

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NANCY GIMENA HUISHA-HUISHA, on behalf of
herself and others similarly situated,

Plaintiffs,

v.

ALEJANDRO MAYORKAS, Secretary of
Homeland Security, *et al,*

Defendants.

Civil Action No. 21-100 (EGS)

**MOTION OF ARIZONA, LOUISIANA, ALABAMA, ALASKA,
KANSAS, KENTUCKY, MISSISSIPPI, MISSOURI, MONTANA,
NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS,
TENNESSEE, UTAH, VIRGINIA, WEST VIRGINIA, AND WYOMING
FOR A STAY PENDING APPEAL**

MOTION FOR STAY PENDING APPEAL

The States of Arizona, Louisiana, Alabama, Alaska, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming (“Proposed Intervenor States” or “States”) hereby respectfully move for a stay pending appeal of this Court’s November 22, 2022 judgment and injunction (Doc. 170).¹

Now that Federal Defendants have filed a notice of appeal, *see* Doc. 179, Proposed Intervenor States respectfully seek a stay pending appeal. In doing so, they recognize that this Court has already stated that “any request to stay this Order pending appeal will be denied for the reasons stated in the accompanying Memorandum Opinion.” Doc. 164 at 2. This Court’s judgment, which the States seek to stay, codifies that Order. Therefore, unless the Court is inclined to revisit that prior determination, the States recognize that this request should be denied summarily and are asserting it to satisfy the exhaustion requirement of Federal Rule of Appellate Procedure 8.

To the extent that this Court is inclined to revisit its prior determination that it will deny all requests for a stay pending appeal, however, it should grant such a stay for the reasons that follow. It should further order highly expedited briefing so that the issue can be resolved expeditiously.²

¹ Plaintiffs oppose this request. Federal Defendants indicated that they “do not believe it is necessary to provide a position because the Court has already said that any motion for a stay pending appeal will be denied.”

² Absent an indication that this Court intends to revisit its prior determination that no stay pending appeal should issue, the States intend to seek an emergency stay pending appeal from the D.C. Circuit as early as Monday, December 12.

Reasons for Granting A Stay

The four factors for evaluating a request for a stay pending appeal are “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Comm. on the Judiciary v. McGahn*, 407 F. Supp. 3d 35, 38 (D.D.C. 2019) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). The States satisfy each of these four elements.

Proposed Intervenor States are likely to succeed on the merits. Defendants’ briefing in opposition to summary judgment thoroughly explains why CDC’s Title 42 orders were lawful and were not arbitrary and capricious. (Doc. 147.) And their briefing also explains why vacatur is inappropriate here. (Doc. 160.) For those same reasons, the States are likely to succeed on the merits.

Proposed Intervenor States will be irreparably harmed. In other litigation related to the federal government’s attempted termination of the Title 42 order, the States conclusively demonstrated that the end of the Title 42 policy will have catastrophic effects on the states. *Louisiana v. CDC*, 6:22-CV-00885, 2022 WL 1604901, at *4-*8, *22 (W.D. La. May 20, 2022). For example, “DHS estimates that [illegal] ‘border crossings’ will increase from approximately 7,000 crossings per day to approximately 18,000 crossings per day after” the end of Title 42. *Id.* at *5. And CDC itself has acknowledged that the “flow of migration directly impacts not only border communities and regions, but also destination communities *and healthcare resources of both.*” *Id.* (emphasis in original) (quoting 86 Fed. Reg. 42,828, 42,835 (Aug. 5, 2021)). For example, higher rates of illegal border-crossing cause increased costs for Proposed Intervenor

Arizona, including 1) environmental damage when “individuals illegally crossing through the border cut trails, trample plant life, and leave behind litter and potentially hazardous waste including soiled clothing and excrement,” *id.* (cleaned up) *6; 2) law enforcement costs for recovery and investigation of human remains of deceased border-crossers found in the desert and for pursuits and arrests of unauthorized aliens, *id.*; and 3) increased health care costs. *Id.* Higher rates of illegal immigration also harm Proposed Intervenor Louisiana, because “migrants coming from the border are sometimes transporting drugs into or across Louisiana.” *Id.* at *7 (cleaned up). Illegal immigration imposes similar costs on all of the States. *Id.* at *7-*9, *22. Thus, for the same reasons outlined by the court in *Louisiana*, the States will be irreparably injured without a stay.

And the balance of harms and public interest also favor a stay, as set out in *Louisiana. Id.* at *22-23. For example, the “States have demonstrated harm that will result from the [termination of Title 42].... On the other hand, the impact of the CDC's Title 42 Orders on immigration are ameliorated by certain exceptions and ‘safety valves’ in those orders. The CDC's Title 42 Orders grant DHS discretion to except non-citizens from the impact of the orders on a case-by-case basis. These exceptions can be triggered by consideration of significant law enforcement, officer and public safety, humanitarian and public health interests. Defendants concede that these exceptions have been employed throughout the period that the CDC's Title 42 Orders have been in place.” *Id.* at *22 (cleaned up).

For all of these reasons, this Court should grant a stay pending appeal in the event that it revisits its prior determination that no such stay should be granted.

Dated: December 9, 2022

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NO: Civil Action No. 21-100 (EGS)

Hon. Emmet G. Sullivan

Oral Argument Requested

PROPOSED ORDER

The Matter came before the Court on December 9, 2022 on the Proposed Intervenor States' Emergency Motion for Stay Pending Appeal. The Court being fully advised in the premises, IT IS HEREBY ORDERED that Plaintiff's Motion is GRANTED. This Court's November 22 judgment, which vacated and permanently enjoined the Title 42 policy, is hereby stayed pending resolution of Federal Defendants' appeal.

IT IS SO ORDERED.

ENTERED:

By the Court:

Date: _____

Hon. Emmet G. Sullivan
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2022, I electronically transmitted the attached document to the Clerk's office using CM/ECF System for filing. Notice of this filing is sent by email to all parties by operation of the Court's electronic filing system.

/s/ Drew C. Ensign