IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF ARIZONA, *et al*., *Plaintiffs-Appellees,* v. CENTERS FOR DISEASE CONTROL & PREVENTION, *et al.,* *Defendants-Appellants,* INNOVATION LAW LAB, *Movant-Appellant.*	No. 22-30303

MOVANT-APPELLANT'S MOTION FOR STAY
OF NATIONWIDE SCOPE OF PRELIMINARY INJUNCTION

CERTIFICATE OF INTERESTED PERSONS

State of Louisiana, et al. v. Centers for Disease Control, et al.
No. 22-30303

The undersigned counsel of record 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. Additionally, as required by Rule 26.1, Movant-Appellant Innovation Law Lab states that it is a nonprofit corporation which does not have a parent corporation, and does not issue stock, so no publicly held corporation owns ten percent (10%) or more of its stock. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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INTRODUCTION

Proposed Intervenor Innovation Law Lab ("Law Lab") respectfully requests that this Court stay the portion of the district court's Preliminary Injunction that applies nationwide, rather than only in the Plaintiff States. *See* Ex. 10 at 46-47.[1] Not a shred of record evidence supports the premise for nationwide relief: that the termination of Title 42 in non-plaintiff states, including California and New Mexico, will harm the Plaintiff States. In contrast, there is no dispute that the district court's order causes serious harm to many non-parties who will never set foot in the Plaintiff States, let alone cause them cognizable injury. Under those circumstances, it was grave legal error to issue a nationwide injunction. If inclined to order injunctive relief at all, the district court should have tailored that relief to run only in the states that are parties to this action. At most, it should have done so as an initial matter, and left open the possibility of extending the injunction's geographic scope if Plaintiff States could show such relief necessary to address the harms they alleged.

As Judge Sutton recently explained in staying another nationwide injunction in an immigration case, "[e]ven if it turns out that the . . . States in this case are entitled to relief, it is difficult to see why an injunction applicable only to them would not do the trick." *Arizona v. Biden*, 31 F.4th 469, 484 (6th Cir. 2022) (Sutton, C.J.,

[1] Proposed Intervenor made the same request to the district court, which denied it on May 27, 2022. *See* Exs. 12, 13; Fed. R. App. P. 8(a)(1) ("A party must ordinarily move first in the district court[.]").

concurring); *see also Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring); *Trump v. Hawaii*, 138 S. Ct. 2392, 2425-29 (2018) (Thomas, J., concurring).

Law Lab is likely to succeed on the merits of its claims that the district court erred in denying its motion to intervene. That aspect of the district court's ruling is directly contrary to this Court's decision in *Texas v. United States*, 805 F.3d 653, 662 (5th Cir. 2015) (reversing denial of motion to intervene filed by immigrants' rights organization).

Additionally, Law Lab will suffer irreparable harm absent a stay, a stay will not cause Plaintiff States substantial harm, and the public interest—including the interests of non-parties—warrants the limited stay sought here pending appeal.

For these reasons, this Court should stay the nationwide scope of the preliminary injunction entered below. *See Nken v. Holder*, 556 U.S. 418, 425-26 (2009) (listing stay factors).[2]

BACKGROUND

On March 20, 2020, the U.S. Centers for Disease Control and Prevention ("CDC") and the U.S. Department of Health and Human Services ("HHS") issued an emergency Interim Final Rule invoking the Public Health Service Act to largely

[2] Law Lab has already appealed the denial of its Motion for Limited Intervention, Exs. 2, 8, and the nationwide scope of the preliminary injunction, Exs. 10, 11.

suspend asylum procedures at the southern border due to risks posed by COVID-19. 85 Fed. Reg. 16,559 (March 24, 2020) ("Title 42"). Concurrently, the CDC Director ordered the "suspen[sion] [of] the introduction" of certain individuals seeking to enter the United States via land borders without entry documents, whose entry is "otherwise contrary to law," or those who seek to "unlawfully enter" between ports of entry. 85 Fed. Reg. 16,567 (March 24, 2020). On September 11, 2020, CDC and HHS published the final rule, which took effect on October 13, 2020. 85 Fed. Reg. 56,424 (Sep. 11, 2020). The CDC renewed Title 42 after the final rule took effect. 85 Fed. Reg. 65,806 (Oct. 16, 2020).

U.S. Customs and Border Protection ("CBP") began implementing Title 42 by halting all processing of asylum-seeking individuals at ports of entry and U.S. Border Patrol ("USBP") began expelling most Mexican, Guatemalan, Honduran, and Salvadoran families and adults to Mexico without an opportunity to seek asylum.[3] Since Title 42 has been in effect, USBP has expelled individuals of other

[3] Stephanie Leutert, et al., Metering & COVID-19 (Apr. 2020), https://usmex.ucsd.edu/_files/MeteringCovid-19.pdf; Dara Lind, *Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately – Ignoring Asylum Law,* ProPublica (Apr. 2, 2020), https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law.

nationalities to Mexico or their countries of origin without an opportunity to seek asylum.[4]

On April 1, 2022, the CDC Director announced the termination of Title 42, effective May 23, 2022 ("Termination Order"). Ex. 1 at 2-31. On April 3, 2022, three Plaintiff States filed this lawsuit challenging the Termination Order. Ex. 15. On April 27, 2022, the district court granted Plaintiff States' motion for a nationwide temporary restraining order enjoining implementation of the Termination Order. Ex. 16. On May 5, 2022, Plaintiff States amended their complaint to include other states. Ex. 17. Arizona and Texas remain the only Plaintiff States sharing a border with Mexico.

On May 9, 2022, Law Lab, a legal services organization that serves asylum-seeking individuals in states including California and New Mexico, moved to intervene for the limited purpose of raising an alternative defense to the Plaintiff States' motion for a nationwide preliminary injunction. Ex. 2. Plaintiff States and Defendants opposed intervention. Exs. 6, 7. On May 13, 2022, at the preliminary injunction hearing, the district court orally denied intervention, Ex. 8, but invited

[4] Jose Luis Gonzalez and Lizbeth Diaz, *U.S. expels dozens of Haitian asylum seekers to Mexico*, Reuters (Feb. 3, 2021), https://www.reuters.com/article/us-usa-immigration-border/u-s-expels-dozens-of-haitian-asylum-seekers-to-mexico-idUSKBN2A40FM; Camilo Montoya-Galvez, *U.S. launches deportation operation to Colombia using Title 42 border rule*, CBS News (Mar. 24, 2022), https://www.cbsnews.com/news/immigration-title-42-colombia-deportations-us-mexico-border/.

Proposed Intervenors to present oral argument and submit a brief as *amici curiae*, which Proposed Intervenors did, Ex. 9.

On May 20, 2022, the district court granted Plaintiff States' motion for a nationwide preliminary injunction. Exs. 10, 11. Defendants and Law Lab appealed.

Law Lab gave notice of this motion to all parties on June 1, 2022. Plaintiff States oppose the motion, but have not indicated if they will file an opposition. Defendants will determine their position after the motion is filed.

ARGUMENT

I. Law Lab has standing to appeal the nationwide scope of the preliminary injunction order.

Law Lab seeks a stay of the nationwide scope of the preliminary injunction pending its appeals of its denied Motion for Limited Intervention, Ex. 8, and of the nationwide scope of the injunction, Exs. 10, 11. Law Lab may appeal the nationwide scope of the preliminary injunction together with the denied Motion for Limited Intervention. *DeOtte v. State*, 20 F.4th 1055, 1066-67 (5th Cir. 2021) (holding denied intervenors may appeal intervention and merits simultaneously).

Law Lab has suffered (and will continue to suffer) harm from the nationwide scope of the injunction. *DeOtte*, 20 F.4th at 1070 ("Standing to appeal requires injury from the judgment of the lower court," and requires appellant to show injury in fact, causal connection, and redressability).

Law Lab's organizational mission is, *inter alia*, to advance migrant and refugee justice, including by serving individuals seeking asylum near the California and New Mexico borders with Mexico. Ex. 5 ¶¶ 2, 10. Title 42's wholesale suspension of the asylum system at the border has frustrated Law Lab's mission "on multiple levels." *Id.* ¶¶ 14-16. Title 42 has "stalled certain core aspects" of Law Lab's mission-related programming, *id.* ¶ 14, including by impeding its ability to engage in collaborative representation projects in California and New Mexico, *id.* ¶ 16. In addition, Law Lab has had to divert resources to meet the needs of individuals on the Mexican side of the California-Mexico border who are blocked from seeking asylum, including by distributing accurate information about the options that such individuals have, *id.* ¶¶ 20-21, and has had to "respond to a flood of inquiries and community uncertainty," *id.* ¶ 22.

The nationwide injunction extended the life of those harms, and will worsen them by creating yet another layer of uncertainty and opportunity for harm to asylum-seeking individuals. *Id.* ¶¶ 20-21. "If Title 42's termination does not take effect," this "would compel Law Lab . . . to continue diverting resources to combat another prime opportunity for misinformation and exploitation of asylum-seeking individuals on the border." *Id.* ¶ 20.

But for the nationwide injunction, Law Lab would have been permitted to resume its services to individuals seeking asylum in California and New Mexico on

May 23, 2022. Ex. 1. Most important for present purposes, the nationwide scope of the injunction stymied Law Lab's operations by blocking access to the asylum system for individuals who intend to seek asylum along the southern border in California and New Mexico *even if they have no intent to reside in Plaintiff States*. Ex. 5 ¶¶ 10-13. An order limiting the scope of this injunction and allowing it to run only in the Plaintiff States' geographic boundaries would permit Law Lab to resume its mission-driven work.

Thus, Law Lab can establish injury in fact, causal connection, and redressability in support of its standing to appeal the geographic scope of the preliminary injunction.

II. This Court should stay the preliminary injunction pending appeal insofar as it operates outside the geographic bounds of the Plaintiff States.

A party may move to stay an order granting an injunction pending appeal. Fed. R. App. P. 8(a)(1)(C). Courts consider four factors in deciding such a motion: (1) whether the party seeking the stay is likely to succeed on the merits of its appeal; (2) whether the applicant would suffer irreparable harm absent a stay; (3) whether granting the stay would substantially harm other parties interested in the proceedings; and (4) whether granting the stay would serve the public interest. *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014) (*citing Nken*, 556 U.S. at 426). The first two factors "are the most critical." *Nken*, 556 U.S. at 434.

A. Law Lab is likely to succeed on the merits of its claim on appeal.

Law Lab can establish "a strong showing of likelihood of success on the merits" of its appeal of the denial of its motion to intervene and of the nationwide scope of the injunction, as required by the first stay factor. *See Woodfox v. Cain*, 789 F.3d 565, 569 (5th Cir. 2015).

1. The district court erred in denying intervention.

As an initial matter, Law Lab is likely to succeed on its appeal of the denial of its motion for limited intervention as of right and permissive intervention, Ex. 8. The right to intervene is reviewed de novo. *Sierra Club v. Espy*, 18 F.3d 1202, 1204 (5th Cir. 1994). Law Lab demonstrated that it is entitled to intervene as of right by showing (1) that its application to intervene was timely; (2) that it has an interest related to the policy that is the subject of the action; (3) that the disposition of the action may "as a practical matter, impair or impede [its] ability to protect that interest"; and (4) that its interest is inadequately represented by existing parties to the suit. *See* Fed. R. Civ. P. 24(a); Ex. 2 at 7-14.[5] The district court did not issue a written denial, instead orally explaining that Proposed Intervenors' interests were adequately represented by Defendants. Ex. 22 at 5:6-7:5.

[5] For the same reasons presented here, Proposed Intervenor is also likely to prevail on its appeal of the denial of permissive intervention, which is reviewed for abuse of discretion. *See League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 884 F.2d 185, 189 (5th Cir. 1989).

The district court's ruling is foreclosed by this Court's precedent. As this Court held in *Texas v. United States*, even when the government defends a policy benefiting proposed intervenors, the government's interest may still differ from intervenors' due to the government's overriding interest in "expansive . . . executive authority" and "efficiently enforcing the immigration laws." 805 F.3d at 663. This is precisely such a case. Law Lab seeks to advance migrant and refugee justice, including by assisting individuals seeking asylum near the California and New Mexico southern borders. Ex. 5 ¶¶ 2, 10-13. It has no interest in expanding federal immigration authority or its efficient enforcement. Therefore, its interests diverge sharply from those of Defendants.

As the district court noted, Defendants have made their divergent interests manifest by declining to present *any* argument for limiting the scope of the preliminary injunction to the Plaintiff States. Ex. 10 at 46; *see Texas*, 805 F.3d at 663 (divergent government interest impacting litigation weighed in favor of intervention).

In light of this, it is no answer that Law Lab merely seeks to pursue a litigation strategy that has been rejected by Defendants. The issue Law Lab seeks to raise goes to the scope and nature of the relief available, not mere litigation strategy. Moreover, where there is a "lack of unity in all objectives," it is sufficient for Law Lab to show that it plans to advance "real and legitimate additional or contrary arguments" to

meet Rule 24(a)'s requirement that the government's representation "*may* be inadequate." *Texas*, 805 F.3d at 662-64 (cleaned up). Law Lab's interests diverge from Defendants' and, to advance those interests, it seeks to pursue an argument Defendants have not pressed. Accordingly, Law Lab is likely to prevail on appeal of the denial of intervention.

2. The record in this case does not warrant a nationwide injunction.

Not a single piece of record evidence supports the critical premise for nationwide relief in this case: that the termination of Title 42 in non-plaintiff states, including California and New Mexico, will harm the Plaintiff States. On the other hand, it is undisputed that the district court's order imposes significant burdens on people who will never harm the Plaintiff States, because it bars access to the asylum system for people who have no intention of ever leaving California or New Mexico. And the injunction greatly harms Law Lab's interests in assisting such individuals, even though they will never burden any Plaintiff State.

"[A] district court should think twice—and perhaps twice again—before granting universal anti-enforcement injunctions against the federal government. Even if it turns out that the . . . States in this case are entitled to relief, it is difficult to see why an injunction applicable only to them would not do the trick." *Arizona*, 31 F.4th at 484 (Sutton, C.J., concurring) (staying a nationwide injunction entered on behalf of several states challenging federal immigration policy). *See also DHS v.*

New York, 140 S. Ct. at 600 (Gorsuch, J., concurring) ("Equitable remedies . . .are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit. When a district court . . . goes further than that, ordering the government to take (or not take) some action with respect to those who are strangers to the suit, it is hard to see how the court could still be acting in the judicial role of resolving cases and controversies."); *Trump v. Hawaii*, 138 S. Ct. at 2425-29 (Thomas, J., concurring). Here, as in *Arizona*, a nationwide injunction is not necessary to remedy—and is entirely out of proportion with—Plaintiff States' alleged harms.

Injunctions must be tailored to take account of case-specific factors. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). *See also Fiber Sys. Int'l, Inc. v. Roehrs*, 470 F.3d 1150, 1159 (5th Cir. 2006) ("[A]n injunction must be narrowly tailored to remedy the specific action necessitating the injunction."). Such tailoring requires considering the precise injury that gave rise to the suit and modulating relief accordingly. *Lewis v. Casey*, 518 U.S. 343, 357 (1996); *see also E.T. v. Paxton*, 19 F.4th 760, 763 (5th Cir. 2021) (state-wide injunction should have been narrowed to address only the harms to the plaintiffs). Where the injury to the prevailing party is slight, equitable relief should typically be correspondingly modest. *Milliken* v. *Bradley*, 418 U.S. 717, 738 (1974) (in "any equity case, the nature of the violation determines the scope of the remedy"); *Scott v. Schedler*, 826 F.3d 207, 211 (5th Cir. 2016) (an injunction "is overbroad if it is not narrowly tailored to remedy the specific

action which gives rise to the order") (cleaned up). To apply this principle of proportionality, courts must weigh the harm suffered by the plaintiff against the burdens of imposing injunctive relief on the defendant and the public at large, including parties not before the court. *eBay v. MercExchange, L.L.C.*, 547 U.S. 388, 391-93 (2006); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

Courts must also consider the viability of narrower alternatives. *See Trump v. Internat'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087-88 (2017) (per curiam) (narrowing injunction that swept "much further" than what would have been necessary to redress the injuries of the plaintiffs and others "similarly situated."). In *Dayton Board of Education v. Brinkman*, the Supreme Court reversed the lower court because "instead of tailoring a remedy commensurate to the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope." 433 U.S. 406, 417 (1977). Similarly, in *Lewis,* the Supreme Court struck down a sweeping injunction because the "violation ha[d] not been shown to be systemwide, and granting a remedy beyond what was necessary to provide relief to [plaintiffs] was therefore improper." 518 U.S. at 360.[6]

[6] *See also New York v. DHS*, 969 F.3d 42, 87-88 (2d Cir. 2020) (limiting geographic scope of injunction against Trump Administration's public charge rule to three plaintiff states); *Innovation Law Lab v. Wolf*, 951 F.3d 986, 990 (9th Cir. 2020) (limiting geographic scope of injunction against Trump Administration's Migrant Protection Protocols ("MPP") to Ninth Circuit); *Texas v. United States*, 14 F.4th 332, 341 (5th Cir. 2021) (partially staying injunction against Biden Administration's

The nationwide injunction ordered below plainly contravenes these equitable principles. The injunction is entirely out of proportion with Plaintiff States' showing of harm, and not justified by the general need for "uniform" immigration policy or the Administrative Procedure Act ("APA")'s remedial scheme.

a. The record evidence does not support nationwide relief.

The district court found Plaintiff States had established irreparable injury in support of their request for a nationwide injunction "based on the government's own predictions[] the Termination Order will result in an increase in daily border crossings," potentially as high as "18,000," and on "evidence supporting the Plaintiff States' position that such a rise in border crossings will increase their costs for healthcare reimbursements and education services" that are not recoverable. Ex. 10 at 44-45. That evidence does not support a nationwide injunction.

First, the 18,000 figure—itself just a projection for purposes of emergency planning, *see* Ex. 19 at 25—says nothing about how many—if any—of those individuals will (1) enter non-plaintiff states as a result of the Termination Order; (2) later move to and reside in Plaintiff States; and then (3) impose economic costs on those Plaintiff States once there. It does not describe *any* injury "directly traceable" to the Termination Order taking effect in non-plaintiff states, let alone

enforcement priorities, citing its nationwide scope), *vacated*, 24 F.4th 407 (5th Cir. 2021) (mem.), *appeal dismissed*, 2022 WL 517281 (5th Cir. Feb. 11, 2022).

sufficient injury to justify the nationwide scope of the preliminary injunction, particularly given the manifest harm to non-parties that the order imposes. *Cf. California v. Texas*, 141 S. Ct. 2104, 2117 (2021) (plaintiff states failed to establish standing where they "failed to show how this injury is directly traceable to any actual or possible unlawful Government conduct[.]").

Second, the evidence of increased healthcare costs is based on examples not traceable to the implementation of the Termination Order *anywhere*, let alone in non-plaintiff states. Plaintiff States' assertion that "Yuma Regional Medical Center ("YRMC") in Arizona was forced to provide $546,050 in unreimbursed medical care for unauthorized [immigrants]," Ex. 18 at 21, refers to costs associated with providing services to individuals "while in ICE custody," Ex. 20 at 4, not individuals who could enter through non-plaintiff states because of the termination Title 42. Similarly, evidence of increased healthcare costs to Missouri refers to costs to treat "ineligible [immigrants]" generally. Ex. 21 at 5. It says nothing about the hypothetical group of people who would have been expelled pursuant to Title 42 but for the Termination Order, let alone the subset of such individuals who would enter the United States through California or New Mexico and later move to Plaintiff States. Plaintiff States' evidence of education costs is similarly untraceable to the operation of Title 42 in non-plaintiff states. *See id.* at 4; Ex. 18 at 21.

Thus, under basic principles of remedial proportionality, even if the evidence on which the district court relied suffices to warrant a preliminary injunction in *Plaintiff* States (a view Law Lab does not share), it did not warrant extending that injunction to apply in states that are *not* parties to this case. *See Dayton*, 433 U.S. at 420; *Lewis*, 518 U.S. at 359-60.

The district court's error is particularly glaring insofar as it failed even to consider the severe harm that nationwide relief imposes on thousands of individual non-parties who will never impose any burden on Plaintiff States. *See Weinberger*, 456 U.S. at 312 (equity requires balancing non-party interests). There is no dispute that the Title 42 order that the preliminary injunction keeps in place bars access to asylum for people who have *no intention of leaving California or New Mexico* prior to their cases being resolved, much less travelling to Plaintiff States. *See, e.g.*, Ex. 4 ¶ 20 ("Alicia Decl."); Ex. 3 ¶ 15 ("Kevin Decl."). Nationwide relief bars those individuals from accessing the asylum system, even though they will never do anything that harms the Plaintiff States.

Moreover, ordering nationwide relief for Plaintiff States without considering the countervailing interests of other states effectively permits fewer than half the states to set nationwide immigration policy at the expense of those that did not participate in these proceedings. Plaintiff States' economic interests are no more compelling than other states' countervailing interests in, for example, expanding

their tax bases and labor forces by welcoming people seeking asylum, or their interest in reunifying family members who would otherwise be expelled under Title 42. *See* Brief of Illinois, *et al*., as *Amici Curiae*, *Biden v. Texas*, No. 21-954 (U.S. filed Mar. 21, 2022), 2022 WL 876862 at *16 (noting the "wide range of benefits" to states arising from the federal government's decision to parole asylum seekers into the country, "from access to safe living conditions to family reunification."). To give another example, Plaintiff States' stated interest in not expending costs associated with educating "[undocumented] children," Ex. 18 at 21, runs directly counter to California's interest in doing just the opposite by funding extended educational opportunities for undocumented students, *see* Cal. Educ. Code § 68130.5 (allowing qualifying undocumented students to pay in-state tuition at state community colleges and universities). The nationwide injunction improperly privileges the Plaintiff States' interests, while disregarding core structural principles of interstate equality.

b. The need for uniformity does not support nationwide relief.

The district court also pointed to the need to "promot[e] uniformity in immigration enforcement," Ex. 10 at 47, but that consideration does not justify the nationwide scope of the injunction it entered, for four reasons.

First, the Title 42 order (like the order terminating it) derives from the Public Health Services Act, 42 U.S.C. §§ 265, 268, which the federal government read to

provide authority to suspend the entry of certain individuals due to the "danger of the introduction of COVID-19 into the United States." 85 Fed. Reg. 65,806 (Oct. 16, 2020). Title 42 must therefore be analyzed as a public health measure for doctrinal purposes—not an immigration policy. As Secretary Mayorkas has stated, "Title 42 is a public health authority and not an immigration policy."[7] COVID-19 public health measures have varied from state to state and region to region throughout the pandemic. Accordingly, the district court erred in relying on the need for "uniformity in immigration enforcement."

Second, the district court's reliance on this Court's holding in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), which upheld a nationwide injunction, overlooks key differences between that case and this one. *Texas* relied upon the need for uniformity in the implementation of the deferred action program at issue, which was characterized by standardized eligibility criteria and would have conferred uniform benefits upon successful applicants across the country. *Id.* at 147-49. In contrast, Title 42 has been characterized by dis-uniform implementation since its inception. As the record reflects, Title 42 applies differently at some ports of entry

[7] White House Press Briefing, Jen Psaki and Alejandro Mayorkas (Sept. 24, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/09/24/press-briefing-by-press-secretary-jen-psaki-and-secretary-of-homeland-security-alejandro-mayorkas-september-24-2021/.

than others, and to some nationalities and not others.[8] Any need for uniformity is insufficient to justify nationwide relief with respect to a policy that is *already* implemented differently across the border. Additionally, in *Texas* no party raised a factual dispute before the district court over whether the millions of potential beneficiaries of that immigration benefits program would move from one state to another. In contrast, here Law Lab has raised the issue, and it is the burden of the Plaintiff States to prove that they will suffer harm in *this* case, which they have failed to do. The district court's assertion that a tailored preliminary injunction "will likely do nothing more than shift border crossings from the Plaintiff States to states not covered by the preliminary injunction," Ex. 10 at 47, is wholly unsupported by the record in this case.

Third, even in cases involving immigration policies, rather than public health policies with immigration-related effects, the need for uniformity is but one factor among many that courts should consider in tailoring relief. While "[i]t is not beyond the power of a court *in appropriate circumstances*, to issue a nationwide injunction," *Texas*, 809 F.3d at 188 (emphasis added), it hardly follows that virtually every case

[8] *See, e.g.,* Ex. 14 at 5-6 (listing only six ports of entry at which different numbers of individuals have been excepted from Title 42 pursuant to the NGO-supported humanitarian exception process); *see also* Kate Morrissey, *Ukrainians only: Racial disparities in U.S. border policies grow more obvious*, San Diego Union-Tribune (Mar. 19, 2022), https://www.sandiegouniontribune.com/news/immigration/story/2022-03-19/ukrainians-border-title-42.

affecting immigration law requires nationwide relief. That is not how our system of distributed federal adjudicative power works. *See DHS v. New York*, 140 S. Ct. at 600 (Gorsuch, J. concurring) ("The traditional system of . . . courts issuing interlocutory relief limited to the parties at hand" "encourages multiple judges and . . . circuits to weigh in only after careful deliberation, a process that permits the airing of competing views[.]").

Finally, the district court's brief remark that a tailored injunction "would only further complicate DHS's operations," does not warrant the sweeping relief it issued. DHS has not advanced that position. *See* Ex. 7. In fact, splits in the lower courts routinely result in non-uniform immigration policies that the federal government nonetheless implements, despite some resulting increased complexity.[9] As in those

[9] For example, from January 2020 to July 2021, a class-wide preliminary injunction required CBP to provide access to counsel to people in MPP *nonrefoulement* interviews. That order was not binding, and the government did not implement it, outside California. *See Doe v. Wolf*, 432 F. Supp. 3d 1200 (S.D. Cal. 2020); *Doe v. Mayorkas*, 854 F. App'x 115 (9th Cir. 2021). Similarly, since 2018, another class-wide preliminary injunction has required arriving asylum seekers found to have a credible fear of persecution to be considered for parole under a previously issued parole directive, and has prohibited ICE from detaining them absent an individualized determination on flight risk or danger. *Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. 2018). But it applies only to people in ICE custody in the jurisdiction of the Detroit, El Paso, Los Angeles, Newark, and Philadelphia field offices. *Id.* at 325.

cases, it remains practicable here to limit the scope of the injunction to only some geographic areas.[10]

B. Law Lab will suffer irreparable harm absent a stay.

Stay applicants must demonstrate they are likely to face irreparable injury absent a stay. *Nken*, 556 U.S. at 426. Law Lab has plainly made that showing.

Title 42 has substantially harmed Law Lab by frustrating Law Lab's mission, disrupting its core functions, and requiring it to redirect significant resources. *See supra* Section I. A stay of the nationwide scope of the preliminary injunction will ameliorate the harms to Law Lab by allowing the Termination Order to take effect in regions critical to Law Lab's mission-driven programming.

C. A stay of the nationwide scope of the preliminary injunction will not cause Plaintiff States substantial injury and the public interest warrants a stay.

"Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest." *Nken*, 556 U.S. at 435.

[10] The district court rightly chose not to rely on Plaintiff States' assertion that the APA requires nationwide relief. To do so would have been inconsistent with the actual practice in many immigration cases (among others), and contrary to governing Supreme Court precedent concerning Congress's need to speak clearly when displacing courts' traditional equitable authority. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010)**;** *Miller v. French*, 530 U.S. 327, 340-41 (2000).

For the same reasons that Plaintiff States failed to show why "an injunction applicable only to them would not do the trick," they will not suffer substantial injury if the injunction is stayed outside their borders pending Law Lab's appeal. *Arizona v. Biden*, 31 F.4th at 484 (Sutton, C.J., concurring). Plaintiff States have not proven that any harms they allege in support of a nationwide preliminary injunction will be caused by individuals who would have been expelled under Title 42, but instead will enter through non-plaintiff states and later move to Plaintiff States. *See supra* Section II(A)(2). Because staying the nationwide scope of the preliminary injunction will still allow the injunction to take effect within the boundaries of Plaintiff States, and because Plaintiff States have not shown that they will be harmed at all by individuals who seek asylum in non-plaintiff states, Plaintiff States will not be substantially injured by this stay.

Consideration of the public interest requires assessing the harm to non-parties. *eBay,* 547 U.S. at 391; *Weinberger*, 456 U.S. at 312. Again, no one has disputed that the district court's order substantially burdens non-parties by cutting off their access to the asylum system even though they will never harm the Plaintiff States, whether because they have no intention of leaving California or New Mexico prior to their cases being resolved, or for countless other reasons. *See, e.g.*, Ex. 4 ¶ 20 (Alicia Decl.); Ex. 3 ¶ 15 (Kevin Decl.) (both stating they have no intent to leave California). For that reason, the public interest will be served by this Court entering a stay of that

portion of the district court's order that applies beyond the Plaintiff States. Entering such a stay will "prevent[] [noncitizens] from being wrongfully removed, particularly to countries where they are likely to face substantial harm," *Nken*, 556 U.S. at 436, without harming the Plaintiff States.

CONCLUSION

This Court should stay the nationwide scope of the preliminary injunction pending appeal.

Respectfully Submitted, Dated: June 2, 2022

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Exhibit 19 ECF 13-2, Declaration of James Rogers

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Exhibit 21 ECF 13-5, Declaration of Maddie Green

Exhibit 22 Preliminary Injunction Hearing Transcript (May 13, 2022)

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

Pursuant to Federal Rule of Appellate Procedure 27(d), I hereby certify the following:

1. The foregoing motion complies with the type-volume limitations of Rule 27(d)(2). The motion contains 5,189 words according to the Microsoft Word word-counting function, excluding the parts of the motion exempted by Federal Rules of Appellate Procedure 27(a)(2)(B) and 27(d)(1).
2. The foregoing motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The motion has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman type style.

Dated: June 2, 2022

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CERTIFICATE OF SERVICE

I, Matthew S. Vogel, hereby certify that on June 2, 2022, I caused the foregoing Motion for Stay of Nationwide Scope of Preliminary Injunction and its attachments to be electronically filed with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit via the CM/ECF system, which will send a notice of this filing to counsel for Defendants-Appellants and Plaintiffs-Appellees.

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