No. 22-30303

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF LOUISIANA, STATE OF ARIZONA, STATE OF MISSOURI, STATE OF WEST VIRGINIA, STATE OF SOUTH CAROLINA, *et al.*,

Plaintiffs-Appellees,

v.

CENTERS FOR DISEASE CONTROL AND PREVENTION, ROCHELLE WALENSKY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, XAVIER BECERRA, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants-Appellants,

INNOVATION LAW LAB,

Movant-Appellant.

On Appeal from the United States District Court
for the Western District of Louisiana

FEDERAL GOVERNMENT'S REPLY BRIEF

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INTRODUCTION

The States' brief makes clear that their alleged injuries have nothing to do with CDC's public-health analysis in its termination of Title 42 emergency orders. Their suit does not relate to public health at all. Instead, the States' theory is that a return to ordinary immigration processing will result in larger numbers of noncitizens entering their territory, leading States to incur expenditures for services that, they allege, they are required to provide to noncitizens by "unfunded mandates" in federal law. Br. 34.

The States cannot remedy that disconnect to establish standing or a cause of action, and they cannot demonstrate reviewability. Nor are the States correct that CDC needed to seek comments on and analyze the costs and benefits of ordinary immigration processing. Both the good-cause and foreign-affairs exceptions apply by their terms to CDC's termination of this emergency public-health order that displaces congressionally enacted immigration laws and requires international negotiation to function. The States' arbitrary-and-capricious claims are also fundamentally inconsistent with Supreme Court precedent, CDC's statutory authority, and deferential APA review. And the equities weigh decidedly against the injunction given its serious intrusion on immigration processing and the federal government's public-health and foreign-affairs discretion.

ARGUMENT

I. This Suit Fails For Lack of Standing, a Cause of Action, and Reviewability.

A. The States do not challenge the district court's conclusion that alleged law-enforcement costs are too speculative to establish standing, but argue that their healthcare and educational expenditures following the entry of additional noncitizens and "unfunded" mandates in federal law are traceable to the termination order. Br. 22. The States' virtually limitless theory is that a State has standing whenever increased state expenditures can be traced to a federal policy, no matter how indirectly. But standing requires a showing that the States' alleged injury "be *fairly* traceable" to the alleged error. *Environment Texas Citizen Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357, 368 (5th Cir. 2020), *as revised* (Aug. 3, 2020). Key factors are attenuation, the actions of third parties, and whether the harms stem from the independent operation of other laws. *See, e.g.*, *California v. Texas*, 141 S. Ct. 2104, 2117-20 (2021); *cf. Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) (costs were not "fairly traceable" to government action even if plaintiffs undertook costs only because of the challenged law).

The States argue that the district court found that border crossings increased while Title 42 orders have been in place, that States' healthcare costs increase when more noncitizens enter the States, and that termination of the emergency order would cause ordinary immigration processing and enforcement to go back into effect. Br.

28. Even if correct, this does not show traceability; the alleged increased expenditures are affected by myriad other factors, including migration patterns of third parties, the ordinary operation of immigration laws, resource limitations on immigration enforcement, and the effects of other laws. The effects of these factors cannot fairly be attributed to any alleged error in CDC's termination of Title 42 emergency public-health orders, which by statute is based solely on a public-health determination.

The States stress that DHS helped CDC implement Title 42 orders. Br. 33. But it does not follow that alleged indirect effects from DHS's ordinary immigration enforcement are fairly traceable to CDC's termination of a temporary emergency public-health measure. The States contend that even if alleged expenditures resulting from ordinary immigration processing are not traceable to CDC's termination order, alleged expenditures arising from an increase in undetected border crossings should be attributed to CDC's termination order. Br. 32. As the government explained, however, undetected border crossings likewise flow from features of ordinary immigration processing—including resource and funding constraints—and are not fairly traceable to the termination order. *See* Gov't Br. 20-21.

The States' reliance on *Massachusetts v. EPA* and *Department of Commerce v. New York* underscores the traceability problem here. In *Massachusetts*, the State claimed that EPA's failure to regulate greenhouse gas emissions would contribute to erosion of its physical territory because of those emissions' effects. 549 U.S. 497, 505 (2007). In *Department of Commerce*, States claimed that changes to the census would predictably

undercount their populations and lead by operation of law to a decrease in funding tied directly to the census. 139 S. Ct. 2551, 2565 (2019). There is no such link between CDC's independent emergency public-health decisionmaking and the costs and benefits of ordinary immigration enforcement.

The States do not advance their argument by noting, Br. 36, that a "procedural rights plaintiff … need not show that the procedural remedy that he is requesting will in fact redress his injury." *Sierra Club v. Glickman*, 156 F.3d 606, 613 (5th Cir. 1998). That does not eliminate the "fairly traceable" requirement. *Id.*; *e.g.*, *Center for Law & Educ. v. Department of Educ.*, 396 F.3d 1152, 1157 (D.C. Cir. 2005). Plaintiffs must at a minimum connect their alleged harms to the proceeding at issue and show that "the procedures in question are designed to protect some threatened concrete interest … that is the ultimate basis of [its] standing.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 & n.7, 573 & n.8 (1992); *Sierra Club*, 156 F.3d at 613. That showing is entirely absent here.

Nor can any special solicitude compensate for that fundamental disconnect. Br. 40. Foundational Article III principles do not "cease[] to exist," "even [for] states." *Texas v. Biden*, 20 F.4th 928, 974 (5th Cir. 2021), *as revised* (Dec. 21, 2021), *reversed on other grounds*, 142 S. Ct. 2528 (2022). In *Massachusetts*, the plaintiff State received special solicitude because of the alleged effects on its coastline and territory, distinctly quasi-sovereign interests. 549 U.S. at 519-20. Here, however, the States seek special solicitude for indirect fiscal effects. Br. 40. The States' expansive view of

special solicitude finds no support in *Massachusetts* and directly contravenes this Court's admonition that special solicitude "will seldom exist." *Texas v. United States*, 809 F.3d 134, 162 (5th Cir. 2015), *as revised* (Nov. 25, 2015).

Contrary to the States' argument, Br. 39, this Court's analysis of special solicitude in *Texas v. Biden* was tied only to an alleged pressure to change State law, not mere fiscal expenditures. 20 F.4th at 970. Similarly, any quasi-sovereign interest in "enforcement of immigration law" has no application here. Br. 40-41 (emphasis omitted) (quoting *Texas v. United States*, 40 F.4th 205, 216 n.4 (5th Cir. 2022) (per curiam)). Title 42 orders are not immigration policies and the States are not arguing about the proper enforcement of the Immigration and Nationality Act. And contrary to the States' apparent suggestion, Br. 38, the Supreme Court has clearly held that a State cannot press interests in the health and welfare of its citizens against the federal government, and reiterated that principle in the same case on which the States rely. *See Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923); *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982).[1]

[1] The States perfunctorily assert that the rule that States may not raise *parens patriae* harms against the federal government is "obsolete" and "invert[s] the Constitution's structure." Br. 39 & n.5, 49-50. The States never develop this argument, which is accordingly forfeited. In any event, the States cannot avoid the Supreme Court's repeated instruction that States cannot press *parens patriae* harms against the federal government. No subsequent Supreme Court decision has permitted such a suit or abrogated that principle. And it is the States that would invert our federal structure by allowing States to challenge all federal decisions based on differing policy views about the general welfare.

B. Even if the States had standing, this Court has emphasized that APA reviewability and cause-of-action principles provide important limits to "cabin policy disagreements masquerading as legal claims." *Texas*, 809 F.3d at 161-62. As explained, the States' allegations reduce to the general notion that increased immigration generally increases certain state expenditures. The States offer no explanation as to how such a general interest in immigration policy is within the zone of interests that Congress intended to protect in 42 U.S.C. § 265. They likewise never explain how their interest in perpetuating Title 42 orders in the absence of a serious public-health danger is in any way consistent with Section 265's purpose. Nor do they explain why Congress would have intended for each of the 50 States to be able to challenge the Executive Branch's emergency public-health decisions under this statute.

Instead, the States misconstrue the zone-of-interests inquiry, arguing variously that Section 265 permits CDC to tailor its public-health responses by considering benefits and burdens of its orders; that CDC must consider harmful effects caused by its Title 42 orders; that CDC consults with other federal departments and may consult with States on implementation of its orders; that CDC delayed the termination based partly on operational necessity; and that the APA requires notice and comment. Br. 42-46. None of these points addresses the "essential inquiry[:] … whether Congress intended for [that] particular class of plaintiffs to be relied upon to challenge [alleged]

agency disregard of the law.'" *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987) (alterations omitted).

In any event, the States' arguments generally concern the ways in which CDC may design Title 42 orders to address a serious public-health danger. But the States' alleged harms do not concern CDC's design of its Title 42 public-health orders. They instead concern alleged state expenditures in response to increased immigration once those emergency orders end because of the absence of a serious public-health danger—interests clearly outside Section 265's purpose. CDC is not an immigration agency and Section 265 is not a tool for immigration policymaking or, as the States suggest, for controlling Medicaid expenses generally. *See* Br. 47. To the extent the States suggest that some noncitizens will enter the country without being screened for COVID-19, Br. 48, the States' alleged fiscal harms are not based on that theory. And the States never explain why Congress would have envisioned all 50 States as possible challengers of CDC's public-health assessments, much less challenges seeking to perpetuate an order without a public-health basis based on alleged incidental effects of the ordinary immigration processing scheme that Congress established.

C. Similarly, the States cannot avoid the fact that Congress clearly committed termination of Section 265 orders to CDC's discretion. The States note that CDC's authority is defined by general parameters, particularly that orders must regard a "communicable disease" and a "serious danger" to public health. Br. 51. But every grant of authority must be defined somehow, and the outlines of CDC's

authority do not make the exercise of that authority reviewable. Rather, the question is whether the statute provides judicially manageable standards to assess CDC's exercise of authority or instead "exudes discretion." *Ellison v. Connor*, 153 F.3d 247, 254 (5th Cir. 1998). Another key factor is whether the agency's decisions "require[] a complicated balancing of a number of factors … peculiarly within [its] expertise" and involve subjects "in which courts have long been hesitant to intrude." *Lincoln v. Vigil*, 508 U.S. 182, 192-93 (1993) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 819 (1992) (Stevens, J., concurring in part and concurring in judgment)).

As the government explained, the statute provides no judicially manageable standards for courts to review CDC's decisions regarding the "serious" nature of a danger, nor whether a measure is "required" "in the interest of the public health." Congress also specified that the duration of these orders will last only as long as the Executive Branch "may deem necessary." 42 U.S.C. § 265. And the States do not contest that this subject matter and context call for the utmost deference to the Executive's public-health judgments, particularly for an emergency authority that requires rapid and flexible decisionmaking. This statutory language and context clearly exude discretion and bar review under 5 U.S.C. § 701(a)(2).

The States' arguments only highlight that Section 265 is a paradigmatic example of a matter committed to agency discretion. The States argue, for example, that the statute entrusting a matter to what the Attorney General "deemed" to be in the "national interest" in *Zhu v. Gonzales*, 411 F.3d 292, 295 (D.C. Cir. 2005),

"understandably provides no serviceable standard for judicial review." Br. 52 (quotation marks omitted). Yet they never explain why a statute authorizing measures that CDC "may deem necessary" "in the interest of the public health" is meaningfully different. The other cases the States cite, Br. 51-52, involved statutes that specified factors the agency was required to consider or actions the agency was required to take, unlike the case here. *See Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 371 (2018); *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 488 (2015).

The States acknowledge the many cases demonstrating that courts owe deference to the Executive's public-health judgments, but argue that those cases did not hold that the Executive's decisions were unreviewable. Br. 52. Those cases, however, did not involve arguments that a decision was committed to agency discretion under 5 U.S.C. § 701(a)(2). The point (which the States do not contest) is that public-health orders issued under Section 265 require balancing numerous factors within the agency's expertise in an area where courts have long been hesitant to intrude. And contrary to the States' suggestion, CDC's Section 265 regulation on its face requires only that CDC disclose certain information when it issues a Title 42 order. *See* 42 C.F.R. § 71.40(c)(2), (c)(5). It provides no judicially manageable standards for scrutinizing CDC's public-health determinations. Br. 53.[2]

[2] The States note that the government did not appeal a preliminary injunction decision in another case, in which that district court concluded that the regulation provides sufficient standards for judicial review. Br. 53. But that preliminary

Continued on next page.

At most, the States' arguments suggest that issuance of a Title 42 order may be reviewable to ensure that the order identifies a public-health danger that CDC deems serious and arises from a communicable disease in a foreign country. Br. 51. But even if an order's issuance were reviewable in that limited respect, Congress specified that the *termination* of an order is determined exclusively by the length of time the Executive Branch "may deem necessary" in the interest of public health, 42 U.S.C. § 265, and the States identify no judicially manageable standard to evaluate that question. The States provide no authority for their assertion that Congress "either ban[ned] all judicial review or none at all," Br. 52 (emphasis omitted); nothing prevents Congress from specifically committing the termination of an order to the Executive Branch's discretion.

II. The Termination Order Is Exempt From Notice and Comment.

The States similarly offer no viable theory as to why CDC was compelled to continue this emergency public-health measure for many more months to undertake notice-and-comment rulemaking, despite the absence of a public-health justification for keeping that measure in force.

A. As to the good-cause exception, the States do not explain why CDC is wrong that (1) Title 42 orders are emergency orders that displace ordinary

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injunction currently has no effect because of a new agency decision issued shortly afterward. *See* Gov't. Br. 8 n.2. That appeal decision is irrelevant, and the district court in this case did not rely on the States' mistaken arguments about CDC's regulation.

immigration processing under the scheme designed by Congress, including statutory procedures for asylum; and (2) it is "impractical" and "contrary to the public interest" to maintain such an extraordinary emergency order for many more months in the absence of a public-health justification. 5 U.S.C. § 553(a)(1).

Instead, the States' lead argument is based on a misapprehension of the facts. The States contend that CDC had 14 months to terminate the order after the February 2021 Executive Order requiring a re-evaluation. Br. 14, 64. That is incorrect. CDC conducted reviews in 30- and 60-day intervals and determined no fewer than *nine* times after the Executive Order that a Title 42 order remained necessary, including during surges related to the Delta variant in 2021 and the Omicron variant in late 2021 and early 2022. *See* Gov't Br. 34. Indeed, CDC issued the most recent Title 42 order in August 2021—several months *after* the Executive Order—and that is the order that the States seek to continue in this lawsuit. Similarly, the States' notice-and-comment arguments never acknowledge CDC's 30- or 60-day reviews. And though the States argue that CDC could have undertaken notice-and-comment rulemaking in 14 months, they never suggest that CDC could have done so within 60 days.

The States likewise misconstrue the facts by arguing that CDC acted inconsistently in taking comments on its Section 265 rule, but not the termination order. Br. 64, 67, 73. The States are referring to CDC's rule establishing procedural regulations for Title 42 orders, which CDC issued as an interim final rule in March

2020 and finalized in September 2020. But that rule established only the *process* for issuing subregulatory Title 42 orders, pursuant to Section 265's instruction that such emergency orders be issued under regulations. Contrary to the States' argument, the procedural rule explicitly contemplated that emergency Title 42 orders would *not* themselves undergo notice and comment, but would be flexibly issued, modified, or terminated based on recurrent reviews of the public-health situation. *See* Gov't Br. 5-8. *All* such Title 42 orders have thus issued without notice and comment. There is accordingly no inconsistency. The fact that the notice-and-comment process for that procedural rule nonetheless lasted more than *five months* only underscores that notice-and-comment rulemaking would needlessly delay termination of these emergency orders by many months.

Aside from their clearly mistaken factual premises, the States are also wrong to suggest, Br. 64, that *United States v. Johnson* established a general rule that notice-and-comment rulemaking is required if that procedure "could have been run in the time taken to issue the … rule[]," 632 F.3d 912, 929 (5th Cir. 2011). That was simply one factor that the *Johnson* Court considered.

More fundamentally, the States' misreading is irreconcilable with the good-cause exception's text and purpose. *See* Gov't Br. 37. According to the States, when an emergency ends, an agency that seeks to terminate an emergency order generally has time to undertake notice-and-comment rulemaking and therefore must do so "no matter how rigorous" or "science based" the agency's conclusion that the predicate

emergency need has ended. Br. 46. Thus, if the government grounds flights at an airport due to a national security emergency and the emergency ends, the government would need to undertake months of notice-and-comment rulemaking—and may even need to consider extraneous matters such as environmental and economic effects—before returning to ordinary airport operations. The APA requires no such impracticality and blindness to the public interest in terminating emergency orders as soon as practicable.

The States do not deny the serious problems with their proposed rule, which could wreak havoc on the government's ability to flexibly respond to emergencies, create uncertainty about what is required to modify or partially terminate an order, and (as here) force agencies to continue disruptive measures for months after the need for them has ceased. The States' principal response is that CDC "has only itself to blame" for any harms; in the States' view, the agency should have made the orders expire by their own terms so that the agency would not need to undergo notice-and-comment rulemaking to terminate them. Br. 73-74. In other words, the States argue that notice and comment is required only because CDC chose to undertake monthly or bimonthly reviews rather than re-issuing orders in serial fashion. Br. 73. Congress designed the APA's good-cause exception precisely to avoid the formalistic imposition of notice-and-comment procedures when they are impractical or contrary to the public interest. And it is black letter law that "agencies 'should be free to fashion their own rules of procedure" and courts should not require anything more

than the "procedural requirements which Congress was willing to" impose. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524, 543 (1978).

The States are also mistaken to claim CDC was inconsistent by providing transition time for DHS to alter its border-wide operations and adopt additional public-health mitigation measures. Br. 68. As the agency explained, notice and comment would cause many months of *additional* delay before DHS could even begin a transition period, and such delay would be impractical and contrary to the public interest given the disruptive nature of the orders and the lack of a public-health justification. *See* 87 Fed. Reg. 19,941, 19,955-56 (Apr. 6, 2022). The States offer no reason to disregard the clear distinction between administratively necessary delay because DHS cannot change its operations in one day and needed time to implement additional public-health measures, and the far longer delay that notice-and-comment rulemaking would require. The Supreme Court has made just this kind of distinction. *See Biden v. Missouri*, 142 S. Ct. 647, 654 (2022) (per curiam).

The States note that Title 42 orders were necessary for two years throughout multiple waves of the pandemic. Br. 68. But good cause to terminate these emergency orders does not hinge on the length of time during which the predicate emergency need lasted. The States similarly argue that the fact that all prior Title 42 emergency orders were issued without notice and comment should not be determinative. Br. 72. As the government explained, however, the context

underscores why notice-and-comment rulemaking is a poor fit, and the States ignore that their theory would render all but the earliest Title 42 orders unlawful because CDC issued them months after the pandemic began. Gov't Br. 34-38.

The rest of the States' arguments either ignore the APA's text or misconstrue the government's arguments. For example, the States say that Congress did not specifically create a notice-and-comment exception for emergencies or Section 265 orders. Br. 65, 69-70. No such exception was necessary. The good-cause exception by its terms reaches all situations where notice and comment would be impractical and contrary to the public interest. The States also challenge arguments that CDC never made by contending that CDC cannot evade notice-and-comment rulemaking by relying on the circumstances at the start of the pandemic, by invoking a regulation rather than an exception to notice and comment, or solely by saying that notice-and-comment rulemaking is burdensome as a general matter. Br. 65-66, 69-70.

Finally, the States appear to suggest that increases in migration are attributable to CDC's termination order, even though their alleged data is about migration increases while Title 42 orders have been in effect. Br. 28, 68-69. The States never explain that suggestion, but in any event this argument does not relate to CDC's proper invocation of the good-cause exception, and CDC considered increases in migration in its public-health analysis. 87 Fed. Reg. at 19,951-52, 19,956.

B. The foreign-affairs exception likewise applies by its terms. The States do not dispute that Title 42 orders necessarily require diplomatic engagement to function,

because the United States cannot expel persons without the receiving countries' permission. Nor do they deny that such orders are the subject of diplomatic discussions (like other coordinated pandemic orders regarding the border), Br. 60, and that diplomatic negotiations are especially complex when it comes to expulsion of third-party nationals to a country where they lack legal status. *See* 86 Fed. Reg. 42,828, 42,836 (Aug. 5, 2021); ROA.3112-13, 3117-18. The orders therefore "involve[]" the "foreign affairs function" of the United States under the exception's plain text. 5 U.S.C. § 553(a)(1).

The States' principal response is that the government must also show that notice-and-comment rulemaking would cause "definitely undesirable" international consequences, a phrase taken from the APA's legislative history. Br. 55 (emphasis omitted) (quoting *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 776 (9th Cir. 2018)). As the government explained and the Second Circuit has held, it is improper to apply such a requirement when an action directly involves the foreign affairs function. *See* Gov't Br. 39-44; *City of New York v. Permanent Mission of India to the United Nations*, 618 F.3d 172, 202 (2d Cir. 2010). That is especially so because it would require courts to evaluate (and the government to disclose) potentially sensitive predictions of foreign-affairs consequences.

The States say that their reading is merely a narrow construction rule, but no amount of narrow construction would yield a requirement that the government convince a court of undesirable international consequences in every case. Nor can the

States justify that atextual position by stating that "the APA generally requires federal agencies to engage with the *American public*." Br. 62. To the extent the States disfavor the reach of the foreign-affairs exception's clear text, that is a concern for Congress. In any event, cases that have applied a more stringent standard did so only to avoid rendering all immigration rules exempt from notice-and-comment rulemaking based on attenuated connections to foreign affairs. Gov't Br. 42-44. That is no concern here.

The rest of the States' arguments incorrectly portray the application of this exception as a post-hoc rationalization, particularly because CDC invoked the exception in one sentence. Br. 60-62. As the government explained, CDC's termination order noted that Title 42 orders (and their termination) entail discussions with other countries, and CDC had already previously noted the required international negotiations. Gov't Br. 39-41. In other words, CDC briefly noted why the termination "involves a foreign affairs function of the United States." 87 Fed. Reg. at 19,956 (alterations omitted) (quoting 5 U.S.C. § 553(a)(1)). This explanation and self-evident context suffice.

Although a showing of negative consequences is not required, the declarations from DHS and State Department officials reinforce the exception's clear application. Those declarations added detail about the discussions and coordination to which CDC referred because CDC does not itself exercise the foreign affairs function—a point the States ignore. That is elaboration of CDC's stated reasons, not brand new

reasons, and is indistinguishable from the declaration that the Ninth Circuit considered in *Yassini v. Crosland*, 618 F.2d 1356, 1361 (9th Cir. 1980) (per curiam). The States suggest that a subsequent "memorandum" with elaboration in *Regents* was adequate, but that a "mid-litigation declaration[]" is not. Br. 60-61. Nothing in *Regents* turned on the fact that the explanation was in the form of a memorandum, and the States point to no authority for such a rule. *See Department of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1908 (2020).

Nor can the States negate the declarants' explanation of negative consequences for U.S. negotiations with other countries. CDC's provision of administratively necessary transition time, partly to adopt additional public-health mitigation measures, clearly does not mean that many more months of delay would not create the harmful perceptions to which the declarations alluded. Br. 62. The fact that the government did not seek extraordinary relief or expedited review likewise does not mean that the harm of imposing a notice-and-comment requirement would be insubstantial. Br. 63. The States' contrary assertion would effectively require appellants to seek extraordinary relief or expedited review of every preliminary injunction for fear of being accused of lacking real harms.

III. The Termination Order Readily Satisfies Arbitrary-and-Capricious Review.

The Court need not address the States' arbitrary-and-capricious arguments, as to which the district court did not rule or exercise its equitable discretion, but if it does, the Court should reject them.

As to reliance interests, the States do not identify any action that they have taken in reliance on Title 42 orders, despite those emergency orders' expressly temporary nature. The States instead contend that the "impacts" of ordinary immigration processing on healthcare and law enforcement qualify as reliance interests, or must be addressed "independent[ly]," and cite cases where agencies were required to address such incidental effects when issuing immigration rules. Br. 75. Yet even if general state expenditures associated with immigration enforcement are relevant to immigration rules, the States never explain why such incidental expenditures must be addressed before terminating *emergency* public-health orders, which never purported to change ordinary immigration processing, and which were expressly temporary and subject to review every 30 or 60 days.

In any event, CDC did address the issue of immigration effects; it explained that analyzing such expenditures is not part of its inquiry under Section 265 because Title 42 orders are not an immigration tool, and that regardless, any such effects are outweighed by the need to end Title 42 orders in the absence of a public-health need. 87 Fed. Reg. at 19,954. Contrary to the States' assertion, Br. 78, CDC expressly

considered whether State and local governments could reasonably rely on Title 42 orders for "resource allocation," and determined that such reliance would be illegitimate or minimal under the circumstances and outweighed for the same reason. 87 Fed. Reg. at 19,954.

At times, the States appear to acknowledge CDC's reasoning, but assert that CDC was nonetheless required to "analyze" the costs of increased immigration generally—matters entirely outside of the agency's expertise. Br. 75, 78. This would necessarily suggest that CDC was required to analyze the general costs of immigration when deciding whether to issue an emergency Title 42 order in the first place. It presumably would also require CDC to evaluate the potential *benefits* of immigration as well, and perhaps also effects on the labor market, on state tax bases, or the economy generally.

This argument is irreconcilable with the nature of CDC's authority and with deferential arbitrary-and-capricious review. An agency that issues an emergency order based on a statutory authority related to that emergency does not need to analyze all conceivable expenditures and benefits of returning to normal after the predicate need has passed. To repeat a hypothetical, if the government grounded flights at an airport due to a national security emergency, it would not need to analyze all economic and environmental costs and benefits of returning to normal airport operations before ending the order. Here, as the States acknowledge, CDC's inquiry under Section 265 concerns a serious danger to public health from a communicable disease, not other

matters like indirect fiscal impacts of immigration. Br. 51. For the same reason, CDC's analysis of potential strain on healthcare resources correctly focused on the "communicable disease" at issue, 42 U.S.C. § 265, not Medicaid expenditures writ large.

Nor was it inconsistent for CDC to consider the administratively necessary time that DHS would need to transition border-wide operations and adopt additional public-health measures. Br. 76. In doing so, CDC clearly was not weighing the costs and benefits of ordinary immigration processing.

The States also appear to suggest that CDC's Title 42 orders have caused harm, and assert that CDC must account "for all immigration programs that it breaks." Br. 43-44, 76. These assertions are difficult to understand. CDC has not altered any underlying immigration rules and lacks the power to do so. Nor have the States alleged any harms tethered to CDC's issuance of Title 42 orders. To the extent the States are suggesting that CDC caused increased migration levels by adopting Title 42 orders that restrict entry, that is baseless. Indeed, the States (incorrectly) stated in district court that Title 42 orders were necessary "safety valves" for increased migration levels. ROA.1061. And regardless, as explained, CDC did address the issues of increased migration levels and possible reliance interests, and concluded that neither changed its analysis.

Much of the States' argument to the contrary fundamentally misconstrues *Regents* and this Court's decision in *Texas v. Biden*, 20 F.4th at 990, as holding that

agencies cannot determine that alleged reliance interests are minimal or illegitimate. Br. 78-79. Those cases only rejected arguments that an agency was not required to address reliance interests *at all*. The Supreme Court made clear in *Regents* that the agency was free to decide that reliance interests were minimal or illegitimate based on the circumstances, or that they were outweighed by other factors. *See* 140 S. Ct. at 1914. That is what CDC did here. *See* Gov't Br. 46-48.

The States' argument that CDC needed to address alternate implementation dates is likewise irreconcilable with deferential APA review. As the States seem to acknowledge, CDC considered the question of *when* to implement termination: *i.e.*, "immediate implementation" versus another time. Br. 82. CDC stated that termination should occur as soon as practicable, consulted with DHS, sought to provide time to transition operations and adopt additional public-health measures, and arrived at a date: May 23. *See* 87 Fed. Reg. at 19,955-56. That was reasoned decisionmaking. The APA did not require CDC to explain why it did not choose May 30 or June 15.

The assertion that CDC needed to consider the "possibility of phased implementation" is similarly flawed. Br. 81. That is in effect what CDC did: it provided nearly two months for DHS to implement additional public-health measures and ready operational capacity while continuing to use exceptions permitted by the August 2021 order. The States do not specify what different phased implementations they have in mind, nor why they would be such an obvious alternative that the APA

compelled CDC to consider them. The States do not appear to be arguing for a geographically phased implementation, which they assert would be infeasible. Br. 96.

The States further highlight their error by contending that DHS "secretly and illegally" began implementing the termination before the May 23 date, and noting that the district court granted a temporary restraining order. Br. 81-82. As the government explained to the district court, both the termination order and the August 2021 order that was operative at that time expressly contemplated that DHS would use the Title 42 order's discretionary law-enforcement exception in preparation for full-scale termination. 87 Fed. Reg. at 19,956; 86 Fed. Reg. at 42,840; ROA.1866, 1885-92. To the extent the States say that CDC needed to consider this alternative, it is in fact what CDC's termination order already contemplated.

For the first time on appeal, the States briefly assert that CDC needed to consider retaining Title 42 orders to the extent that DHS's screening or vaccination capacity is exceeded. Br. 82-83. That argument lacks merit. CDC explained in detail why "[a]t this point in the pandemic," "readily available and less burdensome public health mitigation tools" are sufficient and "the previously identified public health risk is no longer commensurate with the extraordinary measures instituted by the CDC Orders." 87 Fed. Reg. at 19,953. And CDC specifically stated that any limits to DHS's vaccination program would not weigh against termination for the same reasons. *Id.* at 19,952-53 & n.145.

Finally, the States' accusations of pretext warrant no credit from this Court. In district court, the States argued that CDC sought to terminate the order for political reasons. ROA.1099-1100. Now, the States inconsistently suggest that CDC wanted to keep Title 42 orders in place and therefore wanted to have the termination order enjoined. Br. 1-3. This rhetoric does not demonstrate a "significant mismatch" between CDC's determination and the rationale provided, *Department of Commerce*, 139 S. Ct. at 2573, or overcome the presumption of regularity in the agency's decisions, *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). The States entirely ignore CDC's painstaking public-health analysis; that CDC repeatedly reaffirmed the need for Title 42 orders for more than one year *after* the change in administration; and CDC's use of the same notice-and-comment exceptions for every prior Title 42 order.

The States' related assertions about inconsistency with orders regarding different measures issued pursuant to other statutes, and even by other agencies, are meritless. Br. 83-85. As noted, CDC partly based the termination order on the fact that Title 42 orders are among the most extraordinary exercises of emergency power within the agency's authority and that other less burdensome public-health measures

are sufficient. And CDC was addressing the inquiry under Section 265, not some other statute or another agency's decisions.[3]

IV. The Balance of Equities Favors the Federal Government.

The States do not contest that this preliminary injunction requires the government to continue an extraordinary public-health measure contrary to CDC's expert determination that the measure no longer has a public-health basis. Nor do they contest that the injunction seriously disrupts the immigration scheme that Congress designed, including Title 8 asylum procedures. As to the clear foreign-affairs intrusion that the Supreme Court has warned against, *see Biden v. Texas*, 142 S. Ct. 2528, 2543 (2022), the States assert, contrary to the record, that the government will not need to continue coordinating and negotiating for other countries' cooperation on Title 42 Orders. Br. 58. That is incorrect. Enforcement of Title 42 orders requires ongoing coordination and negotiation, and the preliminary injunction requires the government to divert resources toward securing other countries' cooperation, necessarily distracting from other objectives. Gov't Br. 40-41;

[3] The States' suggestion that they may obtain discovery based on their pretext rhetoric is incorrect. APA challenges are based on the administrative record, and litigants may not expand the record without a strong showing of bad faith. *Department of Commerce*, 139 S. Ct. at 2573.

ROA.3112-13, 3117-18 (expressly noting that such negotiations are ongoing); *see also* 86 Fed. Reg. at 42,836.[4]

The alleged increase in state expenditures and desire to comment on termination do not outweigh these clear harms bearing on the separation of powers. The States note that preliminary injunctions are intended to preserve the status quo, Br. 87, but the question is whether the equities weigh against this exercise of injunctive power against the government. Similarly, the fact that various waves of COVID-19 required a series of Title 42 orders over the course of two years, Br. 88, does not weigh in favor of an injunction that prevents ending those emergency orders after the public-health need has lapsed. The States are also wrong that the termination order is likely unlawful, Br. 89-90, but regardless, preliminary injunctions are not awarded as a matter of right. *See* Gov't Br. 52.

Contrary to the States' suggestion, Br. 88, the government is not arguing that equitable balancing always tips in its favor. As the government explained, the federal government's equities generally merge with public interest and the government's views are entitled to significant weight on matters of public health and foreign affairs. Gov't Br. 52. The cases on which the States rely did not involve the triple incursion

[4] Although the government's brief in district court did not specify this harm in the section regarding equities, that section argued that the injunction imposed harms on the government and other sections of the brief discussed facts underlying this harm. *See* ROA.3067, 3091-94, 3106.

into the immigration scheme designed by Congress, CDC discretion, and foreign affairs. *See* Br. 89.

The rest of the States' equitable arguments reprise assertions that are meritless for the reasons explained above. Br. 90-91. At bottom, the States do not show that their alleged fiscal interests in delaying this termination, which must occur eventually, outweigh the injunction's intrusion into the affairs of the federal government.

CONCLUSION

For the foregoing reasons, the Court should vacate the district court's preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

s/ Joshua Dos Santos
JOSHUA DOS SANTOS

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,481 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

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