Case 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
LAFAYETTE DIVISION

REPLY BRIEF OF APPELLANT INNOVATION LAW LAB

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CERTIFICATE OF INTERESTED PERSONS

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

In more than 160 pages of briefing, neither Federal Defendants nor Plaintiff States challenge the fundamental basis of Innovation Law Lab ("Law Lab")'s appeal: Law Lab should have been allowed to intervene as of right because it has a unique protectable interest that Federal Defendants have refused to protect—ensuring any injunction runs only in the Plaintiff States. Neither party suggests that Federal Defendants will ever seek a narrowed injunction that applies only to Plaintiff States in this case. And neither party can credibly claim that Law Lab's interests in serving people seeking asylum in California and New Mexico are not impaired by the injunction's nationwide scope. In short, Law Lab has exactly the sort of interest that Federal Rule of Civil Procedure 24(a)(2) was designed to protect. The district court's failure to allow intervention is reversible error.

Reversible, too, is the district court's decision to enter a nationwide injunction that prohibits the federal government from terminating Title 42 in *any* state. As Law Lab explained, a district court's authority to grant injunctive relief comes from its equitable powers, and the scope of any injunctive relief must be proportionate to the underlying facts and equities of the dispute. Reviewing courts have thus repeatedly emphasized that nationwide injunctions are generally disfavored. That principle is especially relevant here, where *no* evidence supports a nationwide injunction, the public interest is unquestionably harmed by one, and whatever concerns the court may have about preserving uniformity in the traditional immigration context are far less relevant to Title 42, which the Centers for Disease Control ("CDC") created pursuant to its emergency public health powers—not the immigration laws—and

which has been implemented in a dis-uniform manner since its inception. The district court thus abused its discretion by entering a nationwide injunction.

Rather than addressing the heart of Law Lab's appeal, Federal Defendants and Plaintiff States dance around the edges. They raise a series of ancillary issues that have little (if any) basis in Circuit precedent and little (if any) relevance to the facts of this case. For example, Federal Defendants' sole response on the intervention issue is that Law Lab is adequately represented by Federal Defendants because both parties share the same "ultimate objective." Fed. Defs. Br. at 1. But that is simply not true. Law Lab's ultimate objective in *this* litigation is to ensure that any injunction blocking the termination of Title 42 is limited to Plaintiff States, whereas Federal Defendants seek to defend its termination altogether. Federal Defendants have never sought a geographically limited injunction, a point they do not dispute. Even if Federal Defendants were somehow entitled to a presumption of adequate representation, Law Lab has more than rebutted that presumption here.

In focusing on ancillary questions, both Plaintiff States and Federal Defendants fail to meaningfully engage with this Court's controlling precedent on the intervention question. *Texas v. United States*, 805 F.3d 653 (5th Cir. 2015), and *Sierra Club v. Epsy*, 18 F.3d 1202 (5th Cir. 1994), plainly illustrate why Federal Defendants do not adequately represent Law Lab's interests in this case and why the district court's denial of intervention must be reversed. Both parties' inability to explain why intervention was required in those cases but not here—and Plaintiff States' glaring failure to engage them at all—illustrate why reversal is required.

Plaintiff States' additional arguments similarly fall flat. As to intervention, Plaintiff States baselessly contend that Law Lab does not have standing to appeal because its interests are too narrow. But Law Lab has established both standing and a protectable interest that gives rise to intervention by identifying a concrete, demonstrable injury that gives it a stake in the litigation. Specifically, Law Lab has been forced to limit its work supporting people seeking asylum within non-plaintiff states in the United States and instead shift resources toward serving people who intend to seek asylum in the United States but are trapped in Mexico under Title 42. But for the district court's nationwide injunction, Law Lab would be able to resume the full extent of its operations supporting people seeking asylum within non-plaintiff states in the United States. And as to Law Lab's arguments on the scope of the injunction, Plaintiff States' cursory responses boil down to (1) a very odd claim that Law Lab fails to mention the standard of review as frequently as Plaintiff States would like; (2) an effort to manufacture evidentiary support for the central premise of the district court's nationwide injunction—that the termination of Title 42 in non-plaintiff states like California and New Mexico will harm Plaintiff States—even though no such evidence exists; and (3) a smattering of additional undeveloped claims that do not withstand even cursory scrutiny.

For all of these reasons, and for the reasons described in Law Lab's opening brief, the Court should reverse the district court's denial of Law Lab's motion to intervene as of right. Further, if the Court holds that Plaintiff States are entitled to *some* injunctive relief, it should tailor that relief to apply only to Plaintiff States.

ARGUMENT

I. Law Lab's need to protect its ability to operate in non-plaintiff states easily satisfies the requirements for intervention as of right.

Under Federal Rule of Civil Procedure 24(a)(2), a district court *must* allow a non-party to intervene when the non-party shows that (1) its application to intervene was timely; (2) it has an interest related to the policy that is the subject of the action; (3) the disposition of the action may "as a practical matter, impair or impede [its] ability to protect that interest"; and (4) its interest is inadequately represented by existing parties to the suit. *Wal–Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 565 (5th Cir. 2016) (citation omitted). As Law Lab explained in its opening brief, Law Lab satisfied all four requirements in this case. *See* Law Lab Br. at 16–24. That conclusion follows logically from this Court's decisions in *Texas v. United States*, 805 F.3d 653, and *Sierra Club v. Epsy*, 18 F.3d 1202. The district court therefore committed legal error in refusing to allow Law Lab to intervene as of right under Rule 24(a)(2). *See also La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 304 (5th Cir. 2022); *Miller v. Vilsack*, No. 21-11271, 2022 WL 851782, at *1 (5th Cir. Mar. 22, 2022).

Federal Defendants and Plaintiff States raise two counterarguments, neither of which is convincing. First, Plaintiff States—but not Federal Defendants—claim that Law Lab lacks a protectable interest in support of its appeal. But the injury to Law Lab as a result of the nationwide preliminary injunction clearly supports its standing to appeal. Second, Federal Defendants and Plaintiff States argue that Federal Defendants adequately represent Law Lab because the two parties share an

"ultimate objective." *See generally* Fed. Defs. Br.; *see also* Pls. Br. at 94 ("agree[ing]" with Federal Defendants' arguments "for the reasons explained in CDC's Answering Brief"). But this Court's decisions in *Texas v. United States* and *Sierra Club v. Epsy*—which Plaintiff States never even address—preclude any finding that the parties' interests are too closely aligned for intervention.

A. *Law Lab has stated a concrete, personal, legally protectable interest.*

While Federal Defendants do not contest that Law Lab has a protectable interest in the proceedings, Plaintiff States claim that Law Lab does not have a "protectable interest in the outcome they seek." Pls. Br. at 92. Without addressing the interests cited in Law Lab's opening brief, Plaintiff States contend that Law Lab may not "advance its appeal" where Federal Defendants have chosen "not to appeal the injunction's scope" because its interests are too narrow. *See* Pls. Br. at 92.

This argument is meritless. First, Plaintiff States confuse the constitutional requirements for Article III standing with the procedural requirements for intervention as of right in Rule 24(a). To the extent Plaintiff States suggest Law Lab lacks standing to pursue this appeal, they are wrong. In *DeOtte v. Nevada*, 20 F.4th 1055 (5th Cir. 2021), a case in which denied intervenors properly appealed the denial of intervention and the merits simultaneously, this Court unequivocally held that intervenors who "demonstrate an injury" from the district court order have standing to appeal. *Id.* at 1070. Plaintiffs never even cite, let alone distinguish, this controlling authority. Plaintiff States also fail to address Law Lab's injuries in any meaningful way. As Law Lab explained extensively in its opening brief, "concrete and demonstrable injury to the organization's activities—with the consequent drain on

the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests," and therefore supports Article III standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (cited by Pls. Br. at 93); *see also Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1166 (11th Cir. 2008) (upholding standing because "[i]nstead of 'abstract social interests,' the plaintiffs have averred that their actual ability to conduct specific projects during a specific period of time will be frustrated by Subsection 6's enforcement").

To the extent Plaintiff States challenge Law Lab's "protectable interest" in support of Rule 24 intervention, they are also wrong. As explained in Law Lab's opening brief, Rule 24 permits intervention as of right when the proposed intervenor has a "direct, substantial, legally protectable interest in the proceeding." *Texas*, 805 F.3d at 657; Law Lab Br. at 18–19. Whether an interest is legally protectable "turns on whether the intervenor has a stake in the matter that goes beyond a generalized preference that the case come out a certain way." *Id.* An intervenor has a "mere[] prefer[ence]" when it "seeks to intervene solely for ideological, economic, or precedential reasons." *Id.* On the other hand, intervenors have a valid, protectable interest where their purported interest is "specific to them, is capable of definition, and will be directly affected in a substantially concrete fashion by the relief sought." *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998); *see Texas*, 805 F.3d at 657 n.3 (same).

Law Lab has established a protectable interest under Rule 24 (and injury in support of appeal) because Law Lab's operations are directly affected by Title 42 and the nationwide injunction requiring its continued implementation along the

entire border. As detailed in Law Lab's opening brief, Title 42 has significantly impacted Law Lab's day-to-day operations in California and New Mexico. Law Lab Br. at 14–15, 18–19. The scope of the district court's injunction prohibiting Title 42's termination along the entire border deepened that impact. *Id.* at 15. But for the nationwide injunction, Law Lab would be able to continue its regular operations in at least two states along the United States–Mexico border: California and New Mexico. Because the injunction applies to the entire southern border, however, rather than just Plaintiff States' southern borders, Law Lab's services have been diverted from providing the full range of services to people seeking asylum in California and New Mexico. Instead, Law Lab has been forced to redirect resources to people who intend to seek asylum in the United States, but who are trapped in Mexico under Title 42.

As Federal Defendants acknowledge and as Plaintiff States have failed to contradict, Law Lab has a concrete, personalized, and legally protectable interest in continuing to serve people seeking asylum in the United States in non-plaintiff states. That interest is sufficient to support its intervention and its appeal of the district court's denial of its motion for intervention and the nationwide scope of the preliminary injunction.[1]

[1] Plaintiff States' other arguments are illogical, at best. For example, Plaintiff States take issue with the "extremely limited nature" of Law Lab's intervention, while simultaneously accepting that Law Lab would have a protectable interest if its intervention were even narrower—i.e., if Law Lab sought an exemption from the nationwide injunction. Pls. Br. at 93. The Court should disregard these arguments, which make little (if any) sense.

B. *Federal Defendants and Law Lab do not share an "ultimate objective"; only Law Lab is seeking a narrowed injunction.*

Federal Defendants raise a single argument in opposition: they claim that Law Lab has not overcome this Court's "presumption of adequate representation," which applies if a proposed intervenor shares the same "ultimate objective" as a party to the litigation. *See generally* Fed. Defs. Br.; *see also Texas*, 805 F.3d at 661–62.

But Federal Defendants and Law Lab do not, in fact, share an "ultimate objective." Since the start of these proceedings, Law Lab has been clear that its goal in this case is to ensure that, if the district court finds relief for Plaintiff States is warranted, the court narrowly tailor its injunction to run only in Plaintiff States rather than nationwide. *See, e.g.*, Law Lab Br. at 9 (citing ROA 3528–3558); *id.* at 20–24. In contrast, Federal Defendants, who are tasked with defending their termination of Title 42 throughout the nation, have consistently declined to seek a narrowly tailored injunction. Indeed, the district court interpreted Federal Defendants' silence on this point as agreement with the nationwide scope. *See* ROA 3803 ("The Defendants do not appear to contest the entry of a nation-wide preliminary injunction . . . ."). Before this Court, Federal Defendants have persisted in their position; they again lodge no objection to the geographic scope of the injunction. *See generally* Fed. Defs. Br. (not once saying Federal Defendants would seek a narrowly tailored injunction). Law Lab and Federal Defendants therefore have entirely different objectives in this case.

The divergence in interests here is materially indistinguishable from that at issue in *Sierra Club v. Espy*, which neither the federal government nor Plaintiff States make any attempt to distinguish. There, this Court found that the

government's need to represent the "broad public interest" did not adequately represent the economic concerns of groups representing the timber industry, thus requiring intervention. 18 F.3d at 1208. Similarly here, Federal Defendants, who for the last two-and-a-half years have been charged with *implementing* Title 42, have broad interests in efficiently enforcing immigration and public health laws. These broad interests do not come close to representing Law Lab's interests in serving people seeking asylum in California and New Mexico.

Federal Defendants try to recast Law Lab's "ultimate objective" as terminating Title 42 in its entirety, *see* Fed. Defs. Br. at 9, but that's not this case. Whatever Law Lab's broader advocacy goals as to Title 42, it has not pursued the wholesale termination of Title 42 here. Instead, Law Lab has only sought to ensure that any injunction is limited to Plaintiff States.[2] As Law Lab explained in its opening brief, its interests are "to advance migrant and refugee justice, including by expending its resources to assist and provide *pro bono* legal services to individuals seeking asylum at the California and New Mexico southern borders." Law Lab Br. at 23 (citing ROA 3580–3588). Title 42 has harmed Law Lab's operations along the southern border, including by forcing Law Lab to limit its work in non-plaintiff

[2] Indeed, permitting the parties' advocacy outside of this litigation to define their objectives in the litigation would call into question whether Federal Defendants truly seek to terminate Title 42 altogether, given that the federal government has continued to seek Title 42's *expansion* while the district court's injunction has remained in effect. *See* Ted Hesson et al., *Exclusive: Biden Urges Mexico to Take Migrants Under Covid Expulsion Order He Promised to End*, Reuters (Sept. 15, 2022), https://www.reuters.com/world/americas/exclusive-biden-urges-mexico-take-migrants-under-covid-expulsion-order-he-2022-09-14/.

states and to shift resources toward serving people who intend to seek asylum in the United States but are currently trapped in Mexico. *Id.* at 14 (citing ROA 3580–3588); *id.* at 16. The district court's nationwide injunction perpetuates that harm. An appropriately tailored injunction—which Federal Defendants have never sought—would allow Law Lab to resume its normal operations in non-plaintiff states.

As the Supreme Court recently explained, a presumption of adequate representation "applies only when [the parties'] interests overlap fully. Where the absentee's interest is similar to, but not identical with, that of one of the parties, that normally is not enough to trigger a presumption of adequate representation." *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2204 (2022) (cleaned up); *see also* 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1909 (3d ed. Supp. 2022) (when "the absentee's interest is similar to, but not identical with, that of one of the parties . . . intervention ordinarily should be allowed unless it is clear that the party will provide adequate representation for the absentee") (cited in Fed. Defs. Br. at 9). Here, the record evidence shows that Federal Defendants and Law Lab do not have fully overlapping interests and do not share an ultimate objective. Because Federal Defendants fail at the threshold "ultimate objective" question, the presumption of adequate representation does not apply and Law Lab need not show adversity of interest, collusion, or nonfeasance to intervene as of right. *Cf.* Fed. Defs. Br. at 9–10.

Federal Defendants attempt to recast Law Lab's goal of ensuring that any injunction is narrowly tailored as mere "legal argument." Fed. Defs. Br. at 7–8.[3] But that characterization beggars belief. Law Lab does not simply seek to raise an additional argument in support of Federal Defendants for the sake of creativity; it seeks to advance a different legal argument *to achieve a different objective.* This Court has repeatedly held that parties do not have the "same ultimate objective" when they have a "lack of unity in all objectives" that is "combined with real and legitimate additional or contrary arguments." *Brumfield v. Dodd*, 749 F.3d 339, 345, 346 (5th Cir. 2014) (allowing parents to intervene in litigation between Louisiana and federal government about school voucher program); *Texas*, 805 F.3d at 662–63 (allowing parents of U.S. citizen children to intervene in lawsuit brought against the federal government by 26 states to challenge DAPA program). That is exactly the situation here, as the outcomes that Law Lab and Federal Defendants respectively

[3] Federal Defendants later assert (at 10) that Law Lab is not seeking "to provide any additional . . . argument that is inconsistent with the government's arguments." The meaning of this assertion is unclear, given that Federal Defendants have steadfastly refused to argue that the scope of the injunction should be limited to Plaintiff States. In any event, the out-of-circuit opinion they cite at page 10—*United States v. City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002)—actually supports Law Lab's position. There, the Ninth Circuit affirmed the denial of a motion to intervene as of right because the proposed intervenors only sought to "strictly enforce[]" a consent decree. *Id.* at 402; *see also United States v. Territory of Virgin Islands*, 748 F.3d 514, 523 (3d Cir. 2014) (same; cited at Fed. Defs. Br. at 9). But to the extent any injunction is deemed necessary, Law Lab seeks a *different* injunction. Therefore, *City of Los Angeles* offers Federal Defendants no support, as it states that if the proposed intervenors had "contest[ed] any portion of the consent decree," the outcome might have been different because the parties no longer would have "share[d] the same objective." 288 F.3d at 402.

pursue fundamentally differ: if Law Lab achieves its ultimate objective, any relief the district court enters will be tailored to run only in Plaintiff States; if Federal Defendants succeed, there will be no injunction anywhere in the country. Thus, Law Lab and the Federal Government do not share all objectives in this litigation, and Law Lab seeks to raise "real and legitimate additional" arguments to support its distinct interests and objectives.[4]

Notably, Federal Defendants do not cite any relevant Fifth Circuit precedent to support their "legal argument" claim, as this Court's precedent on this point cuts against their position. *See supra* at 11–12 *see also* Fed. Defs. Br. at 14 (acknowledging adverse circuit precedent). The single Fifth Circuit case they *do* cite, *Ruiz v. Collins*, No. 92-2373, 1992 WL 386801 (5th Cir. Dec. 23, 1992), is an unpublished decision from 1992 that involved the unique procedural mechanism of a class action. There, the proposed intervenor sought to challenge the adequacy of class (and thus his own) representation. *Id.* at *1 & n.2. In this case, of course, Law Lab is not represented even nominally by Federal Defendants, so *Ruiz* is inapplicable.

The various out-of-jurisdiction cases Federal Defendants cite in support of their "legal argument" theory are easily distinguished. *See* Fed. Defs. Br. at 8–9. For

[4] That fact distinguishes this case from *Victims Rights Law Center v. Rosenfelt*, 988 F.3d 556 (1st Cir. 2021), *cert denied sub nom. Foundation for Individual Rights in Education v. Victim Rights Law Center*, 142 S. Ct. 754 (2022), where the proposed intervenors sought to make "an additional constitutional argument in defense of government action." *Id.* at 562 (cited in Fed. Defs. Br. at 11). Here, Law Lab does not intend to defend the government's action with a new argument; it instead pursues a different objective altogether.

example, in *SEC v. LBRY, Inc.*, 26 F.4th 96 (1st Cir. 2022), the First Circuit affirmed the district court's denial of intervention on the grounds that "[a] proposed intervenor's desire to present an additional argument or a variation on an argument does not establish inadequate representation." *Id.* at 99–100. But there (unlike here), the proposed intervenor conceded that it "share[d the existing party's] litigation objective." *Id.* at 99. Further, the court recognized an exception where the existing party "refus[es]" to present an argument sought by the proposed intervenor. *Id.* at 100 n.5; *accord Daggett v. Comm'n on Governmental Ethics & Election Pracs.*, 172 F.3d 104, 112 (1st Cir. 1999) (same). The D.C. Circuit likewise recognized in *Jones v. Prince George's County*, 348 F.3d 1014 (D.C. Cir. 2003)—which Federal Defendants also cite—that "an existing party who is . . . unwilling to raise claims or arguments that would benefit the putative intervenor may qualify as an inadequate representative" for purposes of Rule 24(a)(2). *Id.* at 1019–20. And *Stadin v. Union Electric Co.*, 309 F.2d 912 (8th Cir. 1962), a 60-year-old decision from the Eighth Circuit, is plainly inapplicable because the proposed intervenor's adequacy of representation arguments centered on the alleged "unfriendliness of [party] counsel." *Id.* at 919.

Further, several of the cases Federal Defendants cite start from the premise that the proposed intervenor had an identical interest or the same ultimate objective as an existing party, which is not the case here. In *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171 (2d Cir. 2001), for example, the proposed intervenor (the client's former law firm) conceded that it shared "an identity of interest" with an existing party (the client), since both wanted the client to win its breach of contract

lawsuit with a third party. *Id.* at 179–80. As explained above, however, Law Lab's objective as an intervenor in *this* case is limited to narrowing the geographic scope of any injunctive relief, not to argue for the ultimate outcome of the lawsuit. Similarly, in *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297 (9th Cir. 1997), the proposed intervenor "conceded at oral argument" that it had the same "ultimate objective" as the existing state defendants. *Id.* at 1305; *see also LBRY, Inc.*, 26 F.4th at 99 (same; discussed *supra* at 13). Law Lab has not made any such concession in this case.

Moreover, even if Federal Defendants were entitled to a presumption of adequate representation (and they are not), Law Lab would easily overcome it.

This Court has consistently held that proposed intervenors can "rebut[] the presumption[] by showing adversity of interest between themselves and the Government," for example by "demonstrat[ing] that [their] interests diverge from the putative representative's interests in a manner germane to the case." *Texas*, 805 F.3d at 662. As Law Lab's opening brief explains, this Court has repeatedly held that divergent interests indistinguishable from those at issue here sufficed to support intervention. *See* Law Lab Br. at 21–23. Indeed, the intervenors in *Texas v. United States* overcame the presumption of adequate representation for the same reason Law Lab overcomes it here. In *Texas*, this Court held that even when the government defends a policy benefiting proposed intervenors, the government's interest may still diverge from intervenors'—thereby overcoming the presumption of adequate representation—due to the government's overriding interest in "expansive . . . executive authority" and "efficiently enforcing the immigration laws." 805 F.3d at

663. Moreover, this Court held that the proposed intervenors had overcome the presumption by "specify[ing] the particular ways in which their interests diverge from the Government's." *Id.* Although both parties ultimately sought to uphold DAPA, the proposed intervenors had unique concerns—like maintaining custody of their children and obtaining work authorization—that diverged from those of the government. The proposed intervenors then tied their concerns to "real and legitimate additional or contrary arguments." *Id.* (quoting *Brumfield*, 749 F.3d at 346). This Court held the intervenors' distinct interests, coupled with their distinct arguments, were enough to overcome any presumption.

Plaintiff States say nothing whatsoever about this Court's binding precedent in *Texas*. Federal Defendants attempt to distinguish it, but their argument is utterly unpersuasive. Contrary to their suggestion (at 12), nothing in *Texas* creates a new requirement—found nowhere in Rule 24—that the proposed intervenor must take a position at least "partially opposed" to the federal government's in order to justify intervention. It is sufficient, just as it was in *Texas*, for the proposed intervenor's interests to differ from those of Federal Defendants, and for its distinct legal arguments to be tied to those interests.[5] Here, Law Lab actually seeks an entirely different form of relief driven by its plainly distinct interest in providing legal

[5] Federal Defendants mischaracterize Law Lab's position by claiming that Law Lab believes "whenever the government may have broader interests than a proposed intervenor, the inadequate-representation requirement is met." Fed. Defs. Br. at 11. Not at all. The question is whether the proposed intervenor and federal government have *different* interests and whether the federal government will adequately represent those interests.

assistance to recently arrived people seeking asylum, which is part of its organizational mission. It has diverted and will continue to divert resources to address the harms caused by Title 42 at the border. The amount of resources Law Lab will need to divert is directly proportional to the geographic scope of the district court's injunction. Federal Defendants thus miss the mark when they say that "Law Lab's interests would be entirely preserved" if "the government prevail[s]." Fed. Defs. Br. at 8.

Federal Defendants' remaining out-of-jurisdiction cases fare no better, and in any event cannot overcome the relevant Fifth Circuit cases Law Lab cited in its opening brief. *See* Law Lab Br. at 20–22. For example, the government cites the Seventh Circuit's opinion in *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793 (7th Cir. 2019). In that case, however, the proposed intervenor (the Wisconsin Legislature) sought to represent the State of Wisconsin—which was already represented by the existing defendant, the Attorney General. *See id.* at 795–96, 801. As a result, both state entities necessarily shared the same objective of "ensuring the validity of Wisconsin law," and so a presumption of adequate representation was appropriate. *Id.* at 801. Here, however, Law Lab does not seek to represent the same party as Federal Defendants, nor does it seek to ensure the validity of federal law.

Similarly, in *United States Postal Service v. Brennan*, 579 F.2d 188 (2d Cir. 1978), the Second Circuit held that a union could not intervene as of right solely to pursue a preliminary injunction because the existing plaintiff would adequately represent its interests at summary judgment. *See id.* at 191. But the holding was

premised in part on the court's conclusions that (1) the plaintiff's summary judgment motion would secure the relief sought by the union and (2) the union had not suffered irreparable harm and thus would not be entitled to injunctive relief in any event. *See id.* Those facts distinguish *Brennan*, as Law Lab seeks different relief than Federal Defendants and intervention here would not be futile.

Finally, Federal Defendants' policy arguments fail under the plain text of Rule 24(a)(2) and binding case law, not to mention the overwhelming practice in the federal courts. Federal Defendants suggest that, if Law Lab were permitted to intervene, "would-be intervenors could show inadequate representation in virtually all cases," and that cases involving federal agencies should effectively be exempt from the federal rules governing intervention as of right. Fed. Defs. Br. at 1–2; *see also id.* at 8–11. But the reality is that intervention is utterly routine when the Rule 24 factors are satisfied, even when federal agencies are involved. *See, e.g.*, *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 736 & n.9 (D.C. Cir. 2003) (reversing denial of intervention as of right and noting that "we have often concluded that governmental entities do not adequately represent the interests of aspiring intervenors"). As the Supreme Court has repeatedly emphasized, a would-be intervenor faces only a "minimal" burden of showing inadequate representation. *See, e.g.*, *Berger*, 142 S. Ct. at 2203–04. The Court should decline Federal Defendants' invitation to ignore the text of Rule 24 and binding case law on policy grounds.

II. Plaintiff States' arguments in support of a nationwide injunction lack merit.

In its opening brief, Law Lab also explained why the district court erred in concluding that the record evidence and alleged need for uniformity in immigration policy justify a nationwide injunction. Only Plaintiff States have responded to that argument. Their arguments lack merit.

A. *Law Lab provided and applied the correct standards of review.*

Plaintiff States' first merits argument is a perplexing one—they claim that Law Lab did not describe the relevant standards of review enough in its opening brief. *See* Pls. Br. at 94. Yet they recognize that Law Lab "acknowledg[es]" that this Court reviews the scope of injunctive relief for abuse of discretion and factual findings for clear error. *Id.* And they do not point to any examples where Law Lab supposedly failed to apply the correct standard of review. This Court does not require parties to repeat applicable standards of review *ad nauseum*.

B. *Plaintiff States fail to explain how the record evidence can sustain the nationwide scope of the preliminary injunction.*

As Law Lab explained in its opening brief (29–31), the federal government's prediction that "the Termination Order will result in an increase in daily border crossings," potentially as high as "18,000," provides no evidence about (1) how many (if any) individuals will enter non-plaintiff states as a result of the termination of Title 42, then (2) move to and reside in Plaintiff States, then (3) cause Plaintiff States to incur economic costs. *Id.* Law Lab also noted that the record contains no evidence linking supposedly increased costs of providing social services to the termination of Title 42 specifically, rather than to increased immigration generally.

See id. Finally, Law Lab explained that evidence related to the alleged effects of unlawful immigration cannot support Plaintiffs' standing theory absent evidence that terminating Title 42 will increase unlawful immigration, rather than simply allowing people seeking asylum at the southern border to pursue that relief under Title 8 procedures. *See id.*

Plaintiff States rely heavily on the standard of review, but they do not meaningfully engage with any of Law Lab's arguments about the complete lack of record evidence tracing their alleged injury to the challenged government policy. No standard of review, no matter how deferential, can immunize from reversal a nationwide injunction that rests on *no evidence* of harm. The best Plaintiff States muster on appeal is that it would be "preposterous (and citation-less)" to claim their harms "would flow *exclusively* from migrants crossing in Arizona and Texas." Pls. Br. at 95. But this puts the cart before the horse: the party seeking an injunction must show evidence of harm, rather than assert it and ask the opposing party to disprove it. Here, the central premise of the district court's nationwide injunction—that the termination of Title 42 in non-plaintiff states like California and New Mexico will harm Plaintiff States—was "citation-less," whether through "large-scale statistics and figures" or otherwise *Cf. id.* at 96 (citing *Texas v. Biden*, 20 F.4th 928, 971 (5th Cir. 2021), *as amended* (Dec. 21, 2021), *cert. granted*, 142 S. Ct. 1098 (2022), *and rev'd and remanded*, 142 S. Ct. 2528 (2022)).

C. *Plaintiff States' remaining arguments lack merit.*

Finally, Plaintiff States briefly raise seven ancillary issues that they claim support the nationwide scope of the district court's injunction. These undeveloped arguments are easily disposed of.

First, Plaintiff States attempt to characterize *Texas I* and *Texas IV* as creating a "default approach" favoring nationwide injunctions in immigration cases. *See* Pls. Br. at 96 (emphasis omitted). Not so. Setting aside the fact that Title 42 was created as a public health measure—not an immigration measure—this Court has recently rejected that view, explaining that *Texas I* "does not hold that nationwide injunctions are required or even the norm." *Louisiana v. Becerra*, 20 F.4th 260, 263 (5th Cir. 2021). Instead, "[a]s is true for all injunctive relief, the scope of the injunction must be justified based on the 'circumstances.'" *Id.* Thus, while "broad relief" might be appropriate in some immigration cases, *see Texas v. United States*, 40 F.4th 205, 229 n.18 (5th Cir. 2022), this Court has never held that preliminary injunctions for all immigration or immigration-adjacent policies should automatically be nationwide.

Second, Plaintiff States wrongly claim that a tailored injunction would lead to an increase in unlawful border crossings. *See* Pls. Br. at 97. But Plaintiff States' argument on this crucial point is entirely unsupported by the record. Not one shred of record evidence shows that any form of border enforcement works to decrease unlawful entry, let alone Title 42. Their position is also contradicted by common sense. Even if one believes border enforcement deters, it stands to reason that removing people after imposing consequences under Title 8 would deter *more* than removing them without such consequences under Title 42. Relatedly, barring people

from seeking asylum at ports of entry—as Title 42 does—presumably encourages people fleeing dangerous circumstances in their home countries to find other ways to cross into the United States, rather than reducing such crossings. While Law Lab maintains that no speculation of this kind can satisfy Plaintiff States' burden to produce evidence, they have failed to advance even a logical argument in support of their theory.

Third, Plaintiff States suggest that this case does not, in fact, involve public health. *See* Pls. Br. at 97. But as Law Lab explained in its opening brief, and as the record evidence demonstrates, Title 42 is a public health measure that CDC enacted in response to COVID-19, pursuant to authority under the Public Health Services Act. *See, e.g.*, Law Lab Br. at 32. And it is no answer that this Court upheld a nationwide stay for a specific public health measure in *BST Holdings, L.L.C. v. Occupational Safety & Health Administration, United States Department of Labor*, 17 F.4th 604, 611 (5th Cir. 2021). Althoughnationwide remedies *may* be appropriate in public health cases depending on the underlying facts, they can also be "too broad," as the Eleventh Circuit recently recognized. *See Georgia v. President of the U.S.*, No. 21-14269, 2022 WL 3703822, at *1 (11th Cir. Aug. 26, 2022).

Fourth and *fifth*, Plaintiff States try to defend the injunction's nationwide scope by arguing that the "legal violations here" are "systemwide/nationwide." Pls. Br. at 97–98. The problem with that response, however, is that Title 42 applies only to processing at the border and its implementation. Like most border processing policies, it has *never* been uniform. *See* Law Lab Br. at 32–33. That fact also distinguishes this case from *Texas I* and *Texas IV*, both of which involved DAPA, a

policy unrelated to border processing that would have taken effect uniformly across the entire country.

Sixth, Plaintiff States misconstrue Law Lab's public interest arguments. *See* Pls. Br. at 98. Law Lab did not, as Plaintiff States suggest, simply argue that the district court failed to consider *Law Lab's* interests. The public interest prong of the preliminary injunction test required the district court to consider harms to the public *at large*. And as Law Lab pointed out in its opening brief, the district court abused its discretion by failing to even consider the severe harm that a nationwide injunction would impose on thousands of individual non-parties seeking asylum, as well as states that are not party to this lawsuit.[6]

Seventh, Plaintiff States wrongly suggest (without support) that Law Lab needed to prove that a geographically tailored injunction "was actually workable in practice." Pls. Br. at 99. But that argument gets the parties' burdens exactly backward. Nationwide injunctions should be the rare exception, not the default. It is Plaintiff States who must bear the heavy burden to show that a nationwide injunction was "justified based on the circumstances." *Louisiana*, 20 F.4th at 263 (internal quotation marks omitted). And as Law Lab explained in its opening brief, no record evidence supports that drastic remedy here.

[6] Plaintiff States also criticize Law Lab for not citing three recent Supreme Court and Fifth Circuit decisions, which they characterize as involving the federal government's "own view of the public interest concerning COVID-19 emergency measures." Pls. Br. at 88, 98–99. It is not clear why Plaintiff States think those decisions are relevant to Law Lab's arguments, as Law Lab does not make any arguments about the government's view of the public interest.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Law Lab's opening brief, this Court should reverse the district court order denying Law Lab's motion for limited intervention and vacate the order granting Plaintiff States' motion for a nationwide preliminary injunction.

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CERTIFICATE OF SERVICE

I, Eric B. Wolff, hereby certify that on September 21, 2022, I caused the foregoing **REPLY BRIEF OF APPELLANT INNOVATION LAW LAB** 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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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify the following:

1. The foregoing brief complies with the type-volume limitations of Rule 32(a)(7)(B). The brief contains 6,338 words according to the Microsoft Word word-counting function, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f).

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.

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