IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nancy Huisha-Huisha et al.,
Plaintiff-Appellees,
v.
Alejandro N. Mayorkas,
Defendant-Appellants
and
States of Arizona, Louisiana, Alabama, Alaska, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Tennessee, Utah, Virginia, West Virginia, and Wyoming.
Proposed Intervenor-Defendants/Movants.

Case No. 22-5325

STATES' EMERGENCY MOTION FOR A STAY PENDING APPEAL

Relief Requested By Evening Of Friday, December 16

(District Court's Vacatur and Injunction Presently Stayed Until December 21)

CERTIFICATE PURSUANT TO CIRCUIT RULES 8 AND 27(F)

Pursuant to Circuit Rules 8 and 27(f), Proposed Intervenor-Defendants the States of Arizona, Louisiana, Alabama, Alaska, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Tennessee, Utah, Virginia, West Virginia, and Wyoming (the "Proposed Intervenor States" or "States") respectfully submit this certificate in connection with their emergency motion for a stay pending appeal of the judgment and injunction of the district court pending appeal.

This case involves a challenge to the Title 42 System for expelling certain migrants attempting to enter the United States without authorization to do so. *See generally Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 722 (D.C. Cir. 2022). The district court previously enjoined that system, which this Court stayed on an emergency basis and subsequently reversed. *Id.* at 726-31.

On remand, the district court again granted a permanent injunction against the Title 42 System on alternative grounds, and also vacated the relevant agency actions. APP-1-53. Upon the joint request of Plaintiffs and Federal Defendants, the district court granted a stay of its injunction

and vacatur until 12:01am on December 21, 2022. *See* D. Ct. Doc. 166 & APP-171-72.

Six days after the district court's opinion/injunction/vacatur, 15 of the 19 States moved to intervene on November 21. *See* D. Ct. Doc. 168. They were joined shortly thereafter by four additional states, collectively comprising the 19 moving States here. *See* D. Ct. Docs. 171, 176. The States' motion to intervene was fully briefed in the district court on December 2, 2022. APP-59-94.

Federal Defendants filed a notice of appeal on December 7, APP-165, and this appeal was docketed in this Court on December 9. Also on December 9, the States filed a notice with this Court that they believed that their motion to intervene was now pending before this Court by operation of law following Defendants' notice of appeal. They alternatively renewed their motion to intervene in this Court.

Stay Sought And Denied Below. Before the States moved to intervene, the district court announced that "any request to stay this Order pending appeal w[ould] be denied." APP-51.

Nonetheless, in an abundance of caution, the States informed Plaintiffs and Federal Defendants that they would seek a stay pending

appeal within 24 hours of Federal Defendants filing their notice of appeal. They then filed a motion for stay in the district court on December 9 within 30 minutes of receiving both of their respective positions. *See* D. Ct. Doc. 183. The district court denied the motion the same day in a minute order "for the reasons stated in [165] Memorandum Opinion." APP-166.

Nature of the Emergency. The district court's judgment/vacatur/injunction is only stayed until 12:01am on December 21. The States will suffer irreparable harm absent a stay from the termination of Title 42 for the reasons discussed in the motion, and as previously found by the Western District of Louisiana in *Louisiana v. CDC*, __ F.Supp.3d __, 2022 WL 1604901 (W.D. La. May 20, 2022).

The States therefore file this request as an emergency motion under Circuit Rule 27(f). The States, Plaintiffs, and Federal Defendants also jointly respectfully request that this Court decide this motion by the evening of December 16, 2022 (*i.e.*, before the judgment below takes effect on December 21). This request is made only one business day after this Court docketed this appeal, and it was not feasible to seek relief earlier.

Notice to Clerk's Office and Opposing Parties. Counsel for the State provided notice to Plaintiffs and Federal Defendants by email that they intended to seek an emergency stay pending appeal at 12:25am EST today, and sought their positions as to this request and the States' proposed schedule. The States also provided notice to the Clerk's office regarding this motion, and discuss logistics and related matters with Special Counsel to the Clerk.

Proposed Schedule. To facilitate a decision by the requested date of December 19, the States, Plaintiffs, and Federal Defendants have agreed upon the following proposed schedule:

- Monday, December 12: States file their emergency motion.
- Wednesday, December 14: Plaintiffs and Defendants' Responses due.
- Thursday, December 15: States' Reply to Responses due.

The States alternatively proposed to Plaintiffs and Federal Defendants that they would agree to a less expedited schedule if they would agree to a short administrative stay to permit a more typical briefing schedule without the stay expiring in the interim. Both Plaintiffs

and Federal Defendants oppose the issuance of any administrative stay, however.

Request for Administrative Stay. In the event that this Court denies the States' request for a full stay pending appeal, they alternatively request that this Court issue a 7-day administrative stay so that the States can seek relief from the U.S. Supreme Court in an orderly fashion.

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GLOSSARY

Abbreviation	Description
APP-__	The Appendix submitted with this motion along with pin cite to the appropriate page
CDC	Centers for Disease Control and Prevention
DHS	Department of Homeland Security
Huisha-Huisha I	*Huisha-Huisha v. Mayorkas*, 560 F. Supp. 3d 146 (D.D.C. 2021).
Huisha-Huisha II	*Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022).
Huisha-Huisha III	The decision on review here: *Huisha-Huisha v. Mayorkas*, __ F.Supp.3d __, 2022 WL 16948610 (D.D.C. Nov. 15, 2022).
Intervention Mot.	The November 21 motion to intervene filed by the States, re-filed in this Court on December 9.
Intervention Reply Br.	The December 2 reply brief filed by the States in support of their motion to intervene, re-filed in this Court on December 9.
Louisiana	*Louisiana v. CDC*, __ F.Supp.3d __, 2022 WL 1604901 (W.D. La. May 20, 2022).
States	The moving 19 States here: Arizona, Louisiana, Alabama, Alaska, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Tennessee, Utah, Virginia, West Virginia, and Wyoming.
Termination Order	April 1, 2022 Order issued by CDC Director Walensky, titled "Public Health Determination and Order Regarding the Right to Introduce Certain Persons from Countries Where a

	Quarantinable Communicable Disease Exists." 87 Fed. Reg. 19,941 (Apr. 6, 2022).
Texas	*Texas v. Biden*, 589 F. Supp. 3d 595 (N.D. Tex. 2022)
Title 42 or Title 42 System or Title 42 Orders	The series of orders issued by CDC pursuant to 42 U.S.C. § 265 and 42 C.F.R. § 71.40.

INTRODUCTION

This appeal is this case's second trip to this Court. On the first appeal, this Court had little difficulty unanimously concluding that the district court's invalidation of the Title 42 System was deeply flawed and that a stay pending appeal was warranted. *Huisha-Huisha v. Mayorkas ("Huisha-Huisha II")*, 27 F.4th 718 (D.C. Cir. 2022).

Past was prologue here and all of these things remains true: the district court's second invalidation of the Title 42 System also suffers pervasive legal errors, and a stay pending appeal of its erroneous decision is once again warranted, as all of the equitable stay factors continue to support issuance of such a stay.

To be sure, this time the district court's decision was based on APA claims rather than statutory reasoning, but the district court's second-choice grounds of decision are even less defensible than its first, which this Court decisively found wanting in *Huisha-Huisha II*. Nor was this even the first time that this Court saw the need to stay the same district judge's attempt to invalidate part of the Title 42 System. *See P.J.E.S. v. Pekoske*, No. 20-5357, 2021 WL 9100552, at *1 (D.C. Cir. Jan. 29, 2021) (unanimously granting stay pending appeal of district court's

preliminary injunction against implementation of part of the Title 42 System).

As was the case the first time around, the impending cancellation of the Title 42 System will cause an enormous disaster at the border. Indeed, DHS has predicted as much, with the termination of Title 42 "resulting in an increase in daily border crossings," which "could be as large as a three-fold increase to 18,000 daily border crossings." *Louisiana v. CDC*, __ F.Supp.3d __, 2022 WL 1604901, at *22 (W.D. La. May 20, 2022). More recently, DHS has itself sought an additional $3 billion from Congress specifically to address the impending calamity that termination of the Title 42 System will cause. *See* Rogers Decl. Exs. A-C.

The major change this time around is the position of Federal Defendants. Curiously, the change has nothing to do with the merits: as with *Huisha-Huisha II*, Federal Defendants continue to regard the district court's reasoning as hopelessly flawed, telling that court that it "erred in vacating [the challenged] agency actions." APP-143. And with good reason.

Nonetheless, Defendants sensed opportunity in their erroneous litigation loss. Immediately upon receiving the district court's decision,

they collusively agreed with Plaintiffs on a short stay for preparatory purposes the same day. APP-149-52. In doing so, Defendants recreated through artifice *precisely* the Termination Order that the *Louisiana* court had enjoined: *i.e.*, one that attempted to terminated Title 42, did so with a delayed effective date, and did not comply with notice-and-comment rulemaking requirements. Defendants are thus employing strategic surrender to achieve results through collusion what they could not through rulemaking.

Nor is this the first time that DHS has pulled this trick of exploiting calculated surrender to eliminate unwanted rules without complying with the APA. The agency previously employed this ploy to rid itself of the Public Charge Rule, doing so "with military precision to effect the removal of the issue from [the Supreme Court's] docket and to sidestep notice-and-comment rulemaking" for repealing the unwanted rule. Transcript,[1] *Arizona v. San Francisco*, 142 S. Ct. 1926, 45-46 (2022) (Alito, J.); *see also id.* at 48 ("The real issue to me is the evasion of notice-and-comment. And, I mean, basically, the government bought itself a

[1] *Available at* https://bit.ly/3VDDOfZ.

bunch of time [through the acquiesced-in vacatur] where the rule was not in effect.") (Kagan, J.). The same military precision is at work here.

Fortunately, Rule 24 permits the States to intervene to avoid Defendants' artifices from imposing enormous injuries on them from an order that both they *and Federal Defendants agree* is legally unsustainable. The States' motion to intervene should be granted as well as this emergency request for a stay pending appeal.

Just as in *Huisha-Huisha II*, this case comes to this Court from a judgment riddled with legal errors that will cause irreparable harm if not stayed, and the balance of harms and public interest continue to tilt overwhelmingly in favor of a stay. This Court should therefore once again grant a stay pending appeal.

BACKGROUND

A. Prior Appeal In This Court

This Court's *Huisha-Huisha II* decision sets forth the regulatory, factual and prior-litigation background of this case in extensive detail. *See* 27 F.4th at 722-27. This case involves both statutory and APA challenges to the Title 42 System. In *Huisha-Huisha I*, the district court had held that the system violated applicable statutory requirements and

enjoined it. *Id.* 726. This Court first stayed and then reversed that statutory decision; both decisions were unanimous. *Id.* at 726-31.

This Court separately affirmed a different aspect of the *Huisha-Huisha I* decision, holding that "the Executive cannot expel those aliens [excluded by Title 42] to places where they will be persecuted or tortured." *Id.* at 725, 731-33. That portion of *Huisha-Huisha II* is not at issue here.

B. Termination Order And *Louisiana* Injunction

Not long after this Court reversed the district court's first injunction, CDC promulgated a rule that purported to terminate Title 42. *See* Termination Order, 87 Fed. Reg. 19,941 (Apr. 6, 2022).

A group of States, eventually numbering 24 in all, challenged the Termination Order as (1) violating notice-and-comment rulemaking requirements and (2) arbitrary and capricious, thus violating the APA. *Louisiana*, 2022 WL 1604901, at *12.

The district court in *Louisiana* concluded that the States had Article III standing to challenge the attempted termination of Title 42, and that the Termination Order (1) was reviewable, (2) illegally circumvented APA notice-and-comment rulemaking requirements, and

fell within neither the "good cause" nor "foreign affairs" exceptions, and (3) would cause the States irreparable harm; the court also concluded that enjoining the termination of the Title 42 System was supported by the balance-of-harms and public-interest factors. *Id.* at *10-23. The *Louisiana* court therefore granted a preliminary injunction against implementation of the Termination Order. *Id.*

Federal Defendants appealed the issuance of that injunction but did not seek a stay pending appeal. *See Louisiana v. CDC*, No. 22-30303 (5th Cir.). That appeal is fully briefed but not yet set for argument.

C. Second Injunction On Remand

Following this Court's *Huisha Huisha II* decision invalidating the district court's statutory reasoning, the district court granted a second injunction (and also a vacatur) on November 15. *See Huisha-Huisha III*, APP-1-49. This time, the district court's holding relied entirely on APA grounds, largely reasoning that CDC failed to employ a "least restrictive means" standard that putatively applied and failed adequately to consider alternatives. APP-20-40.

The district court further announced that "any request to stay this Order pending appeal w[ould] be denied." APP-51.

Within hours of the *Huisha-Huisha III* decision, Plaintiffs and Federal Defendants agreed upon, and filed, a request for a stay of the injunction/vacatur until December 21. APP-149-52. The district court granted that request the next day "WITH GREAT RELUCTANCE." APP-172 (all caps in original). The district court separately entered a Rule 54(b) judgment on the relevant APA claims on November 22. APP-52.

Because it appeared that Federal Defendants had effectively arranged to recreate the Termination Order that they had obtained an injunction against, 15 States moved to intervene for purposes of appealing the district court's six-days-prior order on November 21, with four additional states joining the motion shortly thereafter. APP-54, 153, 159. That motion to intervene was fully briefed on December 2.

Despite previously telling the Western District of Louisiana that "effective at midnight on December 21, 2022, CDC's Title 42 orders will be vacated," without even mentioning the possibility of appeal, APP-142, Federal Defendants nonetheless filed a notice of appeal on December 7, along with a notice making clear their position that the district court had "erred in vacating" the Title 42 Orders. APP-143, 165. Federal

Defendants confirmed to the States the next day that they would not be seeking a stay pending appeal. APP-146.

The States sought a stay pending appeal from the district court two days later, which the district court denied the same day. APP-166. Now, one business day later, the States seek a stay pending appeal from this Court and request a decision by the evening of December 16 under Circuit Rule 27(f).

LEGAL STANDARD

This Court applies a four-factor standard for evaluating a request for a stay pending judicial review: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Clean Air Council v. Pruitt*, 862 F.3d 1, 8 (D.C. Cir. 2017) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)).

ARGUMENT

I. The States Are Likely To Succeed On The Merits.

A. The States Have Standing To Appeal And Seek Relief Here

For the reasons explained in greater depth in their motion to intervene, the States have protectable interests in this suit and standing to challenge the district court's judgment based on (1) their rights under the *Louisiana* injunction and the APA, and (2) the injuries that the district court's vacatur/injunction will cause them. *See* Intervention Mot.10-15; Intervention Reply Br.5-15 (APP-239-44, 68-78). But even if that were otherwise, Federal Defendants unquestionably have standing to appeal here and have done so, thereby establishing this Court's jurisdiction.

1. The Threatened Destruction Of The Rights That The States Enjoy Under The *Louisiana* Injunction Confers Article III Standing.

The 19 States here (and five others) obtained an injunction specifically against CDC's attempted termination of the Title 42 System. *Louisiana*, 2022 WL 1604901, at *22-23. As a result, they possess enforceable rights under that injunction. *See*, *e.g.*, *NBA v. Minn. Pro. Basketball, Ltd. P'ship*, 56 F.3d 866, 871-72 (8th Cir. 1995) ("A

preliminary injunction confers important rights."). And it is undisputed here that the district court's injunction/vacatur, if not stayed, would effectively destroy those rights under the *Louisiana* injunction.

As a result, the States have cognizable injury here. *See* Intervention Mot.10-15; Intervention Reply Br.5-8 (APP-239-44, 68-71). In addition, the States have interests in avoiding circumvention of the *Louisiana* injunction through artifices like Defendants' collusive actions here. *See*, *e.g.*, *Institute of Cetacean Rsch. v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 949 (9th Cir. 2014); Intervention Reply Br.8-9 (APP-71-72).

2. The States Also Have Standing To Challenge The District Court's Termination Of Title 42

The *Louisiana* court has already concluded, on a record that included much of the States' evidence here, that the States had Article III (and prudential) standing to challenge the termination of the Title 42 System. 2022 WL 1604901, at *10-16. The district court's vacatur/injunction here would effectuate the *exact same* termination, and the States' standing is thus established here too. (The evidence submitted to the *Louisiana* court is only a subset of the evidence submitted here, although all of the *Louisiana* evidence has been submitted to this Court.)

Similarly, the Northern District of Texas has similarly determined that even a *partial* exemption/termination from the Title 42 System (there unaccompanied children) would cause Texas cognizable injury that established Article III standing. *Texas v. Biden*, 589 F. Supp. 3d 595, 610-13 (N.D. Tex. 2022). Standing to challenge a complete termination of Title 42 is thus established here *a fortiori*.

In addition to the evidence that led to positive standing determinations in *Louisiana* and *Texas*, the States have also submitted the deposition of Border Patrol Chief Raul Ortiz and declaration of Stephen Manning, which both further support the States' standing. *See* Intervention Mot.11-12 (APP-240-41).

Notably, the Supreme Court has unanimously held that standing may be premised on the "predictable effect of Government action on the decisions of third parties." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). Here DHS itself has already predicted just such an effect, estimating that termination of Title 42 "will result in an increase in daily border crossings and that this increase could be as large as a three-fold increase to 18,000 daily border crossings." *Louisiana*, 2022 WL 1604901, at *22.

Those additional migrants will predictably cause the States to spend additional funds on law enforcement, education, and healthcare—often as a direct result of federal mandates. *Texas v. Biden*, 20 F.4th 928, 969 (5th Cir. 2021) *rev'd on other grounds* 142 S.Ct. 2528 (2022); *Texas v. Biden*, 10 F.4th 538, 548-49 (5th Cir. 2021); *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (education mandate for aliens not lawfully present in U.S.); 42 C.F.R. § 440.255(c) (emergency healthcare mandate for same). And DHS's projection—and the resulting harm to the States—is further confirmed by DHS's request to Congress for another $3 billion in funding to ameliorate the calamity that Federal Defendants intend to effectuate here. Rogers Decl. Exs. A-C.

That emergency funding request amply confirms the States' threatened injuries here. (There is strikingly no corresponding request by the Administration for funding to offset the *States'* resulting harms.) Particularly given the fact that the States "bear[] many of the consequences of unlawful immigration," *Arizona v. United States*, 567 U.S. 387, 397 (2012), the prospect that DHS alone will have increased costs as a result of terminating the Title 42 System is fanciful.

Finally, the States' standing is further supported by the doubly relaxed standard that applies here. Standing requirements are relaxed here a first time because the States are asserting procedural injuries (harms arising from procedural APA claims). *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992). And they are relaxed a second time because the States are entitled to "special solicitude" in the standing analysis. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

3. Federal Defendants' Injuries Establish This Court's Jurisdiction In Any Event

Even if the States did not have standing to appeal here, this Court would still possess jurisdiction. The invalidation of Federal Defendants' orders and regulations through vacatur and a permanent injunction plainly causes cognizable injury to Defendants, giving them standing to appeal—which they have done. And because they have standing to appeal, this Court has jurisdiction over this entire appeal. *See*, *e.g.*, *Massachusetts*, 549 U.S. at 518 ("Only one of the petitioners needs to have standing" to establish Article III jurisdiction).

This Court thus has jurisdiction to grant a stay pending appeal if the States were only granted permissive intervention and otherwise lacked standing, or even just simply *sua sponte*.

B. The District Court's APA Reasoning Is Deeply Flawed

The district court's second attempt to invalidate the Title 42 System fares no better—and indeed worse—than the first time. Federal Defendants and the States are therefore likely to prevail on their challenge to its decision. *See also* APP-95-140.

1. The District Court's "Least Restrictive Means" Holding Cannot Withstand Scrutiny

The centerpiece of the district court's opinion was its conclusion that the Title 42 System violates a "least restrictive means" standard. There is no mistaking the centrality of this premise: the district court repeated that standard a total of *22 times*. APP-1-49. But the problem for Plaintiffs is that no such "least restrictive means" requirement actually exists. Instead, the linchpin of the district court's analysis is legally flawed for four reasons.

First, the district court's "least restrictive means" standard both inverts the proper legal standard and squarely contravenes the precedents of this Court. Under the APA, "*the government does not have to show that it has adopted the least restrictive means* for bringing about its regulatory objective." *National Cable & Telecommunications Ass'n v. FCC*, 555 F.3d 996, 1002-03 (D.C. Cir. 2009) (emphasis added) (applying

same standard for commercial speech and APA claims). Indeed, federal courts "require the Government to employ the least restrictive means only when ... strict scrutiny applies." *United States v. Am. Libr. Ass'n, Inc.*, 539 U.S. 194, 207 n.3 (2003).

Ultimately, the "least restrictive means" standard bears no resemblance to the governing arbitrary-and-capricious standard here, which generally requires only "a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (cleaned up). The district court plainly erred in applying a "least restrictive means" standard for an APA claim.

Second, the governing 2020 Rule itself contains no such "least restrictive means" requirement, and was perfectly clear that it was *amending* the prior standards adopted under CDC's relevant authority, 42 U.S.C. § 265—which notably did not previously permit CDC to prohibit the exclusion of "persons." *Control of Communicable Diseases*, 85 Fed. Reg. 16,559, 16,560 (Mar. 24, 2020) (2020 interim Title 42 rule noting that "[c]urrent regulations ... only address suspension of the introduction of property into the United States"). The 2020 Rule thus

explicitly acknowledged it was changing policy and gave its reasons for doing so. *Id.* (noting that rule is new "regulatory mechanism to ... suspend the introduction of persons"). The district court's conclusion that the change was unexplained, APP-25-27, is thus unsustainable.

Third, the district court's reliance on language in the *preamble* of the 2017 Final Rule (Control of Communicable Diseases, 82 Fed. Reg. 6,890, 6,912 (Jan. 19, 2017)) was improper. "The preamble to a rule is not more binding than a preamble to a statute. 'A preamble ... is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers.'" *National Wildlife Fed'n v. EPA.*, 286 F.3d 554, 569 (D.C. Cir. 2002); *accord Mejia-Velasquez v. Garland*, 26 F.4th 193, 202 (4th Cir. 2022); *Peabody Twentymile Mining, LLC v. Sec'y of Lab.*, 931 F.3d 992, 998 (10th Cir. 2019).

Fourth, even if the 2017 preambulatory language could be binding here, that language *expressly disclaims* any effect here. Instead, that 2017 preamble says that it applies only to "quarantine, isolation, or other public health measures *under this Final Rule*." 2017 Final Rule, 82 Fed. Reg. 6,890 (Jan. 19, 2017) (emphasis added). *None* of the challenged orders here were issued under the 2017 Rule—which no one contends

could have served as the basis for the Title 42 System. Instead, the challenged Title 42 System was issued under the 2020 Rule and the amended 42 C.F.R. § 71.40, and thus could not be governed by the 2017 preambulatory language even if that language were binding (which it is not).

For all of these reasons, the district court's "least restrictive means" reasoning is plainly erroneous.

2. The District Court's Remaining APA Reasoning Lacks Merit

As Federal Defendants persuasively explained in their briefing below, the orders at issue are not arbitrary and capricious. In particular, while the district court concluded that CDC had not adequately considered alternatives, CDC actually provided an entire section in the 2021 rule doing so; it was appropriately enough titled, "Availability of Testing, Vaccines, and Other Mitigation Measures" and considered alternatives in depth. 86 Fed. Reg. 42,828, 42,833 (Aug. 5, 2021). CDC further considered "[t]he availability of testing, vaccination, and other mitigation measures at migrant holding facilities" but concluded they were not viable because of "[s]pace constraints," "increase[d] community transmission rates," "[o]n-site COVID-19 testing ... is very limited," and

because facilities "are ill-equipped to manage an outbreak and ... are heavily reliant on local healthcare systems.... [which] could strain local or regional healthcare resources.... [and] increase the pressure on the U.S. healthcare system and supply chain." 86 Fed. Reg. at 42,837.

While the district court obviously disagreed with that analysis, its decision merely "substitute[d] [its] judgment for the agency's"—*i.e.*, precisely what the APA denies it authority to do. *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1310-11 (D.C. Cir. 2010) (citations omitted).

The district court also fixated on the possibility of outdoor processing. APP-31-33. But that alternative was not distinctly raised in comments. APP-33 (citing Doc. 154 at 9, suggesting only that processing of aliens might be conducted "in the field," without further elaboration or explanation). Rather, as Federal Defendants rightfully noted, that potential option actually originated from "extra-record statements from Secretary Mayorkas in April 2022," APP-127, and thus provided no basis for invalidating CDC's orders.

Moreover, the August 2021 Order noted a key difference between Title 8 and Title 42 that makes obvious why outdoor processing was not viable: processing "under Title 8 ... takes … [up to] two hours per

person… [while] processing [under Title 42] takes roughly 15 minutes and generally happens outdoors." 86 Fed. Reg. at 42,836. The logistical challenges of decreasing outdoor processing capacity by nearly 90% (*i.e.*, by increasing processing times eight-fold) are obvious.

The district court next criticizes the CDC for not considering the "the development and disbursal of COVID-19 vaccines, on-site rapid antigen tests, and effective therapeutics." APP-35. But the August 2021 Order specifically considered just those factors. 86 Fed. Reg. at 42,833-37. Indeed, the August 2021 Order considered "[t]he availability of COVID-19 vaccines" and determined vaccination was not a viable alternative because arriving aliens "have markedly lower vaccination rates" and this "presents a heightened risk of morbidity and mortality to this population due to the congregate holding facilities at the border…. Outbreaks in these settings increase the serious danger of further introduction, transmission, and spread of COVID-19...." 86 Fed. Reg. at 42,834. Processing aliens under Title 8 would require gathering large groups of unvaccinated aliens in close contact for extended periods of time before they would be fully vaccinated (a process requiring *weeks*).

Finally, the district court wrongly reasoned that CDC failed to consider the impacts to aliens excluded under Title 42. APP-27-30. The statute (42 U.S.C. § 265) itself provides that preventing introduction of persons is warranted when CDC makes the requisite determinations, as it has here, as Defendants correctly argued below. APP-135-38. In any event, CDC did consider such hardships, and has exempted unaccompanied children and created case-by-case exceptions on that very basis. APP-137-38; 87 Fed. Reg. at 19,956. While the district court would have preferred, as a policy matter, that CDC strike a different balance, CDC did consider these very factors, which resulted in specific exemptions based on these precise considerations. In doing so, CDC did not violate the APA.

For all of these reasons, the States and Federal Defendants are likely to prevail on their challenges to the remainder of the district court's APA reasoning as well.

II. The States Will Suffer Irreparable Harm Without A Stay

As the *Louisiana* court already found, the termination of the Title 42 System will cause the States irreparable harm. *Louisiana*, 2022 WL 1604901, at *4-*9, *22. In particular, the greatly increased number of

migrants that such a termination will occasion will necessarily increase the States' law enforcement, education, and healthcare costs. *Id.*; *see also Texas*, 589 F. Supp. 3d at 611-12.

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

The likelihood of irreparable harm to the States is underscored by the fact that DHS has felt compelled to request *$3 billion* in emergency funding to deal with the imminent calamity that the district court's decision will occasion. And the prospect that DHS will alone bear the burden of this manmade disaster is fanciful as States "bear[] many of the consequences of unlawful immigration." *Arizona*, 567 U.S. at 397. Moreover, a surge of migrants approaching the border in anticipating of the December 21 stay expiration has *already* occurred, underscoring the States' harms. *See* Rogers Exs. D-F.

The States will also suffer sovereign injuries from the termination of Title 42 and the enormous surge in unlawful migration that it will occasion. The "defining characteristic of sovereignty" is "the power to exclude from the sovereign's territory people who have no right to be there." *Id.* at 417 (Scalia, J., concurring in part and dissenting in part). Under DHS's own projections, the States will suffer substantial injuries to this "definining characteristic of sovereignty," as hugely increased numbers of migrants will attempt to cross illegally into the United States and into the States.

III. The Balance Of Equities And The Public Interest Support Petitioner's Request For A Stay.

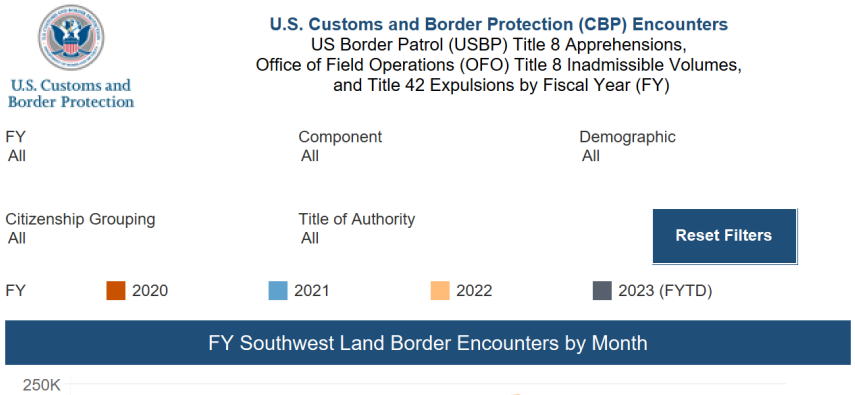
Finally, the balance of equities and public interest also favor a stay pending appeal here for four reasons.

First, the States will suffer enormous harms absent a stay pending appeal, as the *Louisiana* court has already found. *Louisiana*, 2022 WL 1604901, at *4-*9, *22. Moreover, that court already balanced strikingly similar harms/public interest concerns and concluded that a preliminary injunction against termination of Title 42 was warranted in that case. *Id.* at *22-23. So too is a stay pending appeal against the impending termination here.

Second, a stay will not meaningfully harm Defendants. Indeed, it would leave their orders in place and protect them from vacatur of orders that they correctly have argued do *not* violate the APA. Staying invalidation of CDC's own orders will cause that agency no harm.

Moreover, a stay will likely create significant *benefits* for Defendants. Notably, DHS is currently pressing to Congress an emergency request for $3 billion in new funding to deal with the crisis that termination of Title 42 will cause. *See* Rogers Decl. Exs. A-C. A stay will save DHS those billions of dollars. Moreover, avoiding a preventable migrant surge will avoid pouring gasoline on the fire that is DHS's existing loss of operational control of the border, as exemplified by Table 1 next. As that table shows, the number of illegal crossings is reaching all-time highs, without any relief in sight.

Table 1: DHS Southwest Land Border Encounters By Month



	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	Total
2023 (FYTD)	230,678												230,678
2022	164,837	174,845	179,253	154,874	166,010	222,574	235,785	241,136	207,834	200,162	204,087	227,547	2,378,944
2021	71,929	72,113	73,994	78,414	101,099	173,277	178,795	180,597	189,034	213,593	209,840	192,001	1,734,686
2020	45,139	42,643	40,565	36,585	36,687	34,460	17,106	23,237	33,049	40,929	50,014	57,674	458,088

https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters

Third, a stay will not substantially harm Plaintiffs. The plaintiff class told the district court "they continue to face irreparable harm because, despite [this Court's] holding … that Defendants may not expel Class Members to areas where they would be persecuted or tortured,

documented cases of kidnapping, rapes, and other violence against noncitizens subject to Title 42 have also risen dramatically since last year." APP-44-45 (quotations and alterations omitted). The district court agreed. APP-45.

But there is no evidence that enjoining Title 42 would prevent those harms. *See Winter v. NRDC*, 555 U.S. 7, 20 (2008) (requiring a showing of "irreparable harm in the *absence* of preliminary relief") (emphasis added). Even in the absence of the Title 42 policy, the INA does not guarantee admission into the United States—or even prolonged detention in federal facilities. *See* 8 U.S.C. § 1225(b)(1)(A), (B); *Huisha-Huisha*, 27 F.4th at 735 (noting expedited removal permits "the Executive [to] quickly expel aliens with non-credible claims for relief under § 1231(b)(3)(A) and the Convention Against Torture"). Thus, this Court has indicated that the true irreparable harm at issue was the loss of withholding-of-removal or CAT withholding and subsequent expulsion to places "where [class members] will be persecuted or tortured." *See Id.* at 733 (linking those protections to the violent crimes discussed). And so the injunctive relief this Court affirmed allows "the Executive [to] expel

Plaintiffs, but only to places where they will not be persecuted or tortured." *Id.* at 735.

But the district court's injunction and vacatur here changes none of that: whether that injunction/vacatur is stayed or not, the prohibition on expelling migrants to places where they would be persecuted or tortured will remain fully intact in all events. *Id.* More generally, "[f]or purposes of … withholding of removal, it is not enough that a person comes from a wretched place, where life will most probably be far worse than if he remains in the United States." *Barajas-Romero v. Lynch*, 846 F.3d 351, 357 (9th Cir. 2017). Thus, an "increase in general crime" does not justify withholding of removal. *Melgar de Torres v. Reno*, 191 F.3d 307, 314 (2d Cir. 1999).

For the same reason, the class has not shown they are likely to be "subjected to torture." 8 U.S.C. §1231 note; *see* 8 C.F.R. §208.18(a)(1)–(8). But if they can do so, the Executive will be prohibited from expelling them to anywhere where there is such a risk under this Court's *Huisha-Huisha II* decision. 27 F.4th at 731-32. A stay pending appeal here thus will not cause the feared harms.

There is thus no evidence that the continuation of Title 42—as modified by the relief this Court fashioned in the first appeal—would result in the plaintiff class being "expelled to places where they will be persecuted or tortured" as §1231 uses those terms. *Huisha-Huisha*, 27 F.4th at 733. Staying the judgment will, therefore, not substantially injure the class.

Fourth, a stay is also in the public interest. The Title 42 System limits the number of border crossings at a time when the border is in crisis; retaining it is in the public interest. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) ("The Government makes a convincing demonstration that the public interest demands effective measures to prevent the illegal entry of aliens at the Mexican border."); *Louisiana*, 2022 WL 1604901, at *22-23.

Furthermore, the public interest is served by having this dispute resolved on the merits, rather than through Defendants' collusive actions that circumvent APA notice-and-comment rulemaking. *See*, *e.g.*, *Patriot, Inc. v. Dep't of Hous. & Urban Dev.*, 963 F. Supp. 1, 6 (D.D.C. 1997) ("[T]he public interest is best served by having federal agencies comply

with the requirements of federal law, particularly the notice and comment requirements of the APA.").

But absent a stay, the enormous harms that the district court's judgment will occasion—which are premised on legal errors that Federal Defendants explicitly *admit* exist—will become a *fait accompli*. Nor is there any suggestion that DHS will be able to unscramble this egg if this Court were to reverse but without first granting a stay pending appeal.

IV. This Court Should Grant An Administrative Stay Even If It Denies A Stay Pending Appeal

Even if this Court concludes that a full stay pending appeal is not warranted, it should grant a 7-day administrative stay so that the States can seek relief from the Supreme Court in an orderly fashion. Similarly, if this Court requires additional time to decide this motion, it should grant an administrative stay while it is considering this motion.

V. This Court Should Expedite Briefing And Consideration Of This Appeal

Given the enormous, imminent harms at issue here, this Court should also expedite briefing and argument along the similar lines as *Huisha-Huisha II*. The States therefore request a 30 days/30 days/21

days schedule for opening/answering/reply briefs beginning after this Court's stay decision, with oral argument set for April.

CONCLUSION

For the foregoing reasons, this Court should grant the States' emergency motion for a stay pending appeal.

Dated: December 12, 2022

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I hereby certify that on this 12th day of December, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF filing system. Counsel for parties that are registered CM/ECF users will be served by the CM/ECF system pursuant to the notice of electronic filing.

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