No. 22-592

In the Supreme Court of the United States

STATE OF ARIZONA, ET AL., PETITIONERS

v.

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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED

Whether petitioners may intervene to challenge the district court's summary judgment order.

PARTIES TO THE PROCEEDING

Petitioners (putative intervenors below) are the States of Arizona, Alabama, Alaska, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming.

Respondents (defendants-appellants below) are Alejandro N. Mayorkas, in his official capacity as Secretary of Homeland Security; Troy A. Miller, in his official capacity as Acting Commissioner of U.S. Customs and Border Protection (CBP); Pete Flores, in his official capacity as Executive Assistant Commissioner, CBP Office of Field Operations; Raul L. Ortiz, in his official capacity as Chief of U.S. Border Patrol; Tae D. Johnson, in his official capacity as the Senior Official Performing the Duties of Director of U.S. Immigration and Customs Enforcement; Xavier Becerra, in his official capacity as Secretary of Health and Human Services; and Dr. Rochelle P. Walensky, in her official capacity as Director of the Centers for Disease Control and Prevention.*

Respondents (plaintiffs-appellees below) also include Nancy Gimena Huisha-Huisha, and her minor child I.M.C.H.; Valeria Macancela Bermejo, and her minor daughter B.A.M.M.; Josaine Pereira-De Souza, and her minor children H.N.D.S., E.R.P.D.S., M.E.S.D.S.,

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* The complaint named as defendants David Pekoske, then Acting Secretary of Homeland Security; Norris Cochran, then Acting Secretary of Health and Human Services; Rodney S. Scott, then Chief of U.S. Border Patrol; and William A. Ferrara, then Executive Assistant Commissioner, CBP Office of Field Operations, all in their official capacities. Alejandro N. Mayorkas, Xavier Becerra, Raul L. Ortiz, and Pete Flores have been automatically substituted as parties in their respective places. See Fed. R. App. P. 43(c)(2); Fed. R. Civ. P. 25(d).

and H.T.D.S.D.S.; Martha Liliana Taday-Acosta, and her minor children D.J.Z. and J.A.Z.; Julien Thomas, Fidette Boute, and their minor children D.J.T.-B. and T.J.T.-B.; and Romilus Valcourt, Bedapheca Alcante, and their minor child B.V.-A.; all on behalf of themselves and others similarly situated. Minor children are proceeding under pseudonyms pursuant to Federal Rule of Civil Procedure 5.2(a).

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OPINION BELOW

The order of the court of appeals denying intervention (J.A. 1-7) is unreported.

JURISDICTION

The order of the court of appeals denying intervention was entered on December 16, 2022. On December 19, 2022, petitioners applied to this Court for a stay of the district court's judgment. The Court treated the application as a petition for a writ of certiorari and, on December 27, 2022, granted the petition, limited to the question of appellate intervention (143 S. Ct. 478). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Since the beginning of the COVID-19 pandemic, the rules applied to many of the noncitizens the government encounters at or near the Nation's borders have been

set not by the immigration laws Congress enacted in Title 8 of the United States Code, but by emergency public-health orders issued by the Centers for Disease Control and Prevention (CDC) under a provision of Title 42. In April 2022, CDC terminated those orders because it determined that they are no longer necessary to protect the public health. Even after that termination, however, the government has continued to vigorously defend CDC's authority to issue the Title 42 orders in this suit brought by private respondents.

Petitioners are a group of States that seek to compel the government to continue implementing the Title 42 orders. Petitioners do not claim to be seeking to vindicate any interest in slowing the spread of COVID-19 or otherwise protecting public health. Instead, they support the Title 42 orders as a makeshift immigration policy: They believe that a full return to the laws Congress prescribed in Title 8 would result in more noncitizens entering the country, and they oppose that result.

In November 2022, petitioners attempted to intervene in this case after the district court vacated the Title 42 orders. Petitioners sought to justify intervention based on the government's failure to seek a stay pending appeal, even though it had been clear for nearly eight months that the government could not credibly seek that extraordinary relief to perpetuate a policy that CDC had concluded is no longer necessary or statutorily justified. The question presented is whether the court of appeals abused its discretion in denying intervention.

A. CDC's Title 42 Orders

1. A provision of the 1944 Public Health Service Act, 42 U.S.C. 201 *et seq.*, authorizes the Secretary of Health and Human Services (HHS) to respond to an outbreak

of disease by closing the Nation's borders to potentially infectious people or property. That authority exists when the Secretary "determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, and that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required in the interest of the public health." 42 U.S.C. 265. If the Secretary makes that determination, he may "prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose." *Ibid.*[1]

2. In March 2020, in response to the COVID-19 pandemic, HHS and CDC issued an interim final rule to establish a procedure for CDC to temporarily suspend the introduction of noncitizens into the United States under Section 265. 85 Fed. Reg. 16,559 (Mar. 24, 2020). CDC promptly invoked that procedure to issue an order suspending the introduction of certain noncitizens. 85 Fed. Reg. 17,060 (Mar. 26, 2020). HHS and CDC later finalized the rule and issued additional suspension orders. See 85 Fed. Reg. 56,424 (Sept. 11, 2020) (42 C.F.R. 71.40); 85 Fed. Reg. 65,806 (Oct. 16, 2020). The currently operative order was issued in August 2021. 86 Fed. Reg. 42,828 (Aug. 5, 2021).

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[1] Section 265 refers to the "Surgeon General," but the authority was transferred to the Secretary in 1966 and later delegated to CDC. See Reorganization Plan No. 3 of 1966, § 1(a), 31 Fed. Reg. 8855 (June 25, 1966), *reprinted in* 80 Stat. 1610; 42 C.F.R. 71.40.

The Title 42 orders apply to certain noncitizens arriving from Canada or Mexico who would otherwise be held in a "congregate setting" at a port of entry or U.S. Border Patrol station, thereby risking the spread of COVID-19. 86 Fed. Reg. at 42,841. Under the orders, "covered noncitizens apprehended at or near U.S. borders" are "expelled" to Mexico, Canada, or their country of origin. *Id.* at 42,836. Noncitizens subject to the orders are not placed into immigration proceedings under Title 8. As a result, they can be processed much faster—in "roughly 15 minutes" outdoors, as compared to "approximately an hour and a half to two hours" indoors for noncitizens who are issued a notice to appear for removal proceedings under Title 8. *Ibid.*

On the other hand, a removal under Title 8 carries consequences that a Title 42 expulsion lacks. For example, a person removed under Title 8 who unlawfully reenters the country is subject to summary reinstatement of the removal order, 8 U.S.C. 1231(a)(5), and potential felony prosecution, see 8 U.S.C. 1326. A Title 42 expulsion, in contrast, carries no legal consequences. As a result, some migrants expelled to Mexico under Title 42 "have attempted to cross the border multiple times, 'sometimes 10 times or more.'" 560 F. Supp. 3d 146, 176 (citation omitted).

In addition, the government's ability to expel noncitizens under Title 42 is constrained by "a range of factors, including, most notably, restrictions imposed by foreign governments." 86 Fed. Reg. at 42,836. Noncitizens cannot be expelled to Mexico or to their home countries unless those countries consent, and different countries have withheld or limited their consent in various ways. *Ibid.* Those realities, and the case-by-case exceptions in the Title 42 orders themselves, mean that

many noncitizens have been processed under Title 8 even while the Title 42 orders have been in effect. See U.S. Customs & Border Protection, *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions Fiscal Year 2022* (last modified Nov. 14, 2022), www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy22.

3. The Title 42 orders were issued as temporary emergency measures and have always been subject to periodic review. In issuing the August 2021 order, CDC explained that "[u]pon reassessment of the current situation with respect to the pandemic and the situation at the U.S. borders," it had concluded that the order "remains necessary" for single adults and family units (but not unaccompanied children), subject to recurring 60-day reviews. 86 Fed. Reg. at 42,830. The order provides that it "shall remain effective" until either of two triggering events, "whichever comes first": (a) "the expiration of the Secretary of HHS' declaration that COVID-19 constitutes a public health emergency," or (b) a determination by CDC that "the danger of further introduction of COVID-19 into the United States has declined such that continuation of the Order is no longer necessary to protect public health." *Id.* at 42,830, 42,841; see 42 U.S.C. 247d (authorizing the Secretary to declare public health emergencies).

B. Private Respondents' Suit And The Prior Appeal

Private respondents brought suit on behalf of a putative class of noncitizen families subject to the Title 42 orders. See D. Ct. Doc. 57 (Feb. 5, 2021). In September 2021, the district court granted provisional class certification and a classwide preliminary injunction, holding that the orders exceeded CDC's authority under Section 265. 560 F. Supp. 3d 146. In March 2022, the court

of appeals affirmed the injunction in part and vacated it in part, holding that Section 265 likely authorized the expulsion of noncitizens, but that other laws likely bar the expulsion of noncitizens to countries where they "will be persecuted or tortured." 27 F.4th 718, 722.

Meanwhile, in October 2021, while the government's appeal was pending, petitioner Texas moved to intervene in the court of appeals, asserting that the government might settle, dismiss the appeal, or otherwise drop its defense of the Title 42 orders. J.A. 276-298, 299-311; see J.A. 3-4. The court denied the motion, holding that Texas had not satisfied the court's heightened standard "for intervention on appeal." J.A. 222.

C. CDC's 2022 Termination Of The Title 42 Orders

In April 2022, CDC terminated the Title 42 orders. 87 Fed. Reg. 19,941 (Apr. 6, 2022). CDC concluded that "the cross-border spread of COVID-19 due to covered noncitizens does not present the serious danger to public health that it once did, given the range of mitigation measures now available." *Id.* at 19,944. Among other things, CDC highlighted the availability of tests, vaccines, and treatments. *Id.* at 19,949-19,950. Accordingly, CDC "determined that the extraordinary measure of an order under 42 U.S.C. 265 is no longer necessary." *Id.* at 19,944. And CDC emphasized "the statutory and regulatory requirement" that an emergency order under Section 265 "last no longer than necessary to protect the public health." *Id.* at 19,956; see *id.* at 19,954-19,955. The termination was to take effect on May 23, 2022. *Id.* at 19,941.

Petitioners and other States sued to block the termination, and a district court granted their motion for a nationwide preliminary injunction. *Louisiana* v. *CDC*, 603 F. Supp. 3d 406 (W.D. La. 2022). The court relied

solely on a procedural ground, holding that although the Title 42 orders were adopted without notice and comment, CDC had to undertake notice-and-comment rulemaking to terminate them. *Id.* at 433-438.

The government appealed the *Louisiana* injunction, arguing that CDC validly rescinded the Title 42 orders in compliance with the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* See *Louisiana* v. *CDC*, No. 22-30303 (5th Cir.). The government did not, however, seek to stay the injunction pending appeal, and the operative Title 42 order thus has remained in effect while that appeal has proceeded. An immigration advocacy organization sought to intervene and moved for a stay pending appeal, but the government—joined by petitioners—successfully opposed the motion for a stay, arguing that the standard to intervene was not satisfied. See Gov't Opp. to Mot. at 1-2, 11-16, *Louisiana*, *supra* (June 13, 2022); States' Consolidated Br. at 94, *Louisiana*, *supra* (Aug. 31, 2022).

D. Proceedings Below

1. On November 15, 2022, the district court in this case granted private respondents' motion for summary judgment on their claim that the Title 42 policy is arbitrary and capricious, J.A. 10-53, and entered a partial final judgment, J.A. 54-55. The court concluded that CDC had failed to explain why it did not apply a "least restrictive means" test in issuing the Title 42 orders, J.A. 27-34; failed to consider the consequences for noncitizens expelled under those orders, J.A. 34-37; failed to adequately consider alternatives, J.A. 37-43; and failed to show that the spread of COVID-19 by migrants was a "real problem," J.A. 43-45. The court permanently enjoined enforcement of the Title 42 orders against class members and vacated the orders and the

2020 regulation that authorized them, 42 C.F.R. 71.40. J.A. 8-9. The court emphasized that it would not grant a stay pending appeal. J.A. 9.

Faced with the prospect of an abrupt end to the Title 42 orders, the government moved to stay the district court's injunction and vacatur for five weeks. J.A. 213-217. The government explained that time to "prepare for the transition to Title 8 processing" was "critical" to DHS's ability "to secure the Nation's borders" and "to conduct its border operations in an orderly fashion." J.A. 216. Although private respondents did not oppose the stay, J.A. 217, the court granted it only with "great reluctance," J.A. 58 (capitalization omitted).

The government filed a notice of appeal on December 7 and made clear that it would argue on appeal, as it had in district court, "that CDC's Title 42 Orders were lawful, that [42 C.F.R.] 71.40 is valid, and that [the court] erred in vacating those agency actions." J.A. 219; see J.A. 218. The government further stated that it planned to seek to hold the appeal in abeyance pending (a) the appeal of the *Louisiana* preliminary injunction (which could moot this case) and (b) a rulemaking that HHS and CDC will undertake to reconsider the framework under which CDC may exercise its authority under Section 265 (which could moot private respondents' challenge to the underlying regulation). J.A. 219-220.[2]

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[2] After this Court granted certiorari, the government moved the court of appeals to hold the appeal in abeyance pending those events, and also pending this Court's decision. 22-5325 C.A. Doc. 1980682 (Jan. 9, 2023). Private respondents opposed any abeyance extending beyond this Court's decision. The court of appeals ordered the appeal to be held in abeyance pending this Court's decision and directed the parties to file motions to govern further proceedings thereafter. 22-5325 C.A. Doc. 1982224 (Jan. 20, 2023).

2. Meanwhile, on November 21, 2022, petitioners moved to intervene in the district court. D. Ct. Doc. 168. On December 9, after the government filed its notice of appeal, petitioners moved to stay the court's judgment pending appeal. D. Ct. Doc. 183. The court denied the stay, J.A. 56, and later entered an order deferring consideration of petitioners' intervention motion because the case was already before the court of appeals, D. Ct. Docket entry (Dec. 14, 2022).

3. Petitioners asked the court of appeals either to rule on their "pending motion to intervene" in the district court or, in the alternative, to permit them to intervene on appeal. J.A. 245; see J.A. 241-246. The court of appeals construed that request as a "motion for leave to intervene on appeal," J.A. 1, and denied the motion, J.A. 1-7. In a unanimous order, the court found it unnecessary to consider the other requirements for intervention because "the inordinate and unexplained untimeliness of the States' motion to intervene on appeal weighs decisively against intervention." J.A. 3.

The court of appeals explained that "long before now," petitioners "kn[ew] that their interests in the defense and perpetuation of the Title 42 policy had already diverged or likely would diverge" from the government's. J.A. 3. The court observed that Texas had specifically identified the possibility of such divergence "[f]ourteen months" earlier in a filing seeking to intervene in the preliminary-injunction appeal, but that "neither Texas nor any of the States here moved to intervene in district court on remand from" that appellate proceeding. J.A. 4.

The court of appeals also emphasized that "more than eight months ago" CDC had "issued an order terminating the Title 42 policy," which "the same States

seeking to intervene in this case" had challenged in the *Louisiana* litigation. J.A. 5. The court found that CDC's action both "'should have'" and "actually did alert [petitioners]" that the federal government's position regarding continuation of the Title 42 order was different from theirs. *Ibid.* (quoting *Cameron* v. *EMW Women's Surgical Center, P.S.C.*, 142 S. Ct. 1002, 1013 (2022)). Given that backdrop, the court explained, the government's decision "not to pursue the 'extraordinary relief' of a stay pending appeal" should have "come as no surprise." J.A. 6 (citation omitted). The court further emphasized that petitioners did not seek to justify intervention based on anything other than "these long-known-about differing interests" and failed to "explain why they waited eight to fourteen months to move to intervene." *Ibid.*

"Given that record," the court of appeals explained that this case "bears no resemblance to *Cameron* or *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977)," where the would-be intervenors sought to participate "'as soon as it became clear'" that the existing parties would no longer protect their interests. J.A. 6. (citation omitted).

4. On December 27, 2022, this Court granted certiorari and granted petitioners' application for a stay of the district court's order. 143 S. Ct. 478. The Court explained that the stay "precludes giving effect to the District Court order setting aside and vacating the Title 42 policy," but that "the stay itself does not prevent the federal government from taking any action with respect to that policy." *Ibid.*

E. Further Developments

Since this Court's grant of certiorari, Congress has considered legislation that would immediately termi-

nate the current public health emergency. In response, the government announced for the first time its intent to allow that emergency to expire on May 11, 2023. Absent other relevant developments, the end of the public health emergency will (among other consequences) terminate the Title 42 orders and moot this case. The government has also recently announced its intent to adopt new Title 8 policies to address the situation at the border once the Title 42 orders end.

1. By its terms, the operative Title 42 order terminates upon "the expiration of the Secretary of HHS' declaration that COVID-19 constitutes a public health emergency." 86 Fed. Reg. at 42,830. The Secretary is authorized to declare public health emergencies under 42 U.S.C. 247d, which specifies that those declarations expire after 90 days unless renewed. 42 U.S.C. 247d(a). "COVID-19 was first declared a public health emergency in January 2020" and has been periodically renewed since then. 86 Fed. Reg. at 42,831 & n.21.

The declaration of a public health emergency has a variety of legal consequences, including authorizing the Secretary to expend additional funds to respond to the emergency and to waive or modify certain requirements under the Medicare, Medicaid, and Children's Health Insurance Programs to ensure access to healthcare. 42 U.S.C. 247d(b)-(f), 1320b-5. During the COVID-19 pandemic, Congress has also provided increased Medicaid funding to States and adopted other policies tied to the Secretary's emergency declaration. Families First Coronavirus Response Act, Pub. L. No. 116-127, § 6008, 134 Stat. 208-209; see, *e.g.*, §§ 1101, 2301, 2302, 3102, 134 Stat. 179-180, 187-191.

On January 30, 2023, in response to bills that would immediately terminate both the public health emer-

gency and a separate COVID-19 national emergency declared by the President, the Office of Management and Budget (OMB) issued a statement opposing an immediate termination but announcing for the first time that "[a]t present, the Administration's plan is to extend the emergency declarations to May 11, and then end both emergencies on that date." OMB, *Statement of Administration Policy: H.R. 382 and H.J. Res. 7* (Jan. 30, 2023), www.whitehouse.gov/wp-content/uploads/2023/01/SAP-H.R.-382-H.J.-Res.-7.pdf.

2. The anticipated end of the public health emergency on May 11, and the resulting expiration of the operative Title 42 order, would render this case moot: Because the Title 42 order would have "'expired by its own terms,'" this suit seeking only prospective relief would "no longer present[] a 'live case or controversy.'" *Trump* v. *International Refugee Assistance*, 138 S. Ct. 353, 353 (2017) (citation omitted) (quoting *Burke* v. *Barnes*, 479 U.S. 361, 363 (1987)). In that event, the government will ask the court of appeals to vacate the district court's judgment and remand with instructions to dismiss private respondents' suit as moot. See *United States* v. *Munsingwear*, 340 U.S. 36, 39 (1950). And because the mooting of the underlying case would also moot petitioners' attempt to intervene, it would likewise be appropriate for this Court to resolve the intervention dispute by vacating the court of appeals' order denying intervention and remanding with instructions to dismiss petitioners' motion as moot.

3. Since this Court's grant of certiorari, the government has also continued its preparations for a full return to operations under Title 8. In January, DHS and the Department of Justice announced their intent to issue a proposed rule that would place additional condi-

tions on asylum eligibility. DHS, *DHS Continues to Prepare for End of Title 42* (Jan. 5, 2023), www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and (*DHS Announcement*). The proposed rule would adopt a presumption against asylum eligibility for migrants who fail to avail themselves of a lawful pathway for presenting their claims for protection in the United States or another country in the region. *Ibid.* Migrants who cannot overcome the presumption could be promptly removed under Title 8's expedited removal procedure. See 8 U.S.C. 1225(b)(1); see generally *DHS* v. *Thuraissigiam*, 140 S. Ct. 1959, 1964-1966 (2020). The Departments expect to issue the proposed rule in the coming weeks and aim to finalize it by May 11.

As part of its preparations for the end of the Title 42 orders, DHS also announced undertakings to create orderly pathways for migrants to present claims for protection, while deterring irregular migration. *DHS Announcement*. Among other things, DHS announced processes allowing capped numbers of individuals from Haiti, Nicaragua, Cuba, and Venezuela who pass security vetting to seek authorization to travel to the United States to seek parole without making the dangerous journey to the border. *Ibid.*; see 88 Fed. Reg. 1243 (Jan. 9, 2023) (Haitians); 88 Fed. Reg. 1255 (Jan. 9, 2023) (Nicaraguans); 88 Fed. Reg. 1266 (Jan. 9, 2023) (Cubans); 88 Fed. Reg. 1279 (Jan. 9, 2023) (Venezuelans).

Those parole processes were critical to Mexico's decision to begin accepting the expulsion (under Title 42) or the removal (under Title 8) of noncitizens from those four countries who attempt to enter the United States at the southern border without availing themselves of the new pathways. *DHS Announcement*. And those ef-

forts have already resulted in a 97% decrease in border encounters of nationals of those countries. See DHS, *Unlawful Southwest Border Crossings Plummet Under New Border Enforcement Measures* (Jan. 25, 2023), www.dhs.gov/news/2023/01/25/unlawful-southwest-border-crossings-plummet-under-new-border-enforcement-measures. On January 24, 2023, a group of States, including most of the petitioners, filed suit to block the new parole processes. *Texas* v. *DHS*, No. 23-cv-7 (S.D. Tex.).

SUMMARY OF ARGUMENT

A. The court of appeals acted well within its discretion in finding petitioners' intervention motion untimely. This Court has held that a prospective intervenor must act as soon as it becomes apparent that existing parties likely will no longer protect its interests. Here, petitioners seek to intervene to perpetuate the Title 42 orders by moving to stay the district court's judgment pending appeal. But petitioners had known for nearly eight months that the government would have no basis to seek such a stay. The government has continued to defend this case on the merits because CDC's orders were valid when issued. But an emergency stay demands a showing of irreparable harm, and the government could scarcely claim to be irreparably harmed by the vacatur of CDC orders that CDC itself had already terminated because they are no longer in the public interest or statutorily authorized.

Petitioners' challenges to the court of appeals' straightforward application of this Court's precedents lack merit. This Court has never suggested that motions to intervene are per se timely if filed promptly after the original defendant declines to appeal or seek a stay, or before the time to appeal has expired. Instead, the

Court's decisions ask the same fact-specific question the court of appeals asked here: Whether the putative intervenors acted promptly once they became aware of a "strong likelihood" that existing parties would not protect their asserted interest. *NAACP* v. *New York*, 413 U.S. 345, 367 (1973). Petitioners failed to do so.

B. Petitioners' criticisms of the government's litigation decisions are unfounded and neither excuse their untimeliness nor otherwise justify intervention. The government has not sought to circumvent the APA. Instead, CDC terminated the Title 42 orders in compliance with the APA long before the district court issued its judgment in this case. And even after that termination was preliminarily enjoined by the district court in *Louisiana*, the government continued to vigorously defend the Title 42 orders on the merits and has appealed the district court's judgment here. The government's decision not to seek a stay pending appeal was in no sense a "collusive surrender," Pet. Br. 13; it was simply a recognition that such a stay is extraordinary relief that the government could not credibly seek here. And by appealing and seeking to hold the appeal in abeyance pending the resolution of the *Louisiana* litigation and further rulemaking, the government is doing precisely what many of the petitioners maintained it should have done in *Arizona* v. *City & County of San Francisco*, 142 S. Ct. 1926 (2022) (per curiam).

In any event, petitioners' criticisms of the government's approach to this litigation would not justify allowing them to intervene and countermand the government's decisions about how to defend the government's own policies. Petitioners themselves recognized that point when the shoe was on the other foot in the *Louisiana* litigation: They *joined* the government in oppos-

ing intervention by an advocacy group that sought to stay the preliminary injunction preventing CDC from terminating the Title 42 orders. The contrary view petitioners now urge would contradict Congress's considered choice to concentrate litigation decisions in the Solicitor General and flood the courts with motions for emergency relief from States and other parties claiming to be injured by the indirect effects of district-court judgments.

C. Even apart from their untimeliness, petitioners should not be permitted to intervene because they have no legally protected interest in this suit. That is true for two independent reasons.

First, petitioners seek to intervene to preserve CDC's Title 42 orders, which were adopted pursuant to a public-health statute aimed solely at preventing the spread of disease. But petitioners disclaim any interest in the public health or in COVID-19 prevention; instead, their sole asserted interest is in maintaining the Title 42 orders as makeshift immigration policy. Petitioners' interests in limiting immigration are not protected by the public-health statute, the Title 42 orders, or any other relevant law.

Second, petitioners' asserted interests are too indirect and diffuse to support intervention. Petitioners claim that a full return to the immigration laws Congress prescribed in Title 8 will result in an increased number of noncitizens within their borders, which in turn will cause them to make greater expenditures on education, law enforcement, healthcare, and drivers licenses. But as this Court and lower courts have held, those sorts of indirect economic consequences are not the sort of legally protected interests that justify intervention.

D. Finally, even if petitioners could overcome all of those hurdles, they lack Article III standing to seek relief no party has sought (a stay pending appeal). Petitioners' assertion that a return to full Title 8 processing will indirectly lead them to make greater expenditures on their own governmental activities does not qualify as a cognizable Article III injury. In our federal system, virtually every federal policy has such downstream effects on the States. But those ubiquitous incidental effects have never been, and should not become, the basis for an Article III case or controversy. Any other rule would transform the federal courts into an open forum for the resolution of every policy dispute between a State and the federal government.

ARGUMENT

"No statute or rule provides a general standard to apply in deciding whether intervention on appeal should be allowed." *Cameron* v. *EMW Women's Surgical Center, P.S.C.*, 142 S. Ct. 1002, 1010 (2022). The resolution of such a motion is thus "committed to the discretion of the court before which intervention is sought." *Id.* at 1011. This Court has instructed that the exercise of that discretion should be guided by "the 'policies underlying intervention' in the district courts," including "timeliness" and "the legal 'interest' that a party seeks to protect through intervention on appeal." *Id.* at 1010, 1012 (citations omitted); see Fed. R. Civ. P. 24.[3]

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[3] Petitioners incorrectly suggest (Br. 17 n.1) that the question in this case is the propriety of intervention "in the district court." The district court never ruled on petitioners' intervention motion, see D. Ct. Docket entry (Dec. 14, 2022); the court of appeals treated their filing in that court as seeking intervention on appeal, J.A. 1; and this Court granted certiorari to review the court of appeals' order, not to express a first view on an unresolved motion in district court.

The court of appeals did not abuse its discretion in deeming petitioners' motion to intervene untimely. Petitioners assert that they are entitled to intervene because the government failed to seek a stay pending appeal, but petitioners had known for eight months that the government would have no credible basis to seek such a stay. Petitioners have no answer to that simple, dispositive point. Instead, they strive to change the subject by impugning the government's litigation decisions. But those criticisms are unpersuasive on their own terms and would not in any event excuse petitioners' untimeliness. And even if petitioners could overcome that hurdle, they still would not be entitled to intervene because they have no legally protected interest in this suit. Most obviously, they seek to defend a public-health order, but their asserted interests have nothing to do with public health.

Petitioners thus ask this Court to radically transform litigation in suits involving the government. On their view, any party that meets petitioners' capacious understanding of Article III standing is entitled to intervene and seek emergency relief whenever the government declines to do so—even if the putative intervenor had long been on notice that the government could not be expected to seek a stay, even if the intervenor's interest is indirect and diffuse, and even if the intervenor has effectively disclaimed any legal interest in the subject matter of the suit. This Court should reject that disruptive rule, which would threaten to flood the courts—and especially this Court—with requests for emergency relief in every government case that is sufficiently consequential or controversial to attract the attention of one or more States.

A. The Court Of Appeals Did Not Abuse Its Discretion In Denying Petitioners' Motion As Untimely

The timeliness of a motion to intervene "is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review." *NAACP* v. *New York*, 413 U.S. 345, 366 (1973). The court of appeals acted well within its broad discretion here.

1. The timeliness of an intervention motion is judged based on "all the circumstances." *Cameron*, 142 S. Ct. at 1012 (citation omitted). As this Court recently emphasized, the question is whether the movant "sought to intervene 'as soon as it became clear' that [its] interests 'would no longer be protected' by the parties." *Ibid.* (citation omitted). Here, petitioners had long known that the government's interests diverge from theirs in precisely the way petitioners now belatedly contend justifies intervention—specifically, that the government could not be expected to seek a stay pending appeal to perpetuate the Title 42 orders.

Critically, petitioners failed to seek to intervene for nearly eight months after CDC "issued an order terminating the Title 42 policy" in April 2022. J.A. 5. In that order, CDC concluded that given the current state of the pandemic, "the cross-border spread of COVID-19 due to covered noncitizens does not present the serious danger to public health that it once did." 87 Fed. Reg. at 19,944. CDC thus determined that "the extraordinary measure of an order under 42 U.S.C. 265 is no longer necessary"—and thus no longer statutorily authorized. *Ibid.*; see *id.* at 19,944-19,945.

As the court of appeals emphasized, CDC's order "'should have'" and, in fact, "actually did" alert petitioners to the government's different interests with respect

to keeping the Title 42 orders in effect. J.A. 5 (quoting *Cameron*, 142 S. Ct. at 1013). Indeed, petitioners have conceded that it was "clear" to them "*[f]or most of 2022*" that the government "wanted to end Title 42." *Ibid.* (citation and ellipsis omitted). And the only reason the policy remained in place was that petitioners themselves had sued the government and obtained a preliminary injunction in the *Louisiana* case.

Given those developments, the government's decision "not to pursue the 'extraordinary relief' of a stay pending appeal" "should [have] come as no surprise." J.A. 6 (citation omitted). Indeed, the government *could not* have sought a stay. That relief requires a showing that the movant faces "irreparable harm." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam). The government could scarcely have claimed to be irreparably harmed by the end of a policy it had already sought to terminate based on changed public-health circumstances. In light of CDC's conclusions, the government also could not have maintained that continuing the Title 42 orders was in "the public interest." *Nken* v. *Holder*, 556 U.S. 418, 434 (2009) (citation omitted). To the contrary, as petitioners knew, the government was arguing exactly the opposite in the *Louisiana* case, where it had explained that "the public interest weigh[s] heavily" against the preliminary injunction's interference with CDC's decision to end "an emergency public-health measure" that had outlived its public-health justification. Gov't C.A. Br. at 3, *Louisiana* v. *CDC*, No. 22-30303 (5th Cir.).

Petitioners have filed nearly a dozen motions and briefs in this case, which span hundreds of pages. Yet even though their position is predicated on the assertion that they were counting on the government to seek a

stay pending appeal, they have never attempted to explain how the government could have done so. Their silence on that point speaks volumes.

2. This Court's decision in *NAACP* further confirms that the court of appeals acted well within its broad discretion in finding that petitioners should have sought to intervene sooner. Indeed, the Court in that case affirmed a denial of intervention based on a much shorter delay after much more equivocal indications of a divergence of interests.

NAACP was a suit by New York against the United States seeking a declaratory judgment that certain provisions of the Voting Rights Act did not apply to three New York counties. 413 U.S. at 348-349. In response to New York's motion for summary judgment, the United States consented to the entry of the requested declaratory relief. *Id.* at 360. Four days later, before the court entered judgment, a group of voters, elected officials, and advocacy organizations sought to intervene as defendants, asserting that the government's defense had been inadequate. See *id.* at 347-348 n.2, 360.

The three-judge district court denied the motion without explanation, and this Court "readily" affirmed based on "the motion's untimeliness." *NAACP*, 413 U.S. at 366. The Court emphasized that the United States' answer to New York's complaint, which was filed just a month before the United States consented to the entry of judgment, had "revealed that [the United States] was without information with which it could oppose the [subsequent] motion for summary judgment." *Id.* at 367. That answer, the Court explained, made it "obvious that there was a strong likelihood that the United States would consent to the entry of judgment," making it "incumbent" upon the putative intervenors

"to take immediate affirmative steps to protect their interests." *Ibid.*

So too here. CDC's April 2022 termination of the Title 42 orders established far more than a "strong likelihood" that the government would not seek an extraordinary stay to keep those orders in place during this litigation. *NAACP*, 413 U.S. at 367. If petitioners wished to seek such relief, therefore, it was "incumbent" upon them "to take immediate affirmative steps." *Ibid.*

3. Petitioners cite no decision granting intervention to a party who delayed in the face of such clear notice of divergent interests. And petitioners' various challenges to the court of appeals' straightforward application of this Court's precedents lack merit.

a. Petitioners first assert that their motion was timely because they moved to intervene shortly after the government purportedly "abandoned defense" of the Title 42 orders, on the theory that a party seeking to intervene as a defendant may wait until the original defendants "'cease defending the challenged law.'" Br. 18 (brackets, citation, and emphasis omitted); see Br. 18-19, 29-30. That is doubly mistaken.

As an initial matter, the government has not "abandoned defense" of the Title 42 orders. The government vigorously defended those orders in district court, appealed the court's adverse decision, and remains committed to protecting CDC's authority to adopt Title 42 orders by seeking vacatur under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), following the expected developments that would moot the case, see pp. 11-12, *supra*. And if the case does not become moot, the government has made clear that it will continue to argue on appeal "that CDC's Title 42 Orders were lawful, that [42 C.F.R.] 71.40 is valid, and that [the district

court] erred in vacating those agency actions." J.A. 219; see J.A. 218.

In any event, the Court has never endorsed anything like the per se rule petitioners advocate. Just the opposite: In *NAACP*, the Court held that the putative intervenors' motion was untimely even though it was filed just four days after the government "abandoned defense" of the litigation (Pet. Br. 18) by consenting to judgment. See 413 U.S. at 367. And this Court's decision in *Cameron* is not to the contrary. The intervenor in that case, Kentucky's Attorney General, "sought to intervene 'as soon as it became clear' that the Commonwealth's interests 'would no longer be protected' by the parties in the case." *Cameron*, 142 S. Ct. at 1012 (citation omitted). The Court observed that the opponents of intervention there did "not explain why the attorney general should have known that the [existing defendant] would change course." *Id.* at 1013. Here, in contrast, the court of appeals specifically found that petitioners both should have known and "actually did" know long before they sought to intervene that their interests diverged from the government's—and, in particular, that the government's decision not to seek a stay pending appeal should have been "no surprise." J.A. 5-6.

b. Petitioners next assert (Br. 19-20, 26-27) that *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), establishes that a motion to intervene for purposes of appeal is timely whenever it is filed before a notice of appeal would be due. But again, this Court's decision adopted no such rule. Instead, the Court deemed it "critical" that "as soon as it became clear to the [would-be-intervenor] that the interests of the unnamed class members would no longer be protected by the [parties], she promptly moved to intervene to protect those inter-

ests." *Id.* at 394-395. Here, it became clear in April 2022 that the government could not credibly seek a stay pending appeal in the event the district court were to issue an adverse ruling.

c. Petitioners also fault the court of appeals for denying intervention without "evaluat[ing] potential prejudice" to the parties. Br. 12; see, *e.g.*, Br. 14, 20-22, 27. But this Court has never suggested that a specific finding of prejudice is a prerequisite to a denial of intervention based on timeliness. Instead, the Court has repeatedly instructed that would-be intervenors must act "promptly." *United Airlines*, 432 U.S. at 394; see *Cameron*, 142 S. Ct. at 1012; *NAACP*, 413 U.S. at 367. And courts of appeals likewise recognize that a post-judgment intervention motion "will usually be denied where," as here "a clear opportunity for pre-judgment intervention was not taken." *Associated Builders & Contractors, Inc.* v. *Herman*, 166 F.3d 1248, 1257 (D.C. Cir. 1999) (citation omitted); see, *e.g.*, *Jordan* v. *Michigan Conference of Teamsters Welfare Fund*, 207 F.3d 854, 862 (6th Cir. 2000).

In any event, petitioners' delay severely prejudiced the government. Had petitioners sought to intervene earlier, their motion could have been litigated in the ordinary course, their status would have been settled by the time the district court entered judgment, and, if they had been permitted to intervene, the lower courts could have promptly considered and resolved their motion for a stay pending appeal. Instead, petitioners' eleventh-hour filing forced the parties and the lower courts to scramble to litigate and decide the intervention and stay motions together—and ultimately culminated in this Court's entry of a stay just a day before the Title 42 orders were to be lifted.

The uncertainty created by those last-minute developments was especially prejudicial because the transition from Title 42 to Title 8 processing is a complex, multi-agency undertaking with significant policy, operational, and foreign-relations dimensions. The government and its foreign partners made extensive preparations to wind down Title 42 processing upon the expiration of the district court's five-week stay, only to be forced to change course as a result of petitioners' belated effort to intervene.

d. Petitioners additionally err in asserting (Br. 32) that Texas's unsuccessful motion to intervene in the court of appeals at the preliminary injunction stage in October 2021 establishes that "it was not possible to intervene earlier." The denial of Texas's motion rested solely on the court's heightened "standards for intervention on appeal." J.A. 222; see J.A. 223 (citing case). The denial thus posed no obstacle to intervention in district court—particularly once CDC terminated the Title 42 orders in April 2022, which put petitioners on notice that the government would have no basis to seek a stay from any adverse ruling.

e. Finally, petitioners assert (Br. 22-23, 30-32) that they had no reason to intervene earlier because the government was vigorously defending the Title 42 orders in the district court and because the government has taken the position that the APA does not authorize a district court to vacate a rule. Those arguments reflect a fundamental error that pervades petitioners' brief: they conflate the government's views on the merits with its ability and willingness to seek the extraordinary relief of a stay.

On the merits, the government has argued, and continues to maintain, that CDC's Title 42 orders were law-

ful when issued and that the district court erred in holding them arbitrary and capricious. See p. 8, *supra*. The government has also argued, and continues to maintain, that the APA does not depart from fundamental principles of party-specific relief and that the district court thus erred in vacating the Title 42 orders and the underlying regulation. J.A. 219; see, *e.g.*, Gov't Br. at 40-44, *United States* v. *Texas*, No. 22-58 (argued Nov. 29, 2022).[4]

But the government does not "appeal every adverse decision." *United States* v. *Mendoza*, 464 U.S. 154, 161 (1984). And even where, as here, the government appeals, it does not automatically seek a stay. To the contrary, a stay is an extraordinary remedy that requires not just a likelihood of success on the merits, but also a showing of irreparable harm and consideration of the public interest. *Nken*, 556 U.S. at 425-426. A decision to appeal without seeking a stay thus is not "acquiesce[nce]" in the district court's judgment, Pet. Br. 23; it simply reflects that a request for extraordinary relief is appropriate only in extraordinary circumstances.

Petitioners, moreover, were well aware that the government does not seek a stay of every order—or even every nationwide order—with which it disagrees. Petitioners themselves had obtained a nationwide preliminary injunction in the *Louisiana* litigation. The government vigorously opposed that relief in the district court and is challenging it on appeal. But as in this case, the government did not seek a stay pending appeal. Especially in light of that experience just a few months

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[4] Petitioners err in asserting (*e.g.*, Br. 22-23) that the district court's separate injunction was the sort of "nationwide injunction" that the government has opposed. Unlike the vacatur, the district court's injunction was limited to "Plaintiff Class Members." J.A. 9.

earlier in their own litigation, petitioners' insistence (Br. 23) that they "had no reason to think" the government would forgo seeking a stay pending appeal strains credulity.

B. Petitioners' Criticisms Of The Government's Litigation Decisions Do Not Excuse Their Untimeliness Or Otherwise Justify Intervention

Throughout their brief, petitioners attempt to justify their belated attempt to intervene by asserting that the government has sought to "evad[e] the requirements of the [APA]" by "collud[ing] with nominally adverse parties to invalidate [the Title 42 orders] through litigation." Br. 2; see, *e.g.*, Br. 13, 16, 30, 32, 50. Petitioners also seek to cast this case as a successor to *Arizona* v. *City & County of San Francisco*, 142 S. Ct. 1926 (2022) (per curiam), where the government dismissed appeals from decisions enjoining or vacating a policy it planned to revisit in the future but had not yet taken administrative action to repeal. Those assertions are unfounded. Indeed, by appealing and seeking to hold the appeal in abeyance pending litigation over CDC's termination of the Title 42 orders and an upcoming rulemaking, the government is doing precisely what many of the petitioners maintained it should have done in *San Francisco*. And petitioners themselves have previously joined the government in opposing an effort by a third-party to intervene and seek a stay pending appeal after the government declined to do so.

1. Petitioners assert (Br. 16, 32, 47) that the government has sought to "circumvent[]" APA requirements and rescind the Title 42 orders by acquiescing in the district court's nationwide vacatur. That is wrong. Long before the court's decision, CDC terminated the Title 42 orders in compliance with the APA by issuing a

carefully reasoned order explaining that the Title 42 orders were no longer necessary and therefore no longer authorized by 42 U.S.C. 265. 87 Fed. Reg. at 19,941-19,956; see p. 6, *supra*. The *Louisiana* district court preliminarily enjoined that termination because it believed the government was required to proceed by notice and comment. But as the government has explained in its pending appeal, the Title 42 orders were emergency measures issued without notice and comment and subject to ongoing review based on current public-health circumstances. Just as CDC had good cause to forgo notice and comment when it adopted the orders, see 5 U.S.C. 553(b)(B), it likewise had good cause to forgo notice and comment when those temporary emergency measures ceased to be justified. See Gov't C.A. Br. at 30-44, *Louisiana*, *supra*.

Despite CDC's termination, however, the government continued to defend the Title 42 orders as issued and vigorously argued below that they should not be enjoined or vacated—as petitioners themselves acknowledge (Br. 43). And the government also urged the district court to "defer consideration of the issue of remedy" until it had addressed all of private respondents' claims because a decision on whether to vacate the Title 42 orders would otherwise be "premature." D. Ct. Doc. 160, at 1-2 (Sept. 28, 2022). There is thus no basis for petitioners' allegation (Br. 21) that the government somehow sought to procure a judgment vacating the orders or otherwise to "prevail by surrender."

2. Petitioners' criticisms of the government's post-judgment litigation decisions are equally unfounded. Petitioners have objected to the government's decision not to seek a stay pending appeal, its request to hold the appeal in abeyance, and its unopposed motion for a five-

week stay to allow for an orderly transition to full Title 8 operations at the border. Each of those decisions was entirely proper, and none of them justifies intervention.

a. There was nothing collusive, improper, or even surprising in the government's decision not to seek a stay pending appeal. Indeed, as explained above, the government *could not* have sought such relief because it could not plausibly claim that it would suffer irreparable injury from the end of a policy it had already sought to terminate, or that the public interest would be served by perpetuating a now-obsolete public-health measure. See p. 20, *supra*.

b. Petitioners err in attempting to paint the government's motion to hold the appeal in abeyance as a collusive effort to ensure that the errors in the district court's decision are "never corrected." Br. 2, 16. Most obviously, there was nothing collusive about that request; in fact, private respondents *opposed* the government's motion to hold the appeal in abeyance pending proceedings in *Louisiana* and a planned rulemaking by HHS and CDC. See p. 8 n.2, *supra*. Nor was the abeyance motion an effort to preserve the district court's judgment: The Fifth Circuit proceedings and the forthcoming rulemaking could wholly or partially moot this case, which would justify *Munsingwear* vacatur of the judgment. And to the extent that abeyance is denied or a live controversy remains, the government has made clear that it will continue to defend the legality of CDC's regulation and orders on appeal.

In seeking abeyance, moreover, the government did precisely what petitioners themselves have previously argued that it *should* do in cases like this. The petitioners in *San Francisco* (including many of the petitioners here) argued that the government should have appealed

a decision invalidating a rule it no longer supported, then asked the courts "to hold the litigation in abeyance" pending further rulemaking. Pet. Br. at 11, *San Francisco*, *supra* (No. 20-1775). There, petitioners explained that such an abeyance—which "[c]ourts routinely grant"—appropriately "prevents litigation" over policies "that will likely be repealed anyway, conserving the resources of the parties, the government, and the judiciary." *Ibid.*; see Pet. at 5, *Texas* v. *Cook County*, No. 22-234 (cert. denied Jan. 9, 2023) (similar). Petitioners should not be heard to complain that the government is pursuing the very course of action they previously urged.

c. Finally, petitioners note (*e.g.*, Br. 9-10) that the government secured private respondents' non-opposition to a five-week stay of the district court's judgment. But that request flatly contradicts petitioners' attempt to paint a picture of an effort to subvert the Title 42 orders through litigation: The stay *extended* those orders longer than they otherwise would have lasted.

The government's stay motion was also an entirely appropriate response to the situation it confronted. In October 2022, the district court signaled that a ruling on the parties' summary judgment motions was imminent by canceling a scheduled motions hearing. D. Ct. Docket entry (Oct. 5, 2022). Although the government could not credibly seek to stay any adverse judgment pending appeal, DHS had concluded that an abrupt return to full Title 8 operations would severely disrupt its management of the border. J.A. 216. And the situation was urgent because that severe disruption would have begun as soon as the court entered an order enjoining or vacating the Title 42 orders. Anticipating that possibility, the government concluded that it would immedi-

ately seek a temporary stay. Consistent with applicable local rules, it conferred with private respondents and secured their agreement not to oppose a five-week stay based on the understanding that the government would not seek a longer stay pending appeal. See D.D.C. R. 7(m).

Subsequent events validated the government's approach. When the district court issued its decision, it specifically stated "that any request to stay this Order pending appeal will be denied." J.A. 9. Within hours, the government filed its unopposed motion for a five-week stay, explaining that a stay to allow an orderly transition was "critical" to DHS's management of the border. J.A. 216. The court granted that modest request "WITH GREAT RELUCTANCE," J.A. 58, specifically relying on "the lack of opposition by Plaintiffs." *Ibid.*

Petitioners identify no impropriety or circumvention of the APA in those events. And petitioners' criticism of the government's efforts to secure a brief stay are puzzling: The disruptive consequences that petitioners attribute to the end of the Title 42 orders would only have been exacerbated—and petitioners themselves could only have been worse off—had the government simply allowed the district court's vacatur to take immediate effect.

3. In any event, petitioners' criticisms of the government's approach to this litigation would not justify allowing them to intervene and countermand the government's decisions about how best to defend its own policies. Congress and the Executive Branch have chosen to "concentrate[]" such litigation decisions in a "single official," the Solicitor General, precisely because they require a "broader view of litigation in which the Gov-

ernment is involved" and turn on "a number of factors which do not lend themselves to easy categorization." *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 96 (1994); see *United States* v. *Providence Journal Co.*, 485 U.S. 693, 699 (1988).

"The Solicitor General's policy for determining when to appeal" properly takes into account, for example, not only the legal merits of the district court's decision, but "a variety of factors," including the suitability of a particular case as a vehicle for litigating those issues, the likelihood of prevailing, and the broader interests of the relevant agency and the government as a whole. *Mendoza*, 464 U.S. at 160-161. And where, as here, the Solicitor General has determined that an appeal will be taken, allowing intervention based on disagreement with a discrete litigation decision within the pending appeal would improperly "allow a third party to intervene not because an agency failed to move for additional review, but because the agency failed to move for review in the third party's preferred way." *Humane Society* v. *United States Department of Agriculture*, 54 F.4th 733, 735 (D.C. Cir. 2022) (mem.) (Tatel, J., concurring).

That is particularly true of decisions about emergency stays, which implicate not only the government's interest in maintaining control over litigation but also its interest in managing its operations. And that interest is at its apex here because this case involves the management of the border, a matter with significant foreign-relations implications. In the field of "foreign affairs," including "immigration" and "deportation," "[o]ur system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires

that federal power * * * be left entirely free from local interference." *Hines* v. *Davidowitz*, 312 U.S. 52, 62-63 (1941). Especially in this context, courts should not treat the government's decision to forgo an extraordinary request for a stay pending appeal as a basis for allowing intervention by strangers to the litigation that assert indirect injuries stemming from the district court's judgment.

Petitioners themselves recognized those points in the *Louisiana* litigation. There, as here, the district court ruled against the government and issued a nationwide remedy preventing enforcement of the agency's action. There, as here, the government decided to appeal without seeking a stay pending appeal. There, as here, another party sought to intervene to seek a stay. See Doc. 516342383, *Louisiana* v. *CDC*, No. 22-30303 (5th Cir. June 2, 2022). And there, as here, the government argued that the would-be intervenor was not entitled to intervene, notwithstanding its argument that it was injured by the scope of relief and the lack of a stay. Gov't Opp. to Mot. at 1-2, 11-15, *Louisiana*, *supra*. In that case, however, petitioners agreed with the government that the standard for intervention was not satisfied, even though the government had not sought a stay. States' Consolidated Br. at 94, *Louisiana*, *supra*.

The same principle, neutrally applied, would defeat petitioners' bid to intervene in this case. But petitioners embrace the government's circumspect approach to extraordinary relief and intervention only when it preserves policies they like, while rejecting the same principles when they have the effect of preserving policies petitioners oppose. That outcome-driven view further underscores the importance of maintaining the Executive Branch's authority to make this type of litigation

judgment, rather than allowing third parties to intervene and override the federal government's determinations about how best to defend federal actions and broader federal interests.

A contrary rule would not only undermine the considered choices Congress and the Executive Branch have made about control over government litigation, but would also disserve the Article III courts. It would require emergency stay litigation—including, apparently, all the way to this Court—in every case where the government chooses for prudential or other reasons not to pursue that relief, but a State or another third party can claim to be indirectly injured by the district court's judgment. That result would be profoundly disruptive.

4. Petitioners cite no decision adopting their view that the government's failure to seek an emergency stay pending appeal justifies intervention. And they err in invoking (Br. 47) this Court's decision in *Berger* v. *North Carolina State Conference of the NAACP*, 142 S. Ct. 2191 (2022). There, the Court held that state legislative leaders were entitled to intervene alongside the State Board of Elections to defend a state law in federal court on a concededly timely motion. See *id.* at 2201, 2206. In describing the divergence of interests between the legislative leaders and the Board, the Court noted both the Board's decision not to present evidence in district court in opposition to a preliminary injunction and its subsequent decision not to seek a stay of the injunction. *Id.* at 2205. That discussion does not suggest that a mere failure to seek a stay is grounds for intervention where, as here, the original defendant has made a robust defense on the merits.

Just as importantly, *Berger* relied on States' "free[dom] to structure themselves as they wish," em-

phasizing that North Carolina had authorized the legislative leaders to represent the State in court. 142 S. Ct. at 2197. In *Cameron*, too, the Court respected Kentucky's choice "to structure its executive branch in a way that empowers multiple officials to defend its sovereign interests in federal court." 142 S. Ct. at 1011. The same respect is warranted for Congress's judgment that decisions about the defense of federal laws and policies should be "concentrated" in the Solicitor General. *NRA Political Victory Fund*, 513 U.S. at 96. It would frustrate that considered judgment to allow States and other parties to intervene and countermand the Solicitor General's decisions—especially where, as here, the States assert only the most attenuated interests in the underlying policy.

C. Petitioners Lack A Legally Cognizable Interest In This Litigation

A party asserting an entitlement to intervene must establish a cognizable "legal 'interest'" in the litigation. *Cameron*, 142 S. Ct. at 1010 (quoting Fed. R. Civ. P. 24(a)(2)). Petitioners lack such an interest for two independent reasons. First, there is a fundamental disconnect between the immigration-related interests petitioners assert and the public-health justification for the Title 42 statute, regulation, and orders. Second, petitioners' asserted interest in avoiding expenditures they may make as an indirect result of the termination of the Title 42 orders is not the type of direct, legally protectable interest required for intervention.

1. Petitioners have no cognizable legal interest in perpetuating CDC's public-health orders as makeshift immigration policy

a. This Court has emphasized that the interest required for intervention is not merely a practical stake in the outcome of the suit, but a "significantly protectable interest" in the subject of the litigation. *Donaldson* v. *United States*, 400 U.S. 517, 531 (1971). A significantly protectable interest, in turn, is one that the law on which the putative intervenor's claim or defense rests is "designed to protect." *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 135 (1967).

In *Donaldson*, for example, this Court held that a taxpayer could not intervene in a suit by the government against his former employer and the employer's accountant to enforce summonses to obtain records of payments they had made to the taxpayer. 400 U.S. at 518-519. The Court recognized that the taxpayer had an undeniable practical interest in the outcome of the litigation. *Id.* at 530-531. But the Court held that such an interest in the litigation's consequences does not satisfy Rule 24. Instead, Rule 24 demands a "significantly protectable interest," such as a "proprietary interest" in the records or a legally recognized "privilege." *Ibid.*

As the Court later explained, *Donaldson* thus "held that the employee's interest was not legally protectible," as required for intervention. *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 315 (1985). Or, as Justice O'Connor put it, "*Donaldson*'s requirement of a 'significantly protectable interest' calls for a direct and concrete interest that is accorded some degree of legal protection." *Diamond* v. *Charles*, 476 U.S. 54, 75 (1986) (O'Connor, J., concurring in part and in the judgment).

The Court's most recent intervention decisions illustrate that principle. In *Cameron*, the Court held that the Kentucky attorney general's interest in defending the constitutionality of a state statute in federal court was sufficient to justify intervention because "a State 'clearly has a legitimate interest in the continued enforceability of its own statutes'" and the attorney general had a statutory right to defend the constitutionality of the challenged statute. 142 S. Ct. at 1011 (citation omitted); see Ky. Rev. Stat. Ann. § 15.020 (LexisNexis Supp. 2022). The same was true in *Berger*, where the legislators who sought to intervene were "expressly authorized" by state law "to defend the State's practical interests in litigation." 142 S. Ct. at 2202; see N.C. Gen. Stat. Ann. § 1-72.2(b) (2021).

Lower courts have recognized the same principle. The Seventh Circuit, for example, explained that one "dimension of the 'interest' required for intervention as a matter of right" is that the putative intervenor must be "someone whom the law on which his claim is founded was intended to protect." *Flying J, Inc.* v. *Van Hollen*, 578 F.3d 569, 572 (2009). In *Flying J*, the court emphasized that the retailers seeking to intervene to defend a state law were "the statute's direct beneficiaries" and were seeking to vindicate the very interest the law was adopted to serve. *Ibid.*; see, *e.g.*, *Wal-Mart Stores, Inc.* v. *Texas Alcoholic Beverage Commission*, 834 F.3d 562, 566-567 (5th Cir. 2016); *California ex rel. Lockyer* v. *United States*, 450 F.3d 436, 441 (9th Cir. 2006); *New York Public Interest Research Group, Inc.* v. *Regents of the University*, 516 F.2d 350, 352 (2d Cir. 1975) (per curiam).

b. Petitioners' asserted immigration-related interests do not satisfy that standard. Those interests are

not "significantly protectable," *Donaldson*, 400 U.S. at 531, or "legally protectible," *Tiffany*, 469 U.S. at 315, because they are not the sort of interests that any relevant law was "designed to protect," *Cascade*, 386 U.S. at 135. This litigation involves a regulation and orders issued under 42 U.S.C. 265. Section 265 is concerned only with protecting the public health by preventing the spread of disease. It hinges on CDC's finding of a "serious danger of the introduction of [any communicable] disease into the United States"—and CDC's authority to suspend entry is expressly limited to "such period of time as [it] may deem necessary" in order to protect "the public health." *Ibid.*

Congress thus could not have been clearer that *public health* is the touchstone for CDC's exercise of its authority to suspend the introduction of persons from foreign countries into the United States. Consistent with that statutory mandate, the Title 42 orders were issued to "avert" the "serious danger of the introduction of [COVID-19] into the United States." 42 U.S.C. 265; see 86 Fed. Reg. at 42,840 ("I am issuing this Order to preserve the health and safety of U.S. citizens, U.S. nationals, and lawful permanent residents * * * by reducing the introduction, transmission, and spread of the virus that causes COVID-19.").

Petitioners' asserted interests, by contrast, have nothing to do with public health. Indeed, petitioners barely even mention public health or COVID-19. The only references to health in their opening brief are their claims that an increased number of noncitizens within their borders will lead petitioners to increase their general expenditures on healthcare, along with education, law enforcement, and drivers licenses. Br. 15, 37-38, 41, 43. The only reference to COVID-19 in the Argument

section of their brief is their acknowledgment that "the COVID-19 pandemic has significantly abated." Br. 48. Petitioners thus "do not seriously dispute that the public-health justification undergirding the Title 42 orders has lapsed." 143 S. Ct. at 479 (Gorsuch, J., dissenting).

Instead, petitioners recite (Br. 15, 37-38, 41, 43) a litany of additional expenditures they will allegedly make and other incidental effects they will allegedly experience if the Title 42 orders are terminated and DHS returns to full application of the immigration laws in Title 8. But those interests conspicuously omit anything associated with the spread of COVID-19. By their own account, therefore, petitioners' interest in keeping the Title 42 orders in place is to vindicate asserted interests in controlling immigration—not in protecting public health. And nothing in Section 265, HHS's regulation, the Title 42 orders, or any other relevant source of law gives petitioners a legally protected interest in the immigration effects of a public-health policy that all agree has outlived its public-health justification.

c. Petitioners address that dispositive point only in a footnote (Br. 45 n.13), asserting that Section 265 is not "completely disinterested in immigration consequences" because it "operates in part by *regulating immigration*." It is of course true that Section 265 authorizes the suspension of the introduction of "persons" (and property) into the country. 42 U.S.C. 265. But Section 265 authorizes such a suspension for one reason and one reason only: to protect against the introduction and spread of communicable diseases—not to regulate immigration generally or to prevent the sort of incidental effects (such as increased expenditures on education or drivers licenses for noncitizens) that petitioners invoke.

Indeed, CDC would exceed its powers under Section 265 if it attempted to prohibit the introduction of persons for any such immigration-related purpose. Cf. *Alabama Association of Realtors* v. *HHS*, 141 S. Ct. 2485, 2488 (2021) (per curiam) (addressing 42 U.S.C. 264). The immigration-control interests that petitioners assert thus are not even arguably protected by Section 265, much less directly protected in the manner required to support intervention. And just as that absence of any interest protected by Title 42 should have precluded petitioners from bringing suit to challenge CDC's termination of the Title 42 orders, see *Bennett* v. *Spear*, 520 U.S. 154, 161-162 (1997), it also means that petitioners lack a cognizable interest in intervening to defend those orders.[5]

2. Petitioners' asserted interests are too indirect and diffuse to justify intervention

Independent of the fundamental disconnect between the interests petitioners assert and the orders they seek to preserve, petitioners' claimed interests are too indirect and diffuse to warrant intervention. The principles embodied in Rule 24(a) require direct, legally protectable interests. And courts have long recognized that the

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[5] Indeed, petitioners' asserted interest in controlling immigration would not count as a legally protected interest even in a suit directly involving the immigration laws. Congress has precluded review of immigration-enforcement decisions except in narrow circumstances involving the noncitizens who are subject to such enforcement. See 8 U.S.C. 1252 (channeling and limiting judicial review, with no provision for suits by States or other third parties). And this Court has recognized that third parties have "no judicially cognizable interest in procuring enforcement of the immigration laws" against others. *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 897 (1984).

sort of downstream economic effects petitioners invoke are insufficient.

In *Donaldson*, for instance, the consequences of the enforcement proceeding "loom[ed] large in [the taxpayer's] eyes," yet the Court held that they were not the sort of direct and legally protected interest that could support intervention. 400 U.S. at 530-531. Relying on *Donaldson*, courts of appeals likewise have recognized that indirect economic interests—even substantial ones—are not a sufficient basis for intervention. "The reason is practical, and also obvious: the effects of a judgment in or a settlement of a lawsuit can ramify throughout the economy, inflicting hurt difficult to prove on countless strangers to the litigation." *Flying J*, 578 F.3d at 571; see, *e.g.*, *Mountain Top Condominium Association* v. *Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3d Cir. 1995); *New Orleans Public Service, Inc.* v. *United Gas Pipe Line Co.*, 732 F.2d 452, 466 (5th Cir.) (en banc), cert. denied, 469 U.S. 1019 (1984); see also *Medical Liability Mutual Insurance Co.* v. *Alan Curtis LLC*, 485 F.3d 1006, 1008 (8th Cir. 2007); *Greene* v. *United States*, 996 F.2d 973, 976 (9th Cir. 1993).

A contrary rule would be unworkable. Petitioners assert (Br. 38) that termination of the Title 42 orders will increase the number of noncitizens within their borders, and that petitioners will respond by making expenditures or taking other actions in the exercise of their own governmental authority that they would prefer not to take. But such an indirect interest could be asserted by States in countless cases involving federal governmental programs. And in the context of immigration, incidental economic effects may be experienced by any number of non-state entities indirectly affected

by the number of noncitizens in their communities—including local governments, healthcare providers, retailers, landlords, other businesses large and small, and even individuals. Any rule that would potentially allow intervention on the basis of such interests would "clutter too many lawsuits with too many parties." *Chicago* v. *Federal Emergency Management Agency*, 660 F.3d 980, 985 (7th Cir. 2011).

Petitioners assert (Br. 43) that the "avoidance of incurring economic injury is a classic protectable interest supporting intervention." But as just discussed, courts have rejected intervention to assert an interest in avoiding incidental economic consequences. None of the decisions petitioners cite (*ibid.*) supports their contrary view; instead, each recognizes that only "*direct* financial interests" justify intervention. *National Parks Conservation Association* v. *United States Environmental Protection Agency*, 759 F.3d 969, 976 (8th Cir. 2014) (emphasis added); see *United States* v. *Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004) (concluding that the putative intervenor's economic interest was too attenuated); *Utahns for Better Transportation* v. *United States Department of Transportation*, 295 F.3d 1111, 1115 (10th Cir. 2002) (explaining that an intervenor's interest must be "direct, substantial, and legally protectable") (citation omitted).

Petitioners' asserted education, healthcare, law-enforcement, and drivers-license expenditures represent the very sort of indirect, downstream economic interest in the outcome of litigation that cannot support intervention. This case is thus unlike circumstances in which States have intervened to defend federal laws under which they were entitled to receive direct payments from the federal government. See, *e.g.*, *California* v.

Texas, 141 S. Ct. 2104 (2021) (involving intervention by States based on their interest in $650 billion in annual direct payments under the challenged statute). And this case bears no resemblance to those where state officials have intervened to defend *state* laws. See *Berger*, 142 S. Ct. at 2205; *Cameron*, 142 S. Ct. at 1011.

Petitioners err in asserting (Br. 45) that this Court's decision in *Cascade* stands for the proposition that "more attenuated interests" satisfy Rule 24. There, this Court had previously found that the acquisition of a natural-gas company violated federal antitrust laws and had ordered divestiture. 386 U.S. at 135; see *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 662 (1964) (ordering divestiture "without delay"). The Court then later held that California and its regional utility were entitled to intervene on remand to protect their interests in "restor[ing] [the company] as an effective competitor in California" and in "retaining competition in California." *Cascade*, 386 U.S. at 132-133. The Court explained that "protection of California interests in a competitive system was at the heart of our mandate directing divestiture," and that "[i]t was indeed their interests, as part of the public interest in a competitive system, that our mandate was designed to protect." *Id.* at 135. In contrast, petitioners' indirect, generalized interests in immigration control are not what Section 265 or the Title 42 orders were "designed to protect."

D. Petitioners Lack Article III Standing

"[S]tanding is not dispensed in gross," and instead must be demonstrated "for each claim" and "for each form of relief." *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2208 (2021). Accordingly, "an intervenor must meet the requirements of Article III if the intervenor wishes to pursue relief not requested by a [party]."

Town of Chester v. *Laroe Estates, Inc.*, 137 S. Ct. 1645, 1648 (2017); see *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 65 (1997) (applying that principle to an intervenor-defendant). Petitioners wish to intervene to seek a form of relief that no party has sought: a stay of the district court's order pending appeal. At a minimum, then, petitioners must independently demonstrate Article III standing to seek a stay. *Town of Chester*, 137 S. Ct. at 1648. They cannot make that showing.[6]

1. Petitioners' principal asserted injury is their contention that the vacatur of CDC's Title 42 orders and the federal government's full return to immigration processing under Title 8 will result in the entry of more noncitizens, which in turn "will cause [petitioners] to incur additional healthcare, education, law-enforcement, and drivers-license-related expenditures" (Pet. Br. 37-38). As the government has argued in *Texas*, *supra* (No. 22-58), such derivative and incidental effects of federal policies on the States' own governmental activities are not a cognizable Article III injury.

In our federal system, the national government's policies regulating the people within a State will inevitably have derivative effects on the State's expenditures and other exercises of its own authority in relation to those same people. But the autonomy of the national and state sovereigns, each acting "within their respective spheres," *Printz* v. *United States*, 521 U.S. 898, 920

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[6] Although petitioners lack Article III standing, the Court need not resolve that question before addressing the propriety of intervention. Petitioners' entitlement to intervene is "the sort of 'threshold question' that may be resolved before addressing jurisdiction." *Sinochem International Co.* v. *Malaysia International Shipping Corp.*, 549 U.S. 422, 431 (2007) (brackets, citation, and ellipsis omitted).

(1997) (citation omitted), is inconsistent with the notion that a State has a judicially cognizable interest in avoiding the ubiquitous incidental effects of federal policies. And the absence of suits based on such incidental effects during the vast majority of our Nation's history confirms that those effects do not give rise to the sort of dispute "traditionally thought to be capable of resolution through the judicial process." *Raines* v. *Byrd*, 521 U.S. 811, 819 (1997) (citation omitted); see Gov't Br. at 10-24, *Texas*, *supra* (No. 22-58).

Instead, this Court has made clear that a State has standing to challenge federal policies only if it has suffered a "*direct* injury." *Florida* v. *Mellon*, 273 U.S. 12, 18 (1927) (holding that a State lacked standing to challenge a federal inheritance tax). Here, the vacatur of CDC's Title 42 orders and regulation, and full resumption of immigration processing under the laws Congress has prescribed to regulate immigration, does not result in any "*direct* injury" to petitioners. *Ibid.* The Title 42 orders—and the Title 8 measures that will replace them—do not require States to act or to refrain from acting, determine how much federal funding they receive, or deprive them of any legal rights. Cf. *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2565 (2019) (relying on federal funding).

Petitioners' invocation (Br. 41) of "unfunded federal mandates" with respect to "educational and healthcare services [for] immigrants" is misplaced because nothing in the Title 42 orders addresses those services. The full return to the immigration laws that Congress enacted in Title 8 merely tells federal officials how to enforce federal law in a field that the Constitution commits to the federal government. The indirect effects of that ac-

tion on States do not qualify as "legally" and "judicially cognizable" injuries. *Raines*, 521 U.S. at 819.

2. Petitioners invoke (Br. 41) the alleged "rights they enjoy under the injunction issued by the *Louisiana* court." But it does not follow that petitioners have a cognizable Article III injury caused by the judgment in *this* case. *Louisiana* involves the procedural validity of the April 2022 termination order. This case involves the validity of a different set of agency actions: the September 2020 regulation and August 2021 order. The decision in this case would not alter the validity or scope of the injunction in *Louisiana*. To be sure, vacatur of the underlying Title 42 orders would undermine the practical effect petitioners hoped to secure in pursuing the *Louisiana* litigation. But such an indirect effect on separate litigation does not create a cognizable Article III injury, which is why non-parties lack standing to challenge the precedential impact of a decision in which they are not involved, no matter how much such a precedent would undermine the non-party's prospects of success in its separate case. Cf. *Kowalski* v. *Tesmer*, 543 U.S. 125, 134 (2004).

Petitioners' reliance on the *Louisiana* injunction is misplaced for an additional reason: Just as petitioners' asserted interests are insufficient to satisfy Article III in this case, they are also insufficient to give petitioners standing to bring the *Louisiana* suit. The district court in *Louisiana* held otherwise, 603 F. Supp. 3d at 423-431, but its decision is not binding on this Court and petitioners should not be permitted to bootstrap the district court's error there to generate Article III standing where it would not otherwise exist.

3. Contrary to petitioners' assertion (Br. 41), no "doubly relaxed" standard for standing applies here.

The "special solicitude" in *Massachusetts* v. *EPA*, 549 U.S. 497, 520 (2007), applied where Congress had enacted a statutory procedural right to challenge the EPA's rejection of a rulemaking petition, *id.* at 516-518, 519-520, and the State alleged an injury to its interest in preserving its "sovereign territory," *id.* at 519. Petitioners here assert no similar sovereign interest. They claim a sovereign "power to exclude" noncitizens, Br. 39 (citation omitted), but that power lies exclusively with the federal government, not the States. *Arizona* v. *United States*, 567 U.S. 387, 409-410 (2012). Nor do petitioners assert "procedural claims," Br. 42: The district court's ruling, which petitioners seek to challenge, addresses the *substantive* question whether CDC's Title 42 regulation and orders were arbitrary and capricious.

4. Petitioners' lack of Article III standing provides an additional reason the Court should affirm the court of appeals' decision denying intervention. And petitioners' inability to clear the minimum threshold imposed by Article III further underscores that they lack the sort of "direct," "concrete," and "legal[ly] protect[ed]" interest required for intervention. *Diamond*, 476 U.S. at 75 (O'Connor, J., concurring in part and in the judgment).[7]

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[7] Petitioners close their brief with an abbreviated argument (Br. 48-50) that they should be granted permissive intervention under Rule 24(b). But Rule 24 does not govern intervention in the courts of appeals, and this Court thus has not distinguished between intervention as of right and permissive intervention in this context. Instead, *Cameron* instructs that the lack of a governing statute or rule means that all motions to intervene on appeal should be treated as motions for "permissive intervention" that are "committed to the discretion of the court before which intervention is sought." 142

CONCLUSION

The order of the court of appeals denying petitioners' motion to intervene should be affirmed.

Respectfully submitted.

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S. Ct. at 1011. In any event, petitioners' arguments for permissive intervention merely repeat the arguments made elsewhere in their brief that are addressed above.