No. 22A544

In the Supreme Court of the United States

STATES OF ARIZONA, LOUISIANA, MISSOURI, ALABAMA, ALASKA, KANSAS, KENTUCKY, MISSISSIPPI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, TENNESSEE, UTAH, VIRGINIA, WEST VIRGINIA, AND WYOMING,
Applicants,

v.

ALEJANDRO MAYORKAS, SECRETARY OF HOMELAND SECURITY, *ET AL.*,
Respondents.

On Application for a Stay Pending Certiorari

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

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF, MOTION FOR LEAVE TO FILE BRIEF IN COMPLIANCE WITH RULE 33.2, *AMICUS CURIAE* BRIEF OF IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF APPLICANTS

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MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

Movant Immigration Reform Law Institute ("IRLI") respectfully seeks leave to file the accompanying brief as *amicus curiae* in support of the States' stay application.* The state applicants consented to IRLI's motion, the federal and private respondents took no position.

IDENTITY AND INTERESTS OF MOVANT

The Immigration Reform Law Institute ("IRLI") is a nonprofit 501(c)(3) public interest law firm dedicated both to litigating immigration-related cases in the interests of United States citizens and to assisting courts in understanding federal

* Consistent with FED. R. APP. P. 29(a)(4)(E) and this Court's Rule 37.6, counsel for movant and *amicus curiae* authored this motion and brief in whole, and no counsel for a party authored the motion and brief in whole or in part, nor did any person or entity, other than the movant/*amicus* and its counsel, make a monetary contribution to preparation or submission of the motion and brief.

immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of immigration-related cases. For more than twenty years the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization.

REASONS TO GRANT LEAVE TO FILE

By analogy to this Court's Rule 37.2(b), movant respectfully seeks leave to file the accompanying *amicus curiae* brief in support of the stay application. Movant respectfully submits that its proffered *amicus* brief brings several relevant matters to the Court's attention, including the circuit court's misapplication of the timeliness requirement for intervention (particularly in light of the immateriality of the subsequent determination by the Centers for Disease Control and Prevention ("CDC") to terminate the Title 42 policy), the district court's failure to afford the appropriate deference to the CDC in light of its technical expertise, and the fact that plaintiffs have no fundamental or constitutional right affected by the Title 42 policy such that a heightened standard of review would apply.

These issues are all relevant to deciding the stay application, and movant Immigration Reform Law Institute respectfully submits that filing the brief will aid the Court.

Dated: December 20, 2022

Respectfully submitted,

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In the Supreme Court of the United States

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On Application for a Stay Pending Certiorari

MOTION FOR LEAVE TO FILE UNDER RULE 33.2

Movant Immigration Reform Law Institute ("IRLI") respectfully submits that the Court's rules require those moving or applying to a single Justice to file in 8½-by 11-inch format pursuant to Rule 22.2, as IRLI does here. If Rule 21.2(b)'s requirements for motions to the Court for leave to file an *amicus* brief applied here, however, IRLI would need to file 40 copies in booklet format, even though the Circuit Justice may not refer this matter to the full Court. Due to the expedited briefing schedule, the expense and especially the delay of booklet-format printing, and the rules' ambiguity on the appropriate procedure, IRLI has elected to file pursuant to Rule 22.2. To address the possibility that the Circuit Justice may refer this matter to the full Court, however, movant files an original plus ten copies, rather than Rule 22.2's required original plus two copies.

Should the Clerk's Office, the Circuit Justice, or the Court so require, IRLI

commits to re-filing expeditiously in booklet format. *See* S.Ct. Rule 21.2(c) (Court may direct the re-filing of documents in booklet-format). Movant respectfully requests leave to file the accompanying brief as *amicus curiae* — at least initially — in 8½-by 11-inch format pursuant to Rules 22 and 33.2, rather than booklet format pursuant to Rule 21.2(b) and 33.1.

For the foregoing reasons, the motion for leave to file in 8½-by 11-inch format should be granted.

December 20, 2022

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Respondents.

On Application for a Stay Pending Certiorari

AMICUS CURIAE BRIEF IN SUPPORT OF APPLICANTS

Amicus Curiae Immigration Reform Law Institute ("IRLI") respectfully submits that the Circuit Justice — or the full Court, if this matter is referred to the full Court — should grant the stay application until the State applicants timely file and this Court duly resolves a petition for a writ of *certiorari.* IRLI's interests are set out in the accompanying motion for leave to file.

STANDARD OF REVIEW

A stay pending the timely filing and ultimate resolution of a petition for a writ of *certiorari* is appropriate when there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant *certiorari*; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). For "close cases," the Court "will

balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.*

STATEMENT OF THE CASE

To protect public health, Congress authorized the Director of the CDC to "prohibit … the introduction of persons" into the United States. 42 U.S.C. § 265; *see also Huisha-Huisha v. Mayorkas*, 2022 U.S. Dist. LEXIS 207282, *5 (D.D.C. Nov. 15, 2022) (noting the subsequent delegation of this authority to the CDC Director). On March 20, 2020, the CDC exercised this authority in response to the outbreak of the COVID-19 pandemic and issued an interim rule suspending the right to introduce "covered aliens" into the United States. Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060, 17061 (March 26, 2020) (defining covered aliens as including: "aliens seeking to enter the United States at [ports of entry] who do not have proper travel documents, aliens whose entry is otherwise contrary to law, and aliens who are apprehended near the border seeking to unlawfully enter the United States between [ports of entry]"); *see id.* at 17067 ("It is necessary for the public health to immediately suspend the introduction of covered aliens.").

The CDC reaffirmed its determination to suspend the introduction of covered aliens numerous times and last did so on August 2, 2021. *See Huisha-Huisha*, 2022 U.S. Dist. LEXIS 207282 at *9-11 (describing the various CDC orders between March 2020 and August 2021). Finally, on April 1, 2022, the CDC issued an order that would terminate the August 2021 Order, effective May 23, 2022. On May 20, 2022, the

United States District Court for the Western District of Louisiana enjoined the CDC's termination order because it violated the APA's notice-and-comment requirements. *See generally Louisiana v. Ctrs. for Disease Control & Prevention*, 2022 U.S. Dist. LEXIS 91296 (W.D. La. May 20, 2022). An appeal of that decision is pending before the Fifth Circuit Court of Appeals. *See Louisiana v. Ctrs. for Disease Control & Prevention*, No. 22-30303 (5th Cir.).

In this case, Plaintiffs challenged the CDC orders in which it exercised its authority to expel illegal aliens under 42 U.S.C. § 265 (collectively, the "Title 42 policy"), which resulted in two district court decisions. In the first decision, the district court concluded that § 265 does not "grant the Executive the authority to expel or remove persons from the United States." *Huisha-Huisha v. Mayorkas*, 560 F. Supp. 3d 146, 168 (D.D.C. 2021). On appeal, the D.C. Circuit disagreed in part, holding that "the Executive can expel the Plaintiffs from the country. But it cannot expel them to places where they will be persecuted or tortured." *Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 722 (D.C. Cir. 2022).

Following remand, the district court concluded that the Title 42 policy is arbitrary and capricious and vacated the CDC orders and regulation comprising the Title 42 policy. *See generally Huisha-Huisha*, 2022 U.S. Dist. LEXIS 207282. Concerned that the federal government would not appeal the district court's judgment in light of the CDC's attempt to terminate the Title 42 policy earlier this year, the State applicants sought intervention in this case. Before the district court ruled on the intervention motion, the government appealed the district court's

decision. The State applicants renewed their intervention motion and also sought a stay of the district court's judgement pending appeal. The D.C. Circuit denied the State applicants' intervention motion as untimely and dismissed the stay request as moot.

SUMMARY OF ARGUMENT

The State applicants are likely to prevail on the merits. First, the circuit court erred in denying intervention as untimely by conflating the divergence between the State applicants' and federal respondents' positions regarding the continued implementation of the Title 42 policy with their united position regarding the legality of the orders establishing the policy in the first place. The circuit court's ruling also undermines the purpose of the timeliness requirement for intervention. (Section I).

Second, in striking down the Title 42 policy, the district court failed to accord the proper deference to the CDC's judgment that prohibiting the introduction of certain persons into the country is necessary to protect the public health. Under the proper standard of review, the CDC's Title 42 policy is reasonable and should be upheld, and absent a stay of the district court's judgment vacating the Title 42 policy, the ongoing border crisis will only intensify and cause irreparable harm to the health and safety of the country. (Section II).

ARGUMENT

I. THE CIRCUIT COURT'S TIMELINESS RULING IS UNTENABLE.

Instead of addressing the merits of the States' arguments set forth in their request for a stay pending appeal, the circuit court denied the States' request for intervention as untimely. *See* Applicants' ADD at 1-4. In doing so, the court

erroneously conflated the divergence between the State applicants' and federal respondents' positions regarding the continued implementation of the Title 42 policy with their united position regarding the legality of the orders establishing the policy in the first place.

This case raises the question of whether the CDC orders establishing the Title 42 policy were arbitrary and capricious. *See Huisha-Huisha*, 2022 U.S. Dist. LEXIS 207282, *16 ("Plaintiffs argue that the Title 42 Process is arbitrary and capricious …."); *id.* at *43 ("Having concluded that the Title 42 policy is arbitrary and capricious …."). As the circuit court acknowledged, both the States and the federal government take identical positions with respect to this question. *See* Applicants' ADD at 3 ("[T]he States applaud the federal government's legal arguments at summary judgment in the district court …."). Indeed, had the district court accorded proper deference to the CDC's Title 42 policy (as explained more fully below), it would have upheld the policy and the need for intervention would never have arisen. It was only after it became clear that the federal government might not appeal the district court's decision, and, perhaps more importantly, decline to seek a stay pending appeal, that the States' interests actually diverged from those of the federal government *in this case*.

To be sure, the States and the federal government take different positions on whether the continued implementation of Title 42 is warranted today. But this case does not, and cannot, reach that question because review of agency action is limited to the record as it stood at the time the agency acted. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) ("[I]n reviewing agency action, a court is ordinarily

limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record."). Here, that action took place on August 2, 2021, when the CDC last reaffirmed its determination that its Title 42 policy was necessary to protect the public health.

The circuit court erred by conflating the parties' divergence of position with respect to the ongoing implementation of Title 42 with the question at hand—whether the CDC acted arbitrarily and capriciously in enacting the Title 42 policy. The government's subsequent determination to terminate the Title 42 policy has absolutely no bearing on whether the CDC reasonably enacted the policy in the first place.

"Intervention is a procedural device that attempts to accommodate two competing policies: efficiently administrating legal disputes by resolving all related issues in one lawsuit, on the one hand, and keeping a single lawsuit from becoming unnecessarily complex, unwieldy or prolonged, on the other hand." *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 69, (2d Cir. 1994) (citing *United States v. Texas E. Transmission Corp.*, 923 F.2d 410, 412 (5th Cir. 1991)). "Rule 24 attempts to balance the interest of the person seeking intervention with the burdens such intervention may impose on parties to pending suits." Steven Baicker-McKee, William M. Janssen, John B. Corr, Federal Civil Rules Handbook, 712 (2012 ed.). Adopting the circuit court's reading of the timeliness requirement for intervention would upset the balance of interests set forth in Federal Rule of Civil Procedure 24.

Rule 24's timeliness requirement should be read so that simple awareness that

a potential intervenor's interest may diverge from existing parties in the future does not trigger the duty to seek intervention. As noted above, the States concurred with the arguments advanced by the federal government in its defense of CDC's Title 42 policy, and if the federal government had prevailed in the district court (as it should have), the need for intervention would have likely never arisen. Thus, contrary to the circuit court's analysis, it only "became clear" that the States' interests "would no longer be protected" by government in this case once the need for appeal (and a stay pending appeal) became necessary to protect the States' interests. *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977). Because the States' need to intervene did not arise until the federal government ceased protecting their interests, "the timeliness of [their] motion should be assessed in relation to that point in time." *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1012 (2022); *see McDonald*, 432 U.S. at 394-95 (holding that the motion to intervene was timely because it was filed soon after the movant learned that the class representatives would not appeal).

In sum, the circuit court imposed a duty on the States to intervene from the time it became apparent "the federal government's stake in perpetuating Title 42 differed from theirs …." Applicants' ADD at 3. Because the parties' interests in "perpetuating Title 42" has no bearing on the question of whether the CDC reasonably implemented the Title 42 policy to begin with—the only question in this case—the circuit court erred in concluding that the motion to intervene was untimely. This Court should make it clear that parties need not seek intervention so long as an

existing party is adequately representing their interests in that case regardless of whether their interests otherwise may diverge in the future.

II. THE DISTRICT COURT FAILED TO ACCORD PROPER DEFERENCE TO THE CDC'S TITLE 42 POLICY.

It has long been recognized that the power "to forbid the entrance of foreigners … or to admit them only in such cases and upon such conditions as it may see fit to prescribe" is an inherent sovereign prerogative entrusted exclusively to Congress. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *see also Galvan v. Press*, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress . . . ."). Here, Congress entrusted the CDC with "the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as [the CDC Director] shall designate," whenever CDC "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 "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.

Exercising this authority, the CDC issued an order suspending the right to introduce aliens migrating through Mexico or Canada, concluding that their entrance "creates a serious danger of the introduction of COVID-19 into the United States" and that a temporary suspension of their entry is "necessary to protect the public health." *See* Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 85 Fed. Reg. 65806, 65,806 (Oct. 16,

2020) ("October Order"). The October Order was later superseded by an order re-affirming that implementation of the Title 42 policy remains necessary during the COVID-19 public health emergency. *See* Public Health Reassessment and Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 86 Fed. Reg. 42,828, 42,835 (Aug. 5, 2021) ("August Order").

As the States point out (Appl. at 27-33), the district court held the CDC to a "least restrictive means" standard in implementing the Title 42 policy. But nowhere in § 265 does Congress impose a "least restrictive means" standard upon CDC's authority to prohibit the introduction of persons, and the CDC did not adopt such a standard in promulgating its regulation governing the exercise of this authority. *See* 42 C.F.R. § 71.40. Indeed, the D.C. Circuit, in this very case, rightly recognized the CDC's "sweeping authority," which is hardly compatible with a "least restrictive means" test. *Huisha-Huisha*, 27 F.4th at 733 (holding "that [42 U.S.C.] § 265 grants the Executive sweeping authority to prohibit aliens from entering the United States during a public-health emergency[1]; [and] that the Executive may expel aliens who violate such a prohibition").

In addition to applying the wrong standard in reviewing the Title 42 policy,

[1] The federal government maintains that this public health emergency—that arising from the COVID-19 pandemic—continues to exist. See Xavier Becerra, Secretary of Health and Human Services, Renewal of Determination that a Public Health Emergency Exists, Oct. 13, 2022 (available at: https://aspr.hhs.gov/legal/PHE/Pages/covid19-13Oct2022.aspx).

the district court failed to accord the agency the appropriate deference in light of the technical expertise required for setting public health policy. For example, courts "give an extreme degree of deference to the agency when it 'is evaluating scientific data within its technical expertise.'" *Kennecott Greens Creek Min. Co. v. Mine Safety & Health Admin.*, 476 F.3d 946, 954-55 (D.C. Cir. 2007) (quoting *Huls Am. v. Browner*, 83 F.3d 445, 452 (D.C. Cir. 1996)). This Court has recognized that "[o]ur Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)). "The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement." *Id.* Because the elected branches of government are better positioned to marshal scientific expertise and craft specific policies in response to changing circumstances, the courts should afford elected officials "especially broad" discretion when they "'undertake to act in areas fraught with medical and scientific uncertainties.'" *Id.* (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)). But instead of affording the CDC broad deference in reviewing the Title 42 policy, the district court did the opposite, holding the CDC to an erroneously heightened "least restrictive means" standard.

Further, this Court affords broad deference to public health judgments of the elected branches even where those judgments might impinge on fundamental and

constitutional rights, such as the freedom to exercise religion. *See*, *e.g.*, *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613-14 ("Where those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people.") (citing *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545 (1985)); *but see Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curium) (applying strict scrutiny in enjoining a regulation that limited church services to 10 people without imposing comparable limits to commercial businesses).

Here, there is no basis for holding the Title 42 policy to a higher standard of review than reasonableness review. Under this correct standard, a court "simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021).

Plaintiffs in this case have no right whatsoever to enter the United States, so the Title 42 policy prohibiting their introduction to the country does not affect any right Plaintiffs may possess. Indeed, to the extent Plaintiffs have a statutory right not to be expelled to a place where they would face persecution or torture, the CDC's Title 42 policy, as interpreted by the D.C. Circuit, does not apply to them. *Huisha-Huisha*, 27 F.4th at 733 (holding "that under [8 U.S.C.] § 1231(b)(3)(A) and the Convention Against Torture, the Executive cannot expel aliens to countries where their 'life or freedom would be threatened' on account of their 'race, religion,

nationality, membership in a particular social group, or political opinion' or where they will likely face torture"). Thus, Plaintiffs have no fundamental or constitutional right affected by the Title 42 policy that might justify a heightened standard of judicial review.

Finally, the fact that the CDC has subsequently determined that the Title 42 policy is no longer warranted is of no moment. "Ordinarily we review only the order or rule before us, not subsequent events." *Great Lakes Commun. Corp. v. FCC*, 3 F.4th 470, 478 (D.C. Cir. 2021) (citing *COMPTEL v. FCC*, 978 F.3d 1325, 1334 (D.C. Cir. 2020)); *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) ("[I]n reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record."). "If a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision." *Water O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984). The CDC's subsequent order terminating the Title 42 policy is the subject of litigation before the U.S. Court of Appeals for the Fifth Circuit and is before neither the D.C. Circuit nor this Court.

CONCLUSION

This Court should grant the States' stay application.

Dated: December 20, 2022

Respectfully submitted,

/s/ Christopher J. Hajec

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CERTIFICATE AS TO FORM

Pursuant to Sup. Ct. Rules 22 and 33, I certify that the foregoing motion for leave to file, motion for leave to file in compliance with Rule 33.2, and the accompanying *amicus* brief are proportionately spaced, have a typeface of Century Schoolbook, 12 points, and contain 2, 2, and 12 pages (and 353, 236, and 3,094 words) respectively, excluding this Certificate as to Form, the Table of Authorities, the Table of Contents, and the Certificate of Service.

Dated: December 20, 2022

Respectfully submitted,

/s/ Christopher J. Hajec

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CERTIFICATE OF SERVICE

The undersigned certifies that, on this 20th day of December 2022, in addition to filing the foregoing document via the Court's electronic filing system, one true and correct copy of the foregoing document was served by Federal Express, next-day delivery, with a PDF courtesy copy served via electronic mail on the following counsel:

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The undersigned further certifies that, 20th day of December 2022, I arranged for the hand delivery of an original and ten true and correct copies of the foregoing document to the Court by co-counsel.

Executed December 20, 2022,

/s/ Christopher J. Hajec
Christopher J. Hajec