

No. 22-592

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**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*

**BRIEF OF *AMICUS CURIAE* THE CATO  
INSTITUTE IN SUPPORT OF RESPONDENTS**

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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward those ends, Cato conducts conferences, publishes books and studies, and issues the annual Cato Supreme Court Review. The Cato Institute and its scholars have significant experience studying immigration law and policy in the United States. The Cato Institute believes it can assist the Court by providing evidence relevant to the States' intervention request.

### SUMMARY OF ARGUMENT

Since March 2020, the Department of Homeland Security (DHS) has relied upon a Centers for Disease Control and Prevention order under 42 U.S.C. § 265 as the basis for expelling people who have entered the United States without permission. This lawsuit challenges that policy, which the parties refer to as the “Title 42 Policy” or the “Title 42 System.”

Now nineteen States seek to intervene in the case, claiming that the end of the Title 42 Policy will be the beginning of an illegal-migrant influx. But the numbers tell a different story—one in which the Policy itself is the problem, not the solution.

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<sup>1</sup> Rule 37 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.



The Policy sprang to life in extraordinary times, for an extraordinary purpose: to help combat the COVID-19 pandemic. It was never meant to last forever; after just three years, it is a “relic.”<sup>2</sup>

Now that COVID-19 is no longer the emergency it once was and public health priorities have returned to normal, the Title 42 Policy’s limitations have become apparent. The Policy eliminated traditional penalties for entering the U.S. illegally, which in turn encouraged large numbers of migrants to cross the nation’s border without authorization—and to do so more than once. That change in incentives led to more attempts, more *repeat* attempts, and more *successful* attempts at crossing the border illegally.

The States see things differently. In their view, rescinding the Title 42 Policy could mean that illegal migration continues its upward trajectory. But an important piece of evidence on which they rely—what they call an “estimate” from the DHS—does not support their assertion. First, it is not an estimate at all; it was created to account for all possible outcomes, not just likely ones. Second, it measures future migration in days rather than units that better account for long-term effects, such as months or years. And finally, DHS created the document just before implementing a series of immigration initiatives that have successfully reduced illegal entries into the country among various demographics. These flaws in the DHS “estimate” counsel against relying on it as indicative of anything in this case.

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<sup>2</sup> *Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 734–35 (D.C. Cir. 2022).

Instead, the evidence suggests the opposite of what the States fear. Rescinding the Policy would replace the current, lenient punishment for unauthorized entry with more severe penalties under Title 8. And those increased penalties would likely decrease covert crossings. In short, rescission of the Policy would likely *promote* the interests the States say are most at stake in this appeal.

The States, then, have not met their burden on the intervention question. The Court should look beyond the States' rhetoric to what the numbers say and should deny the intervention request.

## ARGUMENT

### I. THE TITLE 42 POLICY CONTAINS TRADE-OFFS THAT UNDERMINE THE STATES' ARGUMENTS.

#### A. The Title 42 Policy eliminated most penalties for illegal crossings.

Under Title 8, those who enter the United States illegally can face harsh consequences. The government can detain them. 8 U.S.C. § 1226. It can criminally prosecute them. 8 U.S.C. § 1325(a). If deemed ineligible for relief, it can send them back to their countries or cities of origin. 8 U.S.C. § 1231(b)(2)(B). And if they reenter, they can be convicted of a felony. 8 U.S.C. § 1326(a).

By contrast, the Title 42 Policy's only penalty is the inability to request relief from removal after arrest. This penalty deters crossers who seek that relief, but for those who want to evade detection, it is not a meaningful deterrent.

The Policy’s practical effects are no better. It requires “the rapid expulsion” of those caught crossing the border without authorization.<sup>3</sup> So the government sends individuals entering from Mexico back across the border, not to their countries or cities of origin.<sup>4</sup> That move shrinks the distance one must travel to reenter the country. The time one must wait to try again has also decreased. Under Title 8 the removal process usually took days, weeks, months, or longer (during which entrants were often detained),<sup>5</sup> but now entrants often find themselves back in Mexico just hours after crossing the border.<sup>6</sup>

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<sup>3</sup> Public Health Reassessment and Order Suspending the Right To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists, 86 Fed. Reg. 42828,39 (Aug. 5, 2021).

<sup>4</sup> *A Guide to Title 42 Expulsions at the Border*, AM. IMMIGR. COUNCIL (May 25, 2022), <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border>.

Julian Resendiz, *Study: Mexican nationals make up largest group crossing border illegally*, BORDER REP. (Mar. 18, 2021, 6:35 PM), <https://www.borderreport.com/immigration/study-mexican-nationals-make-up-largest-group-crossing-border-illegally/>.

<sup>5</sup> The time varied widely depending on the demographic and consequence applied. DEP’T HOMELAND SEC., ICE FACES BARRIERS IN TIMELY REPATRIATION OF DETAINED ALIENS (2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-03/OIG-19-28-Mar19.pdf>.

<sup>6</sup> Camilo Montoya-Galvez, *What is Title 42, the COVID border policy used to expel migrants?*, CBS NEWS (Jan 2, 2023, 1:58 PM), <https://www.cbsnews.com/news/title-42-immigration-border-biden-covid-19-cdc/>.

An example helps make the abstract concrete. Consider single adults from Mexico and the Northern Triangle of Central America (El Salvador, Honduras, and Guatemala). In 2019, the government processed about 87% of this demographic under Title 8.<sup>7</sup> About 40 percent of them were referred for criminal prosecution for entering or reentering illegally, triggering months or years of incarceration.<sup>8</sup> But since April 2020, 94% of these crossers have been subjected to Title 42 expulsions, meaning less than 6% received the more serious penalties that would have applied a year earlier.<sup>9</sup>

In short, the Title 42 Policy replaced severe consequences with more lenient ones and placed expelled crossers closer to a potential point of reentry.

**B. The Title 42 Policy encouraged illegal migrants to cross and cross again.**

The change in consequences has not gone unnoticed. One Mexican national subjected to a Title 42 expulsion told a journalist that crossing the border was “easier” because there was “no court and no deportations (because of) the coronavirus. Most deportations are to Juarez, not the places (the

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<sup>7</sup> These procedures are primarily expedited removal and reinstatement of a prior order of removal. Customs and Border Protection data obtained via Freedom of Information Act request.

<sup>8</sup> *Border Patrol Arrests*, TRAC IMMIGRATION (last visited Feb. 6, 2023), <https://trac.syr.edu/phptools/immigration/cbparrest/>.

<sup>9</sup> *Amicus* made these calculations based on data provided by U.S. Customs and Border Protection. U.S. CUSTOMS & BORDER PROT., NATIONWIDE ENCOUNTERS (last visited Feb. 6, 2023), <https://www.cbp.gov/document/stats/nationwide-encounters>.

migrants) come from.”<sup>10</sup> Another said that the U.S. government was “sending back people very quickly, in hours” and that “[t]he rumor is that chances of crossing undetected are higher, as you can try and try again without much consequences.”<sup>11</sup>

Smugglers even sell multi-attempt packages, charging between \$3,000 and \$5,000 for three tries at crossing into the U.S.<sup>12</sup>

And recidivism rates are high. For example, in the summer of 2020, of those who crossed the border and were quickly expelled to the Mexican state of Tamaulipas, 80% tried to cross the border again.<sup>13</sup>

Taken together, this data and these facts suggest that Title 42 Policy encourages migrants to repeatedly cross the border illegally and that the Policy makes attempts at illegal crossings easier than ever. Indeed, the DHS’s Office of Immigration Statistics has reached that very conclusion. In its Annual Flow Report for 2021, the Office noted that the U.S. Customs and Border Protection’s “use [of] streamlined Title 42 processing and the fact that large numbers of non-Mexicans were expelled to the border area rather than their home countries *appear to have encouraged*

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<sup>10</sup> Resendiz, *supra* note 4.

<sup>11</sup> Alicia A. Caldwell, *Illegal U.S.-Mexico Border Crossings Are Rising Again, Driven by Single Adults*, WALL ST. J. (Aug. 17, 2020, 7:50 AM), <https://www.wsj.com/articles/illegal-u-s-mexico-border-crossings-are-rising-again-driven-by-single-adults-11597665044>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

many noncitizens expelled under Title 42 to make repeated entry attempts.”<sup>14</sup>

**C. Since the Title 42 Policy took effect, illegal border crossings have quadrupled.**

Migrants appear to have acted in response to the unintended incentives the Policy provides. Consider the same demographic mentioned above: single adults from Mexico and the Northern Triangle of Central America. The government has applied the Title 42 Policy to them more often than to any other group: from April 2020 to December 2022, they accounted for 93% of all expulsions under the Policy, and the government expelled them 94% of the time.<sup>15</sup> But these high rates of expulsions did not lead to low rates of border crossing. Instead, *arrests have increased fourfold*, from an average of 22,266 per month in 2019 to 87,604 per month in 2022.

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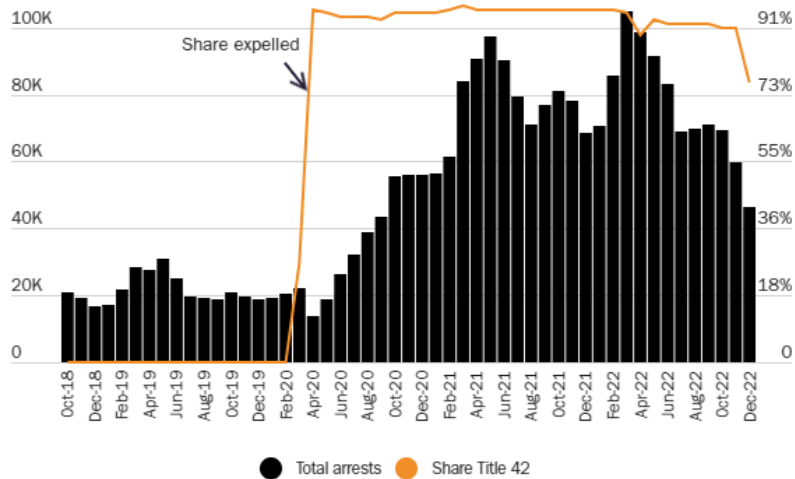
<sup>14</sup> SEAN LEONG, DEPT’ HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2021, ANNUAL FLOW REPORT 11 (Nov. 2022), [https://www.dhs.gov/sites/default/files/2022-12/2022\\_1114\\_plcy\\_enforcement\\_actions\\_fy2021.pdf](https://www.dhs.gov/sites/default/files/2022-12/2022_1114_plcy_enforcement_actions_fy2021.pdf) (emphasis added).

<sup>15</sup> *Amicus* made these calculations based on data provided by U.S. Customs and Border Protection. U.S. CUSTOMS & BORDER PROT., *supra* note 9.

Figure 1

**Does Title 42 deter single adults from the Northern Triangle and Mexico?**

Single adults from the Northern Triangle and Mexico, share expelled, Oct. 2018-Oct. 2022



Sources: Customs and Border Protection, "Nationwide Encounters," 2022.

Notes: "Single adults" = adults traveling without their children. "N. Triangle" = Honduras, El Salvador, and Guatemala.

**D. Since the Title 42 Policy took effect, *repeat* illegal border crossings have more than doubled.**

Single adults subject to the Policy have had markedly higher rates of recidivism than those processed under Title 8. During fiscal year 2019, about 20% of single adults had previously been arrested in the prior 12 months. In fiscal year 2022, that number skyrocketed to nearly half.<sup>16</sup>

DHS's Office of Immigration Statistics conducted a similar review but limited its analysis to Mexican

<sup>16</sup> Customs and Border Protection data received via a Freedom of Information Act request.

nationals, “almost all of whom are expelled or repatriated to the border region.”<sup>17</sup> The Office found that “1-year re-encounter rates were still more than twice as high for Title 42 expulsions (54%) as for Title 8 repatriations (25%).”<sup>18</sup> And it concluded that “the streamlined processing per se contributed to higher than usual repeat entry attempts.”<sup>19</sup>

**E. Since the Title 42 Policy took effect, *successful* illegal border crossings have quadrupled and are on pace to quintuple.**

When Border Patrol observes an illegal entry attempt but the crosser evades arrest, it is called a “gotaway.” Over the last three years, “gotaways” have skyrocketed, from about 150,000 in fiscal year 2019 to about 600,000 in fiscal year 2022.<sup>20</sup> And after three months, fiscal year 2023 was on pace for more than 800,000.<sup>21</sup>

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<sup>17</sup>LEONG, *supra* note 14, at 11.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Adam Shaw & Ronn Blitzer, *Border officials count 599,000 ‘gotaway’ migrants in Fiscal Year 2022: source*, FOX NEWS (Oct. 2, 2022, 2:21 PM), <https://www.foxnews.com/politics/border-officials-count-599000-gotaway-migrants-fiscal-year-2022-source>; Stephen Dinan, *Border evasions top 150,000 in 2019*, WASH. TIMES (Oct. 29, 2019), <https://www.washingtontimes.com/news/2019/oct/29/border-evasions-top-150000-2019/>.

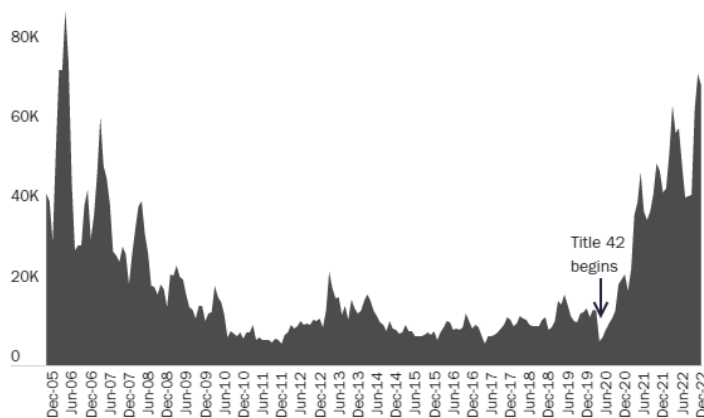
<sup>21</sup> Adam Shaw et al., *Over 73,000 ‘gotaways’ at southern border in November, highest ever recorded*, FOX NEWS (Dec. 1,



Figure 2

**Title 42 has led to more successful illegal crossings**

Border Patrol known "gotaways," Oct. 2005-Nov. 2022



Sources: Cato Institute, Customs and Border Protection, Freedom of Information Act request; Fox News, Dec. 2022; Fox News, Oct. 2022; Fox News, Jan. 2023 (annual data for 2022 interpolated to individual months based on single adult apprehensions).

The last time when entry statistics were at this level, Border Patrol had a policy known as “voluntary return,” which allowed Mexican border crossers to accept return to Mexico in exchange for no penalties.<sup>22</sup> Like the Title 42 Policy, the voluntary return policy was problematic—so problematic, in fact, that DHS labelled it the “least effective and efficient” deterrence policy of all policy options available to the Border

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2022, 2:10 PM), <https://www.foxnews.com/politics/73000-gotaways-southern-border-november-highest-ever-recorded>; Adam Shaw & Bill Melugin, *Border Patrol nabbed 17 people on FBI terror watch list at southern border in December*, FOX NEWS (Jan. 21, 2023, 4:23 PM), <https://www.foxnews.com/politics/border-patrol-nabbed-17-people-fbi-terror-watch-list-southern-border-december>.

<sup>22</sup> Border Patrol Arrests, *supra* note 8.

Patrol.<sup>23</sup> By adopting the same ineffective and inefficient strategy, the Title 42 Policy unsurprisingly produces similarly results.

## II. THE STATES’ “ESTIMATE” OF FUTURE CROSSINGS ABSENT THE TITLE 42 POLICY IS FLAWED.

The States contend that without the Policy, cross-border migration will increase. “Federal Respondents themselves have confidently predicted” the result, they say, because “DHS estimates that the effect of the district court’s judgment would be to increase the number of illegal crossings from around 7,000 per day to as much as 18,000 per day.”<sup>24</sup>

Not so. The 18,000-per-day figure comes from a DHS “planning document”<sup>25</sup> that does not contain—and does not purport to contain—an estimate of what would happen if the Title 42 Policy is rescinded.<sup>26</sup> DHS

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<sup>23</sup> U.S. CUSTOMS & BORDER PROT., SDC CONSEQUENCE DELIVERY SYSTEM (June 2021), [https://s3.documentcloud.org/documents/21199204/bems\\_cst\\_sct\\_cds\\_sdc.pdf](https://s3.documentcloud.org/documents/21199204/bems_cst_sct_cds_sdc.pdf); U.S. CUSTOMS & BORDER PROT., CONSEQUENCE DELIVERY SYSTEM (CDS): SAN DIEGO SECTOR BRIEFING (Mar. 2021), [https://www.documentcloud.org/documents/21199201-cds-sdc-q1-fy21\\_redacted](https://www.documentcloud.org/documents/21199201-cds-sdc-q1-fy21_redacted).

<sup>24</sup> Pet. Merits Br. at 9.

<sup>25</sup> Priscilla Alvarez et al., *Biden administration plans in May to end pandemic border restrictions blocking migrants, sources say*. CNN (Mar. 30, 2022, 6:25 PM), <https://www.cnn.com/2022/03/30/politics/immigration-title-42/index.html>.

<sup>26</sup> U.S. DEP’T HOMELAND SEC., SOUTHWEST BORDER STRATEGIC CONCEPT OF OPERATIONS (CONOP) (Mar. 28, 2022),

officials have commented on this, “caution[ing]” that the 18,000 figure “was simply to prepare for all possible outcomes, not projections.”<sup>27</sup> And the Secretary of Homeland Security has said directly that the department is “not projecting 18,000.”<sup>28</sup> The figure was for planning purposes only; it was never an estimate of likely outcomes.

This non-estimate suffers from two other flaws as well.

First, apprehensions-per-day are an unhelpful unit of measurement. Recall that if the Policy is rescinded, Title 8 will remain in force. So for the States’ claims of harm to carry weight, then, a shift back to Title 8 must result in a net increase in migrants entering the country illegally. DHS’s planning scenario, however, says nothing about the net effect that might accompany a reversion to Title 8. And a “daily” figure does nothing to demonstrate how such a return will affect crossings over more than a few days.

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<https://int.nyt.com/data/documenttools/sbcc-strategic-concept-of-operations/3cd606f92d600718/full.pdf>.

<sup>27</sup> Colleen Long et al., *AP sources: Asylum limits at border expected to end May 23*, AP NEWS (Mar. 30, 2022), <https://apnews.com/article/immigration-covid-health-mexico-united-states-e9c70f098e0ec0ed7d2403f7cce4a30f>.

<sup>28</sup> Mark Moore, *DHS expecting up to 18K migrants daily once Title 42 is lifted: Mayorkas*, N.Y. POST (May 1, 2022, 12:16 PM), <https://nypost.com/2022/05/01/dhs-expecting-18k-migrants-daily-once-title-42-lifted-mayorkas/>.

Second, DHS published the document in March 2022,<sup>29</sup> just before the Department launched several successful immigration initiatives. In April, DHS created the Ukrainian parole program, which reduced the number of Ukrainians encountered at the U.S.-Mexico border from over 21,000 in April to just 26 in December: a drop of 99.9%. In October, DHS created for Venezuelans a new parole program modeled on the Ukrainian program, after which the number of Venezuelans encountered at the U.S.-Mexico decreased by about 82%, and the absolute number of Venezuelan encounters across the entire country (including arrivals at airports under the parole program) fell from 34,000 in September to 14,000 in December.<sup>30</sup> And just last month, DHS expanded the Venezuelan parole program to Haitians, Nicaraguans, and Cubans,<sup>31</sup> after which encounters from Venezuela, Haiti, Nicaragua, and Cuba fell by more than 95

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<sup>29</sup> Catherine E. Shoichet, *We're expecting a big increase in migrants at the US-Mexico border. But this time is different*, CNN (Apr. 1, 2022, 12:47 PM), <https://www.cnn.com/2022/03/31/politics/border-title-42-whats-next-cec/index.html>.

<sup>30</sup> Author's calculations based on Nationwide Encounters, *see* U.S. CUSTOMS & BORDER PROT., *supra* note 9.

<sup>31</sup> Implementation of a Parole Process for Cubans, 88 Fed. Reg. 1266,68 (Jan. 9, 2023); Implementation of a Parole Process for Haitians, 88 Fed. Reg. 1243 (Jan. 9, 2023); Implementation of a Parole Process for Nicaraguans, 88 Fed. Reg. 1255 (Jan. 9, 2023); Implementation of a Parole Process for Venezuelans, 87 Fed. Reg. 63507 (Oct. 19, 2022).

percent.<sup>32</sup> The total amount of migration from those four countries has plunged as well.<sup>33</sup>

To be sure, an expanded application of the Title 42 Policy accompanied the parole programs. But those programs did the heavy lifting. As just one example, although DHS has not used the Policy to expel a single Ukrainian who crossed the border illegally, the parole program has nearly eliminated Ukrainian migration to the U.S.-Mexico border.<sup>34</sup> That result is unsurprising: migrants prefer to enter the country legally.

Because the “estimate” the States depend upon is not an estimate, uses an unhelpful unit of measurement, and is outdated, the Court should not consider it, much less rely on it.

### **III. MOVING PAST THE TITLE 42 POLICY WOULD BENEFIT ALL PARTIES.**

#### **A. Ending the Policy could reduce illegal migration.**

As discussed above, the Policy encourages illegal migration by those seeking to evade detection, and since it came into effect, illegal border crossings of all

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<sup>32</sup> Nick Miroff, *Illegal border crossings fell sharply in January, U.S. figures show*, WASH. POST (Feb. 1, 2023, 2:00 PM), <https://www.washingtonpost.com/national-security/2023/02/01/us-border-crossings/>.

<sup>33</sup> *See id.* (noting the number of people paroled and the number of crossings).

<sup>34</sup> U.S. CUSTOMS & BORDER PROT., NATIONWIDE ENCOUNTERS (Jan. 18, 2023), <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

kinds have increased. Rescinding it would eliminate those incentives, thereby reducing such crossings. With real penalties and distant points of deportation back in play, attempts to enter the country illegally by those previously subject only to the Title 42 Policy would likely decrease.

**B. Ending the Policy would protect the States' interests in fewer successful illegal border crossings.**

The States have repeatedly expressed particular concern about those who illegally enter the United States without detection.<sup>35</sup> They have claimed that this population includes “dangerous criminal aliens” who will “impose significant law enforcement costs,” lead to “increased drug trafficking,” and impose “significant costs on healthcare providers and on social services.”<sup>36</sup>

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<sup>35</sup> Mem. in Supp. of Mot. for Prelim. Inj. at 9, 13–15, *Arizona v. CDC*, No. 6:22-cv-00885-RRS-CBW (W.D. La. Apr. 14, 2022), ECF No. 13-1 (“[T]he number of dangerous criminal aliens crossing the border into Arizona undetected could increase . . .”); Mem. in Supp. of Mot. for T.R.O. and to Compel Produc. of Info. at 3, *Arizona v. CDC*, No. 6:22-cv-00885-RRS-CBW (W.D. La. Apr. 21, 2022), ECF No. 24-1 (“This increases the number of aliens who arrive into the Plaintiff States undetected and thus not processed under either Title 8 or Title 42, or screened for any communicable disease.”); Pl. States’ Reply in Supp. of Their Mot. for a Prelim. Inj. at 9, *Arizona v. CDC*, No. 6:22-cv-00885-RRS-CBW (W.D. La. May 9, 2022), ECF No. 56 (“CDC also ignores the public health harms from unscreened/untested/unvaccinated crossers, including gotaways . . .”).

<sup>36</sup> Mem. in Supp. of Mot. for Prelim. Inj., *supra* note 35, at 19–20.

Removing those incendiary characterizations, the States' interests involve reducing the number of successful illegal migrations. But as discussed above, the Title 42 Policy does the opposite. Rescinding the Policy would promote the States' purported interests by removing the incentives the Policy has created for migrants to try to enter the country illegally time and again.

### CONCLUSION

For the reasons discussed above, in assessing the States' request to intervene, the Court should consider the data and unintended incentives surrounding the Title 42 Policy, and it should affirm the judgment of the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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