the Title 42 Orders is referred to as the "Title 42 System."

II. THE *HUISHA-HUISHA* SUIT CHALLENGING THE TITLE 42 SYSTEM

On January 12, 2021, Plaintiffs, who purportedly are subject to expulsion under Title 42, filed the underlying suit in the district court, alleging the Title 42 System violates various statutory provisions and the APA. The district court granted class

certification and further granted a preliminary injunction prohibiting the Federal Respondents from enforcing the Title 42 System. *Huisha-Huisha v. Mayorkas*, 560 F. Supp. 3d 146, 154–55, 177 (D.D.C. Sept. 16, 2021). The basis of that preliminary injunction was the district court's determination that 42 U.S.C. § 265 does not permit expulsion or removal of aliens. *Id.* at 166–71.

Federal Respondents appealed. The D.C. Circuit first granted Federal Respondents' request for a stay pending appeal and subsequently rejected most of the district court's statutory analysis, affirming only a narrow part. *Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022) ("*Huisha-Huisha II*"). Specifically, the D.C. Circuit held "the Executive may expel the Plaintiffs, but only to places where they will not be persecuted or tortured," then remanded to the district court for further proceedings. *Id.* at 735.

III. TWENTY-FOUR STATES CHALLENGE CDC'S ATTEMPT TO TERMINATE THE TITLE 42 SYSTEM AND OBTAIN INJUNCTIVE RELIEF

In April 2022—fourteen months after President Biden instructed it to consider doing so—CDC issued an order terminating its previous Title 42 Orders outright (the "Termination Order"). 87 Fed. Reg. 19,941 (Apr. 6, 2022). A coalition of States filed suit alleging the Termination Order violated the APA because it was issued without notice and comment, and was arbitrary and capricious. *Louisiana*, 2022 WL 1604901, at *1. The States noted the Termination Order was "plainly at war with other policies of the Biden Administration," such as refusing to lift the mask mandate on airline travelers, refusing to repeal vaccination mandates, and insisting on discharging members of the military who sought religious exemptions from those mandates.

Louisiana Doc. 1 ¶13. And CDC utterly failed to consider the consequences of the Termination Order on the States, which even Biden Administration officials acknowledged would lead to an "influx" of migrants, inflicting a "surge on top of a surge" that would irreparably harm the States. *Id.* ¶¶ 7, 30-31, 90. Ultimately, 24 States joined in the challenge and moved for a preliminary injunction.

The Western District of Louisiana granted the States' motion for a preliminary injunction. 2022 WL 1604901, at *23. That court expressly found that the States had standing to challenge the termination of Title 42. *Id.* at *10–*15. In addition to the special solicitude due States, the court explained, "the States have come forward with evidence that the Termination Order is likely to result in a significant increase in border crossings, [and] that this increase will [adversely] impact" the States in a manner traceable to the termination of Title 42, *id.* at *14–*15. On the merits, the district court held CDC violated notice-and-comment rulemaking requirements without valid excuse before issuing the Termination Order. *Id.* at *20. And although the court declined to reach whether the Termination Order was arbitrary and capricious, it strongly suggested as much based on appellate precedent. *Id.* at *22.

Federal Defendants and proposed intervenors appealed to the U.S. Court of Appeals for the Fifth Circuit. Briefing on the merits is now complete. *See Louisiana v. CDC*, No. 22-30303 (5th Cir.).

IV. THE D.C. DISTRICT COURT VACATES THE TITLE 42 FINAL RULE AND TITLE 42 ORDERS.

Three months after the Western District of Louisiana entered its preliminary injunction against CDC's Termination Order, the *Huisha-Huisha* Plaintiffs moved for

partial summary judgment that "the regulation at 42 C.F.R. § 71.40 and all orders and decision memos issued by [CDC] or the U.S. Department of Health and Human Services suspending the right to introduce certain persons into the United States—is arbitrary and capricious in violation of the Administrative Procedure Act." *See* D. Ct. Doc. 141-3. When Plaintiffs first raised the issue of vacatur in their reply, the Federal Respondents filed a sur-reply emphasizing that "grants of partial summary judgment are generally considered interlocutory orders" and neither party had addressed remedies in their briefing. ADD-194–95 (citation omitted).

The district court nevertheless entered judgment on November 15, 2022, granting Plaintiffs everything they asked for. It "vacate[d] and set[] aside the Title 42 policy—consisting of the regulation at 42 C.F.R. § 71.40 and all orders and decision memos issued by [CDC] or the U.S. Department of Health and Human Services suspending the right to introduce certain persons into the United States" as arbitrary and capricious in violation of the APA. ADD-5.

V. FEDERAL DEFENDANTS ABANDON THEIR DEFENSE OF THE TITLE 42 SYSTEM.

Within hours of the district court's order, Federal Respondents filed an Unopposed Emergency Motion for Temporary Stay. ADD-60 (ECF No. 166). They made clear that "[t]he requested temporary stay … is not for the pendency of appeal but rather for only a temporary period." ADD-59–60 (Minute Order, Nov. 16, 2022). Federal Respondents elaborated:

> DHS requires a short period of time to prepare for the transition from Title 42 to Title 8 processing, given the need to resolve resource and logistical issues that it was unable to address in advance without knowing precisely when currently operative August 2021 Title 42 order would end. Cf. 87 Fed. Reg. at 19,954–56 (setting effective date of Termination

> Order for 52 days from date of issuance to, among other things, provide DHS with additional time to ready operational plans). During this period of time, DHS will need to move additional resources to the border and coordinate with stakeholders, including non-governmental organizations and state and local governments, to help prepare for the transition to Title 8 processing. This transition period is critical to ensuring that DHS can continue to carry out its mission to secure the Nation's borders and to conduct its border operations in an orderly fashion.

Id. The district court granted this request "WITH GREAT RELUCTANCE," stating its order will take effect at midnight on December 21, 2022. ADD-59–60 (Minute Order, Nov. 16, 2022) (capitalization in original). It separately entered a Rule 54(b) judgment on the relevant APA claims on November 22, 2022. ADD-56–57.

Federal Respondents subsequently informed the Western District of Louisiana that "[o]nce the five-week stay expires ... CDC's Title 42 orders will be vacated, and there will thus be no legal authority for the government to continue to enforce the Title 42 policy." ADD-219. Accordingly, notwithstanding the *Louisiana* injunction, "on December 21, DHS will begin processing all noncitizens entering the United States pursuant to Title 8." *Id.*

Because it appeared Federal Defendants had effectively arranged to recreate the Termination Order enjoined in *Louisiana*, 15 States moved to intervene in the *Huisha-Huisha* action for purposes of appealing the district court's six-days-prior order on November 21, with four additional states joining the motion shortly thereafter. *See* D.Ct. Docs. 168, 171, 176. The motion to intervene was fully briefed on December 2. It was subsequently transferred to the D.C. Circuit by operation of law when Federal Defendants appealed on December 7, and the States renewed it in an abundance

of caution on the day the appeal was docketed (December 9). D. Ct. Doc. 180; ADD-58.

The States sought a stay pending appeal from the district court on December 9, which the district court denied the same day. *See* ADD-58. The States sought an emergency stay pending appeal from the D.C. Circuit the next business day, which that court denied on December 16, 2022. ADD-1–4. The D.C. Circuit denied the States' motion to intervene in the same order. *Id.*

LEGAL STANDARD

This Court will grant a stay of a district court's order, including in a case still pending before the court of appeals, if there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth*, 558 U.S. at 190; *San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers); *see also Nken v. Holder*, 556 U.S. 418, 427–29 (2009); *West Virginia v. EPA*, 136 S. Ct. 1000 (2016); *Anderson v. Loertscher*, 137 S. Ct. 2328 (2017).

REASONS FOR GRANTING THE STAY

All the requirements for a stay pending certiorari are satisfied here. This case warrants this Court's review given that this Court has already granted certiorari of equivalent questions presented in *Arizona v. San Francisco*. It further warrants review given the enormous national importance of this case and the crisis that a denial

of a stay is certain to cause here. Given the scale of that crisis, the States are also certain to suffer irreparable harm absent a stay as States "bear[] many of the consequences of unlawful immigration," *Arizona v. United States*, 567 U.S. at 397, and a different district court has already found that the States have Article III standing to challenge the Title 42 termination. *Louisiana*, 2022 WL 1604901, at *10–15.

I. THE STATES HAVE STANDING TO CHALLENGE THE TERMINATION OF THE TITLE 42 SYSTEM

The States will suffer cognizable injury from, and therefore have standing to challenge, the termination of the Title 42 System for four reasons.

First, States possess enforceable rights under the *Louisiana* injunction that the district court's order effectively destroys. *See*, *e.g.*, *NBA v. Minn. Pro. Basketball, Ltd. P'ship*, 56 F.3d 866, 871–72 (8th Cir. 1995) ("A preliminary injunction confers important rights."); *Institute of Cetacean Rsch. v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 949 (9th Cir. 2014).

Second, the *Louisiana* court has already concluded that the States had both Article III and prudential standing to challenge the termination of the Title 42 System. 2022 WL 1604901, at *10–*16. And the record here includes all of the *Louisiana* standing evidence, supplemented by additional evidence such as sworn admissions by Border Patrol Chief Raul Ortiz.

Third, DHS's prediction that termination of Title 42 "will result in an increase in daily border crossings and that this increase could be as large as a three-fold increase to 18,000 daily border crossings," *Louisiana*, 2022 WL 1604901, at *22, will predictably cause the States to spend additional funds on law enforcement, education,

and healthcare. *Department of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (standing may be premised on the "predictable effect of Government action on the decisions of third parties"); *Arizona*, 567 U.S. at 397 (states "bear[] many of the consequences of unlawful immigration"); *Texas v. Biden*, 20 F.4th 928, 969 (5th Cir. 2021), *overruled on other grounds* 142 S. Ct. 2528 (2022) (explaining that "if the total number of in-State aliens increases, the States will spend more on healthcare" (cleaned up)); *Texas v. Biden*, 10 F.4th 538, 548 (5th Cir. 2021) (additional "immigrants will certainly seek educational and healthcare services."). More recently, DHS estimated a similar increase from the imminent Title 42 termination, from 7,000 per day in illegal crossings to as much as 15,000 per day. ADD-114, 123-24, 128, 133-34.

Fourth, the States' standing is evaluated under a doubly relaxed standard, given that (1) the States are asserting injuries predicated on procedural claims, *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992), and (2) States are entitled to "special solicitude." *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

II. THERE IS A REASONABLE PROBABILITY THAT FOUR JUSTICES WILL CONSIDER THE ISSUE SUFFICIENTLY MERITORIOUS TO GRANT CERTIORARI

This case presents an opportunity for this Court to address the district court's misguided attempt to constrain CDC's authority to use Title 42 to protect public health in future pandemics. The consequences are not limited to the present dispute: the district court's ruling will hamstring emergency action by CDC to prevent aliens with communicable diseases from entering the United States in the future.

In addition to addressing the district court's manifest misapplication of the APA's arbitrary-and-capricious standard, this Court's review could halt the collusive

efforts of Plaintiffs and Federal Respondents to circumvent the APA and repeal the Title 42 System without notice and comment. Following the district court's opinion, Federal Respondents saw an opportunity to evade the *Louisiana* court's injunction by colluding with Plaintiffs to craft a resolution that terminated the Title 42 System (1) with the same delayed effective date as the enjoined Termination Order (2) and also like that order, foregoing compliance with the APA's notice and comment procedures. Federal Respondents' calculated and strategic surrender thus attempts to achieve through collusion what could not be obtained through lawful rulemaking.

This Court has disapproved such collusive activity in several other contexts and granted certiorari to permit intervention by States and State representatives. For instance, when DHS attempted to eliminate the Public Charge Rule through a calculated surrender, one Justice aptly observed that Federal Respondents had acted "with military precision to effect the removal of the issue from [the Supreme Court's] docket and to sidestep notice-and-comment rulemaking" for repealing the unwanted rule. Transcript at 45-46, *San Francisco*, (Alito, J.); *see also id.* at 48 ("The real issue to me is the evasion of notice-and-comment. And, I mean, basically, the government bought itself a bunch of time [through the acquiesced-in vacatur] where the rule was not in effect.") (Kagan, J.). Members of this Court have likewise disapproved of Federal Respondents' "tactic of 'rulemaking-by-collective-acquiescence,'" observing that such tactics seek to "leverage[]" litigation losses "as a basis to immediately repeal the [unwanted] Rule, without using notice-and-comment procedures." *San Francisco*, 142 S.Ct. at 1928.

The same collusion and military precision are at work here: Federal Respondents have obtained through artifice an expedited revocation of the Title 42 System without complying with the APA. Absent this Court's intervention, Federal Respondents will continue their strategic maneuvering to avoid complying with the APA. Recognizing the importance of ensuring States have adequate opportunity to protect their interests, this Court has repeatedly granted certiorari to allow intervention by parties who would represent States' "weighty interest[s]" in matters such as this. *See, e.g.*, *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1011 (2022); *Berger v. N. Carolina State Conference of the NAACP*, 142 S. Ct. 2191, 2201 (2022) (recognizing that legislative leaders should be permitted to intervene where the governmental defendants had different interests and perspectives).

This is especially true where, as here, the States' interests "would no longer be protected" by the parties in the case. *Cameron*, 142 S. Ct. at 1012 (reversing lower court's denial of Kentucky Attorney General's motion to intervene after the governor declined to seek further judicial intervention to reverse an injunction against a state abortion law); *see also San Francisco*, 142 S. Ct. at 1928 (Roberts, C.J., concurring) (explaining the importance of intervention when the government seeks to circumvent the "usual and important requirement, under the [APA], that a regulation originally promulgated using notice and comment ([as the Title 42 System was]) may only be repealed through notice and comment"). And unlike *San Francisco*, this case presents no "mare's nest" of complicated issues. *Cf. San Francisco*, 142 S. Ct. at 1928 (Roberts, C.J., concurring) (dismissing as "improvidently granted" due to the "great many

issues" accompanying the fundamental question of whether the Government's actions complied with the APA).

Certiorari is also warranted because, as discussed below, the D.C. Circuit's denial of intervention here is directly contrary to this Court's decisions in *United Airlines* and *Cameron*. Review is thus appropriate given the "conflict[] with relevant decisions of this Court." S. Ct. R. 10(c). Similarly, by refusing to consider prejudice as part of its timeliness inquiry, the D.C. Circuit squarely split with numerous other circuits.

Finally, this Court's review is warranted given the enormous national importance of this case. It is not reasonably contestable that the failure to grant a stay will cause an unprecedented calamity at the southern border. Indeed, DHS and DOJ's own Deputy Attorney General confidently forecast this looming crisis. And DHS is seeking *billions* of dollars in emergency funding from Congress just to mitigate the fallout from it. ADD-66, 71-72, 78-79, 128-29.

The scale of the immigration effects at issue here are thus at least as great as those presented in *United States v. Texas*, No. 22-58, where this Court granted certiorari before judgment under the far-stricter Rule 11 standard. As a result, there is at least a reasonable probability that four Justices would conclude that this dispute satisfies the more-relaxed standards of Rule 10.

III. THERE IS A FAIR PROSPECT THAT A MAJORITY OF THE COURT WOULD VOTE TO REVERSE THE ORDER BELOW

A. The D.C. Circuit's Timeliness Holding Is Erroneous And Violates This Court's Precedents

This Court is also likely to reverse the D.C. Circuit's denial of the States'

motion to intervene on timeliness grounds. That is particularly true as the D.C. Circuit's decision flouts this Court's decisions in *United Airlines* and *Cameron*, and also splits with the decisions of its sister circuits. A reversal is thus likely for six reasons.

First, the D.C. Circuit ignored that the States' motion to intervene was not a typical plenary motion to intervene in all district court proceedings, but rather a request to intervene for purposes of *appeal* after an adverse decision. This Court has been perfectly clear that a central consideration in evaluating the timeliness of such a motion to intervene for appellate purposes is whether the "motion [was filed] within the time period in which the named plaintiffs could have taken an appeal." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 396 (1977). Indeed, this Court's own summary of its holding makes clear its critical importance. *Id.* at 395–96.

Other courts of appeals have properly recognized this factor as the crux of the timeliness inquiry, or even outright dispositive: "as the motion to intervene is filed within the time within which the named plaintiffs could have taken an appeal, *the motion is timely as a matter of law*." *Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317, 1320 (9th Cir. 1997) (emphasis added) (citing *United Airlines*, 432 U.S. at 394–95) (motion filed 29 days after judgment was timely); *accord Ross v. Marshall*, 426 F.3d 745, 755 (5th Cir. 2005) (recognizing centrality of within-time-to-appeal inquiry) (citing *United Airlines*); *Larson v. JPMorgan Chase & Co.*, 530 F.3d 578, 583 (7th Cir. 2008) (recognizing "*general* rule" of timeliness established by *United Airlines*).

Regardless of whether the within-the-time-to-take-an-appeal factor is dispositive or merely very important, the one thing it cannot be, post-*United Airlines*, is

completely irrelevant. And that is how the D.C. Circuit treated it, *never* considering it *whatsoever*. ADD-1–4. That approach both violates this Court's *United Airlines* decision and squarely splits with the decisions of several other circuits cited above.

The D.C. Circuit's failure to address this point is perhaps unsurprising given Federal Respondents' abject refusal to do so. Not *once* in any of their *three briefs* opposing intervention below did Federal Respondents ever deign to address *United Airlines*: Not in its initial November 30 18-page opposition brief, D. Ct. Doc. 174, not in its supplemental 9-page December 13 filing, D. Ct. Doc. 185, and not in its D.C. Circuit 22-page opposition brief on December 15—even though the States cited this precise holding of *United Airlines* at *every stage* and in *every relevant filing* below.[3] Surely, if Existing Parties had even a minimally persuasive response to this controlling holding of this Court, they would have provided it previously. Their silence concedes the D.C. Circuit's manifest error.

Perhaps the D.C. Circuit could have concluded that this essential criterion was *outweighed* by other factors (though only by splitting with the Ninth Circuit). But it did no such thing, instead ignoring this Court's central holding entirely. That approach squarely violates *United Airlines*, and is unlikely to be affirmed by this Court.

Second, the D.C. Circuit's reasoning that the States should have intervened *before* Federal Respondents stopped meaningful defense of the Title 42 System, ADD-2–3—at a time when no party has identified *any* deficiencies in the vigorousness of

[3] Plaintiffs' filings were only slightly less evasive. While they at least acknowledged *United Airlines*, they gave it only cursory treatment and within-the-time-to-appeal holding. *See* D. Ct. Doc. 175 at 18-19; Plaintiffs' D.C. Cir. Intervention Opp. at 20.

Federal Respondents' defense—violates this Court's decisions in *United Airlines* and *Cameron*, as well as numerous lower court decisions consistent with those precedents.

United Airlines makes clear that a party seeking to intervene for purposes of appeal need not do so until it becomes apparent their "interests … *would no longer be protected* by" existing parties—not when they could have suspected the existing parties *might* sell them out. 432 U.S. at 394 (emphasis added). *United Airlines* thus requires some affirmative indication that existing parties are "no longer … protect[ing]" their interests, *id.*, not that they *might not* do so in the future.

Cameron is even more closely on point here. There, as here, existing parties were fully defending the challenged law at issue and had not yet taken *any* steps inconsistent with robust defense. 142 S. Ct. at 1008, 1013. Then, when those parties actually stopped defending the law at issue, the attorney general moved to intervene to pick up the dropped defense and existing parties objected on timeliness grounds. *Id.* at 1012. To no avail: "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*." *Id.* (emphasis added).

The D.C. Circuit's timeliness reasoning flouts both of these holdings. It first reasoned that States should have intervened at a time when Federal Respondents were still fully defending the Title 42 System simply because the States were aware that "the federal government's stake in perpetuating Title 42 *differed* from theirs." ADD-3 (emphasis added). But the States having different stakes from the Federal Government—which is virtually omnipresent given our federal system of dual

sovereigns—is not what triggers the States' "need to seek intervention"; only the Federal Government "ceas[ing] defen[se of] the [challenged] law" did. *Cameron*, 142 S. Ct. at 1012. The D.C. Circuit's holding that the States had a need to intervene earlier defies *Cameron*'s holding.

The court of appeals similarly violated this Court's exhortation that "the timeliness of [a party's] motion should be *assessed in relation to [the] point in time*" in which existing parties "ceased defending the [challenged] law." *Id.* There is no dispute that this did not occur any earlier than November 15. No party or court has identified *any* inadequacies in the robustness of Federal Respondents' defense of the Title 42 system in the district court prior to that court's November 15 decision. But on that day—and within mere hours of the decision (in what likely was pre-arranged privately with plaintiffs previously)—Federal Respondents abandoned meaningful defense of the Title 42 System and instead agreed collusively with Plaintiffs to recreate the enjoined Termination Order. In doing so, they refashioned the three essential features of that enjoined order: (1) terminating the Title 42 system, (2) doing so with a delayed effective date to give DHS time to prepare, and (3) effectuating that termination *without* notice-and-comment compliance. *Compare* 87 Fed. Reg. at 19,941, 19,956 *with* ADD-59–60 (Minute Order, Nov. 16, 2022). Only when Federal Respondents sprung "this tactic of 'rulemaking-by-collective-acquiescence,'" *San Francisco*, 142 S. Ct. at 1928, did their meaningful defense of the rule cease and the States' "need

to seek intervention … arise." *Cameron*, 142 S. Ct. at 1012. And the States moved to intervene a mere six days after that, which is plainly timely.[4]

The D.C. Circuit appears to believe that the need to intervene was triggered earlier, given the "divergence in interests" and the Federal Government's "intent to drop the Title 42 policy." ADD-3–4. *Cameron* answers this reasoning too: there was no doubt in that case that "Governor Beshear ran on a pro-choice platform and had repeatedly withdrawn from the defense of abortion restrictions when serving as Attorney General." 142 S. Ct. at 1013 (cleaned up). But despite that well-known antipathy to abortion restrictions, the attorney general's motion was still timely. *Id.* at 1012–13. And the so-called "warning signs" that, according to the D.C. Circuit, should have put the States on notice here were far less overt than those in *Cameron*. For instance, unlike then-Attorney-General Beshear, until their about-face after judgment, Federal Respondents had never previously "withdrawn from the defense of" the Title 42 System. *Id.* at 1013. In further contrast, the Administration's approach to the Title 42 System has been characterized more by tortured ambivalence and contradictions, rather than the history of unmitigated hostility and pattern of non-defense that was present in *Cameron*. The timeliness of the States' actions should therefore be measured from when Federal Respondents announced their abdication in *this*

[4] Indeed, Federal Respondents paradoxically argue that the are *still* defending the Title 42 System such that they continue to adequately represent the States' interests. *See* U.S. D.C. Cir. Response at 10-14. That argument is specious: despite acknowledging the errors in the district court's holdings and the severe harms that those errors would occasion, Federal Respondents have both (1) sought to ensure that such errors are *never* corrected and those resulting harms *never* prevented by announcing their intend to hold that appeal in indefinite abeyance and (2) opposed the States' request for a stay pending appeal without *ever* denying that all four stay factors weighed in favor of such a stay. *Id.* at 7-8, 20-21.

litigation, not merely based on earlier political musings or their prior unlawful attempt to terminate administratively the Title 42 System that was enjoined by another court. *See Cameron*, 142 S. Ct. at 1012; *United Airlines*, 432 U.S. at 390, 394.

Third, the D.C. Circuit's timeliness reasoning is premised upon a basic factual error. That court reasoned that "the States have asked this court to allow them to intervene *for the first time* in this litigation when the case is *already on appeal*." ADD-2 (emphasis added). Not so. The States' motion to intervene was filed in the district court on November 21, D. Ct. Doc. 168—a full *16 days* before Federal Respondents filed their notice of appeal. D. Ct. Doc. 180. This error undermines the D.C. Circuit's timeliness holding: if the court of appeals was confused as to the basic fact of *when* the request to intervene was made, how could it have evaluated timeliness properly?[5]

Fourth, the D.C. Circuit failed to consider the issue of prejudice in ascertaining timeliness, as several other circuits do. *See*, *e.g.*, *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994) (the "requirement of timeliness is … a guard against prejudicing the original parties…"); *Banco Popular de Puerto Rico v. Greenblatt*, 964 F.2d 1227, 1232 (1st Cir. 1992) (prejudice is "a vital element of a timeliness inquiry."); *Alt v. EPA*, 758 F.3d 588, 591 (4th Cir. 2014); *Stupak-Thrall v. Glickman*, 226 F.3d 467, 473 (6th Cir. 2000); *In re Fine Paper Antitrust Litig.*, 695 F.2d 494, 500 (3d Cir. 1982).

The court of appeals failed to analyze prejudice entirely, however. The only potential "prejudice" to Plaintiffs and Federal Respondents is that this dispute would

[5] To be sure, the States did, in an abundance of caution, file a short notice *renewing* their motion to intervene in the court of appeals on December 9 (the day the appeal was docketed) if that court believed the original motion was not already pending there. ADD-220-25. But it would have been impossible to do otherwise: One cannot possibly seek to intervene *in* an appeal until the case is "already on appeal."

be resolved *on the merits* rather than through their collusive machinations. *Cf., e.g.*, *Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007) (permitting intervention where it would not "create delay by injecting new issues into the litigation, but instead [would] ensure that [the court's] determination of an already existing issue is not insulated from review simply due to the posture of the parties." (quotation marks omitted)). That is not cognizable "prejudice," particularly as it is "entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of … mere technicalities." *Foman v. Davis*, 371 U.S. 178, 181 (1962). Nor should outright collusion be given any more respect than "mere technicalities."

Fifth, the D.C. Circuit's standard operates as a quintessential Catch-22. If the States had tried to intervene earlier, Existing Parties would have opposed because Federal Defendants were then vigorously defending the Title 42 System. Indeed, in similar situations, federal entities routinely oppose intervention on the grounds that the intervenors' interests are adequately represented by the federal defense. *See, e.g.*, *Entergy Gulf States La. L.L.C. v. EPA*, 817 F.3d 198, 203 (5th Cir. 2016); *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 315–16 (D.C. Cir. 2015). This is not mere speculation: Texas tried to intervene earlier in this case, and Existing Parties opposed intervention on that very basis.[6] And the D.C. Circuit denied Texas's

[6] Plaintiffs argued that the Defendants adequately represented Texas interests because the federal government had "swiftly appealed the District Court's preliminary injunction order, obtained an emergency stay of the injunction, and now seek[s] to vacate that injunction." ADD-215. The Federal Government likewise opposed intervention on similar grounds, also arguing that it adequately represented Texas's interests because "after the district court entered an injunction, the federal government appealed and sought a stay the very next day." ADD-207. Federal Defendants thus made clear that their seeking of a stay pending appeal was central to the analysis of whether they adequately represented the States' interests—which they refused to do this second time around, and instead actively opposed a request for such a stay when the States made it.

motion—arguably judicially estopping those parties from arguing that the States should have intervened earlier. Yet when Texas (and the 18 other States) sought to intervene after Federal Defendants "ceased defending the [challenged] law," the D.C. Circuit held it was too late. *Cameron*, 142 S.Ct. at 1012.

So when exactly was the right time to intervene? In truth, there almost certainly *never* was one. At best, the D.C. Circuit's answer was that the States should have kept filing *seriatim* motions to intervene early and often. But that is neither a workable system nor consistent with this Court's precedents.

Sixth, there is an enormous difference between knowing (1) what the eventual *administrative* objectives of an Administration are, and (2) whether it is willing to employ collusive, underhanded *litigation* tactics to achieve them. As to the former, it has been clear that the Biden Administration politically favored terminating Title 42 since February 2, 2021, when the President specifically directed CDC to consider "termination, rescission, or modification" of the Title 42 System. *See* Exec. Order 14,010, 86 Fed. Reg. 8267 (Feb. 2, 2021). By that standard, the States should have sought to intervene by March 2021—or more than 20 months before Federal Respondents would show the first hint of inadequate legal defense in November 2022.

Rule 24 does not require that the States become conspiracy theorists about the mere potential for inadequate defense in the future when the Federal Defendants are *actually engaged in vigorous defense* and the presumption of regularity is in full force. The resources of non-parties are best preserved for when there is objective evidence

of actual inadequate legal defense. Here, there was *none* prior to November 15 and no party or court has *ever* pointed to any.

B. The District Court Improperly Applied a "Least Restrictive Means" Standard to CDC's Agency Action

The foundation of the district court's decision was its conclusion that the Title 42 System violates the "least restrictive means" language in an earlier and separate 2017 Final Rule. The district court's application of the "least restrictive means" standard here, however, has no support in the text of either the 2017 Final Rule or the controlling statutes. Indeed, Congress actually entrusted CDC with particularly broad discretion to protect the populace from dangerous communicable diseases originating outside the United States. *See* 42 U.S.C. § 265 ("Section 265"). And in exercising this discretion, CDC was not required—by statute, regulation, precedent, policy, or otherwise—to consider the "least restrictive means" of inhibiting the spread of COVID-19 across the border. The district court's interpretation, if adopted, would thus eliminate the flexibility needed to address public health emergencies.

As an initial matter, the district court's "least restrictive means" requirement inverts the proper legal standard. Under the APA, "the government *does not have to show that it has adopted the least restrictive means* for bringing about its regulatory objective…" *National Cable & Telecomms. Ass'n v. FCC*, 555 F.3d 996, 1002 (D.C. Cir. 2009) (emphasis added) (applying same standard for commercial speech and APA claims). Indeed, federal courts "require the Government to employ the least restrictive means only when ... strict scrutiny applies." *United States v. Am. Libr. Ass'n, Inc.*, 539 U.S. 194, 207 n.3 (2003).

Imposing this stringent "least restrictive means" standard in the highly deferential public health context contradicts well-settled precedent. In the absence of a protected class or fundamental right, courts apply the well-known arbitrary and capricious standard, which generally requires only a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (cleaned up). This "highly deferential" standard bears no resemblance to the heightened scrutiny imposed by a "least restrictive means" standard. *See Zevallos v. Obama*, 793 F.3d 106, 112 (D.C. Cir. 2015). By applying the "least restrictive means" standard, the district court failed to offer the appropriate level of deference to the agency in evaluating its technical expertise and predictive judgments. *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009); *West Virginia v. EPA*, 362 F.3d 861, 871 (D.C. Cir. 2004).

To justify its departure from the appropriate framework, the District Court relied on the preambulatory "least restrictive means" language of the 2017 Final Rule, which amended CDC regulations "governing its domestic (interstate) and foreign quarantine regulations" following Ebola and other outbreaks. Control of Communicable Diseases, 82 Fed. Reg. 6,890-01, 6,890 (Jan. 19, 2017) (the "2017 Final Rule"). This reliance was improper for four reasons.

First, the "least restrictive means" standard has no application to the Title 42 System, which CDC issued under an interim rule adopted at the beginning of the pandemic on March 24, 2020 (the "March 2020 Interim Rule")—not the 2017 Final Rule. Importantly, the March 2020 Interim and September 2020 Final Rules do not

contain a "least restrictive means" standard. *See* 85 Fed. Reg. 56424-01 (Sept. 11, 2020) (effective Oct. 13, 2020); 85 Fed. Reg. 16,559-01 (Mar. 24, 2020); *see also* 42 C.F.R. § 71.40. In adopting the 2017 Final Rule, CDC voluntarily implemented a "least restrictive means" policy under the authority granted primarily by 42 U.S.C. § 264 ("Section 264").[7] This makes sense considering the constitutional interests that Section 264 and domestic (interstate) *quarantine* regulations implicate.

Section 264 is a statute of general application that vests CDC with the authority to make rules necessary to "prevent the introduction, transmission, or spread of communicable diseases from [1] foreign countries into the States ... or [2] from one State ... into any other State." *Id.* § 264(a). The statute conditionally permits *apprehension, detention*, or conditional release of individuals both from a foreign county *and* individuals already within the country. *Id.* § 264(b)–(d).

As explained in the 2017 Final Rule's preamble, CDC sought to use the "least restrictive means necessary to prevent the spread of communicable disease" in "implementing *quarantine, isolation*, or other public health measures *under this Final Rule*." 82 Fed. Reg. 6890-01, 6890 (emphasis added). As discussed, the preamble expressly limits the "least restrictive means" standard to the measures under the 2017 Final Rule, which does not discuss summary expulsion of persons. Nor does CDC's use of "other public health measures" broaden the 2017 Final Rule's scope beyond

[7] Although CDC identified Section 265 as additional authority for issuing the 2017 Final Rule, this rule did not contemplate the expulsion of persons from foreign countries. Rather, it limited its suspension of entry to "animals, articles, or things from designated foreign countries and places" and explicitly noted that despite receiving comments related to immigration policy and regulations, "[t]hese comments are beyond the scope of this final rule and have not been included in this discussion." 82 Fed. Reg. at 6893, 6929.

measures involving "apprehension, detention, or conditional release." Indeed, under the *ejusdem generis* canon, "other public health measures" must be read as embracing "objects similar in nature" to quarantine and isolation of individuals. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001). The March 2020 Interim the September 2020 Final Rules do not address quarantine and isolation of individuals within the U.S., but rather *suspending entry* of migrants into the United States.

This distinction is made clear by the differing statutory sources of authority. The principal source of authority for the 2017 Final Rule was Section 264, which authorizes regulations regarding "apprehension" and "detention." The 2017 Final Rule cites Section 265 only five times, whereas it cites Section 264 *forty* times.

The 2017 Final Rule is thus about the quarantine and isolation of individuals, not about suspension of entry of migrants. Conversely, the *only* purpose of the 2020 Final Rule is "suspension of entries" under Section 265. The former addresses different concerns and, given the interests at stake, demands a more-tailored approach. CDC's use of a "least restrictive means" standard is, thus, appropriate in the more restrictive context of quarantine and isolation because such measures often implicate liberty interests protected by the Due Process Clause, triggering strict scrutiny. *See, e.g.*, 82 Fed. Reg. at 6900 (discussing due process concerns).

The March 2020 Interim Rule and the September 2020 Final Rule, in contrast, were adopted *only* under Section 265, which contemplates suspending "the introduction of persons" (*i.e.*, expulsion) of noncitizens at the border. *See Huisha-Huisha II*, 27 F.4th at 728–29. This involves a much different process than "apprehension,

detention, or conditional release" because the constitutional issues at play under the federal government's "right to exclude" imposes a different balance. *See id.* at 728 ("In the immigration context, the law often allows policies that "'would be unacceptable if applied to citizens.'" (*citing Reno v. Flores*, 507 U.S. 292, 305–06 (1993)).

Further, the 2017 Final Rule plainly limits its scope to only public health measures issued under that rule. It did not—and could not—have served as the basis for the Title 42 System. The Preamble of the 2017 Final Rule states only that CDC "will seek to use the least restrictive means necessary to prevent the spread of communicable disease" in "implementing quarantine, isolation, or other public health measures *under this Final Rule*." 82 Fed. Reg. at 6,890 (emphasis added). An isolated policy determination in the Preamble of a separate rule does not establish a blanket policy that apples to every health measure designed to prevent the spread of communicable disease. Thus, even if the Preamble is relevant to the 2017 Final Rule, the Title 42 System falls outside the Preamble's purview and does not bind CDC to using the "least restrictive means" to accomplish its regulatory objective.

Second, even if the 2017 Final Rule did apply to the Title 42 System, the preamble alone is insufficient to bind CDC to a given policy. Indeed, "[t]he preamble to a rule is not more binding than a preamble to a statute. 'A preamble ... is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers.'" *National Wildlife Fed'n v. EPA*, 286 F.3d 554, 569 (D.C. Cir. 2002); *accord Mejia-Velasquez v. Garland*, 26 F.4th 193, 202 (4th Cir. 2022); *Peabody Twentymile Mining, LLC v. Sec'y of Lab.*, 931 F.3d 992, 998 (10th Cir. 2019).

Third, the 2017 Final Rule preamble itself makes clear that a "least restrictive means" standard is not even controlling as to the 2017 Final Rule *itself*. The preamble explains that "an isolation or quarantine order is typically issued in time-sensitive situations where because of the exigent circumstances surrounding the risk of communicable disease spread *it is not immediately possible to explore all available less restrictive means*." 82 Fed. Reg. at 6,914 (emphasis added). The 2017 Final Rule makes clear that CDC is under *no* obligation to engage in a "least restrictive means" analysis in the midst of a health emergency.

Thus, the 2017 Final Rule provides that CDC should examine "whether *less* restrictive alternatives would adequately serve to protect the public health," but only in very specific circumstances, and only *after* an order has been issued. *Id.* at 6,972–73, 6977 (emphasis added) (adding 42 C.F.R. §§ 70.15(c), 70.16(j), (l), and 71.38(c), which provide for after-the-fact review of whether "less restrictive alternatives would adequately serve to protect the public health.").

The 2017 Final Rule only calls for such reviews *after* a "quarantine, isolation, or conditional release order" has been issued, and only as it relates to "an individual," and not with regard to generalized determinations about public health. *See* 42 C.F.R. §§ 70.15(a), (c), 70.16(a), (j); 71.38(a), (c).

Fourth, the March 2020 Interim Rule and September 2020 Final Rule were clear that they *amended* prior standards that CDC adopted under Section 265, which previously did not permit CDC to prohibit the exclusion of "persons." *See* 85 Fed. Reg. at 16,560 (CDC is "amending the regulations that implement section 362 of the Public

Health Service (PHS) Act, 42 U.S.C. 265, as part of its response to Coronavirus Disease 2019 (COVID-19)" and noting that "[c]urrent regulations ... only address suspension of the introduction of property into the United States and the procedures to quarantine or isolate persons."). The March 2020 Interim Rule thus explicitly acknowledged it was *changing* policy and provided adequate reasons for doing so. *Id.* (explaining that rule is a new "regulatory mechanism to ... suspend the introduction of persons who would otherwise pose a serious danger of introduction of COVID-19 into the United States."). The district court's conclusion that this change was unexplained, ADD-26–33, is simply incorrect.

C. The District Court Improperly Determined that CDC Did Not Adequately Consider Alternatives to the Title 42 System

As detailed in Federal Defendants' briefs below, (ADD-148–193), the rules at issue were not arbitrary and capricious, and CDC adequately considered alternatives. The district court mischaracterizes this case as presenting only two competing factors to consider: harm done to aliens by returning them to their home country versus the spread of COVID-19 in the United States. But CDC considered a range of other important factors that the district court completely ignored. Specifically, CDC's justification for the Title 42 system was based also on under-resourced local border health care facilities that would be severely stressed and on the heightened risk of injury and death to aliens themselves. *See*, *e.g.*, 86 Fed. Reg. at 42,833–42,834, 42,837. Neither the district court nor Plaintiffs even considered these other factors or explain how, in light of them, CDC's expert reasoning was arbitrary and capricious.

Indeed, in the August 2021 Order, CDC considered multiple appropriate

alternatives in depth, including "[t]he availability of testing, vaccination, and other mitigation measures at migrant holding facilities" but concluded they were not viable because of "[s]pace constraints," "increase[d] community transmission rates," "[o]n-site COVID-19 testing ... is very limited," and because facilities "are ill-equipped to manage an outbreak and ... are heavily reliant on local healthcare systems ... [which] could strain local or regional healthcare resources ... [and] increase the pressure on the U.S. healthcare system and supply chain…" 86 Fed. Reg. at 42,833, 42, 837.

The district court agreed that CDC adequately considered the "possibility of permitting self-quarantining, but ultimately concluded that lack of resources made it impractical." ADD-37–38. Confusingly, however, the district court did not apply this (correct) analysis to other factors that CDC carefully evaluated and weighed under its statutory mandate. The district court instead disagreed with CDC's *conclusions* concerning the relevant factors and, in doing so, "substitute[d] [its] judgment for the agency's." *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1311 (D.C. Cir. 2010).

The district court first suggested that CDC should have considered the possibility of outdoor processing. ADD-38–40. But not only was outdoor processing unavailable in August 2021, this alternative was also not raised in comments. ADD-180; ADD-39 (citing D. Ct. Doc. 154 at 9 (suggesting only that processing of migrants might be conducted "in the field," without further elaboration or explanation)). The district court, therefore, should have "decline[d] to consider this claim … [as] waived.'" *National Min. Ass'n v. Dep't of Lab.*, 292 F.3d 849, 874 (D.C. Cir. 2002) (citation omitted)). Further, as the Federal Defendants rightfully noted, this potential

option originated from "extra-record statements from Secretary Mayorkas in April 2022," ADD-180, which confirm nothing more than those measures were not in place in August 2021 and could not serve as a viable alternative.

The district court's suggestion that Title 8 could serve as an alternative is similarly flawed. Importantly, the August 2021 Order expressly acknowledges that processing under Title 42 systems "takes roughly 15 minutes and generally happens outdoors," whereas processing under Title 8 takes up to "two hours per person," and presents substantial logistical challenges in view of the surge of noncitizens at the border and the resulting "serious risk of increased COVID-19 transmission in CBP facilities." 86 Fed. Reg. at 42,835, 42,836 & n.78. These key differences between Title 8 and Title 42 demonstrate why outdoor processing was simply not a viable option.

Next, the district court improperly faulted CDC for not considering "the development and disbursal of COVID-19 vaccines, on-site rapid antigen tests, and effective therapeutics." ADD-40–43. Contrary to this finding, however, the August 2021 Order specifically considered vaccines and other mitigation measures as well as other important factors, including the manner of COVID-19 transmission, emerging variants, the risks specific to certain types of facilities or congregate setting, the availability of testing, and the impact on U.S. communities and healthcare resources. *See, e.g.*, 86 Fed. Reg. at 42,831. But considering the substantial public health interests at stake, DHS's ability to manage and process covered noncitizens in border facilities, the rapid spread of the highly transmissible Delta variant, and data showing that arriving migrants "have markedly lower vaccination rates," CDC determined that vaccination

was not a viable alternative. *Id.* at 42,834.

CDC reasonably concluded that these circumstances "present[ed] a heightened risk of morbidity and mortality to this population due to the congregate holding facilities at the border" and that "[o]utbreaks in these settings increase the serious danger of further introduction, transmission, and spread of COVID-19." *Id*. Processing aliens under Title 8, as the district court suggested, would require gathering large groups of unvaccinated migrants in close contact for extended periods of time before being fully vaccinated (a process requiring weeks).

The district court also erred in reasoning that CDC did not consider other treatments, such as monoclonal antibodies. CDC *did* consider treatment alternatives for migrants, but did so in the context of real-world resource limitations. And CDC considered the local availability of treatments and concluded that because DHS border facilities "are heavily reliant on local healthcare systems," and that "[a]lthough COVID-19-related healthcare resources have substantially improved since the October Order was issued, emerging variants and the potential for a future vaccine-resistant variant mean the possible impacts on U.S. communities and local healthcare resources in the event of a COVID-19 outbreak at CBP facilities cannot be ignored.…. Reliance on healthcare resources in border and destination communities may increase the pressure on the U.S. healthcare system and supply chain during the current public health emergency." *Id.* at 42,837. CDC considered *all* resources available to treat covered aliens and reasonably concluded that the U.S. health care system could not handle the strain.

Finally, the district court erroneously concluded CDC failed to consider "the consequences of suspending immigration proceedings for all covered noncitizens" that were subject to expulsion under the Title 42 System. ADD-33–36. CDC *did* consider such hardships. Because CDC recognized the Title 42 System would have a dramatic impact on normal immigration proceedings, it exempted unaccompanied children and created other case-by-case exceptions based on the totality of the circumstances. ADD-190; 86 Fed. Reg. at 42,829. Moreover, one of the principal justifications for the August 2021 Order was to avoid harm to aliens, specifically considering how best to avoid "heightened risk of morbidity and mortality" of migrants. *Id.* at 42,834. The district court wrongly focused only on the possible harm of "suspend[ing] the codified procedural and substantive rights of noncitizens seeking safe harbor." ADD-35. Yet, the D.C. Circuit had already held that "[f]or aliens covered by a valid § 265 order," they lack any lawful "path to asylum or other legal status." *Huisha-Huisha II*, 27 F.4th at 722. CDC thus did not need to consider codified procedural and substantive rights of noncitizens because the "Executive ha[d] eliminated" them. *Id.*

For all these reasons, there is a fair prospect that a majority of this Court will vote to reverse the district court's judgment below.

IV. APPLICANTS WILL SUFFER IRREPARABLE HARM ABSENT A STAY

As the *Louisiana* court already found, the termination of the Title 42 System will cause the States irreparable harm. *Louisiana*, 2022 WL 1604901, at *4–9, 22. In particular, the greatly increased number of migrants resulting from this termination will necessarily increase the States' law enforcement, education, and healthcare costs. *Id.*; *see also Texas v. Biden*, 589 F. Supp. 3d 595, 611–12 (N.D. Tex. 2022).

Indeed, DHS has predicted that the termination of Title 42 will result "in an increase in daily border crossings" that "could be as large as a three-fold increase to 18,000 daily border crossings." *Louisiana*, 2022 WL 1604901, at *22; *accord supra* at 3.

Because of sovereign immunity, the States cannot recover these costs from the Federal Defendants. And, further to this point, it is well-established that irrecoverable injuries are irreparable injuries. *See East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 677 (9th Cir. 2021); *Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994); *Temple Univ. v. White*, 941 F.2d 201, 214–15 (3d Cir. 1991).

The likelihood of irreparable harm to the States is underscored by the fact that DHS has requested *$3-4 billion* in emergency funding to deal with the imminent calamity that the district court's decision will occasion. *Supra* at 3, 18. But this financial burden will not be borne by DHS alone: As this Court has recognized, States "bear[] many of the consequences of unlawful immigration," *Arizona v. United States*, 567 U.S. at 397, including financial ones, *see, e.g.*, *Texas v. United States*, 809 F.3d 134, 155 (5th Cir. 2015) (State would incur significant costs in issuing driver's licenses to noncitizens); *Texas v. Biden*, 589 F. Supp. 3d at 611–12 (finding significant costs incurred in providing State programs to noncitizens).

Indeed, there has already been a surge of migrants approaching the border in anticipation of the December 21 stay expiration, underscoring the States' harms. *See* ADD-81–117. This surge in immigration will be at least as substantial to the States as the harms outlined in *United States v. Texas*, No. 22-58 (July 21, 2022), in which

this Court granted certiorari before judgment in light of the strain on the Department of Homeland Security's finite resources to address national security and public safety issues.

The States will also suffer sovereign injuries from the termination of the Title 42 System and consequent surge in illegal entries. The "defining characteristic of sovereignty" is "the power to exclude from the sovereign's territory people who have no right to be there." *Arizona v. United States*, 567 U.S. at 417 (Scalia, J., concurring in part and dissenting in part). The States will experience substantial injuries to this "defining characteristic of sovereignty" as a consequence of district court's decision because, as DHS has projected, the numbers of migrants who attempt to cross illegally into the United States and the States will increase greatly.[8]

That a stay is warranted here is further supported by Federal Respondents' refusal to deny below that *all* of the standards for a stay pending appeal were satisfied in this case—instead only contending that the States' stay request should be denied because Federal Defendants were not seeking one and the States putatively were not proper parties. *See* U.S. D.C. Cir. Response at 20-21.

[8] Granting a stay will not cause meaningful harm to Federal Respondents or Plaintiffs. As to the former, it will actually save them billions of dollars and avoid a crisis that they confidently predict would otherwise happen. As to the latter, the prior injunction against deporting Plaintiffs to places where could be tortured or persecuted remains in place. *See Huisha-Huisha II*, 27 F.4th at 731-35; *cf Lucas v. Townsend*, 486 U. S. 1301, 1304 (1988) ("In close cases, the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.") (Kennedy, J., in chambers).

V. THIS COURT SHOULD ISSUE AN IMMEDIATE ADMINISTRATIVE STAY

For the reasons set forth above, and because the termination of the Title 42 System is set to take effect only 36 hours after this filing, this Court should issue an immediate administrative stay while it considers this application. Such a stay is particularly appropriate given the enormous harms that would otherwise be inflicted upon the States and further because there is not the slightest indication that DHS could ever meaningfully remedy those harms after they have occurred.

VI. THIS COURT SHOULD CONSIDER GRANTING CERTIORARI NOW

Due to the tremendous national importance of the issues presented and the fast-moving nature of the case, this Court may also wish to deem this application to be a petition for certiorari on the intervention questions, grant review, and expedite briefing and argument so that this case can be heard this Term. The States would support such a grant of certiorari.

Given this Administration's demonstrated and pervasive propensity to employ "this tactic of 'rulemaking-by-collective-acquiescence,'" this Court should resolve the question of whether outside parties, such as States, can intervene to attempt to thwart such collusive tactics sooner rather than later. *Arizona v. San Francisco*, 142 S.Ct. at 1928. Resolving these issues this Term would provide important salutary benefits, as well as serving as a potential deterrent to future collusive tactics.

CONCLUSION

For the foregoing reasons, the emergency application for stay of the district court's vacatur and injunction should be granted.

Dated: December 19, 2022

Respectfully submitted,

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