

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.

RESPONDENTS' OPPOSITION TO APPLICATION FOR STAY

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CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, respondents make the following disclosures:

Counsel for Respondents state that they do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in any of the Counsel for Respondents.

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INTRODUCTION

Nearly three years ago, the Centers for Disease Control and Prevention (“CDC”) issued what was supposed to be a temporary, public health emergency measure under Section 265 of Title 42. The measure was purportedly justified by the then-nascent COVID-19 pandemic. The “Title 42 policy,” which directs the summary expulsion of noncitizens and wholly bars access to asylum, has remained in effect ever since.

Circumstances since then, including the availability of vaccines and other protections, have dramatically changed. The district court in this case thus correctly found the Title 42 policy arbitrary and capricious under the APA because CDC had failed to consider various relevant factors, and to bring the policy in line with evolving conditions on the ground. CDC itself has also concluded that these Title 42 expulsions are no longer justified in the interests of public health and therefore attempted to terminate the policy more than eight months ago.

While the federal government recognizes that the Title 42 policy does not have a current public health justification, it has appealed the district court’s arbitrary and capricious ruling and is seeking to preserve the government’s authority to use Title 42 in the future. However, a group of States who were denied intervention and a stay by a unanimous panel of the D.C. Circuit now petitions this Court at the absolute eleventh hour.

The States do not assert that expulsions are currently justified on *public health* grounds. To the contrary, twelve of them recently told this Court that, “even assuming the COVID-19 pandemic at some point qualified as a ‘national emergency,’ certainly it does not qualify today, when American life is mostly indistinguishable from what it looked like in pre-pandemic times.” Br. of Utah, Ohio, *et al.* as Amici Curiae at 12, *Biden v. Nebraska*, No. 22A444 (U.S. Nov. 23, 2022) (student loan program); *see id.* (“COVID-19 is now irrelevant to nearly all Americans”).

Instead, the States candidly seek to force the federal government to keep this policy in place solely as a pretextual means of *immigration control*. But whatever is ultimately deemed the proper way to handle migration flows and asylum protections, it cannot be through the disingenuous invocation of the Nation’s public health laws in the absence of any even *asserted* public health rationale, rejected by CDC itself.

The Court should deny the States’ request for several reasons. *First*, the court of appeals correctly held that the States’ last-minute effort to inject themselves into this litigation is untimely on the facts of this case. As the court of appeals noted, the States conceded that they knew of their interest in this case—and the potential divergence of their interests from the federal government’s—for most of this year (if not longer), yet offered no justification for the “inordinate and unexplained” amount of time they waited before seeking intervention. Add. 2. *Cameron v. EMW Women’s Surgical Center*, 142 S. Ct. 1002 (2022), and *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), are wholly different because neither case involved an explicit concession by the putative intervenors that that they had been fully aware for months that the parties’ interests and their own did not fully overlap and that they could not therefore rely on the existing parties to adequately represent their interests. Because only a *party* may seek relief from this Court, the correctness of the decision below to deny intervention dooms the States’ case for a stay.

The States spill substantial ink comparing this case to *Arizona v. City and County of San Francisco*, 142 S. Ct. 1926 (2022), arguing that Plaintiffs and the federal government are “colluding” to “evade” notice and comment requirements for repealing the Title 42 policy. Stay App. 16. But the States’ reliance on *Arizona* here is unpersuasive for multiple reasons. For starters, their entirely unsupported allegations of “collusion,” even if credited, are no answer to

the court of appeals’ timeliness holding. The States have known since April that CDC was seeking to terminate the program, and indeed sued to challenge that decision. Yet they waited until November to seek intervention here. Moreover, as Chief Justice Roberts recognized in *Arizona*, the Executive routinely chooses either to acquiesce in judgments against it or otherwise take steps short of fighting to the bitter end—and, indeed, is “entitled” to do so. *Id.* at 1928 (Roberts, C.J., concurring). The Chief Justice highlighted as concerning an *additional* aspect of *Arizona*: the “further step” of the government “leverag[ing]” a court ruling against it as the justification for revoking the Rule without notice and comment procedures. *Id.* But that further step is totally missing here; the government’s attempt to terminate Title 42 via agency order occurred well before the district court’s ruling in this case. Nor has the government acquiesced in the district court’s ruling; rather, it has appealed, and simply chosen not to seek a full stay pending appeal. As the federal government has explained, that standard strategic litigation decision was based not on “collusion,” but on the government’s inability to show the requisite irreparable harm for a stay given the dramatically changed public health landscape—a problem that also dramatically undermines the States’ application.

The States also emphasize that the federal government has indicated it will seek an abeyance of the appeal to, *inter alia*, engage in rulemaking to revise the Title 42 regulation, suggesting this procedure is underhanded. But, even assuming the D.C. Circuit will grant that request, it is commonplace for the government to seek to hold litigation in abeyance pending rulemaking. Finally, the notice and comment principle implicated in *Arizona* was the “usual and important requirement . . . that a regulation *originally promulgated using notice and comment* . . . may only be repealed through notice and comment.” *Id.* at 1928 (Roberts, C.J., concurring)

(emphasis added). But the operative August 2021 Title 42 order was *not* promulgated through notice and comment, so that “usual and important requirement” is not in play here.

Second, even if the States were permitted to intervene, they are unlikely to succeed on the ultimate merits of the case: whether the Title 42 policy is arbitrary and capricious. Add. 26-46; *Huisha-Huisha v. Mayorkas*, ___ F. Supp. 3d ___, 2022 WL 16948610, at *7-14 (D.D.C. Nov. 15, 2022). As Judge Walker, writing for the court of appeals in the prior appeal in this case in March 2022, explained, the policy is a “relic from an era with no vaccines, scarce testing, few therapeutics, and little certainty.” *Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 734 (D.C. Cir. 2022) (affirming in part preliminary injunction on statutory grounds); *see id.* at 735 (“it’s far from clear that the CDC’s order serves any purpose”). The court of appeals thus pointedly directed the district court to consider on remand “Plaintiffs’ claim that the [policy] is arbitrary and capricious.” *Id.* at 735. The district court then correctly held that the Title 42 policy violates the APA’s reasoned decisionmaking requirements, finding that CDC silently jettisoned its own longstanding policy and practice of using the “least restrictive” public health measures; failed to acknowledge the enormous toll of human suffering inflicted by the policy on migrants; ignored obvious alternatives to expulsions; and, critically, did not account for the dramatic changes in the policy’s factual underpinnings since it was instituted at the beginning of the pandemic in March 2020.

Third, the equities weigh decisively against the States. In the D.C. Circuit’s words, the “record is replete with stomach-churning evidence of death, torture, and rape” inflicted upon expelled noncitizens, evidence that “is not credibly disputed.” *Huisha-Huisha*, 27 F.4th at 733-34. Any further stay would send even more people to “walk the plank” into “extreme” and preventable “violence.” *Id.* at 733-34 (cleaned up). On the other side of the scales, the States do

not even try to advance a public health interest in continuing expulsions. Instead, the States claim that terminating Title 42 will lead to additional migrants residing in their States, and as a result will increase their downstream costs. But that discounts that Title 8 procedures, including expedited removal, will remain in place. Even if the States' speculative predictions of financial harm were credited, there is no legal basis to misuse a public health measure to displace the immigration laws long after any public health justification has lapsed. If changes need to be made to the immigration statutes, that choice "is up to Congress." *Cf. Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2490 (2021) (invalidating landlord-tenant COVID-19 policy). It is not the role of the courts, especially on a belated emergency request from States that themselves have dismissed the validity of the public health concerns that were once said to justify the Title 42 policy.

BACKGROUND

1. This case concerns CDC's unprecedented system of summary expulsions of noncitizens from the United States, established outside the framework of the immigration laws under the public health authority of 42 U.S.C. § 265. The statute provides that the Surgeon General may "prohibit . . . the introduction of persons or property" from designated places based on a "serious danger of the introduction of [communicable] disease into the United States." The government has interpreted it to authorize summary expulsions.¹ The regulations and orders that have established this expulsion system are collectively referred to as the "Title 42 policy," in contrast to the "Title 8" immigration removal powers.

¹ Despite its existence since 1893, § 265 was never used to expel anyone from the country before 2020. Whether the federal government suddenly discovered expulsion authority under the long-dormant statute is not, however, a question raised in this appeal. *See Add. 7-55.*

The Title 42 policy was established on March 20, 2020, purportedly as an emergency measure to address the then-nascent COVID-19 pandemic. *See* 85 Fed. Reg. 16,559 (Mar. 24, 2020); 85 Fed. Reg. 17,060-02 (Mar. 26, 2020).² The initial March 20 Order was set to expire in 30 days, but was extended for an additional 30 days the next month, 85 Fed. Reg. 22,424, and then extended indefinitely in May 2020, 85 Fed. Reg. 31,503-02. The currently operative regulatory framework for Title 42 expulsions was promulgated in September 2020, after a brief notice and comment period. 85 Fed. Reg. 56,424; 42 C.F.R. § 71.40. That regulation addresses the scope of the government’s asserted power under 42 U.S.C. § 265 and establishes a framework for the issuance of particular CDC expulsion orders.

The currently operative CDC order was signed on August 2, 2021. 86 Fed. Reg. 42,828-02 (Aug. 5, 2021). Unlike the basic regulatory framework, but like all the various orders that preceded it, the August order was issued without notice and comment and barred entry for “covered noncitizens”—effectively, those arriving without visas or other valid entry documents, including those presenting themselves at a port of entry. *See Huisha-Huisha*, 27 F.4th at 725. For covered noncitizens who already crossed the border, the order directed rapid expulsion from the United States, without the opportunity to apply for asylum if they feared persecution. *Id.* at 726.

The Title 42 policy has now been in place for nearly three years. The vast majority of expelled migrants are sent to Mexico, while others have been returned to their home countries of origin, including some of the most dangerous countries in the world, like Haiti. The practical effect of these expulsions has been devastating. Because of extraordinarily dangerous conditions

² Many of the relevant CDC actions were signed or announced on one date, but only later published in the Federal Register.

in Mexico, and the predictability of expulsions at designated times and points along the border, the policy effectively forces noncitizens, including families with small children, to “walk the plank” into the waiting hands of cartels and others ready to abduct and exploit them. *Huisha-Huisha*, 27 F.4th at 733. As the court of appeals explained in a prior appeal, “the record is replete with stomach-churning evidence of death, torture, and rape.” *Id.*

2. Plaintiffs, individuals fleeing persecution, filed this challenge in January 2021. In September 2021, the district court issued a preliminary injunction, holding that § 265 likely did not authorize Plaintiffs’ expulsions outside the framework of the ordinary immigration and asylum statutes. *Id.* at 726. The court of appeals stayed the injunction and expedited briefing. *Id.*

On October 11, 2021, Texas—one of the States currently before this Court—sought to intervene before the court of appeals. *See* Add. 2-3 (describing Texas’s assertions of the federal government’s inadequate representation). The court of appeals denied Texas’s motion, finding Texas had not satisfied the heightened “standards for intervention on appeal,” leaving the State free to seek intervention on remand. Add. 204.

On March 4, 2022, the court of appeals affirmed the preliminary injunction in part and remanded for resolution of the merits. The court of appeals held that § 265 likely did authorize expulsions in general, but required screening for withholding of removal and protection under the Convention Against Torture. *Huisha-Huisha*, 27 F.4th at 735. The court also pointedly noted that the Title 42 policy appeared to be a “relic from an era with no vaccines, scarce testing, few therapeutics, and little certainty,” and directed the district court on remand to address “Plaintiffs’ claim that the § 265 [Title 42] Order is arbitrary and capricious,” a claim the district

court had not yet considered. *Huisha-Huisha*, 27 F.4th at 734-35; *see also id.* at 735 (observing that the policy appeared not to serve “any purpose”).

3. Several weeks after the court of appeals’ decision, on April 1, 2022, CDC issued an order terminating all prior Title 42 orders, explaining that there was no longer a public health justification for continuing to summarily expel noncitizens and that § 265 therefore did not provide the agency with continuing authority for the policy. 87 Fed. Reg. 19941, 19944, 19955 (Apr. 6, 2022). A number of States—including all the proposed intervenor States here—challenged the termination order in the Western District of Louisiana. The Louisiana district court entered a preliminary injunction, holding that the Title 42 orders could not be terminated without notice and comment, without addressing the fact that the operative August 2021 order was likewise issued without notice and comment. *See Louisiana v. CDC*, __ F. Supp. 3d ___, 2022 WL 1604901 at *20, 23 (W.D. La. May 20, 2022), *appeal pending*, No. 22-30303 (5th Cir.). The federal government appealed that ruling, but did not seek a stay. As a result of the *Louisiana* litigation, the Title 42 policy remains in place despite CDC’s attempt to end it. Meanwhile, even after CDC’s April 1 termination order, and the States’ decision to challenge it in federal court elsewhere, the States did not seek intervention in this case.

On August 15, 2022, Plaintiffs in this case filed a motion for partial summary judgment, arguing that even if there is statutory authority for the Title 42 policy, the policy violated the APA on arbitrary and capricious grounds. The States here were specifically notified of this summary judgment filing the next day. Notice at 6 n.2, *Louisiana v. CDC*, No. 22-885 (W.D. La. Aug. 16, 2022), Doc. No. 154. However, “neither Texas nor any of the States here moved to

intervene in district court on remand from [the court of appeals] during the summary judgment proceedings.” Add. 3.³

On November 15, 2022, the district court granted Plaintiffs’ motion, and shortly thereafter entered partial summary judgment on the arbitrary and capricious claim. On Defendants’ unopposed motion, the district court stayed its judgment for five weeks, to give Defendants time to transition from the Title 42 policy to standard Title 8 immigration processing. Add. 59-60. Under the district court’s order, the stay is set to expire at 12:01 a.m., December 21, 2022. *Id.*

On November 21, 2022, the States filed a motion to intervene in the district court—over a year after Texas’s attempt to intervene on appeal was denied, nearly eight months after CDC sought to end the Title 42 policy, and after the district court granted summary judgment. Add. 2. The federal government filed a notice of appeal, which the States asserted divested the district court of jurisdiction over the intervention motion. *Id.* Eighteen days after their intervention

³ The States claim that Plaintiffs “first raised the issue of vacatur in their [summary judgment] reply.” Stay App. 11. That is incorrect. The federal government notified the States in the same August 16 filing that the “*Huisha-Huisha* plaintiffs seek entry of an order *vacating* and setting aside Defendants’ ‘Title 42 policy.’” Notice at 6 n.2, *Louisiana v. CDC*, No. 22-885 (W.D. La. Aug. 16, 2022), Doc. No. 154 (emphasis added) (emphasis added). Plaintiffs sought that precise relief in their opening summary judgment papers. *See* District Court Doc. No. 144-1 at 2, 26; District Court Doc. No. 144-2. Notably, the States make no argument that vacatur was not warranted in this case. Indeed, while they note the federal government’s position elsewhere that vacatur and nationwide relief are unavailable, Stay App. 2, the States themselves have endorsed the availability of those forms of relief, *see* Brief for Respondents at 39-48, *United States v. Texas*, No. 22-58 (U.S. Oct. 18, 2022) (seeking vacatur and permanent injunction on enforcement priorities); *Biden v. Texas*, 142 S. Ct. 2528, 2536 (2022) (States sought nationwide vacatur and permanent injunction as to memorandum rescinding Migrant Protection Protocols). In any event, the States do not claim they were unaware that Plaintiffs were seeking an injunction, but presumably would be making the same argument here if the district court had issued only an injunction, and not vacatur.

filing, the States also filed a pro forma stay motion at the district court, which was denied the same day. Add. 58.

In the meantime, the States filed a motion to intervene before the court of appeals, and—after waiting three more days following the district court’s stay denial—a motion for a stay pending appeal. Add 2. On December 16, 2022, the court of appeals unanimously denied the States’ motion to intervene, and dismissed their request for a stay as moot. Add. 1, 4. The court emphasized that the States had been long aware that their interests might diverge from the federal government’s given Texas’s prior intervention attempt a year ago, Add. 2-3, as well as the States’ statement in their intervention papers that “[f]or most of 2022, it has been clear that CDC/DHS wanted . . . to end Title 42,” Add. 3 (emphasis in original). The court of appeals accordingly concluded that “the inordinate and unexplained untimeliness of the States’ motion” foreclosed intervention. Add. 2-3.

On December 19, the States sought a stay pending certiorari and immediate certiorari from this Court. The Chief Justice entered an administrative stay the same day and directed a response by 5 p.m. the following day.

ARGUMENT

A “stay applicant’s burden is particularly heavy when a stay has been denied by the District Court and by a unanimous panel of the Court of Appeals.” *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, J., in chambers). To justify a stay here, the States must prevail on a series of issues. First, they must show a likelihood of success on the merits. See *Hollingsworth v. Perry*, 558 U.S. 183 (2010); *Nken v. Holder*, 556 U.S. 418, 434 (2009); *Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring) (explaining likelihood of certiorari is part of analysis of likelihood of success on the merits); *id.* (Gorsuch, J.,

dissenting) (“the first question confronting any injunction or stay request” is “whether the applicants are likely to succeed on the merits”). Because they were denied *intervention* by the court of appeals, they must first demonstrate a likelihood of success on intervention. And even assuming they can show a likelihood of success on intervention, they must then establish a likelihood of success on the merits of the appeal of the district court’s APA judgment, given that had they successfully intervened below, they would still have been required to show likelihood of success on the merits of the appeal to justify a stay. Moreover, because the district court found the Title 42 policy arbitrary and capricious in multiple respects, the States must show a likelihood of success on *each* of those grounds. Finally, the States must establish irreparable injury to them absent a stay pending appeal, and that the balance of equities favors a stay. The States’ stay application fails on each of these issues, any one of which is enough by itself to deny the application.

I. THE COURT OF APPEALS PROPERLY DENIED INTERVENTION.

The court of appeals was right to deny intervention based on the facts here. And because the States are not parties, and are not likely to achieve party status, their stay application can be denied on that basis.

As the court of appeals explained, the States—by their own admission—have known about their interest in this litigation *and* the divergence of their asserted interests from the federal government’s “[f]or most of 2022,” yet waited until after summary judgment in November to seek intervention. Add. 3. Indeed, Texas moved to intervene on appeal over a year ago, asserting the federal government’s inadequacy to represent Texas. Add. 2-3. That request was denied expressly on the grounds that the State had not met “the standards for intervention *on appeal.*” Add. 204 (emphasis added). The denial order cited the D.C. Circuit’s precedent

Amalgamated Transit Union Int'l, AFL-CIO v. Donovan, which requires a heightened showing of “exceptional circumstances supported by imperative reasons” to intervene directly on appeal. 771 F.2d 1551, 1553 (D.C. Cir. 1985).⁴ Given that emphasis on the heightened *appellate* intervention standard, the States’ next step should have been to seek to intervene in district court, where that standard does not apply. But despite what Texas described in its appellate intervention papers as a “‘palpable’ divergence in interests that already existed in October 2021, neither Texas nor any of the States here moved to intervene in district court on remand from [the court of appeals] or during the summary judgment proceedings.” Add. 3. Nor have the States ever adequately explained “why they waited eight to fourteen months to move to intervene.” *Id.* Where, as here, a motion “is untimely, intervention must be denied,” regardless of whether the other intervention factors are satisfied. *NAACP v. New York*, 413 U.S. 345, 365 (1973).

The States resist this conclusion, arguing that intervention after judgment is timely where the government declines to appeal. But here the government has appealed. Add. 2. It has not sought a stay pending appeal, but such stays are “extraordinary relief.” Add. 3. No precedent suggests that post-judgment intervention is timely where, as here, the movant had prior knowledge that the case implicated their asserted interests, conceded that they had longstanding concerns about the existing parties’ goals, and had previously stated expressly that the existing parties would not adequately represent those interests. “Timeliness is to be determined from *all the circumstances.*” *NAACP*, 413 U.S. at 366 (emphasis added). And here, the circumstances before judgment made it “obvious that there was a strong likelihood that” the parties’ interests would diverge. *See id.* at 367.

⁴ The correctness of the court of appeals’ heightened standard for intervention on appeal is immaterial to the issues currently presented. What matters is that the heightened intervention standard was the reason for the intervention denial.

Accordingly, as the court of appeals explained, “this case bears no resemblance to” either *Cameron v. EMW Women’s Surgical Center*, 142 S. Ct. 1002 (2022), or *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), where the intervenors had no such clear, conceded prior knowledge of their divergent interests or the parties’ asserted inadequacy to represent them. Add. 3-4.⁵ To hold that intervention is required here would *invite* prospective intervenors to lie in wait, sandbagging litigants and courts, secure in the knowledge they can always intervene at a later date. That is not this Court’s rule. Indeed, *NAACP* is squarely contrary to the States’ proffered rule, and they do not even mention it. *See Cameron*, 142 S. Ct. at 1013 (confirming *NAACP*’s holding that post-judgment intervention was untimely where the circumstances “should have alerted the would-be intervenors about the United States’ likely course of action”).⁶

Moreover, unlike both *Cameron* and *United Airlines*, here the States’ unjustified delay has prejudiced Plaintiffs and will continue to do so. For one thing, their intervention arguments are predicated on highly contestable factual assertions regarding purported costs to the States. When Texas raised similar claims in its prior appellate intervention motion, Plaintiffs made clear they would seek to probe such claims, noting the unfairness of denying them any opportunity “to gather and submit evidence in opposition to Texas’ arguments.” Plaintiffs-Appellees’ Opposition at 20-21, *Huisha-Huisha*, No. 21-5200 (D.C. Cir. Oct. 15, 2021). Yet because the States waited until after judgment below, Plaintiffs had to agree to an expedited schedule on

⁵ The States rely heavily on *United Airlines*, but as the court of appeals held, that case is plainly inapposite: In that case, “there was *no reason* for the” intervenor (a member of a certified class) “to suppose that” class counsel “would not . . . take an appeal” until after judgment. 432 U.S. at 394 (emphasis added).

⁶ In *Berger v. N. Carolina State Conf. of the NAACP*, 142 S. Ct. 2191, 2194 (2022), on which the States rely, timeliness was undisputed.

intervention in district court with no opportunity to develop the record given the threat that, otherwise, the States would seek administrative stays to delay the district court's ruling. The States should not be rewarded for their unjustified delay.

And notwithstanding Plaintiffs agreeing to an extremely expedited schedule at every stage of the intervention and stay proceedings, the States' delay threatens disruption and further harm to noncitizens. By not addressing intervention in an orderly manner before judgment, the States have forced the parties and courts to jam intervention and stay proceedings into the five-week period the district court granted to facilitate the government's return to regular immigration processing. The result of that delay, and the States' further delay in seeking a stay, *see infra*, has already been an administrative stay, threatening a continuation of the "stomach-churning" harms, 27 F.4th at 733, as well as a disruption of the federal government's preparations for the transition to Title 8 processing—which was the reason for the district court granting any stay at all, *cf. NAACP*, 413 U.S. at 369 (finding intervention untimely where it created "potential for seriously disrupting the State's electoral process").

The States assert, without so much as a shred of evidentiary support, that the federal government is colluding with Plaintiffs to evade the APA's procedural requirements. But this is a *non sequitur*: Whatever their asserted concerns about purported "collusion," the federal government's position that Title 42 should end became crystal clear over eight months ago, on April 1, 2022, when CDC announced that it was terminating the policy. Add. 3. Accordingly, putting aside the States' wholly unfounded charge of "collusion," the States' motion to intervene was untimely by a wide margin—and the decision below was correct for that reason alone.

In any event, the facts of this case do not bear out the States' accusations. The federal government is appealing the district court's ruling, not "colluding." Its choice not to seek the

extraordinary relief of a stay pending appeal does not remotely support the States’ accusation that it is engaging in subterfuge. As Defendants explained, CDC’s determination that Title 42 expulsions are no longer needed as a public health measure drastically limited the arguments available to them for a stay pending appeal. *See* Defendants’ Opposition to Motion to Intervene and Motion for a Stay Pending Appeal at 14, *Huisha-Huisha*, No. 22-5325 (D.C. Cir. Dec. 14, 2022) (“the federal government could not claim irreparable harm from a court order compelling the very action the CDC had itself tried to take”). Indeed, that exact weakness in any stay motion the federal government might have filed is evident in the States’ own motion—which does not even try to advance any claim of irreparable harm regarding COVID-19, even though that is the only even arguably legitimate purpose of the Title 42 policy. And, notably, in the States’ own case challenging CDC’s termination of the Title 42 policy, they obtained a preliminary injunction against that rescission on notice and comment grounds and the federal government there also declined to seek a stay pending appeal. *Louisiana*, 2022 WL 1604901, at *23. On the States’ reasoning, then, the federal government must be “colluding” with the States themselves in that case. An appellant’s failure to seek the extraordinary relief of a stay pending appeal is simply not evidence of collusion.

Given CDC’s conclusion that public health needs do not justify Title 42, the federal government instead sought a five-week stay to facilitate the transition from Title 42 to Title 8 processing—the ordinary means of controlling our borders that Congress has long authorized. Add. 197. The States repeatedly point to that short-term stay request as though it is damning evidence of wrongdoing because CDC’s termination order also included a transition period. Stay App. 1, 16, 22. But there is nothing suspicious in that: The government asserted a need for time to organize the logistics for the transition, whether that transition resulted from agency

termination or court order. Moreover, the States notably never suggest that it would have been better for the federal government *not* to seek that temporary stay once it had concluded it had no basis to seek a stay pending appeal. None of this remotely suggests some underhanded conspiracy. And all of it was eminently predictable given what the States knew for most of this year.

Nor, contrary to the States' repeated suggestions, does this case look anything like *Arizona v. City and County of San Francisco*, in which some Members of this Court voiced concern with the government "leverag[ing]" a court ruling against it "as a basis to immediately repeal" a regulation by issuing a replacement Rule. 142 S. Ct. 1926, 1928 (2022) (Roberts, C.J., concurring). This case involves no attempt to revoke a rule based on a judgment, purportedly mooted out a case before interested parties could intervene. *See id.* (describing this "further step" in *Arizona*). Rather, here, the government lost in district court, appealed, and simply chose not to seek a stay pending appeal given the absence of any current public health justification for the policy.

And while the States claim an interest in CDC's asserted authority to address "future pandemics," Stay App. 15, the federal government itself shares that interest, *see* Add. 201-02 (noting government's intent to undertake notice and comment rulemaking to replace the vacated regulation). The States call the government's proposal to hold the appeal in abeyance pending the government's rulemaking process a "too-cute-by-half tactic." Stay App. 3. But that accusation rings hollow given that that the federal government routinely asks for such abeyances.

For related reasons, there is no merit to the States' accusation that this litigation somehow amounts to an evasion of notice and comment requirements. The Plaintiffs have been challenging the Title 42 policy as arbitrary and capricious for nearly two years. The D.C. Circuit

directed the district court to consider the arbitrary and capricious claim in March, before CDC had issued its termination memo. If CDC had *never* terminated Title 42, the district court could have vacated the policy just as it did below. And if the federal government had concluded Title 42 was not necessary as a public health measure, it could have accepted that judgment or appealed it but not sought to keep the program in place pending appeal. *See Arizona*, 142 S. Ct. at 1928 (recognizing that the Executive is generally “entitled” to, for example, choose “to voluntarily dismiss . . . appeals, leaving in place the relief already entered”). The fact that the States in another lawsuit have challenged CDC’s *termination memo* as procedurally improper for failure to engage in notice and comment does not afford them some free-floating right to notice and comment procedures before a court can strike down the underlying policy as unlawful. Moreover, the States’ notice and comment theory—that CDC’s termination order required those procedures—would apply equally to CDC’s operative August 2021 order keeping the policy in place. *See Louisiana*, 2022 WL 1604901 at *19 (“Indeed, the extraordinary nature of the CDC’s Title 42 orders argue against a wholesale exemption of actions under Title 42 from the normal rulemaking process.”). If the termination order is unlawful, as the States claim, so is the August order; keeping the August 2021 order in effect does not therefore *vindicate* notice and comment requirements, but would simply amount to a continuing violation of the failure to obtain notice and comment when imposing the order in August 2021.

In any event, as noted above, none of this alters the fact that States’ attempt to intervene in this case was untimely. And the court of appeals’ resolution of that fact-bound question, arising from highly unusual circumstances here, is not only correct but also unpublished, meaning its implications for future intervention efforts are limited. *See Stay App.* 24-25

(wrongly claiming a circuit split). For all these reasons, the States’ stay application and request for certiorari on the intervention issue should be denied.

II. EVEN IF THEY ARE PERMITTED TO INTERVENE, THE STATES ARE UNLIKELY TO SUCCEED ON THE MERITS.

Even if the States were permitted to intervene, it would make no difference to the outcome of their stay application. The district court identified four defects that render the Title 42 policy arbitrary and capricious under this Court’s precedents. The States fail to show that any, let alone all, of those conclusions are likely incorrect. But absent such a showing, they have failed to establish that they are likely to succeed.

1. First, “the requirement that an agency provide reasoned explanation for its action” means that the “agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). As the district court held, CDC did just that by silently ignoring the “least-restrictive-means” standard applicable to the agency’s public health measures and by failing to assess whether the Title 42 summary expulsion policy was the least restrictive means of addressing any potential significant risk of COVID-19 from migrants. Under this Court’s cases, the issue was not whether the policy was in fact the least restrictive means, as the States misleadingly suggest, but rather whether the agency silently departed from its longstanding practice of undertaking such an assessment. Because CDC did so depart, the district court rightly “conclude[d] that the August 2021 Order is arbitrary and capricious due to CDC’s ‘failure to acknowledge and explain its departure from past practice.’” Add. 33.

The States argue that the APA does not itself require agencies to employ a least-restrictive-means analysis. Stay App. 27-38. But the district court never suggested that. Rather, in accordance with this Court’s precedents, the district court concluded that CDC “fail[ed] to

acknowledge and explain its departure from [its own] past practice”—not that CDC was required to adopt that standard in the first place. Add. 33; see *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (“An unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.”) (cleaned up).

CDC’s longstanding policy and practice has been to impose only the “least restrictive means necessary to prevent spread of disease,” as explained in a 2017 rulemaking. *Control of Communicable Diseases*, 82 Fed. Reg. 6890, 6912 (Jan. 19, 2017). The 2017 rule was issued in part “to clarify the agency’s standard operating procedures and policies,” *id.* at 6931, including its policy of applying the least-restrictive-means standard in all its decisions concerning public health measures, *id.* at 6912. The rule discussed CDC’s actions during the 2014-2016 Ebola epidemic “as an example” of its application of this general least-restrictive-means standard. *Id.* at 6912. CDC explained that the screening and monitoring protocol it had instituted for travelers arriving from countries affected by Ebola “was viewed as the least restrictive alternative to widespread quarantine and travel bans demanded by some members of the public.” *Id.* at 6895.⁷

⁷ See also CDC, *Key Messages: Ebola Virus Disease, West Africa* 15 (Oct. 16, 2014) (stating that CDC’s Ebola guidance was “based on the least restrictive means necessary to protect the public’s health”), <https://stacks.cdc.gov/view/cdc/38556>; CDC, *Notes on the Interim U.S. Guidance for Monitoring and Movement of Persons with Potential Ebola Virus Exposure* (page last reviewed Dec. 27, 2017) (stating that CDC’s August 2014 guidance to its staff reflected “the goal of applying the least-restrictive measures necessary to protect communities and travelers”), <https://www.cdc.gov/vhf/ebola/exposure/monitoring-and-movement-of-persons-with-exposure.html>.

In addition to Ebola, CDC has also applied the least-restrictive-means standard to other diseases, such as tuberculosis;⁸ and included the standard in a “Public Health Law 101” course for practitioners.⁹ More recently, it has applied the standard to other COVID-19 measures.¹⁰

Congressional testimony of two high-ranking, longtime CDC officials further confirms that use of the least-restrictive-means standard was CDC’s established policy. As the district court noted, Principal Deputy Director Dr. Anne Schuchat testified that CDC’s practice was to seek to use the “least restrictive means possible to protect public health.” Add. 28-29 (quoting District Ct. Doc. No. 153-4 at 8). And in testimony made public after summary judgment briefing below concluded, Dr. Martin Cetron, the Director of CDC’s Division of Global Management and Quarantine, confirmed that CDC “should attempt to provide the least restrictive means” and “shouldn’t go to the most restrictive approach if lesser restrictive means that have fewer collateral consequences and damages and unintended consequences would

⁸ CDC, *Guidelines for the Investigation of Contacts of Persons with Infectious Tuberculosis* 11 (Dec. 16, 2005), <https://stacks.cdc.gov/view/cdc/6768> (“The use of existing communicable disease laws that protect the health of the community (if applicable to contacts) should be considered for contacts who decline examinations, with the least restrictive measures applied first.”); CDC, *Menu of Suggested Provisions For State Tuberculosis Prevention and Control Laws* (last reviewed Sept. 1, 2012), <https://www.cdc.gov/tb/programs/laws/menu/appendixa.htm> (“Public health officials generally employ a step-wise approach to implementing TB control measures, beginning with the least restrictive measure necessary . . .”).

⁹ CDC, *Public Health Law 101: A CDC Foundational Course for Public Health Practitioners*, at 24, <https://www.cdc.gov/phlp/docs/phl101/PHL101-Unit-2-16Jan09-Secure.pdf>, (last reviewed Apr. 13, 2012, *see* https://www.cdc.gov/phlp/publications/phl_101.html); *see also* CDC, *Good Decision Making in Real Time: Public Health Ethics Training for Local Health Departments: Student’s Manual* 90 (June 6, 2017), <https://stacks.cdc.gov/view/cdc/49997>.

¹⁰ CDC, *Developing a Framework for Assessing and Managing Individual-Level Risk of Coronavirus Disease 2019 (COVID-19) Exposure in Mobile Populations* (CDC framework for assessing public health responses concerning arriving travelers, ordered from “least to most restrictive”) (last updated Oct. 29, 2021), <https://www.cdc.gov/immigrantrefugeehealth/exposure-mobile-populations.html>.

suffice.” Exhibit to Plaintiffs-Appellees’ Opposition to the States’ Motion for a Stay Pending Appeal at 170, *Huisha-Huisha*, No. 22-5325 (D.C. Cir. Dec. 14, 2022) (“Cetron Tr.”). Dr. Cetron further testified that in issuing the Title 42 policy, CDC “jump[ed] directly to the most restrictive approach rather than looking at less[] restrictive approaches.” Cetron Tr. 172; *see also id.* at 202 (Dr. Cetron advised the CDC Director that the Title 42 policy “was not a least restrictive means approach”).¹¹

The States do not even address the testimony of CDC officials Dr. Schuchat and Dr. Cetron, both of whom are uniquely positioned to understand CDC’s policies and practices over the years. Nor do the States address CDC’s use of the least restrictive standard in contexts such as tuberculosis, Ebola, or other COVID-19 policies. Instead, the States argue only that the 2017 rulemaking does not show that the least-restrictive-means standard applies to the Title 42 policy. Stay App. 28-33. That is flatly incorrect.

The States argue that the 2017 rulemaking is irrelevant because only the *preamble*, and not the text of the adopted regulations, discusses the least-restrictive-means standard. *Id.* at 31. But under this Court’s precedents, agencies must acknowledge changes not only from prior regulatory language, but also sub-regulatory policies as well as consistent agency practices. And the preamble to a regulation included in a rulemaking published in the federal register is more formal than, for example, an agency handbook, which is plainly evidence of agency policy and

¹¹ The transcript of Dr. Cetron’s testimony is also posted online at <https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/2022.05.02%20SSCC%20Interview%20of%20Martin%20Cetron%20-%20REDACTED.pdf>. The transcript was made public on October 17, 2022. *See* Press Release, Select Subcomm. on the Coronavirus Crisis (Oct. 17, 2022), <https://coronavirus.house.gov/news/press-releases/clyburn-trump-cdc-redfield-caputo-report>.

As with Dr. Schuchat’s testimony, Dr. Cetron’s testimony may be considered “to evaluate the existence of a ‘least restrictive means’ standard with respect to public health measures generally.” Add. 28 n.3.

practice. See *Encino Motorcars*, 579 U.S. at 217-18 (“decades-old practice” reflected in agency handbook); *Fox Television Stations, Inc.*, 556 U.S. at 521 (departure from “staff rulings and Commission dicta” in adjudications); *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 207 L. Ed. 2d 353, 140 S. Ct. 1891, 1913 (2020) (agency memorandum); cf. *United States v. Mead Corp.*, 533 U.S. 218, 230 & n.12 (2001) (explaining that rulemaking is a paradigmatic method of definitive agency interpretations).

The States also wrongly claim that the 2017 rulemaking says that the least-restrictive-means standard applies *only* to public health measures ordered *under* that 2017 rule. But the rule discussed the standard as an existing policy of general application “in *all situations* involving quarantine, isolation, or *other public health measures.*” Add. 30-31 (emphasis the district court’s) (quoting 82 Fed. Reg. at 6912). And, again, that clear statement is confirmed by past practice and the testimony of two high ranking CDC officials, which the States ignore.

Similarly, the States argue that the 2017 rule concerned only “quarantine and isolation of individuals,” which they contend are not “similar in nature” to barring entry under the Title 42 policy. Stay App. 29-31. To the contrary, the 2017 rule expressly addressed suspending entry under 42 U.S.C. § 265—the same statute on which the Title 42 policy is premised. Indeed, the 2017 rule cites § 265 as one of the two “primary legal authorities supporting this rulemaking.” 82 Fed. Reg. at 6892. In particular, that rule finalized a proposed regulation at 42 C.F.R. § 71.63 governing the “suspension of entry of animals, articles, or things from designated foreign countries and places into the United States.” 82 Fed. Reg. at 6894, 6929-30. Just like the Title 42 policy, that regulation is clearly premised on 42 U.S.C. § 265, which concerns suspending the introduction of both “persons and property.” The States’ attempt to distinguish the 2017 rule as

based on a “differ[ent] statutory source[] of authority” thus fails for the same reason. Stay App. 30.

The States’ contention that the least-restrictive-means standard does not apply to the exclusion of foreign travelers is further belied by CDC’s use of that standard when considering whether to bar the “introduction of persons into the country during the Ebola virus outbreak.” Add. 32 (citing 82 Fed. Reg. at 6896). The 2017 rule explained that CDC applied “principles of least restrictive means to successfully ensure that measures to ban travel between the United States and the affected countries were unnecessary.” 82 Fed. Reg. at 6896. Such bans were rejected in part because they “would have had dramatic negative implications for travelers.” *Id.*; *see also* CDC’s Response to the 2014-2016 Ebola Epidemic: West Africa and United States 62 (July 8, 2016) (CDC seeks to use “the least restrictive means” when “recommending and implementing” “travel and border health measures”).¹²

Moreover, even if the 2017 rule were limited to literal “quarantine and isolation” measures—and it explicitly is not—the Title 42 policy is expressly premised on its status as a “quarantine rule” within the meaning of 42 U.S.C. § 268(b). Add. 28. That statute provides that “[i]t shall be the duty of the customs officers . . . to aid in the enforcement of quarantine rules and regulations.” CDC has consistently cited § 268(b) as the authority for DHS’ lead role in implementing the Title 42 policy. *E.g.*, 85 Fed. Reg. at 56459 (Final Rule); 86 Fed. Reg. at 42841 (August 2021 order).¹³

¹² <https://stacks.cdc.gov/view/cdc/40216>.

¹³ Sections 265 and 268 both appear in subchapter II, part G of Title 42 of the U.S. Code, which is titled “Quarantine and Inspection.”

The States also claim that the least-restrictive-means standard does not apply “in the midst of a health emergency,” or else applies only *after* a public health order has been issued. Stay App. 32. That is baseless. In 2014, CDC applied the standard while deciding what public health measures to “put into place at U.S. ports of entry in response to the Ebola outbreak”—an analysis that led CDC to rule out “measures to ban travel.” 82 Fed. Reg. at 6895-96. And Dr. Schuchat and Dr. Cetron have confirmed that CDC was supposed to apply the same standard *to the consideration of the Title 42 policy* in the early days of the COVID-19 pandemic.

More fundamentally, *all* of these attempts to justify CDC’s failure to apply the least-restrictive-means standard amount to impermissible “*post hoc* rationalizations,” and so are beside the point. *Regents of the Univ. of Cal.*, 140 S. Ct. at 1909. Even if CDC could have justified departing from the standard on any of the bases the States offer in their brief, the point is the agency never even acknowledged that standard, nor did it articulate any justification for not applying it. Under this Court’s precedents, that failure is arbitrary and capricious.

Any doubt that the least-restrictive-means standard as a matter of CDC practice applies in this context is dispelled by CDC’s latest actions. Add. 29-30. CDC applied the standard in both its orders *terminating* the Title 42 policy, first as to unaccompanied children and then altogether. *Id.* Its March 2022 order concerning unaccompanied children stated that “CDC is committed to using the least restrictive means necessary,” and concluded that “less restrictive means are available.” 87 Fed. Reg. 15243, 15252 (Mar. 17, 2022). And CDC’s general termination order applicable to families and single adults admitted that the Title 42 policy was “among the most restrictive measures CDC has undertaken” and determined that “less restrictive means are available.” 87 Fed. Reg. 19441, 19951, 19955. The agency itself has therefore formally acknowledged that the least-restrictive-means standard applies in this context. Yet none of

CDC's earlier actions *authorizing* or *maintaining* the Title 42 policy even referenced the least-restrictive-means standard, much less explained why it was ignored. *E.g.*, 85 Fed. Reg. 56424 (Final Rule); 86 Fed. Reg. 42828 (August 2021 order).

Finally, the States argue that the Title 42 rulemaking can be read as *silently amending* that standard in this context. Stay App. 32-33. In making this argument, the States effectively concede that the rule actually contains no mention of the least-restrictive-means standard. But under the APA, an agency cannot silently amend its policies and practices but must “display awareness that it *is* changing position.” *Fox Television Stations, Inc.*, 556 U.S. at 515 (emphasis in original). The interim final rule’s general statement that it was “amending [CDC’s] regulations” does nothing to acknowledge CDC’s general policy of applying the least-restrictive-means standard or its departure therefrom here. And, in any case, CDC plainly did not believe the Title 42 rulemaking silently did away with its longstanding standard, given that the agency expressly applied it in its termination orders. Because CDC departed from its own standard in maintaining the Title 42 policy, and did not explain why it was departing from that standard, it violated the APA’s requirement of reasoned decisionmaking.

2. Second, CDC impermissibly disregarded the devastating impact of the Title 42 policy on noncitizens, a “‘relevant factor,’ or an ‘important aspect of the problem,’ that CDC should have considered.” Add. 34 (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)).

“[N]umerous public comments during the Title 42 policy rulemaking informed CDC that implementation of its orders would likely expel migrants to locations with a ‘high probability’ of ‘persecution, torture, violent assaults, or rape.’” Add. 35-36 (quoting District Ct. Doc. No. 144-1 at 27). One comment cited more than 1,000 publicly reported attacks on migrants in Mexico

within a one-year period. District Ct. Doc. No. 154 at 36. Another explained how survivors of rape, sexual assault, and domestic abuse are “at risk of being murdered by their persecutors” if expelled under Title 42. *Id.* at 50. Other comments warned that the policy summarily expels LGBT individuals to countries where their sexual orientation or gender identity is criminalized outright, *id.* at 46, or makes them prime targets for persecution, *id.* at 28-29. CDC failed to grapple with these known and foreseeable consequences of its policy either in its rulemaking or orders, including the operative August 2021 order. The district court correctly explained that “[i]t is unreasonable for the CDC to assume that it can ignore the consequences of any actions it chooses to take in the pursuit of fulfilling its goals.” Add. 35.

Notably, these very States argued in their own lawsuit challenging CDC’s *termination* of the Title 42 policy that the APA required the federal government to consider “all important aspect[s] of the problem,” including supposed “harms to States” like “healthcare, education, and law-enforcement costs.” Appellees’ Brief at 75, *Louisiana v. CDC*, No. 22-30303 (5th Cir. Aug. 31, 2022). While the harms asserted in that litigation are speculative, particularly in light of the Title 8 backdrop of immigration control that remains fully in place, here the Title 42 policy is routinely subjecting noncitizens to extraordinary and certain danger and harm, and for reasons CDC itself acknowledges are no longer valid. As these same States aptly put it: The “APA prohibits CDC’s refusal to consider” “wanton harms” imposed by the policy and whether those harms “might be avoided or mitigated.” *Id.* at 76.

Title 42 is a discretionary authority—one that was never invoked to expel persons until 2020. Stay App. 27, 33. It is the antithesis of reasoned decisionmaking for the agency, in deciding as a *policy* matter whether to adopt or maintain the Title 42 policy, to refuse even to *look* at the fact that its policy was subjecting persons to acts of assault, torture, rape, and murder.

The district court was thus right to conclude that CDC’s “decision to ignore the harm that could be caused by issuing its Title 42 orders was arbitrary and capricious.” Add. 36; *see Fox Television Stations, Inc.*, 556 U.S. at 537 (agencies cannot “ignore inconvenient facts”).

The States’ assertion that “CDC *did* consider such hardships” is wrong. Stay App. 37. *None* of the agency’s decisions remotely acknowledged the daily harms inflicted on noncitizens as a result of expulsion, much less grappled with those harms. In particular, neither CDC’s pre-August 2021 orders exempting children, nor its references to case-by-case exceptions, acknowledged the extraordinary harms resulting from expelling migrants. CDC’s July 2021 order stated only that a continued exemption for unaccompanied children would “permit[] the government to better address the humanitarian challenges for these children.” 86 Fed. Reg. at 38717, 38720. But that one vague clause does not even identify the referenced “humanitarian challenges”—which might refer simply to the fact that proper care of unaccompanied children requires attention to all sorts of special issues (such as custody and general child protection) distinct from the extreme dangers in Mexico. Similarly, like its predecessors, the August 2021 order provides only that DHS may grant case-by-case exceptions “based on the totality of the circumstances, including consideration of significant law enforcement, officer and public safety, humanitarian, and public health interests.” 86 Fed. Reg. at 42841. Accepting such passing vague references to potential “humanitarian” concerns as reasoned consideration of the dangers awaiting expelled migrants would cross the line from reviewing an agency’s reasons to supplying them. *See Encino Motorcars*, 579 U.S. at 224 (“It is not the role of the courts to speculate on reasons that might have supported an agency’s decision. . . . Whatever potential reasons the Department might have given, the agency in fact gave almost no reasons at all.”).

Nor does CDC’s purported consideration of the COVID-19-related health risks potentially faced by noncitizens held for processing, Stay App. 37, excuse the agency’s utter failure to consider the very distinct dangers of physical violence facing them when summarily expelled. Where expulsion means such grave danger of rape, assault, torture, and death, CDC’s “cure” for migrants’ COVID-19 risks is arguably worse than the disease. At a minimum, CDC had to *consider* those dangers.

Confusingly, the States also claim that because the court of appeals has held that CDC likely has the statutory authority to eliminate asylum protection, the agency was not required to consider the real world impact of a decision to do so. Stay App. 37. But whether CDC has the statutory authority to strip away such protection and whether it engaged in reasoned decisionmaking in choosing to exercise that asserted authority are distinct questions. *See Regents of the Univ. of Cal.*, 140 S. Ct. at 1910. CDC *chose* to eliminate asylum access, as a policy matter. Even if it had the authority to do so, under the APA it had to acknowledge the consequences before doing so. CDC did not do so here.

3. Third, CDC violated the APA requirement to consider reasonable alternatives, particularly those that are “within the ambit of the existing policy.” *Regents of the Univ. of Calif.*, 140 S. Ct. at 1913 (quoting *State Farm*, 463 U.S. at 51).

As the district court explained, CDC “failed to appropriately consider the availability of effective therapeutics that ‘reduce[d] the risk of hospitalization’ by approximately 70 percent.” Add. 41. The original “March 2020 Order listed the lack of vaccines, ‘approved therapeutics,’ and rapid testing as justifications for the emergency measures.” *Id.* at 40-41 (citing 85 Fed. Reg. at 17062). The unavailability of therapeutic treatments for COVID-19 was thus a “significant factual predicate” for the policy as initially implemented. *Id.* at 40. However, “the August 2021

Order failed to even mention such treatments or their overall availability,” even though the circumstances in that regard had materially changed. *Id.*; see *Fox Television Stations, Inc.*, 556 U.S. at 516 (“a reasoned explanation is needed for disregarding facts and circumstances that underlay . . . [a] prior policy”); see also CDC’s Response to the 2014-2016 Ebola Epidemic: West Africa and United States, *supra*, at 62 (“[T]ravel and border health measures . . . demand constant assessment and refinement to adjust to changing epidemic characteristics.”). Nor can CDC’s general references to DHS border facilities’ “relian[ce] on local healthcare systems,” Stay App. 36, substitute for actual consideration of the development of effective therapeutic drugs on the need for the policy. See *Encino Motorcars*, 579 U.S. at 224 (where an agency provides only “conclusory statements,” a court will not “speculate on reasons that might have supported an agency’s decision”).

Further, although the August 2021 Order notes that Title 42 processing was done outdoors, the order “makes no mention of whether Title 8 processing could also take place outdoors, as suggested by at least one commenter as a less drastic measure to expulsion.” Add. 39. The States wrongly insist that the cited comment did not adequately raise the possibility of outdoor processing. Stay App. 34. But the comment specifically proposed that CDC could address its COVID-19 transmission concern with people “congregating in detention centers” if “individuals could be processed in the field.” District Ct. Doc. No. 154 at 9. And, even absent a comment, CDC’s own statement that Title 42 processing was safer because it “generally happens outdoors,” 86 Fed. Reg. at 42,836, naturally raises the question whether Title 8 processing could likewise occur outdoors. See *State Farm*, 463 U.S. at 51 (agencies must consider alternatives “within the ambit” of the existing policy).

The States assert without any evidentiary support that outdoor processing was “unavailable in August 2021.” Stay App. 34. But CDC *never* explained whether such outdoor processing—which would have addressed much of the stated rationale for the Title 42 policy—could be implemented, and if not, why not. After all, by August 2021 the Title 42 policy had been in place for some 17 months, more than enough time for the government to take the necessary steps. Cf. 85 Fed. Reg. at 17067 n.66 (CDC indicating in the original March 2020 order that DHS could expand even indoor processing space in as little as 90 days—although CDC never later addressed whether that had been done). Nor is it obvious, as the States assert, that outdoor Title 8 processing would not be viable simply because it could take longer than outdoor Title 42 processing. Stay App. 35. CDC might or might not have found it viable, but it never even *considered* the question, and the States’ “*post hoc* rationalizations” cannot cure that failure. *Regents of the Univ. of Cal.*, 140 S. Ct. at 1909.

Similarly, despite noting the advent of “widely available” vaccines and effective on-site rapid testing, 86 Fed. Reg. at 42833, CDC’s August 2021 order lacked “any serious analysis of whether reasonable steps could have been taken to at least begin instituting vaccination programs” for migrants as an alternative to expulsion, “particularly given that all Americans had been eligible for the vaccine for more than three months by [August 2021]”; or if such steps could be taken toward “increasing the supply of on-site rapid testing.” Add. 42-43. The order’s mention of lower vaccination rates in some migrants’ countries of origin does nothing to address the potential viability or benefits of providing vaccination to migrants upon their arrival in this country. See Stay App. 35-36 (citing 86 Fed. Reg. at 42834).

The States assert that vaccinating noncitizens during processing would have been misguided because they would not get the full protection of vaccination for several weeks. Stay

App. 36. Again, however, the States' *post hoc* rationales cannot substitute for reasoned consideration by CDC itself, and CDC made no such claim. *Regents of the Univ. of Cal.*, 140 S. Ct. at 1909. Indeed, the order indicates that CDC *did* think vaccinating migrants would have been useful and "encourage[d] DHS to develop such programs as quickly as practicable." 86 Fed. Reg. at 42840. As the district court concluded, however, CDC failed to explain why steps had not been or could not be taken to put such a program in place. Add. 43.

Dr. Cetron's testimony confirms the district court's conclusion that CDC repeatedly ignored such alternatives. He testified that by "jumping directly to the most restrictive approach," CDC "bypassed some very fundamental public health principles in terms of going to [the] root cause of the public health concerns," including "cohorting, testing, assessment, use of nonpharmaceutical interventions, masks, et cetera." Cetron Tr. 172. He likewise explained that the risk from migrants "was overstated," such that the Title 42 policy lacked "a commensurate rationale," *id.* at 181-83; and that there was "insufficient evidence that the nature of the threat would warrant [the Title 42 policy]," which was "not the appropriate tool," *id.* at 202-03.

In short, as the court of appeals previously observed, the Title 42 "order looks in certain respects like a relic from an era with no vaccines, scarce testing, few therapeutics, and little certainty." *Huisha-Huisha*, 27 F.4th at 734. As in *Regents* and *State Farm*, the agency's failure even to consider the feasibility of adopting less sweeping alternative measures was arbitrary and capricious.

4. Finally, CDC impermissibly "ignore[d] inconvenient facts" concerning the utility of the Title 42 policy and its own "factual determinations" on the effectiveness of pandemic travel restrictions in such circumstances. *Fox Television Stations, Inc.*, 556 U.S. at 537; *State Farm*,

463 U.S. at 43 (action is arbitrary and capricious if agency’s “explanation for its decision . . . runs counter to the evidence before the agency”).

The district court found that CDC ignored evidence that noncitizens subject to Title 42 did not pose any particular risk, and that their numbers were minuscule compared to the overall number of land travelers entering the country. Add. 45-46. The administrative record established that “during the first seven months of the Title 42 policy, CBP encountered on average just one migrant per day who tested positive for COVID-19.” Add. 45 (citing District Ct. Doc No. 155-1 at 23). It further established that “at the time of the August 2021 Order, the rate of daily COVID-19 cases in the United States was almost double the incidence rate in Mexico and substantially higher than the incidence rate in Canada.” *Id.* Meanwhile, that August 2021 order covered less than 1 percent of people entering the southern border by land. *Id.* at 40; *see* District Ct. Doc. No. 118-18 at 1. *See also* Oral Argument Tr. at 5, District Ct. Doc. No. 153-2 at 18 (Judge Walker observing the exceedingly small number of “border crossers” covered by the policy and the lack of any reason to believe they “are more likely to have COVID” than the vast numbers of people allowed to cross).¹⁴

Ignoring this evidence was “especially egregious in view of CDC’s previous conclusion [in 2017] that ‘the use of quarantine and travel restrictions, in the absence of evidence of their utility, is detrimental to efforts to combat the spread of communicable disease[.]’” Add. 45-46

¹⁴ In July 2021, more than 11 million people entered the United States from Mexico by land. *See* U.S. Bur. of Transp. Stats., Border Crossing Entry Data, <https://explore.dot.gov/views/BorderCrossingData/Monthly?%3Aembed=y&%3AisGuestRedirectFromVizportal=y> (select July 2021 and “US-Mexico Border”). That same month, there were less than one hundred thousand Title 42 encounters. *See* U.S. Customs & Border Protection, Southwest Land Border Encounters, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> (last modified Nov. 14, 2022) (select “Title 42” under “Title of Authority”).

(citing 82 Fed. Reg. at 6896); *see also* U.S. Dep’t of Health and Human Servs., Pandemic Influenza Plan (Nov. 2005) at 307 (“[T]ravel restrictions would need to be about 99% effective to delay introduction into a country by one to two months.”); *id.* at 369 (“[T]ravel restrictions . . . are likely to be much less effective once the pandemic is widespread.”).¹⁵ When a “new policy rests upon factual findings that contradict those which underlay its prior policy,” an agency must give a “reasoned explanation . . . for disregarding [those] facts and circumstances.” *Fox Television Stations, Inc.*, 556 U.S. at 515-16. None of CDC’s actions instituting or maintaining the Title 42 policy acknowledged these earlier conclusions.

As Dr. Cetron testified, once COVID-19 was widespread within the United States, border restrictions generally, and the Title 42 policy specifically, would be ineffective, Cetron Tr. 50, 172-73, 182-83—particularly with a “huge volume” of other travel allowed, *id.* at 53; *see also id.* at 179 (purported risk of migrants importing COVID-19 “did not jibe” with the data, especially in light of infection “hot spots in the U.S. that were much more powerfully overwhelming”). Both the administrative record and Dr. Cetron’s congressional testimony confirm the court of appeals’ observation in the first appeal that “from a public-health perspective, . . . it’s far from clear that the CDC’s order serves any purpose.” *Huisha-Huisha*, 27 F.4th at 735.

If the district court’s conclusion as to any one of these four determinations is correct, its decision must be upheld. Unless the States can demonstrate that *all four* are incorrect, its purported appeal cannot prevail. Yet the States have failed to show that the district court likely erred in any one of its four grounds for holding the Title 42 policy arbitrary and capricious.

¹⁵ <https://www.cdc.gov/flu/pdf/professionals/hhspandemicinfluenzaplan.pdf>.

III. THE EQUITIES WEIGH DECISIVELY AGAINST A STAY.

A stay pending appeal is not warranted to maintain a public health policy where *no one* even attempts to argue that it is now needed as a public health measure, and where the law already affords the federal government substantial authority to expeditiously remove individuals. *See DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1964-66 (2020) (discussing expedited removal authority). The absence of Title 42 simply resurrects the wide-ranging immigration authorities that Congress has enacted. The States cannot show “they will be irreparably injured absent a stay,” much less that any harm they might suffer outweighs the harm of a stay. *Nken*, 556 U.S. at 434.

1. On the required showing that they will suffer irreparable harm, *Nken*, 556 U.S. at 434, the States’ evidence is woefully speculative and thin. Even if they could show sufficient harm to establish *standing*, here their burden is to show they will be irreparably harmed by the cessation of Title 42 during the *pending appeal*, even as the government retains the full scope of its Title 8 authorities.¹⁶

The States’ threshold premise—that ending Title 42 will draw more noncitizens to this country—is speculative. Because Title 42 generally involves expulsion to Mexico and carries no legal consequences, nothing prevents noncitizens from seeking safety by “cross[ing] the border multiple times, sometimes 10 times or more.” *Huisha-Huisha v. Mayorkas*, 560 F. Supp. 3d 146, 176 (D.D.C. 2021) (cleaned up). By contrast, the standard Title 8 immigration procedures involve removal backed by significant criminal and civil penalties for those who unlawfully reenter—which the federal government has stated “has a greater deterrent effect than expelling a

¹⁶ For all the reasons explained in Plaintiffs’ briefing below, the States lack even Article III standing in this case. *See* Plaintiffs-Appellees’ Opposition to Motion to Intervene, *Huisha-Huisha*, No. 22-5325 (D.C. Cir. Dec. 14, 2022).

migrant to Mexico under Title 42.” Opposition to Motion for TRO at 1, *Louisiana*, No. 22-885 (W.D. La. Apr. 22, 2022), Doc. No. 27.

For similar reasons, even if in the *short-term* more noncitizens were to enter as the government transitions to ordinary Title 8 processes, predicting the long-term effect of that transition on undocumented populations is fraught with uncertainty. Whether Title 8 procedures lead to deportation backed by criminal penalties for reentry, or instead lead to regularization of status, involves many contingencies and intervening discretionary decisions not at issue here. *See California v. Texas*, 141 S. Ct. 2104, 2117 (2021) (rejecting “difficult to establish” standing theory that “depends upon the decision of an independent third party”) (cleaned up). And the speed and outcome of Title 8 proceedings may depend on which authorities the Executive chooses to exercise—including expedited removal under 8 U.S.C. § 1225(b)(1)—rendering any impact on the undocumented population yet more uncertain. *See Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 412-13 (2013) (rejecting standing theory predicated on speculation regarding government’s choices among its legal authorities). Given these uncertainties, the States cannot claim with any degree of certainty what impact the cessation of the Title 42 policy and the resumption of Title 8 controls during the pendency of the appeal will have on State education and health care expenditures over the next year, five years, or ten. Nor have the States adduced any evidence by which this Court could determine that impact.

Notably, the States have never claimed that the federal government must keep Title 42 in place forever; in *Louisiana*, they assert only notice and comment and arbitrary and capricious claims. But on their theory of harms (costs from increased migration), the end of Title 42 would allegedly impose essentially the same harms *whenever* it occurs, and irrespective of whether *any* public health concerns exist—now, or after the appeal, or after notice and comment proceedings.

If these supposed costs will be imposed sooner or later, the States do not explain why the prospect of imposing them sooner warrants a stay. Indeed, their own newspaper articles suggest that because of seasonal migration fluctuations, any possible short term increase in entries may be more limited now than at other times. Add. 74.

In addition, the States have also not acted with the type of dispatch one would assume if they truly believed that the transition from Title 42 to Title 8 would cause them irreparable harm. The district court issued its opinion on November 15, and the States moved for intervention in the district court on November 21. But they did not seek a *stay* from the district court until December 9—eighteen days after their intervention motion and 24 days after the district court’s merits ruling. The States then waited three more days, until December 12, to seek a stay at the court of appeals.¹⁷

Moreover, after expressly asking the court of appeals to rule by December 16, the day after the States filed their reply brief—a request with which the court of appeals complied—the States then waited three *more* days, until December 19, to seek relief from this Court. All this needless delay is the reason this application has reached this Court one day before the district court’s stay was to expire. The States’ leisurely approach to seeking stay relief belies their dire

¹⁷ As the States noted below, it was clear from the district court’s opinion that it did not intend to grant a stay pending appeal (and indeed, the district court denied the States’ request for a stay the same day). One would therefore have assumed that the States would have sought a stay in the district court immediately after the district court issued its merits opinion, so that when the district court denied a stay the States could immediately seek a stay from the court of appeals. Yet the States wasted most of the five-week stay period before even filing in the district court, much less filing in the court of appeals.

Any suggestion the States may make that they could not have sought a stay from the D.C. Circuit until the Defendants filed a notice of appeal is incorrect. As the D.C. Circuit recently held, a stay pending review without an appeal is available under the All Writs Act—the same authority the States invoke in their current stay application before this Court. *See In re NTE Connecticut, LLC*, 26 F.4th 980, 987 (D.C. Cir. 2022).

predictions that they will suffer irreparable injury, unless they deliberately intended to jam this Court and the court of appeals into granting an administrative stay.

2. By contrast, there can be little doubt that a stay would irreparably and “substantially injure” the noncitizens summarily expelled into danger. *Nken*, 556 U.S. at 434. As Judge Walker observed, “the record is replete with stomach-churning evidence” of immense danger migrants face that “is not credibly disputed.” *Huisha-Huisha*, 27 F.4th at 733.

The record in this case documents the truly extraordinary horrors being visited on noncitizens every day by Title 42 expulsions. *See, e.g.*, Joint Appendix at 347, *Huisha-Huisha*, No. 21-5200 (D.C. Cir. Oct. 21, 2021) (“CBP has routinely expelled my clients, including newborns, into the waiting arms of kidnapers[.]”), 357 (mother and seven-year-old daughter “kidnapped immediately after DHS expelled them”), 358 (mother “was raped in the street in Tijuana after DHS expelled her there with her three young children”), 366 (body of 15-year-old son found mutilated after expulsion). The policy makes noncitizens even more vulnerable targets by expelling them at “predictable locations at predictable times in areas where kidnapers and organized crime are rampant.” *Id.* at 346. Cartels wait at the end of the bridges where CBP pushes families into their waiting arms. *See id.* (“As a result, many migrants are kidnapped immediately upon CBP releasing them into Mexico from a U.S. port of entry.”).

The scale of human suffering inflicted by this policy is staggering: There have been at least 13,480 reports of “murder kidnapping, rape, torture, and other violent attacks” against noncitizens subject to Title 42 since January 2021. Human Rights First, *Human Rights Stain, Public Health Farce: Evasion of Asylum Law and Title 42 Abuse Must End— and Never Be Revived* 4 (December 2022); *see id.* at 11 (describing Senegalese man shot in the head in broad

daylight in a park across the street from the U.S.-Mexico border in Tijuana).¹⁸ This very real, daily violence far outweighs any speculative indirect budgetary harms that might arise from a potential eventual increase in undocumented immigrants residing in these States.

The States brush aside this remarkable record of systematic horrors in a single terse sentence in a footnote. Stay App. 39 n.8. In an effort to minimize the harm to migrants, they point to the court of appeals’ prior holding that Title 42 expulsions are subject to certain protection screenings, suggesting that those screenings are enough to mitigate the dangers to noncitizens. *Id.* But the district court reexamined the equities on remand and rightly found that Plaintiffs “continue to face irreparable harm that is beyond remediation.” Add. 52. Indeed, the *implementation* of the court of appeals’ ruling, while not before this Court, has been deeply flawed, if not illusory. *See* Add. 51-52 (noting that Defendants cited the existence of screenings but did not provide evidence of how many such screenings had taken place, even as the rate of expulsions doubled).¹⁹

¹⁸ <https://humanrightsfirst.org/wp-content/uploads/2022/12/HumanRightsStainPublicHealthFarce-1.pdf>.

¹⁹ Under Defendants’ screening procedures, they do not affirmatively inquire whether noncitizens fear return to their home country or to Mexico, which the immigration statutes would ordinarily require. U.S. Customs & Border Protection, *Processing of Noncitizens Manifesting Fear of Expulsion Under Title 42* (May 21, 2022), <https://www.aila.org/infonet/cbp-issues-guidance-on-processing-of-noncitizens>. Rather, if noncitizens “manifest” a fear of return on their own, Defendants will give them some sort of a screening interview to determine if they meet the standard for withholding of removal or relief under the Convention Against Torture (“CAT”). *Id.* Notably, when Defendants previously established a screening for CAT protection subject to a similar requirement that noncitizens affirmatively request an interview, a vanishingly small percentage of noncitizens even received a screening, and only eight percent of those who did passed it. Camilo Montoya-Galvez, *Few migrants processed under Title 42 border policy are screened for U.S. protection*, CBS News (Oct. 15, 2021), <https://www.cbsnews.com/news/immigration-title-42-border-policy-migrants-screened-us-protection/>.

In any event, the States misapprehend the difference between Title 42 expulsions (even with the screenings ordered by the court of appeals) and regular immigration processing. Under the court of appeals' ruling in the first appeal, noncitizens subject to Title 42 may seek screenings only for "withholding of removal" and for claims under the Convention Against Torture. *See Huisha-Huisha*, 27 F.4th at 725, 733. But in Title 8 proceedings, noncitizens are entitled to seek *asylum*, which requires a lower demonstration of "well-founded fear," *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 431, 449 (1987). The Title 42 policy, even as modified by the D.C. Circuit's mandate, thus eliminates access to the most basic protection: asylum. *Huisha-Huisha*, 27 F.4th at 730-31.

Moreover, even if the withholding and torture screenings were adequate, and even if asylum were available, noncitizens unable to make out a case for protection *from expulsion to Mexico in particular* would still be exposed to those harms as a result of the policy. As the record demonstrates, the policy is pushing noncitizens (even non-Mexicans) back into extraordinarily dangerous conditions in Mexico, thereby subjecting them "'to unacceptable risks' of 'extreme violence'" and other hardships. *Huisha-Huisha*, 27 F.4th at 734.

3. Nor, finally, can the States demonstrate that a stay is in the public interest. *Nken*, 556 U.S. at 434. As an initial matter, "there is a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm." *Id.* at 436. Here expulsions are not only unlawful (because the policy violates the APA), but, as explained above, the expulsion process itself facilitates and increases the chances of "substantial harm" to noncitizens. Nor is the countervailing consideration noted in *Nken* present here: Far from hindering "prompt execution of removal orders," *id.*, the cessation of the Title 42 policy would permit the Title 8 immigration provisions to once again operate.

Tellingly, the States do not even try to justify continued Title 42 expulsions on public health grounds. Nor could they, in an era of vaccinations, testing, and greater certainty about the disease. Their concerns arise not from COVID-19, but from immigration itself—and that is a matter to take up with Congress, not this Court. The States’ silence about COVID-19 speaks volumes, given that the entire purpose of the Title 42 policy is supposed to be as a COVID-19 control measure. Indeed, the States themselves recognize that conditions have changed dramatically since the Title 42 policy was first instituted in March 2020. Nearly all these States have long since ended their own COVID-19-related public health emergencies, recognizing that vaccines and treatment are widely available.²⁰ And, as noted above, many of them recently argued to this Court that, “even assuming the COVID-19 pandemic at some point qualified as a ‘national emergency,’ certainly it does not qualify today, when American life is mostly indistinguishable from what it looked like in pre-pandemic times.” Brief of Utah, Ohio, *et al.* as Amici Curiae at 12, *Biden v. Nebraska*, No. 22A444 (U.S. Nov. 23, 2022) (student loan program); *see id.* (“COVID-19 is now irrelevant to nearly all Americans”). The States note various other travel restrictions established in the early days of the pandemic, Stay App. 6-7, but fail to acknowledge that *all* those restrictions have since been lifted. Maintaining Title 42 would keep an emergency COVID-19 measure in place for ulterior and pretextual reasons, despite even the proposed intervenors “publicly declar[ing] the pandemic over.” *See* Response to Application to Vacate Injunction at 1, *Biden v. Nebraska*, No. 22A444 (U.S. Nov. 23, 2022).

²⁰ *See* States’ COVID-19 Public Health Emergency Declarations and Mask Requirements, National Academy for State Health, <https://www.nashp.org/governors-prioritize-health-for-all/>.

The States’ argument effectively boils down to an assertion that Title 42—with no hearings and no access to asylum—is a better *immigration* control system from their perspective than the actual immigration statutes that Congress has enacted. But again, that is a choice for Congress. *Alabama Ass’n of Realtors*, 141 S. Ct. at 2490 (relying on fact that Congress “failed to act in the several weeks leading up to the [COVID-19 eviction] moratorium’s expiration”); S. 4022, 117th Cong. (2022). It is no more permissible for putative intervenors—or the courts—to warp a public health authority into an immigration policy tool than it would be for an agency to do so. *Cf. id.* at 2489. Whatever Congress may choose to do, the public interest surely does not favor maintaining a public health policy without public health justification, as a pretextual way of circumventing the ordinary immigration and asylum statutes Congress enacted.

CONCLUSION

The States’ application should be denied.

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