No. 22-30303

In the United States Court of Appeals for the Fifth Circuit

STATES OF ARIZONA, LOUISIANA, MISSOURI et al.,
Plaintiff-Appellees,

v.

CENTERS FOR DISEASE CONTROL AND PREVENTION et al.,
Defendant-Appellants,

and

INNOVATION LAW LAB,
Proposed-Intervenor-Defendants.

On Appeal from the U.S. District Court for the
Western District of Louisiana, No. 6:22-cv-00885-RRS-CBW

STATES' CONSOLIDATED ANSWERING BRIEF

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Dated: August 31, 2022

CERTIFICATE OF INTERESTED PARTIES

This brief is filed exclusively on behalf of governmental parties, and therefore not required to furnish a certificate of interested parties under Fifth Circuit Rule 28.2.1. The undersigned counsel of record nonetheless certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. The States of Arizona, Louisiana, Missouri, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Mississippi, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming.
2. Drew C. Ensign, Brunn ("Beau") W. Roysden III, James K. Rogers, Anthony R. Napolitano, and Robert J. Makar—*Counsel* for Petitioners.
3. Mark Brnovich, Arizona Attorney General; Jeff Landry, Louisiana Attorney General; Eric S. Schmitt, Missouri Attorney General; Steve Marshall, Alabama Attorney General; Treg R.

Taylor, Alaska Attorney General; Leslie Rutledge, Arkansas Attorney General; Ashley Moody, Florida Attorney General; Christopher M. Carr, Georgia Attorney General; Lawrence G. Wasden, Idaho Attorney General; Derek Schmidt, Kansas Attorney General; Daniel Cameron, Kentucky Attorney General; Lynn Fitch. Mississippi Attorney General; Austin Knudsen, Montana Attorney General; Douglas J. Peterson, Nebraska Attorney General; Drew H. Wrigley, North Dakota Attorney General; Dave Yost, Ohio Attorney General; John M. O'Connor, Oklahoma Attorney General; Alan Wilson, South Carolina Attorney General; Herbert H. Slattery III, Tennessee Attorney General; Ken Paxton, Texas Attorney General; and Sean D. Reyes, Utah Attorney General; Jason S. Miyares, Virginia Attorney General; Patrick Morrisey, West Virginia Attorney General; and Bridget Hill, Wyoming Attorney General.

4. Defendants-Appellants: Centers for Disease Control & Prevention; Rochelle Walensky, in her official capacity as Director of the Centers for Disease Control & Prevention; U.S. Department of Health & Human Services; Xavier Becerra, in his

official capacity as Secretary of Health and Human Services; U.S. Department of Homeland Security; Alejandro Mayorkas, in his official capacity as Secretary of Homeland Security U.S. Customs & Border Protection; Christopher Magnus, in his official capacity as Commissioner of U.S. Customs and Border Protection; U.S. Immigration & Customs Enforcement; Tae Johnson, in his official capacity as Senior Official Performing the Duties of Director of U.S. Immigration and Customs Enforcement; U.S. Citizenship & Immigration Services; Ur Jaddou, in her official capacity as Director of U.S. Citizenship and Immigration Services; U.S. Border Patrol; Raul Ortiz, in his official capacity as Chief of the U.S. Border Patrol U.S. Department of Justice; Merrick Garland, in his official capacity as Attorney General of the United States of America; Executive Office for Immigration Review; David Neal, in his official capacity as Director of the Executive Office for Immigration Review; Joseph R Biden, Jr, in his official capacity as President of the United States; the United States of America.

5. DOJ Counsel for Defendants-Appellants: Brian M. Boynton; Sarah E. Harrington; Sharon Swingle; Joshua Dos Santos; Jean Lin; Jonathan D Kossak; John Robinson; and Joseph J. DeMott.
6. Proposed Intervenor-Appellant Innovation Law Lab.
7. Counsel for Proposed Intervenor-Appellant Innovation Law Lab, from Center for Immigration Law and Policy, UCLA School of Law: Ahilan T. Arulanantham, Monika Y. Langarica, and Talia Inlender; from the National Immigration Project of the National Lawyers Guild: Joseph Meyers, Victoria Neilson, Matthew Vogel, and Sirine Shebaya

STATEMENT REGARDING ORAL ARGUMENT

Given the tremendous importance of the issues presented and the enormity of the harms that would be inflicted upon the States if the district court's preliminary injunction were to be reversed, the Plaintiff States agree with Federal Defendants that oral argument is warranted here.

GLOSSARY

Abbreviation	Description
CDC	Centers for Disease Control and Prevention
Census	*Department of Commerce v. New York*, 139 S. Ct. 2551 (2019)
DHS	Department of Homeland Security
Law Lab	Innovation Law Lab
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 I	*Texas v. United States*, 809 F.3d 134 (5th Cir. 2015)
Texas II	*Texas v. Biden*, 10 F.4th 538 (5th Cir. 2021)
Texas III	*Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021)
Texas IV	*Texas v. United States*, 40 F.4th 205 (5th Cir. 2022)
Title 42	The Public Health Services Act, 42 U.S.C. § 265
Title 42 Orders	The series of orders issued pursuant to 42 U.S.C. § 265 Title 42.
RE	Record Excerpts
ROA	Record on Appeal

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INTRODUCTION

Defendants' rationales for excusing compliance with APA notice-and-comment rulemaking requirements are remarkably flimsy—so much so that the half-heartedness of their defense is hard to miss. In particular, Defendants sought neither a stay pending appeal nor to expedite this appeal. When specifically asked about the Administration's failure to seek such a stay, the White House Press Secretary could not supply an answer.[1] Nor are Defendants continuing litigation in the district court to attempt to achieve final victory there either. The Centers for Disease Control and Prevention ("CDC") also has not begun the process of conducting notice-and-comment rulemaking, which could potentially cure the APA violation faster than this appeal could be resolved, thereby eliminating the basis for the district court's injunction. Instead of the accelerated, multi-prong strategies manifestly available to Defendants, they instead have insisted upon a single, slow one.

[1] *See* White House, Press Gaggle by Press Secretary Karine Jean-Pierre and National Security Advisor Jake Sullivan En Route Tokyo, Japan (May 22, 2022), https://bit.ly/3ClUqlv ("We're appealing. I mean, I don't have much more than — than what the DOJ is doing is appealing Title 42," followed by the gaggle quickly terminating thereafter).

The upshot is that if Defendants wish to free themselves of the district court's injunction, they do not appear to be in any hurry to do so. Notably, the combination of the Title 42 Termination Order and the injunction against it would appear to "fix" many political problems for the Administration. It gets credit with its base for the attempt. At the same time, it avoids bearing the enormous consequences of the termination actually going into effect, which could hurt its standing with everyone else. And the Administration and its allies can (and have) in their self-serving narratives cast the Judiciary as a politically motivated villain, even though the district court was merely discharging its duties by enjoining Defendants' patently unlawful actions.[2]

Defendants' apparent appellate apathy here stands in stark contrast to the Administration's actual, revealed priorities for immigration policy. For example, after a district court vacated DHS's rule establishing (non-)enforcement priorities, DHS first quickly sought a

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[2] *See*, *e.g.*, Suzanne Monyak, *House Democrats hold firm on Title 42 policy after court ruling*, Roll Call (May 23, 2022), https://rollcall.com/2022/05/23/house-democrats-hold-firm-on-title-42-policy-after-court-ruling/ ("Congressional Progressive Caucus Chair Pramila Jayapal, D-Wash., described the ruling from a *Trump-appointed* Louisiana federal judge as 'a decision *driven by politics* and not facts.'" (emphasis added)).

stay pending appeal from this Court; failing at that, it then rapidly sought both a stay pending certiorari and certiorari before judgment from the Supreme Court, and successfully obtained the latter. *United States v. Texas*, 2022 WL 2841804 (U.S. 2022). But not even a hint of equivalent prioritization is discernible here.

Much like this appeal, CDC's[3] heart does not appear to have been in the Termination Order's drafting. Consider first CDC's attempted invocation of the foreign-affairs exception to the APA's notice-and-comment requirements. CDC's entire rationale literally consists of only a *single* sentence. Despite the exceptional importance of the issues presented, CDC apparently could not be bothered to draft even a second one. Such bureaucratic sloth would be problematic for ordinary agency action; for one of the most important issues pressing this nation, it is indefensible.

What little CDC does say is patently insufficient. Specifically, federal courts have made clear that the foreign-affairs exception "applies in the immigration context only when [notice-and-comment rulemaking]

[3] As used herein, "CDC" is used interchangeably with "Federal Defendants" to refer to all defendants unless context indicates otherwise.

will provoke definitely undesirable international consequences." *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 775-76 (9th Cir. 2018) (cleaned up) (emphasis added). But CDC's single-sentence rationale does not identify *any* actual consequences at all, let alone ones of "definitively undesirable" magnitude. Instead, CDC refers only to "*ongoing discussions* with Canada, Mexico, and other countries regarding immigration," ROA.346 (emphasis added), without supplying any details—as if the *mere existence of talks* categorically sufficed. No court has ever held as much, and there is no reason for this Court to be the first.

Implicitly recognizing the insufficient nature of CDC's single-sentence rationale, the Departments of Homeland Security, State, and Justice all frantically attempted to backfill a defensible rationale with *post hoc* rationalizations and outside-administrative-record evidence. That effort violates "a 'foundational principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" *DHS v. Regents of the Univ. of Calif.*, 140 S. Ct. 1891, 1907 (2020) (citation omitted). Nor does such extra-record evidence actually flesh out CDC's stated rationale—which relied

solely upon the *mere existence* of *international talks*, without any reference to *consequences*. But even if such evidence could be considered, it is still insufficient and relies heavily on vague generalities. At bottom, those declarations reflect Defendants' view that they can freely dispense with the input of the American people by invoking the specter of disapproval by foreign elites. The APA begs to differ.

CDC's attempted invocation of the "good cause" exception fares little better, and CDC had ample knowledge that its rationale was unlikely to survive judicial scrutiny. This Court has been perfectly clear that, in ascertaining whether good cause exists, a central consideration is whether "[f]ull notice-and-comment procedures *could have been run in the time taken to issue the [challenged] rule*." *United States v. Johnson*, 632 F.3d 912, 929 (5th Cir. 2011) (emphasis added). In *Johnson*, this Court invalidated a good-cause invocation because the agency had "seven months" to do so. *Id.*

CDC had *twice* that much time here. Specifically, President Biden ordered CDC to begin evaluating termination on February 2, 2021, and it is undisputed that CDC had been actively considering that action from that day up until its April 1, 2022 Termination Order *fourteen months*

later. That was ample time to take public comments if CDC were inclined to do so. CDC simply wasn't. And in refusing to take public comments, CDC knowingly invited a grave risk that an injunction, just like the district court's, would come to pass. It did.

CDC's refusal stands in notable contrast to the agency taking comments when it created the instant Title 42 system—and doing so in under six months. CDC's good-cause rationale here, however, does not even *acknowledge* that fact, *let alone attempt to explain* why it could not take comments again. Similarly, CDC made amply clear that it was perfectly fine with a delayed effect after its putative public-health determination—selecting an effective date nearly two months after its April 1 Order. But CDC did not even *attempt* to explain why it could not delay its effective date a bit further to permit notice-and-comment rulemaking. Indeed, it did not explain why it selected May 23 at all.

CDC's central premise seems to be a form of forced parallelism: *i.e.*, that because good cause existed when it promulgated Title 42 Orders, it necessarily must also exist when it seeks to end them. But the APA merely offers the agency the opportunity to invoke the good-cause exception in each instance; it does not guarantee the state of the world

will be the exact same when a policy is promulgated and when its termination is sought. Indeed, the world (unsurprisingly) has changed enormously: Title 42 was adopted when a once-in-a-century pandemic was *unfolding rapidly*. In contrast, the COVID-19 pandemic is now ebbing at a rate that amply permits notice-and-comment rulemaking (as was notably performed even when the pandemic raged). That is, after all, *the central premise* of the Termination Order: that the public-health *situation has changed* and the pandemic had sufficiently abated to permit Title 42 to be terminated.

CDC was thus required to demonstrate good cause for the Termination Order by pointing to the circumstances that existed *at that time*, rather than at Title 42's inception. It failed to do so.

Transgressing notice-and-comment requirements is hardly the Termination Order's only APA violation, however. Instead, CDC's reasoning has several obvious deficiencies that render its Termination Order arbitrary and capricious. Three broad violations stand out.

First, CDC's reasoning is at war with itself as to whether immigration consequences are permissible considerations under 42 U.S.C. § 265 ("Section 265" or "§ 265"). CDC refused to consider any

harms to the States (or any other non-federal entity) based upon increased immigration because it believed it lacked authority to do so. But it simultaneously *explicitly and extensively relied on immigration consequences* to delay the Order's effective date, and did so to give DHS time to respond to the immigration calamity that CDC recognized its Order would create. The federal government's position appears to be that it can selectively consider immigration consequences "for me, but not for thee" vis-à-vis the States. But that feds-paramount/States-irrelevant distinction lacks any conceivable grounding in the statutory text, and the APA does not bless such self-serving, myopic decision-making.

Ultimately, either CDC has authority to consider immigration consequences under § 265 or it doesn't. *Either way*, its Termination Order cannot stand because it simultaneously rests on both mutually exclusive propositions.

Second, CDC's refusal to consider the reliance interests of States violates the APA. CDC largely premised that refusal on Title 42 Orders being "temporary"—despite having lasted more than two years at that time. That "temporary" rationale squarely contravenes decisions of both

the Supreme Court and this Court in *Regents* and *Texas v. Biden ("Texas III")*, 20 F.4th 928 (5th Cir. 2021), respectively.[4]

Third, CDC failed to consider obvious alternatives adequately—or at all. Two such alternatives are readily apparent: (a) Phase implementation, which was unintentionally made obvious by DHS, which clandestinely and unlawfully began implementing the Termination Order a month *before* the May 23 effective date—culminating in a temporary restraining order (a detail tellingly unmentioned in Defendants' brief). But CDC can and should have considered phased implementation—an alternative DHS apparently felt it was *compelled* to undertake, notwithstanding its manifest illegality. (b) Alternative effective dates: CDC also failed altogether to consider different effective dates, even though it admitted immediate implementation would be a policy disaster too awful even to contemplate seriously.

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[4] *Texas II* and *III's* mootness/final-agency-action and statutory holdings—which are not at issue here—were overruled in *Biden v. Texas*, 142 S. Ct. 2528 (2022). None of *Texas II* and *III*'s standing and other APA holdings were at issue, however, as the United States did not seek certiorari on them. Those holdings thus all remain good law and binding precedent here. The full cites for *Texas I*, *II*, *III*, and *IV* are also provided by the glossary preceding the Table of Contents and the first time each is cited.

Any one of these APA violations would sustain the district court's preliminary injunction even if its notice-and-comment holding were erroneous (which it isn't).

Given the pervasive APA violations that infect CDC's Termination Order from top to bottom, Defendants understandably seek to avoid this Court's review of the merits. They thus predictably raise a flurry of procedural objections, such as Article III standing, statutory standing/zone-of-interest, and committed-to-agency discretion unreviewability. But these contentions are perfunctory and baseless. Indeed, given how clearly they violate square holdings of this Court, many flirt with the boundaries of fair argument and could only be accepted, if at all, by this Court sitting *en banc*.

Because the district court did not abuse its discretion in issuing the preliminary injunction, this Court should affirm.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 and entered a preliminary injunction on May 20, 2022. ROA.3805-53. Federal Defendants filed a timely notice of appeal the same day. ROA.3854. This Court has jurisdiction under 28 U.S.C. § 1292(a).

The district court also denied Proposed-Intervenors' ("Law Lab's") motion to intervene on May 13. ROA.3758-804. Proposed Intervenors filed a timely notice of appeal on May 24. ROA.3862-63. This Court has jurisdiction over that appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

The issues presented are:

(1) Whether CDC's refusal to conduct notice-and-comment rulemaking violates the APA.

(2) Whether the Termination Order's reasoning is arbitrary and capricious.

(3) Whether the district court abused its discretion in its equitable balancing.

(4) Whether the district court erred in denying Law Lab's motion to intervene.

(5) Whether, by making its injunction effective nationwide, the district court abused of discretion, where Federal Defendants do not oppose the nationwide scope.

STATEMENT OF THE CASE AND FACTS

1. *CDC Authority Under § 265*

Under the Public Health Services Act, the CDC Director "may prohibit … the introduction of persons and property," if 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 the restriction "is required in the interest of the public health." 42 U.S.C. § 265.

Prior to the COVID-19 pandemic, however, CDC's regulations only permitted "suspend[ing] the introduction of property" and "quarantin[ing] or isolat[ing] persons." 85 Fed. Reg. 16,559, 16,560 (Mar. 24, 2020).

2. *March 2020 IFR*

In March 2020, CDC issued an Interim Final Rule amending CDC's regulation to permit "suspen[ding] the introduction of persons" to prevent COVID-19 spread into the U.S. ROA.3759. CDC invoked the APA's good-cause exception to notice-and-comment, citing "the national emergency caused by COVID-19." ROA.3759. At the same time, however, CDC expressly invited "comment on all aspects of this interim final rule." *Id.*

After receiving 218 comments, CDC published a final rule September 11, 2020. ROA.3759.

3. *Title 42 Orders*

Along with the March 2020 IFR, CDC issued an order suspending the introduction into the U.S. of all "persons traveling from Canada or Mexico," except for "U.S. citizens, lawful permanent residents, and their spouses and children" and other limited exceptions. ROA.3760. That order was set to expire after thirty days, but it was subsequently renewed twice. ROA.3760. In May 2020, the 30-day renewal requirement was abandoned and instead replaced with a mandatory review every 30 days. ROA.3760.

When the Final Rule became effective in October 2020, CDC issued a new order under its aegis. ROA.3760. That order was "substantially the same as" prior orders, was subject to same 30-day periodic reviews, and was to remain in force until CDC had "publish[ed] a notice in the Federal Register terminating [it]." ROA.3760. CDC subsequently promulgated Title 42 orders relating to unaccompanied children that are not relevant here. ROA.3760.

4. *Executive Order 14,010*

On February 2, 2021, President Biden signed Executive Order 14010, which ordered that CDC "'shall promptly review and determine whether termination, rescission, or modification of the [Title 42 orders] is necessary and appropriate.'" ROA.3762. The federal government had therefore been actively considering termination of the Title 42 Policy for over 14 months by the Termination Order's date.

5. *CDC Termination Order*

On April 1, 2022, CDC Director Walensky issued an order terminating the Title 42 policy (the "Termination Order" or "Order"). ROA.3762. The Order asserts two exceptions to APA notice-and-comment requirements: the foreign-affairs and good-cause exceptions. ROA.346. The agency supplied single-sentence and single-paragraph rationales for each, respectively. *Id*.

The Termination Order explicitly delayed its effective date 52 days "to provide DHS time to implement operational plans for fully resuming Title 8 processing." ROA.345. It also devoted about three pages to explaining why any reliance interests by the States were not "reasonable

or legitimate," before providing a single-sentence rationale purporting to weigh such interests even if they were legitimate. ROA.340-42.

6. *Failing Situation At The Border*

The Termination Order was issued at a time when the United States was facing historically unprecedented levels of illegal crossings even with Title 42 in place. ROA.3766. DHS itself estimated there were "300,000 known 'gotaways'—migrants who were not apprehended or turned themselves in and who got past agents—since fiscal year 2022 began." ROA.3766. The district court also credited uncontested evidence that "only 27.6% of undocumented persons crossing the southern border were apprehended by DHS personnel." ROA.3767.

7. *Projected Effect Of Termination Order At Border*

Against that backdrop, the Title 42 Policy resulted in over one million expulsions of aliens in Fiscal Year 2021, and over 400,000 in Fiscal Year 2022 through February 28, 2022. ROA.434.

The Termination Order was projected to cause a major increase in border crossings from the prior 7,000/day level; DHS itself estimated it "could be as large as a three-fold increase to 18,000 daily border crossings." ROA.3801.

That projected increase, coming at a time of already unprecedented levels of unlawful crossings, met with extensive criticism even amongst Democratic Senators, who have described the Termination Order as a "frightening decision" and predicted it will cause a "migrant surge that the administration does not appear to be ready for." ROA.1117-18; ROA.1153-55; ROA.1172-83.

PROCEEDINGS BELOW

A. Suit Filing And Preliminary Injunction

The States of Arizona, Louisiana, and Missouri filed this suit on April 3. Amended complaints added 21 additional states. ROA.251, 3156.

After the States filed a motion for a preliminary injunction on April 14, the parties agreed upon a schedule that would permit the States' motion to be briefed, heard, and decided before the Termination Order's May 23 effective date. ROA.1722.

B. DHS's Premature Implementation And TRO

Despite the May 23 effective date, DHS began secretly implementing the Termination Order sometime before April 20. The States discovered that premature implementation through news reports

and subsequently confirmed it through discussions with the Border Patrol Union. ROA.1972-73, 1839-54.

The States then sought a temporary restraining order against DHS's premature implementation. ROA.1820. Although Federal Defendants raised several procedural objections, they did not deny their the pre-effective-date implementation. ROA.1868.

The district court then granted a 14-day temporary restraining order against implementation of the Termination Order, ROA.1955, 1972, and subsequently extended that until the earlier of the court's preliminary-injunction decision or May 23. ROA.3526.

C. Attempted Intervention By Law Lab

Four days before oral argument, Law Lab and two asylum-seeking migrants filed a motion to intervene for the "distinct and limited … purpose … to argue that, should the Court enter any injunctive relief, such relief should be geographically limited to run only in the Plaintiff States." ROA.3464.

Both the States and Federal Defendants opposed that motion to intervene. ROA.3665, 3678. The district court denied intervention orally at the May 13 preliminary injunction hearing but permitted Proposed

Intervenors to participate as *amici curiae* to advance their objections to the nationwide scope sought by Plaintiffs and not opposed by Federal Defendants. ROA.3696.

D. Preliminary Injunction Decision

The district court granted the States' request for a preliminary injunction on May 20.

- ***Reviewability***

The district court began its analysis by addressing Federal Defendants' three objections to jurisdiction/reviewability. On Article III standing, the court first noted that standing requirements were doubly relaxed because (1) the States were asserting procedural violations and (2) were entitled to "special solicitude" as States. ROA.3825-30.

The district court next rejected Defendants' contentions that the States' injuries were not fairly traceable to the Termination Order. The district court made a specific factual finding that "the Termination Order is likely to result in a significant increase in border crossings, that this increase will impact [the States'] healthcare systems, and that they will incur higher costs for healthcare reimbursements." ROA.3832. It then reasoned that under the *Census* and *Texas III* cases, "traceability for

purposes of standing may be based 'on the predictable effect of Government action on the decisions of third parties.'" ROA.3834-35 (quoting *Texas III*, 20 F.4th at 973).

Applying these legal principles, the court held that "Plaintiff States can similarly rely on the predicted effect of the Termination Order …[causing] an increase in border crossings … [that] will likely impact their healthcare and educational expenditures," which established "the traceability requirement for standing." ROA.3835.

The district court next rejected CDC's argument that the States lacked a cause of action under the zone-of-interest test for two reasons. First, the States have "have legitimate interests in the health and welfare of their citizens" that were impaired by the Termination Order. ROA.3881. Second, because Section 265 "protects public health *by regulating immigration*" that the States' harms from the "immigration-related consequences of the Termination Order" sufficed. ROA.3881-82.

Finally, the district court rejected Defendants' argument that decisions under Section 265 were categorically unreviewable under the APA's "committed to agency discretion" exception. ROA.3837-38. After recognizing the "'strong' and well-settled' presumption in favor of judicial

review," the court held that Section 265 "provide[d] … 'meaningful standards'" that precluded the exception applying. ROA.3838 (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)).

- ***Merits***

The district court held that CDC had violated the APA by failing to conduct notice-and-comment rulemaking because its rationales for invoking the foreign-affairs and good-cause exceptions failed. As to the former, CDC's single-sentence rationale was insufficient, as "the cursory information included in the Termination Order is simply insufficient." It further held that the declarations submitted by Defendants could not be considered because they were "impermissible post hoc rationalizations." ROA.3845.

As to good cause, the district court held CDC's rationale was "flawed for at least four reasons." ROA.3842. First, the "fourteen-month period [post-Executive Order 14,010] provided the CDC with ample time to … undergo the normal notice-and-comment process." ROA.3842. Second, CDC's rationale was "internally inconsistent," since while "CDC refers to the need for swift action," the agency actually delayed the Order's effective date because DHS needed time "to 'institute operational

plans.'" ROA.3842-43. Third, CDC's rationale "was overbroad in that it would apply to all rules issued under Title 42 regardless of circumstances." ROA.3888. Fourth, "the same emergency conditions do not exist … with respect to *terminating* [CDC's] COVID-related orders" as did when the agency promulgated the Title 42 system. ROA.3843.

The district court did not resolve the States' other APA claims, although it noted "it does not appear … that the CDC considered alternatives to a blanket order" terminating Title 42. ROA.3846-47.

- ***Irreparable Harm/Equitable Balancing***

The district court held that the States' injuries constituted irreparable harm under *Texas III*. ROA.3894. It further concluded that the balance of harms and public interest favored issuance of injunctive relief. ROA.3894-95. The court further concluded that a nationwide injunction was appropriate under this Court's *Texas I* decision because "'there [wa]s a substantially likelihood that a geographically-limited injunction would be ineffective because [immigrants] would be free to move among states,'" and made a finding that "a nation-wide injunction is necessary for complete relief." ROA.3850-51 (quoting *Texas v. United States ("Texas I")*, 809 F.3d 134, 188 (5th Cir. 2015).

E. These Appeals.

Both CDC and Law Lab appealed. While CDC did not seek a stay pending appeal, Law Lab did, which this Court unanimously rejected on June 16, 2022.

SUMMARY OF THE ARGUMENT

I. CDC's reviewability arguments are uniformly meritless.

I.A. As to Article III standing, CDC challenges only traceability. Here, the district court's unchallenged factual findings establish but-for causation, which alone suffices as "Article III 'requires no more than *de facto* causality.'" *Department of Commerce v. New York ("Census")*, 139 S. Ct. 2551, 2566 (2019) (citation omitted). Similarly, traceability is readily satisfied under this Court's decisions in *Texas II* and *III*. That is particularly true as the predicted increase in migrants here is enormous and historically unprecedented. Moreover, CDC's traceability arguments ignore (a) gotaways, who will *never encounter* the "ordinary operation of immigration law" that CDC alleges breaks the causal chain, (b) that Congress itself connected CDC's orders to resulting DHS implementation by statutory command, and (c) the role of unfunded federal mandates, from which the States' injuries flow inexorably. Finally, any doubts about

the States' standing are dispelled by the doubly-relaxed standard here, due to the States asserting procedural injury and the special solicitude owed to them as States.

I.B. The States also readily satisfy the zone-of-interest test for two reasons. *First*, the zone of interest of section 265—a statute authorizing regulation of *immigration*—plainly is concerned about *immigration-related* consequences. Moreover, CDC's own regulation and the Termination Order both belie CDC's arguments here, particularly as CDC unequivocally relied upon *immigration-based consequences* to delay the Order's effective date. *Second*, the uncontested strains on the States' healthcare systems readily fall within § 265's public-health concerns.

I.C. Finally, CDC's orders under § 265 are also not categorically unreviewable under the committed-to-agency-discretion exception. Here, Section 265 supplies multiple "meaningful standard[s] against which to judge the agency's exercise of discretion." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018). It notably permits regulation only of diseases that are "communicable," that must result in a "serious" danger, and that must be located "in a foreign country," and such regulations must be "required in the interest of the public health." § 265.

And even if those standards were insufficient to permit judicial review, CDC's own regulation supplies them—an issue that CDC unambiguously lost previously, did not appeal, and now completely ignores.

II. CDC's single-sentence foreign-affairs rationale does not suffice. CDC was required to establish that notice-and-comment compliance would "provoke definitely undesirable international consequences.'" *East Bay*, 932 F.3d at 775-76. But CDC did not identify *any actual consequences*, and instead relied upon the mere existence of "*ongoing discussions* with Canada, Mexico, and other countries." ROA.346 (emphasis added). Nor is CDC's attempted reliance on *post hoc*, extra-administrative-record declarations of other agencies proper—or availing even if considered.

III. CDC's invocation of the "good cause" exception to notice-and-comment requirements fails too. This Court has made clear that the central inquiry is whether "[f]ull notice-and-comment procedures *could have been run in the time taken to issue the [challenged] rule*." *Johnson*, 632 F.3d at 929 (emphasis added). Here, ending Title 42 had explicitly been under consideration for 14 months—*twice* the seven months that this Court found sufficient to preclude good cause in *Johnson*. Moreover,

CDC failed (a) even to acknowledge it previously conducted notice-and-comment when creating the Title 42 system, let alone explain why it could not do so again, (b) to explain why it could not delay the Termination Order's effective date a bit further to permit notice-and-comment compliance when it had already felt compelled to adopt a two-month delay.

Nor does CDC's invocation of the good-cause exception when Title 42 was created mean that it necessarily must exist when its termination is attempted. The central premise of the Termination Order is that the pandemic's contours have fundamentally changed. CDC thus cannot rely on the proposition that, because the 25-months-prior situation established good cause, then it must necessarily do so now as well.

IV. The Termination Order also violates the APA because its rationales are arbitrary and capricious. The key violations here are that (1) CDC ignored immigration-based harms, particularly to the States, and hopelessly contradicted itself as to whether it can consider such consequences, (2) CDC wrongly discounted the States' reliance interests as illegitimate because Title 42 was supposedly "temporary" (but actually lasted *longer* than grants of DACA status in *Regents*), and (3) CDC failed

to consider obvious alternatives, such as phased implementation and alternative effective dates.

V. CDC's balance of equities arguments fail because the district court did not abuse its discretion. Indeed, its balancing here is strongly supported—if not outright *compelled*—by the Supreme Court's decisions in *Alabama Ass'n of Realtors v. HHS ("Alabama Realtors")*, 141 S. Ct. 2485 (2021), and *NFIB v. OSHA*, 142 S. Ct. 661 (2022), and this Court's decision in *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604 (5th Cir. 2021). The district court did not abuse its discretion in balancing the equities here in the same fundamental manner.

VI. Finally, the district court correctly denied intervention of right to Law Lab because it failed to establish either a protectable interest or the inadequacy of CDC's representation. In any event, the district court acted well within its discretion in issuing a nationwide injunction under this Court's decisions in *Texas I* and *IV*, which CDC notably did not oppose. As a result, any error in denying intervention is harmless here, and Law Lab's scope arguments fail on the merits.

STANDARDS OF REVIEW

This Court "review[s] a preliminary injunction for abuse of discretion." *Texas I*, 809 F.3d at 150. "[F]indings of fact are subject to a clearly-erroneous standard of review, while conclusions of law are subject to broad review and will be reversed if incorrect." *Id.* This Court reviews the scope of injunctive relief for abuse of discretion. *Id.* at 187-88.

ARGUMENT

I. THE TERMINATION ORDER IS REVIEWABLE

Seeking to avoid judicial review of the Termination Order, CDC advances (1) Article III standing, (2) statutory standing/zone-of-interest, and (3) committed-to-agency-discretion arguments. All fail.

A. The States Have Article III Standing

CDC notably does not contest two of the three requirements for Article III standing here: either that the States are threatened with imminent, concrete injury-in-fact and that the preliminary injunction redresses their injury. *Census*, 139 S. Ct. at 2565. Instead, it contests only whether the States' injuries are "fairly traceable" to the Termination Order. They are.

1. The District Court's Uncontested Factual Findings Establish But-For Causation

CDC's standing arguments are hamstrung by what the agency does not challenge: *i.e.*, a *single* one of the district court's factual findings. The key factual findings for present purposes are:

- "[T]he Termination Order will result in increased border crossings and that, based on the government's estimates, the increase may be as high as three-fold." ROA.3813;
- "DHS estimates that 'there have been more than 300,000 known 'gotaways'—migrants who were not apprehended or turned themselves in and who got past agents'" from October 1, 2021 to April 1, 2022. ROA.3813;
- "[T]he record supports Arizona's position that an increase in border crossings as a result of the Termination Order will increase the state's costs for healthcare reimbursements." ROA.3816; and
- "[T]he record supports Missouri's position that an increase in border crossings as a result of the Termination Order will increase the state's costs for healthcare reimbursements, the

provision of educational services, and the administration of its driver's license program." ROA.3817.

By failing to challenge any of these findings, CDC has effectively conceded but-for causation, since "[t]he 'but-for causation inquiry' is 'purely a question of fact.'" *Anthoine v. N. Cent. Cntys. Consortium*, 605 F.3d 740, 752 (9th Cir. 2010) (citation omitted); *accord Davis v. United States*, 670 F.3d 48, 53 (1st Cir. 2012); *Grand Canyon Tr. v. Bernhardt*, 947 F.3d 94, 96 (D.C. Cir. 2020).

2. The States' Injuries Are Fairly Traceable Under Traditional Article III Standards

CDC's only standing challenge is purely to the traceability prong. Even when not relaxed—as it is doubly here, *infra* § I.A.3—Article III requires only that harms are "'*fairly* traceable to the defendant's challenged behavior.'" *Census*, 139 S. Ct. at 2565 (citation omitted) (emphasis added). This showing is *less* rigorous that proximate causation. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014) ("Proximate causation is not a requirement of Article III standing[.]"). It also "requires *less of a causal connection than tort law*." *Environment Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357, 368 (5th Cir. 2020) (emphasis added). Ultimately, "Article III

'requires no more than *de facto* causality.'" *Census*, 139 S. Ct. at 2566 (citation omitted).

Here the States' evidence readily satisfies the ordinary Article III traceability standard without *any* relaxation for five reasons.

First, CDC's effective concession that but-for causation exists here all but concedes traceability too. The Supreme Court in the *Census* case unanimously treated the existence of "*de facto* causality" as dispositive of the traceability requirement: because it existed there, "traceability [wa]s satisfied." 139 S. Ct. at 2566. So too here.

The *Census* case also addresses the principal factor that often breaks traceability: "the independent action[s] of third parties." *Id.* at 2565. But such actions do not defeat standing where injuries are based upon the "predictable effect of Government action on the decisions of third parties." *Id.* at 2566.

Here the district court has already made unchallenged factual findings that the Termination Order will predictably cause an enormous increase in border crossings. ROA.3765-66. The district court similarly made findings that that those additional crossers will predictably seek to

avail themselves of free education and health services. ROA.3768-71. These uncontested findings readily establish "*de facto* causality."

That conclusion is further compelled by this Court's holding that a major nationwide immigration policy, such as Title 42, is "precisely the sort of large-scale policy that's amenable to challenge using large-scale statistics and figures." *Texas III*, 20 F.4th at 971. Here the States have pointed to just such "large-scale statistics": indeed, numbers rarely (if ever) come any larger.

This Court further recognized a readily traceability causal chain whereby "*if* the total number of in-State aliens increases, the States will spend more on healthcare." *Texas III*, 20 F.4th at 969. So it is here: by increasing the number of migrants entering the Plaintiff States, the Termination Order will have the "predictable effect" of increasing the State's healthcare costs. *Id.* at 973. This Court similarly held earlier in that same case that "Texas's injury *[wa]s also traceable*" precisely because "at least some MPP-caused immigrants will certainly seek educational and healthcare services." *Texas v. Biden ("Texas II")*, 10 F.4th 538, 548 (5th Cir. 2021) (emphasis added).

Second, CDC's inordinate reliance (at 3, 18-19, 21-23) on the States' harms resulting from "ordinary operation of immigration laws" is misplaced because it simply ignores the elephant in the room: gotaways. CDC thus (at 19-20) mischaracterizes the States' harms as relying solely on "application of … procedures for asylum." But much—indeed *most*—of those new crossers will *not* encounter DHS at all, and thus never will be subject to "ordinary operation of the immigration law." Instead, they will instead be added to the States' populations without any intermediation of immigration laws operating on them at all.

CDC does not dispute—or even discuss—the district court's acceptance of the State's uncontested evidence that "only 27.6% of undocumented persons crossing the southern border were apprehended." ROA.3814. Nor does it dispute the specific finding that "'there have been more than 300,000 known "gotaways" … since fiscal year 2022 began.'" ROA.3813 (citation omitted). Plainly, "gotaways" constitute at least a large share—if not large majority—of crossers, and CDC does not contend otherwise. And while the States prominently raised this "gotaways" argument below, ROA.1069, 1073-75, CDC apparently continues to have no answer to it.

Third, even aside from gotaways, the States' harms are readily traceable even for those migrants processed through "ordinary operation of immigration laws." Indeed, Congress itself has drawn the requisite causal connection between § 265 orders and immigration effects: DHS has a mandatory statutory "duty" to "aid in the enforcement" of such orders. 42 U.S.C. § 268(b) (DHS "shall … aid"). Where Congress itself has explicitly connected the dots from Point A to B, only the willfully obtuse could conclude such a connection is not "fairly traceable."

CDC is similarly mistaken in contending (at 23) that the States' harms "arise from laws that operate independently." Congress has ensured the opposite: when CDC commands DHS to suspend ordinary immigration policies pursuant to § 265, DHS must obey under § 268(b). There is nothing "independent" about that.

A comparison to *Massachusetts v. EPA*, 549 U.S. 497 (2007), is instructive. There, reversing EPA's denial of a rulemaking petition to designate greenhouse gases as "air pollutants" would not accomplish *any* tangible result by itself. *Id.* at 513, 523-26. Only through downstream "ordinary operation" of environmental laws would other provisions kick in, and future regulations would issue that might diminish GHG

emissions. *Id.* Yet Massachusetts had no traceability problem there. *A fortiori*, neither do the States here.

Fourth, Defendants ignore the role of unfunded federal mandates that create an unbroken chain of federal-government-caused injuries. Federal law requires the States "to provide educational and healthcare services to immigrants regardless of immigration status." ROA.3831; *accord Plyler v. Doe*, 457 U.S. 202, 230 (1982); 42 C.F.R. § 440.255(c). Thus, when DHS confidently predicts (as it has here) that the Termination Order will result in large increases in migrants, it inexorably follows that the States will incur additional healthcare and education expenses. That easily satisfies traceability.

Ultimately, the federal government's position boils down to this:

(1) We can take actions that are alleged to violate the APA that we confidently predict *will* lead to a massive increase in migrants.

(2) We further can mandate that the States provide free education and healthcare expenses to those new migrants.

(3) We also can—and do—refuse to compensate the States for these federally-mandated expenditures.

(4) Although we concede the existence of this injury-in-fact for which the Termination Order is a but-for cause, none of this injury is cognizable and the States cannot even question whether those injury-producing actions violate the APA.

(5) Because Article III … somehow.

That is manifestly not the law. And the contempt for federalism and the States underlying these distortions of standing precedents amply merits this Court's decisive rejection.

Fifth, CDC's standing arguments rely heavily on irrelevancies and distortions. In particular, CDC contends that Article III standing is somehow lacking because the States "challenge only the termination of an *emergency* public-health order that is expressly *temporary*." CDC Br.23 (emphasis added).

Those contentions are unserious. Article III has no exception for "emergency" or "temporary" measures. For example, President Truman's "emergency" and "temporary" seizure of steel mills was very much reviewable under Article III. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). CDC's "emergency" and "temporary" eviction moratorium extension was also incontestably reviewable. *See*

generally Alabama Realtors, 141 S. Ct. 2485. So is the Termination Order.

3. Standing Requirements Are Doubly Relaxed Here

As explained above, the States would have Article III standing even if the ordinary requirements applied with full force. But they don't. Not even close. Instead, Article III requirements—particularly traceability—are doubly relaxed here.

First Relaxation: Procedural Injuries

Standing/traceability is relaxed a first time because the States are asserting "procedural right[s] to protect [their] concrete interests." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992). The States can thus assert their procedural rights under the APA "'without meeting all the normal standards for redressability and immediacy.'" *Massachusetts*, 549 U.S. at 498 (quoting *Lujan*, 504 U.S. at 573 n.7).

CDC does not deny this first relaxation, nor meaningfully grapple with it beyond begrudgingly acknowledging its existence (at 23). The example provided in *Lujan* is particularly instructive. 504 U.S. at 573 n.7. Just as the dam-adjacent resident need not actually trace his dam-construction-caused harms through the deficient environmental

analysis, the States similarly need not demonstrate that, if CDC conducted notice-and-comment rulemaking and promulgated an APA-compliant decision, the result would be any different. They need only show that the agency *could* reach a different result post-compliance. This ultimately is why, for example, New York had Article III standing in the *Census* case even though its alleged injuries were *several* steps downstream of ordinary operations of a whole host of laws. *Census*, 139 S. Ct. at 2565-66.

Notably, this sharp relaxation as to traceability (and redressability) stands in stark contrast to "the requirement of injury in fact[, which] is a hard floor of Article III jurisdiction." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). But the States' satisfaction of that "hard floor" is undisputed here.

Second Relaxation: Special Solicitude For States

Traceability is relaxed a second time because the States are "entitled to special solicitude" in standing analysis. *Massachusetts*, 549 U.S. at 520; *accord Texas I*, 809 F.3d at 159 *aff'd by an equally divided court* 579 U.S. 547 (2016) (applying *Massachusetts*'s relaxed "special solicitude" to conclude that the States' "causal connection [wa]s

adequate"); *Texas v. United States ("Texas IV")*, 40 F.4th 205, 216 (5th Cir. 2022).

CDC (at 24-25) indirectly acknowledges that this Court extended special solicitude standing to *immigration-based* harms in *Texas IV*, 40 F.4th at 216 & n.4, but urges this Court to "not extend its precedents in a way that makes State standing a foregone conclusion as to every significant federal policy."

This attacks a straw man. The States do not seek special solicitude for challenges to all "significant federal polic[ies]." Instead, the States here merely seek special-solicitude standing where they satisfy CDC's *own articulation* of the test: "where States have a procedural right and a 'quasi-sovereign interest.'" CDC Br.23.

CDC does not deny the States' procedural rights. The States further have "quasi-sovereign interest[s] in the health and well-being—both physical and economic—of its residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982). By placing additional strains on their healthcare and education systems, the Termination Order harms the States' ability to serve the health and educational needs

of their existing residents, thereby inflicting quasi-sovereign injuries. CDC's arguments thus flunk CDC's own standard.

This Court has held that States had special-solicitude standing in a virtually *identical* context: *i.e.*, where States were challenging the federal government's repeal of an immigration policy and that termination resulted in the presence of additional "immigrants [that] will certainly seek educational and healthcare services from the state," *Texas II*, 10 F.4th at 548-49, and caused the States to "spend more on healthcare," *Texas III*, 20 F.4th at 969. Those holdings control here. Nor is *Texas III* merely a driver-license-only case as CDC implies (at 23).

CDC also advances (at 24) the red herring that "States cannot seek to redress the harms of its residents as *parens patriae* … against the federal government." That assertion is wrong,[5] but irrelevant here because the States' standing arguments are *not* based purely (or even principally) on harms to their citizens under a *parens patriae* theory.

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[5] Following *Massachusetts*, "a long train of federal courts have applied or mirrored the Supreme Court's careful circumscription of *Mellon* to hold that a state may bring a *parens patriae* action against the federal government where it does not challenge the operation of a federal statute and it asserts a proper right." *Texas v. United States*, 555 F. Supp. 3d 351, 379 (S.D. Tex. 2021), *appeal dismissed* 2022 WL 517281 (5th Cir. 2022) (collecting cases).

Instead, the States are relying on injuries to *their own quasi-sovereign and proprietary interests* reflected in *their own* increased healthcare and education expenses/system strains—and in a manner indistinguishable from *Texas II*, *III* and *IV*.

Federal Defendants did not even attempt to seek Supreme Court review of *Texas II* and *III*'s standing holdings (though it did of other issues). But their arguments now proceed as if they had obtained not only certiorari, but victory on them—as if *Texas II* and *III* were legal nullities. They are not; they remain controlling law here, their dispositive holdings are alternatively ignored or mischaracterized by Federal Defendants.[6]

In any event, this Court has subsequently resolved any conceivable doubt here, expressly holding States have "quasi-sovereign '*interest[s] in*

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[6] CDC's reliance (at 24) on *Arizona v. Biden*, 31 F.4th 469, 472 (6th Cir. 2022) is misplaced. This Court has already recognized that the Sixth Circuit's standing analysis there was fundamentally incompatible with this Court's precedents and, in any event, was unpersuasive. *Texas IV*, 20 F.4th at 229. *Arizona* is further impossible to reconcile with the Supreme Court's standing holdings in *Massachusetts* and the *Census* case, and its premise that the States are no different than mere private entities under our constitutional system of dual *sovereigns* is bizarre. Moreover, it is far from clear why Massachusetts's alleged loss of coastline lands is not "capable of estimate in money" in a manner that adverse health outcomes resulting from the increased strains on States' healthcare systems would be.

the enforcement of immigration law'" that can be asserted against the federal government. *Texas IV*, 40 F.4th at 216 n.4 (citation omitted) (emphasis added). And contrary to CDC's contention (at 25), that holding need not be "extend[ed]" to control here; it need only be applied.

B. The States' Injuries Satisfy The Zone-Of-Interest Test

Next up in CDC's efforts to shield its Termination Order from judicial review is its contention that the States lack a cause of action because their harms fall outside of Section 265's zone of interest. That attempt fails too.

1. The Zone-Of-Interest Test Is Not Stringent

CDC notably glosses over the governing standard: The zone-of-interest requirement is "*not ... especially demanding*," and the "benefit of any doubt goes to the plaintiff." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224-25 (2012) (citation omitted) (emphasis added). Here the States need only be "*arguably* within the zone of interests to be protected or regulated by the statute.'" *Id.* at 224 (emphasis added) (citation omitted).

2. Immigration Consequences Are Part Of Section 265's Zone Of Interest

CDC's primary argument is that immigration-based harms fall outside of Section 265's zone of interest because CDC cannot consider immigration consequences when regulating under § 265. But that argument cannot be squared with the statutory text, CDC's own regulation, or the Termination Order's actual rationales.

a. CDC Must Consider Immigration Consequences Under § 265

CDC's central argument (at 25-27) appears to be that Congress mandated that CDC blind itself to the immigration consequences of any orders issued under § 265. But § 265's text makes plain that it authorizes CDC to regulate *immigration* into the U.S.: explicitly permitting it to "prohibit, in whole or in part, the introduction of persons." 42 U.S.C. § 265. In doing so, CDC necessarily must consider the immigration consequences of its orders under § 265: how else could those orders ever be effective?

Similarly, by CDC's logic the agency would be compelled to adopt an alternative that would produce utter disaster for the immigration system over an alternative that would produce manageable results but is 2% less effective in combatting disease spread. It is also difficult to see

how CDC could justify its Title 42 humanitarian exceptions under its instant argument—which are explicitly premised on alleviating immigration-based hardships rather than any conceivable public-health rationale. ROA.326 (noting the Title 42 Orders' provision for humanitarian exceptions).

Immigration consequences are thus not "'marginally related to … the purposes'" of § 265, CDC Br.25 (citation omitted); they are in fact the point of it, and the mechanism by which Section 265 actually operates. CDC lacking authority to consider such consequences would be like DOJ and FTC lacking authority to consider whether pricing is anticompetitive in setting antitrust policy: *i.e.*, a recipe for mandatory policy incoherence.

In essence, CDC's arguments assume that Congress adopted a sort of anti-Pottery-Barn rule: the agency is legally compelled to abscond from the scene without taking accountability for any of the items that its actions broke. That would be terribly convenient for the agency, since it need not—and legally could not—attempt to clean up any messes its § 265 orders may have caused. And suddenly ending Title 42, with a massive backlog in place and in manner confidently predicted to cause

an immigration surge of *unprecedented* proportions, is one such giant mess of CDC's own creation.

There is no indication that Congress intended anything of the sort, however—let alone made that position so uncontestably clear that the States' immigration-based harms are not even "*arguably* within the zone of interests to be protected or regulated by the statute.'" *Patchak*, 567 U.S. 209, 224 (emphasis added) (citation omitted).

b. CDC's Arguments Violate Its Own Regulation

CDC's zone-of-interests arguments contravene the agency's own regulation implementing § 265. *See* 42 C.F.R. § 71.40(d). The regulation mandates that CDC "*shall*, as practicable under the circumstances, consult with *all* Federal departments or agencies whose interests would be impacted." *Id.* (emphasis added). "All" federal agencies plainly include those with non-public-health related "interests," *id.*, and so the regulation expressly contemplates consideration of non-public-health-related consequences, such as immigration consequences. *Id.*

Likewise, the regulation states that the CDC "may … consult with any State or local authorities that [it] deems appropriate." *Id.* Again, "*any* State or local authorities" plainly include those with non-public-health-

related concerns. *Id.* (emphasis added). CDC's own regulation thus backhandedly recognizes that States have interests within Section 265's ambit.

c. CDC Wrongly Argues That Section 265 Orders Must Terminate Immediately

CDC's arguments rest heavily on its repeatedly expressed view (at 1, 21, 26, 32, 37, 45, 46, 49, 51) that Title 42 orders *must* end the *very moment* their public-health rationales do. CDC thus contends statutory standing is lacking because § 265 "requires … termination [of orders] *as soon as* the public-health need has ceased." CDC Br.26 (emphasis added). CDC similarly argues that "Title 42 emergency orders *must end* when the public-health justification for the orders has lapsed." CDC Br.21 (emphasis added).

Not so. If that is what Congress intended, it would have exempted § 265 orders from the APA. Congress didn't. Instead, because the APA concededly applies, CDC's putative determination that the "public-health justification … ha[d] lapsed" does not by itself effectuate *anything*, and instead is the proverbial tree falling in a forest unnoticed. Instead, *only* by undertaking the procedures mandated by the APA can CDC effectuate

any result *at all*—no matter how rigorous, science-based, and politics-free its reasoning purports to be.

CDC itself explicitly acknowledges that the Termination Order is a "major rule" under the Congressional Review Act, ROA.346 n.185, and thus a rule under the APA. 5 U.S.C. § 804(2)-(3). And by Congress requiring APA compliance for CDC's actions to become legally effective, the inescapable corollary is that CDC's violation of APA mandates can—and typically *should*—prevent its findings from becoming effective.

Thus, while CDC contends (at 32-33) that "[n]o one can reasonably dispute that Title 42 orders … must come to an end when CDC deems them unnecessary," the States quite reasonably dispute just that. So does the APA. Absent compliance with the APA, whatever "CDC deems" is simply without legal effect.

It is thus remarkable how far afield CDC's arguments have strayed: CDC now confidently asserts that "no one can reasonably dispute" what bedrock requirements of administrative law in fact unequivocally demand.

d. CDC's Zone-Of-Interest Arguments Violate The Termination Order's Own Rationale

Finally, CDC's arguments in this Court are fundamentally inconsistent with the Termination Order's actual rationales. For example, CDC's argument that Title 42 orders must end the moment their "public-health justification … lapse[s]" is completely incompatible with the Termination Order May 23 effective date—*i.e.*, nearly *two months later than* CDC's April 1 public-health determination.

Similarly, CDC's contention that immigration consequences are outside of Section 265's zone-of-interest is belied by the fact that CDC *explicitly relied on immigration consequences* to delay the effective date. CDC thus *expressly* relied upon "DHS requir[ing] time to institute operational plans to implement this order … and begin regular immigration processing." ROA.346. That is *precisely* the sort of consideration of immigration consequences that CDC now argues it cannot lawfully engage in—but manifestly did.

3. The States' Health-Based Harms Also Suffice

Even if the States' interests in avoiding immigration-harms generally fell outside of § 265's zone of interests, the *unchallenged* strains on the States' *healthcare* systems easily suffice under § 265.

Indeed, Defendants themselves estimate that post-Termination-Order crossings (up to 18,000 per day) will exceed the screening and vaccination capacity of Defendants—to say nothing about gotaways that DHS could not even conceivably screen. *See* ROA.3104 ("CDC did not base its termination decision on … DHS's ability to screen everyone attempting to cross the border."); ROA.336. By knowingly taking actions that will cause a drastic increase in migrants crossing the border who are neither screened for COVID-19 nor required to be vaccinated against it, CDC has invited harms that fall squarely within § 265's wheelhouse.

CDC explicitly argued below that for "quasi-sovereign interest[s]," such as health- and healthcare-based injuries, the "State[s] cannot assert such an injury against the United States." ROA.3075. That argument is squarely foreclosed by numerous precedents of this Court, *Texas III*, 20 F.4th at 969-70 (permitting states to assert their "affected 'quasi-sovereign interests'" against federal government); *Texas II*, 10 F.4th at 549 (same); *Texas I*, 809 F.3d at 154 (same), and the Supreme Court, *Massachusetts*, 549 at 520 (permitting Massachusetts to assert its "stake in protecting its *quasi-sovereign interests"*) (emphasis added)). The

district court thus quite properly rejected CDC's argument. ROA.3872-73.

On appeal, CDC now shifts tack. The agency no longer directly advances that foreclosed-by-precedent argument, and instead now argues that *Congress* somehow intended to codify in § 265 CDC's legally erroneous view of State quasi-sovereign interests. But CDC points to no real evidence that Congress intended any such thing aside from citing footnote 16 from *Snapp* (at 16), which has nothing to do with *Congressional* intent. Instead, that footnote merely restates a limited, now-obsolete principle without relevance here. *Supra* at 39-40 & n.5. That footnote does not say that States cannot rely upon quasi-sovereign interests as *part* of making their standing case—and *Texas I*, *II*, *III*, and *IV* all hold that they can. It further has *nothing* to do with statutory standing.

Moreover, CDC's argument fails even on its own terms. CDC contends (at 26) that "[t]he federal government is also *a* guardian of citizens' health and welfare," CDC Br.26 (emphasis added)—note "a," not "the." That is hardly incompatible with the States serving as other such guardians. That revealing concession really is nothing more than a

cornerstone of federalism: "our Constitution establishes a system of *dual sovereignty* between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (emphasis added). Indeed, CDC's arguments invert the Constitution's structure. The States—not the federal government—have the general, reserved "police powers to legislate as to the protection of the *lives*, limbs, *health*, comfort, and quiet of all persons." *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (emphasis added). CDC has no such power, let alone a singularly preemptive one.

C. CDC Actions Under § 265 Are Not Categorically Unreviewable Under The Committed-To-Agency-Discretion Exception

In contrast to the States' "not especially demanding" burden under the zone-of-interest test, establishing that the committed-to-agency-discretion exception applies is a "'heavy burden.'" *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015) (citation omitted). CDC cannot satisfy it.

"By default in APA cases, [federal courts] presume reviewability." *Texas III*, 20 F.4th at 978. The committed-to-agency-discretion exception is thus read "quite narrowly." *Regents*, 140 S. Ct. at 1905 (quoting *Weyerhaeuser*, 139 S. Ct. at 370). It is confined to "those *rare circumstances* where the relevant statute is drawn so that a court would

have *no meaningful standard* against which to judge the agency's exercise of discretion." *Weyerhaeuser*, 139 S. Ct. at 370 (quoting *Lincoln*, 508 U.S. at 191 (emphasis added)).

Here § 265 readily provides such "meaningful standards." And even if the statutory text alone did not, CDC's own regulation does.

1. Section 265 Supplies Multiple "Meaningful Standards"

Section 265 provides several such "meaningful standards." CDC cannot regulate all diseases, but only "communicable" ones; it cannot regulate all resulting dangers, but only "serious" ones; it cannot regulate diseases wherever located, but rather only those in "in a foreign country"; and any regulation must be "required in the interest of the public health," and not on some other basis. 42 U.S.C. § 265. All four of these criteria provide just such "meaningful standards" to permit judicial review.

Indeed, these standards are *substantially* more specific than the oblique "shall endeavor" language that the Supreme Court unanimously held was a "perfectly serviceable standard for judicial review" in *Mach Mining*, 575 U.S. at 486, 488. Congress thus did not intend to "'prohibit all judicial review' of the agency's compliance with a legislative mandate," *id.* at 486—which is the necessary result if the committed-to-

agency-discretion were to apply. The exception either bans *all* judicial review or none at all; it cannot bar only particular challenges as CDC implies (at 27-29).

Nor does the singular use of the word "deem" negate the otherwise-meaningful standards that § 265 supplies. In *Zhu v. Gonzales*, for example, it was not just that Congress used the word "deem," but further that the statutory provision permitted the Attorney General to act based of his own vision of what he "deemed" to be in the "'national interest'"—a term that Congress left undefined. 411 F.3d 292, 295 (D.C. Cir. 2005). Unlike those four standards supplied by § 265, completely undefined "national interest" understandably provides no "serviceable standard for judicial review." *Mach Mining*, 575 U.S. at 488.

Texas v. EPA, is even more inapposite: this Court's discussion of the word "deem" was in a section of the opinion (§ III) addressing a distinct merits issue, not the section discussing venue (§ II), where the committed-to-agency-discretion exception applied. 983 F.3d 826, 837 (5th Cir. 2020).

CDC also points (at 29) to case law that federal courts accord *deference* to agency's technical expertise, particularly involving "public-

health assessments." But there is a world of difference between courts affording deference to agency's expertise *when exercising judicial review* and holding that *judicial review is categorically precluded*. *See*, *e.g.*, *Marshall v. United States*, 414 U.S. 417 (1974) (resolving case involving medical judgment without hint that such action was unreviewable).

CDC's citation of cases *exercising* judicial review (at 29) thus actually underscores that public-health assessments are quite frequently reviewable under the APA, as they are here.

2. CDC's Implementing Regulation Also Supplies Workable Standards

Even if the statutory text itself failed to supply the requisite reviewable standards, CDC's implementing regulation does. The Northern District of Texas thus rejected an identical committed-to-agency-discretion argument in a decision that CDC did not see fit to appeal. *Texas v. Biden*, __ F. Supp. 3d __ 2022 WL 658579, at *11-12 (N.D. Tex. Mar. 4, 2022).

While CDC acknowledges this decision as part of the procedural history (at 8 n.2), it does not even attempt to explain why its reasoning was incorrect. CDC could not possibly be unaware of its own unappealed loss on this issue (raised specifically below, ROA.3433-34). But it

apparently has nothing persuasive to say about it—at least not before its reply brief.

II. CDC'S SINGLE-SENTENCE INVOCATION OF THE FOREIGN-AFFAIRS EXCEPTION IS UNTENABLE

CDC's Termination Order contains only a single sentence justifying its invocation of the APA's foreign-affairs exception to notice-and-comment requirements. In litigation, Defendants furiously attempted to backfill a defensible rationale with post-decision declarations. But neither that timely single-sentence nor Defendants' untimely, outside-administrative-record, *post hoc* rationales suffice.

A. CDC's Cursory Rationale Is Patently Insufficient

CDC brazenly contends that its single-sentence rationale, which mentions nothing beyond the *mere existence of talks* with foreign governments, alone satisfies the APA's foreign-affairs exception. It doesn't, and no court has ever accepted a rationale so cursory and flimsy.

1. CDC's Single-Sentence Justification Fails The Majority Standard

The APA provides an exception to notice-and-comment requirements for "foreign affairs function[s]." 5 U.S.C. § 553(a)(1). It has no such exception for immigration functions. *Id.* To be sure, immigration rules almost invariably "implicate foreign affairs." *East Bay*, 932 F.3d at

775 (quoting *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980)). But if those implications alone sufficed, federal courts would effectively recognize a *de facto* immigration exception to notice-and-comment requirements that Congress refused to create. Thus, "the foreign affairs exception would become distended if applied to [immigration] actions generally." *Id.* (cleaned up) (quoting *Yassini*, 618 F.2d at 1360 n.4).

To prevent the foreign-affairs implications of immigration regulations from creating a *de facto* immigration exception, federal courts have repeatedly applied a stringent standard: the exception applies "in the immigration context only when ordinary application of the public rulemaking provisions *will provoke definitely undesirable international consequences*." *Id.* at 775-76 (cleaned up) (emphasis added).

Multiple circuits have adopted the "definitely undesirable international consequences" standard. *See Rajah v. Mukasey*, 544 F.3d 427, 437 (2d Cir. 2008) ("For the exception to apply… [there must be] *definitely undesirable international consequences*." (emphasis added) (citation omitted)). *Jean v. Nelson*, 711 F.2d 1455, 1477 (11th Cir. 1983) *vacated and rev'd on other grounds*, 727 F.2d 957 (11th Cir. 1984) (en

banc) (same); *American Ass'n of Exporters & Importers-Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985) (holding that exception applied *because* "disclosure … would 'provoke definitely undesirable international consequences.'" (citation omitted)).

Here, CDC's single-sentence rationale does not mention *a single consequence* of any magnitude *whatsoever*, ROA.346—let alone ones "provok[ing] definitely undesirable international consequences." *East Bay*, 932 F.3d at 775-76. Instead, CDC mentions *nothing* more than "*ongoing discussions* with Canada, Mexico, and other countries regarding immigration and how best to control COVID-19 transmission over shared borders." *Id.* (emphasis added).

There are likely few (if any) immigration policies that would not benefit from—or at least create pretext for—some "discussions with Canada, Mexico, and other counties," thereby putatively permitting agencies to dispense with notice-and-comment mandates. But the APA has no immigration, much less talking-about-immigration, exception. And if CDC's perfunctory sentence sufficed, no agency would ever bother to conduct notice-and-comment rulemaking for immigration rules—it is

far less burdensome to spend a few minutes calling Ottawa or Mexico City.

CDC attempts (at 41) to defend its conceded "one sentence long" rationale by contending that "CDC did not need to provide lengthy explanation given that Title 42 orders can operate only through use of the foreign affairs function." But CDC's single sentence does not state *any* of that inherent-foreign-affairs-operation rationale—or indeed even discuss Title 42's actual operation specifically at all.

Ultimately, CDC's rationale is precisely what courts have held would unlawfully "distend[]" the foreign-affairs exception. *East Bay*, 932 F.3d at 775-76 (citations omitted).

2. CDC's Rationale Fails Under The Minority Approach Too

Undoubtedly recognizing the indefensibility of its consequence-free rationale under the definitely-undesirable-international-consequences standard, CDC understandably reaches for an alternative one—one less faithful to the APA's text, purpose, and interpreting case law. In any event, CDC's rationale does not suffice under the minority standard either.

CDC relies heavily (at 43) on the D.C. district court's decision in *Capital Area Immigrants' Rights Coal. v. Trump ("CAIR")*, 471 F. Supp. 3d 25, 53 (D.D.C. 2020) But while *CAIR* criticizes the consensus standard as "unmoored from the legislative text," *id.* at 53, the majority approach is actually a straightforward application of the textual canon against reading exceptions expansively such that they swallow their attached rules. *See*, *e.g.*, *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-32 (1995). It thus prevents the "foreign affairs exception [from] becom[ing] distended" to a blanket immigration exception. *East Bay*, 932 F.3d at 775 (citation omitted).

In any event, the *CAIR* standard is, if anything, *worse* for CDC. It explicitly requires that the rule must "'clearly and directly' involve activities characteristic of the conduct of international relations." *CAIR*, 471 F. Supp. 3d at 55. But even in CDC's telling, Title 42 is *a public-health* measure that is not directly part of the "conduct of international relations"—and instead merely has implications for it.

Even worse for CDC, *CAIR* explicitly held that the foreign-affairs exception was not met for a rule regarding "asylum criteria," *id.* at 55—which Title 42 is akin to by excluding many migrants from attempting to

claim asylum. CDC thus cannot even satisfy its preferred standard either.[7]

B. CDC's Reliance On *Post-Hoc*, Extra-Record Evidence Is Unavailing

CDC's attempt to rely on post-hoc, extra-administrative-record declarations from other agencies also fails.

1. CDC Cannot Rely On *Post-Hoc*, Extra-Record Declarations

"It is a 'foundational principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" *Regents*, 140 S. Ct. at 1907 (quoting *Michigan v. EPA*, 576 U.S. 743, 758 (2015)). "The *post hoc* rationalizations of the agency cannot serve as a sufficient predicate for agency action." *Id.* at 1909 (cleaned up) (citation omitted)). Thus, "[a]n agency must defend its actions based on the reasons it gave when it acted." *Id.*

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[7] CDC's reliance on *New York v. Permanent Mission of India to the United Nations*, 618 F.3d 172 (2d Cir. 2010) is similarly unavailing. Title 42 is hardly the sort of "quintessential foreign affairs functions such as diplomatic relations and the regulation of foreign missions" that the Second Circuit recognized an exception to the definitely-undesirable-international-consequences standard for. *Id.* at 202.

CDC bizarrely invokes *Regents* itself as blessing its attempt to rely on such *post-hoc*, extra-record declarations, contending that *Regents* putatively explains "the difference between elaboration and post-hoc justifications." CDC Br.42. But that distinction does CDC little good. The "elaboration" in *Regents* was a separate memorandum, promulgated following a remand and using APA procedures, that was itself challenged; it was not a declaration filed mid-litigation. *Regents*, 140 S. Ct. at 1908. *Regents* did not address such mid-litigation declarations whatsoever, and certainly did not bless them.

Moreover, *Regents* stresses that any such "elabor[ation]" "'must be viewed critically' to ensure that the rescission is not upheld on the basis of impermissible '*post hoc* rationalization.'" *Id.* at 1908 (citation omitted). CDC's putative "elaboration" here cannot survive such critical viewing: CDC's actual rationale relied upon the *mere existence of talks*—not actual foreign consequences and certainly not Title 42 inherently involving operations of foreign affairs. All such reasoning is *post hoc* here. Moreover, those *post-hoc* rationales offered here *are not even CDC's*. Instead, they are supplied by declarants from DHS and the State Department. ROA.3111-18. CDC is thus grasping at others' straws, and

it cites no persuasive justification for permitting *its* APA violations to be cured post-promulgation by *other agencies*.

CDC also relies (at 42) on *Yassini v. Crossland* to justify consideration of extra-record declarations. That case (unlike *Regents*) actually did consider extra-record declarations. But *Yassini* offers no explanation for *why* such an exception to the "foundational principle of administrative law" was warranted. *See Yassini*, 618 F.2d at 1361. This Court therefore should not adopt that unreasoned exception. Moreover, the declarations in *Yassini* only explained the *process* used to reach the challenged determination, rather than supply a substantive defense of it.

But even if this Court did accept the *Yassini* exception, Defendants' declarations cannot squeeze within it. In *Yassini*, the extra-record declaration was considered only for the limited purpose of explaining the connection between the challenged action at issue (revocation of delayed departure) and the Iranian hostage crisis—the latter of which self-evidently fell within the foreign-affairs exception.

Here, by contrast, CDC is not merely supplying an ancillary detail (such as specific connection to an acknowledged crisis) by rather spinning an entirely new *post hoc* rationale whole cloth.

2. Defendants' Declarations Are Insufficient In Any Event

In any event, Defendants' *post-hoc*, extra-record declarations are still insufficient even if permissibly considered. The declaration of Deputy Assistant Secretary Emily Mendrala alone is the only one willing to use the word "consequences," albeit just once, and the "consequences for international relations" it references are simply those inherent in *all* immigration policy. ROA.3114 ¶7.

More generally, the Mendrala declaration speaks extensively about "engagement" with foreign countries about Title 42. But that is precisely what the States have identified as the problem: the APA generally requires federal agencies to engage with the *American public*; it does not permit a few discussions with foreign governments about immigration matters to avoid such public engagement through notice-and-comment.

In addition, CDC's declaration-based rationale contradicts itself. In CDC's telling (at 42-43), Defendants' declarations establish that "continuation of Title 42 orders without a public-health justification would harm U.S. credibility in ongoing negotiations." But the Termination Order, with its two-month-delayed effective date, did precisely that. Why exactly would U.S. credibility with foreign

governments be unharmed by a 2-month delay but suffer "definitely undesirable international consequences" if delayed for approximately four more months to conduct notice-and-comment rulemaking? Defendants' declarations never say.

The credibility of Defendants' "credibility" argument is also severely undermined by their refusal to seek a stay pending appeal. If the federal government truly believed that continuing Title 42 past April 1 (or May 23) would produce severe diplomatic repercussions, it was duty-bound to seek a stay pending appeal to avoid those harms from being effectuated. Defendants' refusal to do so should tell this Court all it needs to know.

III. CDC FAILED TO ESTABLISH GOOD CAUSE TO DISPENSE WITH NOTICE-AND-COMMENT REQUIREMENTS

As this Court has repeatedly explained, "it is well established that the 'good cause' exception to notice-and-comment should be 'read narrowly in order to avoid providing agencies with an 'escape clause' from the requirements Congress prescribed.'" *Johnson*, 632 F.3d at 928 (quoting *United States v. Garner*, 767 F.2d 104, 120 (5th Cir. 1985)). In assessing whether good cause exists, this Court "must rely only on the

'basis articulated by the agency itself' at the time of the rulemaking. 'Post hoc explanations'" do not suffice. *Id.* (cleaned up).

Here, CDC's rationales do not satisfy this demanding standard.

A. Because CDC Had Ample Time To Conduct Notice-And-Comment Rulemaking, Its Good-Cause Rationale Fails

CDC's "good cause" rationale fails most obviously because the agency had ample time to take and respond to public comment, and simply refused to do so. This Court has made plain that in evaluating "good cause," a central question is whether "[f]ull notice-and-comment procedures *could have been run in the time taken to issue the [challenged] rule*." *Id.* at 929 (emphasis added).

Here they plainly could. President Biden expressly ordered CDC to begin active consideration of terminating Title 42 Orders on February 1, 2021, and it is undisputed that CDC was doing so from that date to the April 1 Termination Order—*14 months* in all. And during that entire 14-month period, the enormous immigration challenges involved with terminating the Title 42 Orders should have been under active consideration—and could have been commented on.

That 14-month period was *ample* time to take and respond to comments, particularly as CDC did so in *less than 6 months* for the

issuance of the October 13, 2020 final rule following the March 20 interim-final rule. ROA.3759. Similarly, in *Johnson* the available time was "seven months"—which precluded good cause. *Id.*; *see also Env't Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920-21 (D.C. Cir. 1983) (eight-month delay was infirm). CDC had *twice* as much time here, which is fatal under *Johnson*.

CDC's only response to *Johnson* is to argue (at 36-37) that "there is no rule that agencies always must undertake notice-and-comment rulemaking whenever it is theoretically possible, no matter how great the disruption." That's a straw-man characterization of the States' position. But it is nonetheless instructive because the Termination Order does not identify any actual "disruption" that notice-and-comment procedures *themselves* would cause. Instead, the only "disruptions" that CDC's good-cause rationale refers to is the "disruption of ordinary immigration processing" that Title 42 Orders cause. ROA.346. But that is akin to arguing that § 265 orders by their nature are categorically exempt from notice-and-comment requirements because, by very their nature, they always "disrupt[] … ordinary immigration processing." But Congress did not create any such immigration-based exception.

Equally unavailing is CDC's related contention (at 33) that its "regulations provide for issuance of such orders without additional rulemaking processes." CDC obviously cannot exempt itself from statutory APA requirements by mere regulation. Indeed, it is bizarre that CDC would argue otherwise.

CDC also contends that it had established "good cause" because notice-and-comment processes would "impose considerable burdens on CDC." CDC Br.31. But that contention is conspicuously citation-less, and for good reason: CDC advanced no such rationale in its Termination Order. CDC Br.31 (citation-less paragraph advancing argument). That "considerable burden[]" contention is thus precisely the sort of "'[p]ost hoc explanation[]' [that] do[es] not suffice. *Johnson*, 632 F.3d at 928 (cleaned up).

In any event, the APA's notice-and-comment mandates are *intentionally* burdensome and thus universally disliked by all agencies subject to them. CDC's antipathy for those burdens is no more "good cause" than any other agency's.

B. CDC's Good-Cause Rationales Are Plainly Insufficient

CDC's rationale suffers from three other glaring deficiencies, each of which would independently require invalidation even absent the *Johnson* violation.

First, the Termination Order fails completely even to *acknowledge* that CDC conducted notice-and-comment rulemaking when creating the current Title 42 system—let alone attempting to explain why it could not do so again for termination. ROA.318-47. CDC's premise that notice-and-comment procedures are fundamentally incompatible with the COVID-19 pandemic is thus belied by the fact that CDC conducted such procedures *during* this pandemic.

Federal courts "have *never* approved an agency's decision to *completely ignore relevant precedent*." *Jicarilla Apache Nation v. DOI*, 613 F.3d 1112, 1120 (D.C. Cir. 2010) (emphasis added). And that is exactly what CDC's good-cause rationale did here: *completely* ignoring its prior notice-and-comment compliance. That omission is glaring.

Second, CDC itself recognized that delay of the Termination Order's effective date was appropriate. Indeed, CDC's good-cause rationale explicitly invoked "DHS's need for [more] time," ROA.346, to *delay* the

effective date, rather than any purported need for the Termination Order to take effect faster.

But CDC did not even attempt to explain why it could not permit further delay to allow notice-and-comment compliance. If CDC was perfectly fine with a two-month delay, why couldn't it abide another 3-4 months to permit notice-and-comment rulemaking? CDC never says—and thus dooms its good-cause rationale. ROA.318-47.

Third, CDC simply never grapples meaningfully with the fundamental distinction between short-term and permanent decisions. A single 30- or 60-day extension of Title 42 does not permit notice-and-comment rulemaking. But having built up more than *two years* of hydraulic pressure with Title 42 in place—which even Defendants acknowledge is *unprecedented* in the challenges thereby created for ending it—CDC could no longer treat the permanent termination of Title 42 as a mere one-off decision with no more consequence than a short-term exception. Instead, it is profoundly different in both its nature and effect.

Having created the circumstances in which ending Title 42 would produce calamitous results—as even many Democratic Senators have acknowledged, ROA.1117-18; ROA.1153-55; ROA.1172-83—CDC was

obliged to take public comment on that avoidable, man-made calamity before inflicting it upon the American people and the States.

C. There Is No COVID-19 Pandemic Exception To Notice-And-Comment Requirements

CDC's good-cause rationale is based on its view that § 265 orders, by their very nature, are "emergency" measures that *always* are exempt from notice-and-comment requirements. Indeed, CDC unsubtly describes § 265 orders as "emergency" orders/measures *fifty times* in its brief. But that inordinate repetition does not suffice as good cause.

Congress does not share that inherent-emergency-exception view: it created no such categorical exception, either in § 265 or 5 U.S.C. § 553. Moreover, CDC's prior conducting of notice-and-comment procedures belies its present premise that notice-and-comment procedures are fundamentally incompatible with regulation under § 265.

This Court pointedly rejected OSHA's equivalent rationale for dispensing with notice-and-comment rulemaking for its workplace vaccine mandate, explaining that the "stated impetus—a purported 'emergency' that the entire globe ha[d] endured for nearly two years … is unavailing." *BST Holdings*, 17 F.4th at 611. It is even more "unavailing" here, still later into the pandemic. *See also Louisiana v. Becerra*, 577 F.

Supp. 3d 483, 500 (W.D. La. 2022) (collecting cases rejecting reliance on COVID-19 pandemic to invoke good-cause exception).

Moreover, given that CDC has been actively considering whether to revoke Title 42 since February 2021, any "emergency" here was of the agency's "own making [and] can[not] constitute good cause." *NRDC v. Abraham*, 355 F.3d 179, 205 (2d Cir. 2004).

Finally, good cause does not exist where agency action does not actually "stave off any imminent threat to the environment or safety or national security." *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012). Here, however, CDC rather ironically invokes the "good cause" exception to *create*—not stave off—an imminent threat in the form of massively increased migration and further loss of operational control at the southern border. CDC cannot invoke the good-cause exception to *inflict* a disaster on U.S. border control *more quickly*, rather than "stave [one] off."

D. CDC's Reliance On Title 42's Initial Promulgation Is Misplaced

CDC's final (and central) rationale appears to be a form of forced parallelism: *i.e.*, because "CDC promulgated its Title 42 orders without notice and comment, ... it was entitled to terminate them without notice

and comment as well." CDC Br.16. But just because "good cause" exists for dispensing with notice-and-comment when a rule is issued does *not* mean that it *necessarily must exist* whenever an agency decides to repeal or terminate it.

A simple example demonstrates the flaw in CDC's syllogism. Suppose a newly enacted statute mandates that an agency issue implementing rules with 60 days. *See*, *e.g.*, *Petry v. Block*, 737 F.2d 1193, 1195 (D.C. Cir. 1984) (statute "directed the Secretary to promulgate implementing regulations 'not later than 60 days after the date of enactment'") (alteration omitted). That tight statutory deadline can easily establish "good cause" to forego notice-and-comment rulemaking on the front end. *Id.* at 1195-97. But if the agency wishes to amend or repeal those regulations ten years down the line in circumstances, that initial statutory deadline hardly supplies "good cause" for the decade-hence amendment/repeal. Nor does CDC genuinely contend otherwise. Its mandatory-symmetry premise thus cannot withstand scrutiny.

CDC quotes *Perez v. Mortg. Bankers Ass'n* for the premise that the "APA generally requires 'that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first

instance.'" CDC Br.16 (quoting 575 U.S. 92, 101 (2015)). That truism is correct as far as it goes: if an agency must supply reasoned decision-making when enacting a rule, it must similarly supply such reasoning when repealing it. *See*, *e.g.*, *Motor Vehicle Mfrs. Ass'n. of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983). But that principle here only means that CDC had equal opportunity to attempt to supply a "good cause" rationale when implementing Title 42 as when seeking to terminating it.

It does *not* mean that the exact same "good cause" necessarily must exist at termination simply because it existed at initial promulgation. Indeed, the world generally, and the pandemic specifically, has changed enormously in two years between Title 42's adoption and the Termination Order. CDC's pretense that the exact same "good cause" necessarily exists in March 2020 as in April 2022 is unserious. Indeed, the difference between a rapidly unfolding pandemic and a slowly abating one are night-and-day antipodes.

CDC even contradicts itself by quoting precedent that good cause "must be evaluated 'case-by-case, sensitive to the totality of the factors at play.'" CDC Br.30-31 (quoting *NRDC v. Evans*, 316 F.3d 904, 911 (9th

Cir. 2003)). But under CDC's central premise here, the actual circumstances involved are completely irrelevant: CDC was always categorically entitled to terminate Title 42 without notice-and-comment whenever it chose simply because it was putatively promulgated in that manner.

Moreover, CDC cannot prevail even under its forced-parallelism premise. CDC notably *did* conduct notice-and-comment rulemaking when creating the instant Title 42 system even amidst an unfolding pandemic—thus binding it, under CDC's argument, to doing so again.

E. CDC's Purported Predicament Is Self-Inflicted

Finally, CDC makes a policy argument (at 35) that the district court's holding "may deter the agency from adopting an emergency order … because the task of unwinding the order would be burdensome." But CDC has only itself to blame here: CDC could have made its Title 42 Orders expire automatically, as CDC acknowledges (at 33), and previously did, *supra* at 13. Had the agency done so, no notice-and-comment compliance would be required for termination.

Instead, CDC affirmatively elected to make its Title 42 orders effective until repealed, thus necessarily requiring APA compliance to

effectuate a termination. That further meant that violating the APA would render an attempted termination a legal nullity. All of that should have been obvious to CDC, and it has only itself to blame for electing that path.

To be sure, had CDC promulgated Title 42 orders in self-expiring form, those orders could have been challenged for failing to address the immigration consequences of expiration. But CDC's position is that it is legally precluded from considering such factors anyway, so that would be no obstacle if CDC were actually correct. *But see supra* § I.B.2.

IV. THE TERMINATION ORDER IS ARBITRARY AND CAPRICIOUS

Alternatively, this Court should affirm the district court's injunction because the Termination Order violates the APA. Although the district court did not resolve the issue definitively, this Court "may affirm the district court's judgment for any reason supported by the record." *Simmons v. Sabine River Auth. La.*, 732 F.3d 469, 474 (5th Cir. 2013).

A. CDC Failed To Consider Immigration-Based Harms To The States

"[A]gency action is lawful only if it rests on a consideration of the relevant factors" and considers all "important aspect[s] of the problem."

Michigan, 576 U.S. at 750-52 (cleaned up) (requiring "reasoned decisionmaking"). Here, CDC concededly failed to consider the harms to States from the Termination-Order-caused influx of migrants. That failure violates the APA.

Even though the Termination Order predicts that it will cause a substantial influx of additional migrants, CDC made *zero effort* to analyze the resulting impacts to the States in terms of additional healthcare, education, and law-enforcement costs. These are indisputably "important aspect[s] of the problem," *Michigan*, 576 U.S. at 752 (cleaned up), since States "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012). That is particularly true given unfunded federal education and healthcare mandates. *Supra* at 34-35.

Contrary to CDC's implicit premise (at 44-49), this APA violation is independent of the agency's failure to consider reliance interests adequately. Even absent reliance interests, CDC has no license to inflict massive financial injuries on the States without at least first considering what the magnitude of those harms would be, and whether they could be mitigated. *Michigan*, 576 U.S. at 752.

CDC's defense appears to be its anti-Pottery-Barn rule: *i.e.*, that it is legally prohibited from taking accountability for all immigration programs that it breaks in the course of regulating under § 265. *Supra* at 42-44. That rationale fails for the reasons explained above. *Supra* § I.B.2.

Moreover, CDC's rationale is at war with itself. CDC relied *explicitly* on immigration consequences to delay the Termination Order's effective date, making plain its authority to consider such consequences.

Nor is there any statutory basis for CDC's brand of myopic decision-making in which only the harms to the federal government (principally DHS) are considered, and those of the States are completely ignored. In CDC's view, the agency is entitled to inflict wanton harms on the States without ever analyzing what the magnitude of that damage might be or whether it might be avoided or mitigated—or even permitting the States to comment on the problem. Thankfully, the APA prohibits CDC's refusal to consider the States' harms, which are undeniably an "important aspect of the problem." *Michigan*, 576 U.S. at 752 (cleaned up).

B. CDC Wrongly Discounted The States' Reliance Interests

"When an agency changes course … it must 'be cognizant that longstanding policies may have engendered serious reliance interests

that must be taken into account.'" *Regents*, 140 S. Ct. at 1913 (cleaned up) (citation omitted). "It would be arbitrary and capricious to ignore such matters." *Id.*

Unlike its foreign-affairs rationale, CDC drafted more than a single sentence to address reliance interests. ROA.340-42. Like that rationale, however, this one too violates the APA for three principal reasons.

First, CDC wrongly contends (at 48-49) that the States' increased costs cannot establish reliance interests. Such increased costs are supported by unchallenged factual findings and nearly a dozen declarations. ROA.1201-1706.

This Court in *Texas III* held that the "States' reliance interests" included "costs to States," and rejected an argument by DHS that is nearly indistinguishable from CDC's here. *Texas III*, 20 F.4th at 990. Similarly, the Supreme Court in *Regents* specifically held that the reliance interests that the agency must consider include financial costs to the States, noting that "States and local governments could lose $1.25 billion in tax revenue each year." *Regents*, 140 S. Ct. at 1914. The Supreme Court did not hold that specific resource-allocation decisions

were required to create reliance interests. *Id.* And this Court squarely held otherwise in *Texas III*. 20 F.4th at 990.

Moreover, as the Federal Government acknowledged in its agreements with several states including Arizona, Louisiana, and Texas, state "budget[s] ha[ve] been set months or years in advance and [states] ha[ve] no time to adjust [their] budget[s] to respond to [federal immigration] policy changes." *Id.* at 989 (quoting agreement with Texas); ROA.349-68 (DHS agreements with Arizona and Louisiana). Thus, new and unanticipated costs and financial harms from a change in federal immigration policy, arising in the middle of a budget cycle, disrupt States' legitimate reliance interests. CDC considered none of that.

Second, CDC's attempt to delegitimize the States' reliance interests entirely because Title 42 "orders are, by their very nature, short-term orders," ROA.340, is unavailing. The Supreme Court squarely rejected the same "temporary" rationale in *Regents* where DHS reasoned that reliance interests were categorically precluded because DACA status was given "only in two-year increments." *Regents*, 140 S. Ct. at 1913. Title 42 is *eerily* similar in duration, having been in effect for slightly more than

two years when CDC denied the existence of any "legitimate" reliance interests. ROA.340.

This Court too rejected DHS's argument that States' interests were illegitimate or unworthy of regard because the immigration policy at issue was "short term." This Court explicitly rejected DHS's later recycling of its short-term- nature argument and explained that DHS's willingness to make it again post-*Regents* was "[a]stonishing[]." *Texas III*, 20 F.4th at 990. Defendants' tripling-down on that twice-rejected rationale is no less astonishingly bad here.[8]

Third, CDC argues (at 47) that it did in fact weigh the States' reliance interests. But that supposed weighing consists only of a single "even if" sentence following two pages of decrying the States' reliance interests as not "reasonable or legitimate." ROA.340-42. This "weighing" is entirely conclusory without supplying any actual analysis. ROA.342. This Court, however, has been perfectly clear that "[s]tating that a factor was considered … is not a substitute for considering it." *Texas III*, 20

[8] CDC also offers a throwaway line about ongoing litigation. CDC Br.46 (authority "remained contested"); *see also* ROA.341. But DACA was even more contested—with *far* more success—and yet *Regents* held that DHS wrongly discounted reliance interests based on litigation. *Regents*, 140 S. Ct. at 1913-15.

F.4th at 993 (citation omitted). And that is all that CDC's "even if" throwaway line does.

Moreover, CDC admits that it did not analyze any immigration-related consequences of its Termination Order. Its Termination Order even confesses that "CDC is not aware of any reasonable or legitimate reliance … beyond potentially local healthcare systems' allocation of resources," ROA.342—*admitting* that it necessarily did not consider any reliance interests relating to education and law-enforcement costs despite this Court's holdings in *Texas II* and *III* having made the existence of those interests crystal clear.

Those are fatal admissions and omissions. And even with respect to healthcare, by refusing to analyze immigration-based consequences, CDC could not have possibly calculated the resulting strains on the States' healthcare systems meaningfully. But that is information CDC would have obtained if it had bothered to conduct notice-and-comment rulemaking.

C. CDC Failed To Consider Obvious Alternatives

"An agency is required 'to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such

alternatives.'" *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008) (citation omitted). Even more specifically here, "when an agency rescinds a prior policy its reasoned analysis must consider the 'alternatives' that are 'within the ambit of the existing policy.'" *Regents*, 140 S. Ct. at 1913 (cleaned up) (citation omitted). Here, CDC's order failed to do so in at least three ways.

First, CDC failed to consider the possibility of phased implementation of the Termination Order—an alternative made painfully apparent by DHS's conduct. The Termination Order is perfectly clear about its May 23 effective date and makes no allowance for implementation before then. ROA.318, 322, 339, 342, 344-46. Implementation before the effective date was thus both illegal and squarely violated DHS's § 268(b) duties.

But apparently perceiving the disastrous results that CDC-ordered instant implementation would produce, DHS took it upon itself to begin implementing the Termination Order *before* May 23—secretly and illegally. ROA.1972-73. It did so even though it knew that the States were seeking a preliminary injunction against implementation of the Termination Order and that the States and DOJ had negotiated a

briefing schedule to permit adjudication *before* the Termination Order's stated (and lawful) effective date. After the States discovered the clandestine implementation from news reports, they sought and obtained a richly deserved temporary restraining order. ROA.1972-75.

CDC could—and *should*—have considered the policy alternative that DHS ultimately (and unlawfully) implemented before it was enjoined: phased implementation. Such phased implementation would plainly be "within the ambit of the existing policy." *Regents*, 140 S. Ct. at 1913 (cleaned up). CDC thus violated the APA and *Regents* by failing to consider it. ROA.3847.

Second, CDC gave no apparent consideration to alternative implementation dates (besides immediate implementation). The May 23 date has no explanation beyond that was what DHS asked for. ROA.343, 345. But DHS is not the only affected party, and plucking an unexplained date from the ether does not satisfy CDC's duty to supply a reasoned explanation for its choice.

Third, CDC failed to consider obvious health-based mitigation measures. For example, CDC could have retained Title 42 to the extent that crossers (projected at up to 18,000 per day) exceeded the federal

DHS's COVID-19 screening capacity or vaccination capacity (~6,000per day day), ROA.336. It failed to explain why it did not do so.

D. The Termination Order And Administration COVID-19 Policy Are Mired In Self-Contradiction And Pretext

Finally, CDC seeks to buttress its arbitrary-and-capricious defense by contending (at 45) that the "States have not challenged the substance of CDC's public-health conclusion[.]" CDC's arguments thus proceed from the premise that its public-health analyses are unassailable and unchallenged. Not so.

While not the central focus of the States' claims, the States have not been shy about pointing to CDC's obvious analytical deficiencies in its public-health rationales. While those flaws need not be belabored here, a few words are in order given that CDC repeats this uncontested-substance premise throughout its brief (at 3, 18, 45, 49).

Notably, CDC contradicts itself by acknowledging (at 3) that the States have asserted "pretext and that ordinary immigration processing will not offer enough screening for disease generally." Those are challenges to the *substance* of CDC's public-health analysis, and neither is a small one. *See also supra* at 83.

Indeed, CDC and Administration policy is riddled with self-contradiction and transparent political motivation that makes the pretextual nature of the Termination Order manifest. Notably, while the Administration has sought to end Title 42 Orders on the basis of the pandemic abating, it simultaneously has extended the COVID-19 emergency declaration twice post-Termination Order,[9] and further extensions are all but guaranteed. Similarly, the Administration has not withdrawn any of its extensive vaccine mandates, mask mandates, and eviction moratoriums that have not been invalidated by the Supreme Court itself. Indeed, the Administration is still actively prosecuting vaccination mandates for every U.S. worker on whom it can lay its regulatory hands. *See*, *e.g.*, *Kentucky v. Biden*, 23 F.4th 585 (6th Cir. 2022). It further is attempting to use the pandemic to justify unilateral elimination of hundreds of billions of education debt.[10]

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[9] On April 12 and July 15, 2022. *See* HHS, Renewal of Determination That a Public Health Emergency Exists, July 15, 2022, https://aspr.hhs.gov/legal/PHE/Pages/covid19-15jul2022.aspx.

[10] White House, FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most, Aug. 24, 2022, https://bit.ly/3TqGVHf.

The contradictions and political calculations are manifest: the pandemic has supposedly abated the pandemic *precisely enough* for the Administration to terminate the pandemic-control measures it politically dislikes, but not enough such that the Administration cannot retain *all* of those pandemic-control measures that meet with its political favor and now even adopt sweeping new 12-digit expenses.

To accept "public health" as the sole reason for these differential pandemic policies would require federal courts "to exhibit a naiveté from which ordinary citizens are free.'" *Census*, 139 S. Ct. at 2575 (2019) (citation omitted). Perhaps CDC could explain these seeming inexplicable-except-as-naked-political-calculations distinctions. But its Termination Order does not even try to do so, and thus violates the APA.[11]

[11] The issue of pretext is more factually intensive than the other APA claims, and thus may benefit from remand and discovery if the other APA claims are insufficient to invalidate the Termination Order.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ISSUING THE PRELIMINARY INJUNCTION

The district court also did not abuse its discretion in concluding that the States had established irreparable harm and that the balance of harms and public interest favored the relief issued.

A. The States Have Established Irreparable Harm

On irreparable harm, CDC passingly suggests (19, 51) that the States' harms do not "qualify" as irreparable harm. This Court has squarely held otherwise. *See Texas I*, 809 F.3d at 186; *Texas II*, 10 F.4th at 560; *Texas III*, 20 F.4th at 1001-02. And aside from repeating its traceability argument, CDC advances no other contention that the States' conceded harms—recognized in unchallenged factual findings—satisfy the irreparable-harm requirement.

B. The District Court Did Not Abuse Its Discretion In Balancing The Harms And Public Interest

As to the balance of harms and the public interest, which merge here, much of CDC's arguments are based on its recycled premises that (1) its public-health rationales are substantively unassailable and incontestably not-pretextual, (CDC Br.49-50) and (2) that Title 42 "must end when the public-health justification has ceased" (CDC Br.51). Those contentions fail for the reasons explained above. *Supra* at 83-85, 45-46.

CDC also complains (at 50) about the injunction forcing the "government to continue negotiating with foreign governments to implement a COVID-19 measure." But the Termination Order never actually took effect due to the preliminary injunction, and there is thus nothing new to negotiate—unless mere continuation of agreements with no apparent expiration dates counts as "negotiating." This argument further fails because it is offered without any citation to such negotiations actually being required (CDC Br.50). This argument further fails once again because it was not raised below, and is thus waived. *See* ROA.3106-07.

CDC also ignores that the "central purpose of a preliminary injunction" is to "maintain[] the status quo." *Griffin v. Box*, 910 F.2d 255, 263 (5th Cir. 1990). Here, absent a preliminary injunction, hundreds of thousands of additional migrants will enter the United States; there is not the slightest reason to believe that DHS could subsequently unscramble that egg and belatedly remedy the States' resulting harms by restoring the *status quo ante*. Worse, CDC apparently believes that the equities *compelled* the district to allow such harms to occur while the

case was being litigated even though the district court believed those harms were likely the product of unlawful agency action.

As to the remainder of CDC's equitable arguments, to describe them is to demonstrate their absurdity: Ultimately, CDC contends that the district court *abused its discretion* in concluding that (1) the harms that the States would suffer from an avoidable immigration calamity of proportions unseen in the history of the Republic outweighed (2) the government's harms from an extension, by a few months, of a program that it had kept in place for more than *two years* and that it had actively considered cancelling for 14 months before finally pulling the trigger (illegally and ineptly).

More fundamentally, CDC's premise appears that its own view of the public interest concerning COVID-19 emergency measures is so compelling that a district court necessarily abuses its discretion in adopting any contrary balancing. CDC also bizarrely suggests the States are not even permitted to press their own "views of the public interest against the federal government," CDC Br.52, as if the public interest always favors the federal government when it is sued by States.

If that arrogance provokes a feeling of déjà vu, that is understandable. They are the same arguments that CDC pressed unsuccessfully in *Alabama Realtors*—and lost. 141 S. Ct. at 2490 ("[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends.").

They are also the same ones that the federal government made to this Court in the OSHA vaccine mandate case, and lost. *BST Holdings*, 17 F.4th at 618. And then lost again in the Supreme Court. *NFIB v. OSHA*, 142 S. Ct. at 666 ("The equities do not justify withholding interim relief."). They are also indistinguishable from those made unsuccessfully concerning the emergency-styled contractor vaccine mandate in the Sixth Circuit. *Kentucky v. Biden*, 23 F.4th 585, 612 (6th Cir. 2022) ("[T]he public's true interest lies in the correct application of the law.").

The upshot is that—despite the sheer number of times it is advanced—Federal Defendants' we-win-all-equitable-balancing-under-COVID premise should be rejected here just as it was in *Alabama Realtors*, *BST Holdings*, *NFIB v. OSHA*, and *Kentucky*. In adopting the same essential reasoning as those decisions, the district court did not abuse its discretion. Nor did it do so in following this Court's default rule

that "there is generally no public interest in the perpetuation of unlawful agency action." *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1143 (5th Cir. 2021) (citation omitted).

C. DHS's Secret, Illegal Implementation Actions Render Defendants' Hands Unclean

The district court's equitable balancing is further supported by Defendants' unclean hands. As explained above, DHS secretly and illegally began implementing the Termination Order before its effective date, culminating in a temporary restraining order. *Supra* at 16-17, 81-82. That conduct was deeply inequitable, and further supports that the district court did not abuse its discretion here. *Cf. Coastal Corp. v. Texas E. Corp.*, 869 F.2d 817, 822 (5th Cir. 1989) ("T[he issue of [a party's] clean hands *alone* is sufficiently *telling* to warrant our vacating the preliminary injunction."); *Adray v. Adry-Mart, Inc.*, 76 F.3d 984, 991 (9th Cir. 1995) ("[U]nclean hands weighs in the equitable balance that underlies the design of a remedy.")

D. CDC's Litigation Conduct Undercuts Its Equitable Arguments

Finally, CDC's refusal to seek a stay pending appeal plainly undermines CDC's equitable contentions. If the federal government truly believed that the intrusions about its sovereign prerogatives were as

overwhelming as it asserts—so much so that a district court could not award *any* preliminary relief even if it were completely convinced the Termination Order was unlawful—it is difficult to understand Defendants' litigation tactics here.

In particular, CDC's refusal to seek a stay pending appeal *guarantees* that such putatively overwhelming harms will come to pass for the duration of this appeal. Nor did CDC even seek to expedite this appeal, and filed its opening brief more than two months after the district court's injunction.

These simply are not the actions of Defendants whose sovereign prerogatives are being intolerably curtailed. That perhaps is not too surprising: the Biden Administration was perfectly willing to tolerate Title 42 for 14 months before acting eventually to terminate it. What it apparently was not willing to tolerate was using any of that time to satisfy the burdens of APA compliance, which is why the district court's injunction was sadly necessary and hardly an abuse of discretion.

VI. LAW LAB'S APPEAL LACKS MERIT

Law Lab attempted to intervene below to raise a single argument: a challenge to "the nationwide preliminary injunction Plaintiff States

sought." Law Lab Br.9. The district court, however, correctly denied intervention as of right (as well as permissive intervention, which is not appealed). In any event, the district court did not abuse its discretion in issuing a nationwide injunction. Any error in denying intervention is therefore harmless, and Law Lab's appeal should alternatively be denied on the merits.

A. The District Court Correctly Denied Intervention Of Right

Law Lab's request to intervene of right was correctly rejected because it satisfied neither the protectable interest nor inadequacy of representation requirements. *See Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015) (explaining four requirements to intervene).

1. Law Lab Lacks A Protectable Interest In The Outcome They Seek

Law Lab first contends (at 18) that it "need not have an interest that would give rise to standing." Not so. "[A]n intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing." *Town of Chester, N.Y. v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1651 (2017). Because CDC has elected not to appeal the injunction's scope, Law Lab must have a protectable

interest that would support its Article III standing to advance its appeal here.

The extremely limited nature of Law Lab's proposed intervention defeats any such protectable interests here, however. Law Lab does not seek an exemption from the injunction for itself or its clients, for example, where an interest actually protectable *for Law Lab* might be more apparent. Moreover, its scope-only arguments necessarily presume the Termination Order's illegality.

The "protectable" interest that Law Lab asserts is thus essentially that, notwithstanding the Termination Order's assumed unlawfulness, it should nonetheless be permitted to go into effect in California and New Mexico.[12] That might be a protectable interest that those states and their attorneys general could assert, but Law Lab has no protectable interest in those particular geographic boundaries. Instead, the geographic scope that Law Lab actually challenges is "simply a setback to the organization's abstract social interests," which does not suffice for Article III standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

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[12] Law Lab ignores the Canadian border entirely, though states like Washington and Maine would presumably also be excluded under its proposed remedy.

2. Law Lab Failed To Establish DOJ's Representation Was Inadequate

The States agree with CDC that Law Lab failed to establish that Federal Defendants did not adequately represent their interests for the reasons explained in CDC's Answering Brief.

B. The District Court Did Not Abuse Its Discretion In Issuing A Nationwide Injunction

Even if Law Lab were otherwise entitled to intervene as of right, the nationwide scope of the injunction was not an abuse of discretion.

1. Law Lab Misapprehends This Court's Standards Of Review

This Court reviews the scope of injunctive relief only for abuse of discretion. *Texas I*, 809 F.3d at 187-88. While partially acknowledging this standard, Law Lab never actually argues the district court abused its discretion. Indeed, the word "abuse" appears only once in that standards-of-review acknowledgement (at 13). Law Lab instead repeatedly treats its scope arguments as if they were subject to de novo review. They aren't.

Similarly, while acknowledging that factual findings are reviewable only for clear error (at 13), Law Lab repeatedly refuses to accept those findings without attempting to demonstrate any clear error.

Law Lab's arguments thus profoundly misapprehend this Court's review here.

2. The District Court's Unchallenged Factual Findings Establish Plaintiff States' Harms From Law Lab's Proposed Injunction

Much of Law Lab's argument is premised on its hyperbolic claim that "not a single piece of record evidence supports the central premise for the nationwide scope…: that the termination of Title 42 in non-plaintiff states, including California and New Mexico, will harm the Plaintiff States." Law Lab Br.24. Not so.

The district court made unchallenged factual findings—supported by extensive record evidence now ignored—that non-border states such as Louisiana and Missouri would suffer irreparable harm from ending Title 42 and further that the increased number of migrants would be enormous. ROA.3769-71. The proposition that *all* of these harm to non-border States would flow *exclusively* from migrants crossing in Arizona and Texas, and none from other border states, is preposterous (and citation-less). Moreover, Law Lab ignores the Canadian border entirely.

Instead, the district court's *factual finding* that the States would not obtain "complete relief" from Law Lab's proposed injunction "given

the ability of immigrants crossing the border to move freely from one state to another" is unassailable, and certainly not clearly erroneous. And it is particularly supported by this Court's square holding that the States may rely on "large-scale statistics and figures." *Texas III*, 20 F.4th at 971. The figures here are gargantuan, precluding any finding of clear error.

3. The Injunction's Scope Was Not An Abuse Of Discretion

The nationwide scope of the district court's injunction was not an abuse of discretion for seven reasons.

First, *Texas I* and *IV* make plain that the district court permissibly followed this Court's *default* approach. *Texas IV* reiterates this Court's general rule that "[i]n the context of immigration law, *broad relief is appropriate* to ensure uniformity and consistency in enforcement." 40 F.4th at 229 n.18 (emphasis added). *Texas IV* further renewed *Texas I*'s holding that *"'a geographically-limited injunction would be ineffective* because [migrants] would be free to move among states.'" *Id.* (quoting *Texas I*, 809 F.3d at 188 (emphasis added)). The district court did not abuse its discretion by following this Court's *Texas I* and *IV* reasoning precisely. Those decisions also necessarily refute Law Lab's contention

(at 26-29) that the district court somehow transgressed inherent limitations on its equitable authority.

Second, much like CDC, Law Lab simply ignores the issue of gotaways. Its suggestion (at 31) that there is "no evidence … that Title 42's rescission will increase unlawful immigration *at all*" is belied by gotaways who will never encounter the asylum system, and simply enter the U.S. unlawfully without hindrance by DHS. *Supra* at 32. And there is no challenge to the factual findings that the Termination Order will enormously increase crossings (and thus the number of gotaways).

Third, Law Lab's suggestion (at 32) that *Texas I* and *IV* are distinguishable because this case involves a "public health measure for doctrinal purposes" is belied by the fact that Section 265 is a statute regulating *immigration*, *supra* § I.B.2, and this Court's nationwide stay in *BST Holdings* for another *public-health* measure. 17 F.4th at 619.

Fourth, Law Lab's arguments fail under their own cherry-picked precedents—particularly as the legal violations here are incontestably systemwide/nationwide. For example, *Dayton Board of Education v. Brinkman* provides that "only if there has been a systemwide impact may there be a systemwide remedy." 433 U.S. 406, 417 (1977). But CDC's

failure to conduct notice-and-comment rulemaking was a *systemwide violation*, as were its other APA transgressions.

Similarly, *Califano v. Yamasaki* explicitly held that "[t]he scope of injunctive relief is dictated *by the extent of the violation established*, not by the geographical extent of the plaintiff class." 442 U.S. 682, 702 (1979) (emphasis added). Here, CDC's APA violations were *nationwide*, and the district court did not abuse its discretion by following *Califano*'s exhortation not to limit relief to "the geographical extent of the plaintiff" states, as Law Lab demands. *Id.*

Fifth, Law Lab's assertion (at 33) that "Title 42 has been implemented differently across different ports of entry" is unavailing. *Texas I* and *IV* recognize the purpose of immigration-based injunctions is to "ensure uniformity and consistency in enforcement." *Texas IV,* 40 F.4th at 229 n.18—not perpetuate prior non-uniformity.

Sixth, the district court did consider harms to non-parties as part of the public interest, and specifically permitted Law Lab to file an amicus brief and present arguments at the preliminary injunction hearing. ROA.3802-03. Law Lab may disagree with that balancing, but it established no abuse of discretion. That is particularly so as the district

court struck the same balance as *Alabama Realtors*, *BST Holdings*, and *NFIB v. OSHA*—not one of which Law Lab cites. Nor do non-parties suffer any cognizable harms from non-implementation of *illegal* agency action. *Supra* at 89-90.

Seventh, Law Lab's failure to supply any evidence that its proposed solution was actually workable in practice supports affirmance. Without any such evidence, the district court's common-sense operational concerns were hardly an abuse of discretion.

Indeed, Law Lab does not cite a single case in which the federal government acquiesced in the nationwide scope of an injunction but a district court nonetheless abused its discretion by entering one. There is no reason for this case to be the first.

CONCLUSION

The district court's injunction should be affirmed in its entirety.

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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 17,964 words, excluding the parts exempted by Rule 32(f); and (2) the typeface and type style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word (the program used for the word count).

This Court granted the States an expansion of the type-volume limitation to 18,000 words on July 8, 2022.

s/ Drew C. Ensign
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CERTIFICATE OF SERVICE

I, Drew C. Ensign, hereby certify that I electronically filed the foregoing Brief for Petitioners in with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on August 31, 2022, which will send notice of such filing to all registered CM/ECF users.

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