No. 22-592

IN THE

Supreme Court of the United States

ARIZONA, ET AL.,

Petitioners,

v.

ALEJANDRO MAYORKAS, SECRETARY OF HOMELAND SECURITY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* THE IMMIGRATION LAW REFORM INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute[1] ("IRLI") is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts (including this Court) and administrative bodies, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 579 U.S. 547 (2016); *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018); *Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957 (9th Cir. 2017); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 942 F.3d 504 (D.C. Cir. 2019); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

SUMMARY OF ARGUMENT

Properly applied, Federal Rule of Civil Procedure 24 strikes an important balance between efficiently resolving legal disputes in a single lawsuit and preventing such a lawsuit from becoming unduly

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[1] Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amicus*, its members, or its counsel—contributed monetarily to preparing or submitting this brief.

complex or unwieldy due to the unnecessary intervention of numerous potentially interested parties. By waiting to intervene until it became clear that their interests were no longer protected by Respondents, the States followed both the spirit and the letter of Rule 24.

This Court should read Rule 24 straightforwardly to allow interested parties such as the States to wait until their interests are no longer protected by existing parties in a specific case before seeking intervention. The States' patience in seeking intervention only after their legal interests in this case were suddenly abandoned by Respondents should be rewarded, not punished. The circuit court adopted a contrary rule, a rule that would require the States to seek intervention when their policy preferences in perpetuating the Title 42 system diverged from Respondents' even though their legal positions in the case before the court remained identical. Such a rule would be burdensome to all involved and would put at risk the efficient resolution of legal disputes in cases such as this.

Although the States and the federal government may have differing policy views on whether the Title 42 system remains necessary to protect the public health under current circumstances, they both agree that the Centers for Disease Control ("CDC") orders establishing the Title 42 policy were lawfully issued pursuant to 42 U.S.C. § 265 and were not arbitrary and capricious. Respondents argued this position adequately before the district court. Only after the district court erroneously concluded that the Title 42 policy is arbitrary and capricious did

Respondents, in making it clear that they would not seek a stay of the district court's judgment pending appeal (and later by stating their intention to seek to hold their appeal in abeyance) reveal the inadequacy of their representation of the States' interests in this case.

Fundamentally, the circuit court erred by conflating Respondents' policy goals, which diverged from those of the States, with the parties' legal interests in this case, which were identical, and pursued vigorously by Respondents until shortly before the States moved to intervene. The circuit court would have required the States to anticipate that Respondents would suddenly abandon their own legal interests in this case, which they had previously shown no sign of doing, and forced the States to make a dubious attempt at intervention based on speculation. Rule 24 has no such requirement.

ARGUMENT

I. The States' intervention motion was timely.

A brief overview of the Title 42 system and the various challenges to that system is helpful in understanding the parties' policy preferences and legal positions with respect to the legal question at issue in this case, particularly as they relate to the timeliness of the States' intervention motion.

To protect public health and prevent the spread of communicable diseases, Congress authorized the Director of the CDC to "prohibit … the introduction of persons" into the United States. 42 U.S.C. § 265; *see*

also J.A. 12 (noting the delegation of this authority to the CDC Director). On March 20, 2020, the CDC exercised this authority in response to the outbreak of the COVID-19 pandemic and issued an interim rule suspending the right to introduce "covered aliens" into the United States. Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060, 17061 (March 26, 2020) (defining covered aliens as including: "aliens seeking to enter the United States at [ports of entry] who do not have proper travel documents, aliens whose entry is otherwise contrary to law, and aliens who are apprehended near the border seeking to unlawfully enter the United States between [ports of entry]"); *see id.* at 17067 ("It is necessary for the public health to immediately suspend the introduction of covered aliens."). The CDC reaffirmed its determination to suspend the introduction of covered aliens numerous times and last did so on August 2, 2021. *See* J.A. 15-17 (describing the various CDC orders between March 2020 and August 2021).

In this case, Plaintiffs challenged the CDC orders in which it exercised its authority to expel illegal aliens under 42 U.S.C. § 265 (collectively, the "Title 42 system"), which resulted in two district court decisions. In the first decision, the district court struck down the Title 42 system, concluding that § 265 does not "grant the Executive the authority to expel or remove persons from the United States." *Huisha-Huisha v. Mayorkas*, 560 F. Supp. 3d 146, 168 (D.D.C. 2021). On appeal, the D.C. Circuit disagreed at least

in part, holding that "the Executive can expel the Plaintiffs from the country. But it cannot expel them to places where they will be persecuted or tortured." *Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 722 (D.C. Cir. 2022).

Less than a month after the D.C. Circuit reversed the district court's first decision, the CDC, on April 1, 2022, sought to terminate the Title 42 system. *See* Public Health Determination and Order Regarding Suspending the Right To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists, 87 Fed. Reg. 19941 (Apr. 6, 2022). Before the CDC's termination order took effect, however, the States challenged that order, and the United States District Court for the Western District of Louisiana preliminarily enjoined the CDC's termination order because it likely violated the APA's notice-and-comment procedures. *See generally Louisiana v. Ctrs. for Disease Control & Prevention*, 2022 U.S. Dist. LEXIS 91296 (W.D. La. May 20, 2022). An appeal of that decision is currently pending before the United States Court of Appeals for the Fifth Circuit. *See Louisiana v. Ctrs. for Disease Control & Prevention*, No. 22-30303 (5th Cir.).

Following remand from the D.C. Circuit, the district court concluded on summary judgment that the Title 42 system is arbitrary and capricious and vacated the CDC orders and regulation comprising the Title 42 system. *See generally* J.A. 27-53. Concerned that Respondents would not appeal the district court's judgment in light of both the CDC's earlier attempt to terminate the Title 42 system and its announcement that it was seeking a brief, administrative stay of the

decision only, rather than a stay pending appeal, the States sought to intervene in this case. But before the district court ruled on the intervention motion, the government appealed the district court's decision to the D.C. Circuit. The States renewed their intervention motion before the D.C. Circuit and also sought a stay of the district court's judgement pending appeal. The D.C. Circuit denied the State applicants' intervention motion as untimely and dismissed the stay request as moot. This Court granted certiorari and stayed the district court's judgment pending resolution of this case.

In light of this history, there is no question that the States and Respondents have differing policy preferences with respect to the continued implementation of the Title 42 system. Respondents take the position that the Title 42 system is no longer necessary to protect the public health and should be terminated, whereas the States take the position that the Title 42 policy should not be terminated before the CDC considers all relevant factors and solicits public comments in accordance with procedures mandated by the APA. But these policy divergences did not affect Respondents' agreement on the only legal question at issue in this case, which is whether the CDC orders that first established the Title 42 system were lawfully issued pursuant to 42 U.S.C. § 265 or were instead arbitrary and capricious at the time they were issued. *See* J.A. 22 ("Plaintiffs argue that the Title 42 Process is arbitrary and capricious …."); J.A. 46 ("Having concluded that the Title 42 policy is arbitrary and capricious …."). Nor did these policy differences reduce the vigor of Respondents' advocacy of this

shared legal position—not, that is, until the district court's decision, after which Respondents abandoned any vigorous defense of the Title 42 system, but instead stated their intention effectively to cancel their own appeal by moving to hold it in abeyance, and did not seek a stay of the district court's judgment pending that appeal.

"[T]he most important circumstance relating to timeliness" is whether the States sought to intervene "'as soon as it became clear' that [their] interests 'would no longer be protected' by the parties in the case." *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1012 (2022) (quoting *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977)). There is no question that, in this case, Respondents stopped protecting the States' interests only after the district court ruled against the government on summary judgment and enjoined and vacated the Title 42 system. Up until that point, Respondents had vigorously defended the lawfulness of the CDC orders establishing the Title 42 system.

A simple counterfactual illustrates the point. Respondents argued on summary judgement that the agency actions establishing the Title 42 system were lawful under the APA. If the district court had agreed with Respondents' arguments and correctly held that the agency acted well within the bounds set forth by Congress in 42 U.S.C. § 265 and adequately considered all relevant factors, the need for the States to intervene would never have arisen. Respondents would have represented the States' interests not only adequately, but successfully.

The circuit court determined, however, that the States' motion to intervene was untimely because, according to the circuit court, the States should have sought to intervene much earlier when their interests in the continued implementation of Title 42 diverged from those of the federal government. J.A. 5-6. For example, the circuit court suggested that the States should have sought intervention when the CDC issued its order terminating the Title 42 system. *See id.*

But the CDC's attempt to terminate the Title 42 system has no bearing on the legal question *in this case*. The only legal question before the district court was whether the CDC orders establishing the Title 42 system were lawful under the APA. Any subsequent actions or changes in position by the CDC have no bearing on that legal question. Indeed, the district court's review of agency action is limited to the record as it stood at the time the agency acted. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) ("[I]n reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record."). Here, that agency action took place, at the latest, on August 2, 2021, when the CDC last reaffirmed its determination that implementation of the Title 42 system was necessary to protect the public health. Nothing that occurred after that date can or should affect the outcome of the legal question raised in this case. Nor, prior to the district court's decision, did any post-August 2, 2021, occurrence have any apparent effect on Respondents' conduct of this case that would have justified intervention. Indeed, neither Respondents nor the circuit court have identified any

legal argument in defense of the Title 42 system that Respondents failed to make or that the States could have advanced if they had sought to intervene earlier.

The Court should adopt a reading of Rule 24 that permits interested parties to do exactly what the States did here—refrain from seeking intervention as long as an existing party adequately represents their interests. Such a reading would prevent premature attempts to intervene by interested parties that would impose undue burdens on both the parties and the courts. Here, for example, the contrary reading of the circuit court would have required the States to anticipate that the federal government's policy decision to end the Title 42 process might undermine its willingness to defend its prior decision enacting that process, and would have forced the States to make a dubious bid for intervention based on speculation that Respondents might, at some point, abandon their principled defense of their prior action out of narrow expedience. The States should not now be punished for eschewing that time-wasting exercise.

In sum, by focusing on the difference in policy preferences regarding the continued implementation of Title 42, the circuit court erred by conflating the parties' legal interests *in this case* with their "interests in keeping Title 42 in place." J.A. 5. The two are not the same. Indeed, whatever the various parties' policy preferences relating to Title 42 are going forward, those preferences have no bearing on the only legal question in this case—whether the CDC acted arbitrarily and capriciously in enacting the Title 42 policy. The government's subsequent determination to terminate the Title 42 policy similarly has no bearing

on whether the CDC reasonably enacted the policy in the first place.

II. Respondents no longer adequately represent the States' interests.

Rule 24(a)'s inadequate representation requirement is not onerous, and "the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). The States amply demonstrate the inadequacy of representation by Respondents in this case ever since the district court's ruling on summary judgment, including their failure to seek a stay of the district court's judgment and their stated intention to hold the appeal in abeyance. *See* Petitioners' Brief at 46-47. An additional point bears mentioning, however.

It may be tempting to treat the public health emergency resulting from the COVID-19 outbreak as of diminished importance, particularly in light of the CDC's attempt to terminate the Title 42 system. As recently as January 11, 2023, however, the Secretary of Health and Human Services renewed his determination that a public health emergency exists as a result of the continued consequences of the COVID-19 pandemic. *See* https://aspr.hhs.gov/legal/PHE/Pages/covid19-11Jan23.aspx. Particularly in light of these conflicting signals by public health authorities, this Court should avoid taking a stance on the gravity of the emergency. It remains important, however, that, absent intervention and a stay or reversal of the district court's judgment in this case, the government's ability to exercise its authority to

prohibit the introduction of persons under 42 U.S.C. § 265 may likely be hindered in the future.

For the protection of the public health, Congress granted the CDC the authority to prohibit the introduction of persons into the United States. *See* 42 U.S.C. § 265. Nowhere in § 265 did Congress suggest that the CDC must exercise this authority via the least restrictive means. Yet the district court ruled that the CDC is constrained by this least restrictive means standard. J.A. 27-34. Respondents readily admit that the district court erred in this regard, yet intend not to seek reversal of this ruling, but merely abeyance on appeal until the case becomes moot. J.A. 219-20. Thus, absent intervention by the States, the authority of the CDC to take action in the future to protect the public health could be hindered by the district court's erroneous holding.

CONCLUSION

For the foregoing reasons, the Court should reverse the order of the Court of Appeals denying intervention.

Respectfully submitted,

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