Nos. 22A__

In the Supreme Court of the United States

STATES OF ARIZONA, LOUISIANA, MISSOURI, ALABAMA, ALASKA, KANSAS, KENTUCKY, MISSISSIPPI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, TENNESSEE, UTAH, VIRGINIA, WEST VIRGINIA, AND WYOMING.

Applicants,

v.

ALEJANDRO MAYORKAS, SECRETARY OF HOMELAND SECURITY ET AL.,

Respondents.

Addendum to Application to the Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court of the United States and Circuit Justice for the D.C. Circuit, For A Stay Pending Certiorari

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-5325 **September Term, 2022**

1:21-cv-00100-EGS

Filed On: December 16, 2022

Nancy Gimena Huisha-Huisha, and her minor child, et al.,

Appellees

v.

Alejandro N. Mayorkas, Secretary of Homeland Security, in his official capacity, et al.,

Appellants

BEFORE: Millett, Walker, and Pan, Circuit Judges

O R D E R

Upon consideration of the motion to exceed the word limits; the motion for leave to intervene on appeal, the December 14, 2022 notice regarding filings, the responses to the motion, and the lodged reply; the emergency motion for stay, the responses thereto, and the reply; and the motion for leave to file a brief as amicus curiae in support of a stay, it is

ORDERED that the motion to exceed the word limits be granted. The Clerk is directed to file the lodged reply. It is

FURTHER ORDERED that the motion for leave to intervene on appeal be denied. The movant-intervenors (the "States") may, however, participate as amici curiae. As no statute or rule governs intervention at the appellate stage, this court applies the policies underlying intervention in the district courts outlined in Federal Rule of Civil Procedure 24. See Cameron v. EMW Women's Surgical Ctr., P.S.C., 142 S. Ct. 1002, 1010 (2022); Karsner v. Lothian, 532 F.3d 876, 885 (D.C. Cir. 2008). Those factors are: "(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests." Deutsche Bank Nat'l Tr. Co. v. F.D.I.C., 717 F.3d 189, 192 (D.C. Cir. 2013) (quoting Karsner, 532 F.3d at 885).

"Timeliness is an important consideration" to be determined from all the

circumstances, Cameron, 142 S. Ct. at 1012, "especially weighing the factor[] of time elapsed since the inception of the suit," Smoke v. Norton, 252 F.3d 468, 471 (D.C. Cir. 2001) (quoting United States v. AT&T, 642 F.2d 1285, 1295 (D.C. Cir. 1980)). Intervention "will usually be denied where a clear opportunity for pre-judgment intervention was not taken." Associated Builders & Contractors, Inc. v. Herman, 166 F.3d 1248, 1257 (D.C. Cir. 1999) (quoting Dimond v. District of Columbia, 792 F.2d 179, 193 (D.C. Cir. 1986)); see NAACP v. New York, 413 U.S. 345, 365 (1973) ("If [an application] is untimely, intervention must be denied."); Associated Builders, 166 F.3d at 1257 ("If the motion was not timely, there is no need for the court to address the other factors that enter into an intervention analysis."); Amador County v. Department of the Interior, 772 F.3d 901, 903 (D.C. Cir. 2014) ("At the threshold * * * the motion to intervene must be timely.") (citing United States v. British Am. Tobacco Austl. Servs., Ltd., 437 F.3d 1235, 1238 (D.C. Cir. 2006)).

In this case, the inordinate and unexplained untimeliness of the States' motion to intervene on appeal weighs decisively against intervention.

First, although this litigation has been pending for almost two years, the States never sought to intervene in the district court until almost a week *after* the district court granted plaintiffs' partial summary judgment motion and vacated the federal government's Title 42 policy. The filing was so late in the litigation process that the federal government's filing of a notice of appeal shortly thereafter, in the States' view, deprived the district court of jurisdiction even to act on the motion. Notice Re: Pending Mot. to Intervene and Alternative Renewed Mot. to Intervene at 2–4, Huisha-Huisha v. Mayorkas, No. 22-5325 (D.C. Cir. Dec. 9, 2022). As a result, the States have asked this court to allow them to intervene for the first time in this litigation when the case is already on appeal. Id. at 4.

Second, long before now, the States have known that their interests in the defense and perpetuation of the Title 42 policy had already diverged or likely would diverge from those of the federal government's should the policy be struck down. Fourteen months ago, Texas—one of the States seeking intervention now—filed a motion to intervene in this court on the ground that "[e]volving circumstances * * * have made it apparent that Texas' interests diverge from [the federal] Defendants' and that Texas' intervention is necessary for its interests to be adequately represented." Mot. to Intervene at 2, Huisha-Huisha v. Mayorkas, No. 21-5200 (D.C. Cir. Oct. 11, 2021). Texas cited as grounds for the differing interests its concerns that the federal government would settle or otherwise not vigorously pursue preservation of its existing immigration policy, id. at 2–3, and actions by the federal government that "have called into question whether Defendants will continue to defend the Title 42 Process, or whether they might take action (i.e., a settlement, failure to pursue an appeal, or otherwise) that would be adverse to Texas," id. at 3 (emphasis added). See also id. at 14 ("[T]he potential for Defendants' representation to be inadequate has recently come

to the fore in light of the Defendants' representations in Texas' other litigations * * * and because of Defendant Mayorkas's recent promulgation of final guidance" on immigration matters.) (citation omitted); id. at 18 ("There is a palpable prospect that Defendants might resolve this litigation in a way that would harm Texas[.]").

Despite that "palpable" divergence in interests that already existed in October 2021, neither Texas nor any of the States here moved to intervene in district court on remand from this court or during the summary judgment proceedings.

On top of that, more than eight months ago, the federal government issued an order terminating the Title 42 policy. Because of the asserted consequences of that significant change in position by the federal government, the same States seeking to intervene in this case sued the federal government for failing to perpetuate the Title 42 policy and obtained a preliminary injunction against implementation of the termination order, which the federal government has appealed. See Louisiana v. CDC, __ F. Supp. 3d ___, 2022 WL 1604901 (W.D. La. May 20, 2022), appeal pending, No. 22-30303 (5th Cir.). These events not only "should have alerted the would-be intervenors" that the federal government's stake in perpetuating Title 42 differed from theirs, Cameron, 142 S. Ct. at 1013 (citing NAACP, 413 U.S. at 367), it actually did alert them. They told the district court two weeks ago: "For most of 2022, it has been clear that CDC/DHS wanted * * * to end Title 42[.]" Reply Memo. in Support of Mot. to Intervene at 1, Huisha-Huisha v. Mayorkas, No. 1:21-cv-00100 (D.D.C. Dec. 2, 2022), ECF No. 177 (emphasis added).

While the States applaud the federal government's legal arguments at summary judgment in the district court, Reply to Resps. in Support of Mot. to Intervene at 3–4, Huisha-Huisha v. Mayorkas, No. 22-5325 (D.C. Cir. Dec. 15, 2022), Texas' prior effort to intervene as well as the federal government's attempted termination of the Title 42 policy put the States on notice—in their own words—"[f]or most of 2022" that their interests in keeping Title 42 in place had long since ceased to overlap with the United States' interests. Further, given the fact that eight months ago the federal government indicated its intent to drop the Title 42 policy, it should come as no surprise to the States that the federal government has now chosen not to pursue the "extraordinary relief" of a stay pending appeal. Citizens for Responsibility & Ethics in Wash. v. FEC, 904 F.3d 1014, 1017 (D.C. Cir. 2018). Yet these long-known-about differing interests in preserving Title 42—a decision of indisputable consequence—are the only reasons the States now provide for wanting to intervene for the first time on appeal. Nowhere in their papers do they explain why they waited eight to fourteen months to move to intervene.

Given that record, this case bears no resemblance to Cameron or United Airlines, Inc. v. McDonald, 432 U.S. 385, 394 (1977), on which the States rest their claim to intervention on appeal. The States' own prior filings show that they did not

No. 22-5325 **September Term, 2022**

seek intervention "as soon as it became clear" that the intervenor's interests would no longer be protected by existing parties. Cameron, 142 S. Ct. at 1012 (quoting United Airlines, Inc., 432 U.S. at 394). While in United Airlines, "there was no reason for the respondent to suppose that [the named plaintiffs] would not later take an appeal until * * * after the trial court had entered its final judgment," 432 U.S. at 394, intervenor-movant Texas voiced that very risk more than a year ago when it told this court that "[t]here is a palpable prospect that Defendants might resolve this litigation in a way that would harm Texas—whether through a settlement, failure to pursue further appeal, or otherwise." Mot. to Intervene at 18, Huisha-Huisha v. Mayorkas, No. 21-5200 (D.C. Cir. Oct. 11, 2021). And the rest of the intervenor-movant States have known that the United States no longer shared their interest in preserving Title 42's operation "[f]or most of 2022[.]" Reply Memo. in Support of Mot. to Intervene at 1, Huisha-Huisha v. Mayorkas, No. 1:21-cv-00100 (D.D.C. Dec. 2, 2022), ECF No. 177. It is

FURTHER ORDERED that the emergency motion for stay or administrative stay be dismissed as moot. It is

FURTHER ORDERED that the motion for leave to file an amicus brief in support of a stay be dismissed as moot.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Laura M. Morgan
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NANCY GIMENA HUISHA-HUISHA, *et al.*, Plaintiffs, v. ALEJANDRO MAYORKAS, *in his official capacity as Secretary of Homeland Security, et al.*, Defendants.	Civ. Action No. 21-100(EGS)

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that Plaintiffs' Motion for Partial Summary Judgment, ECF No. 144, is **GRANTED**. The Court vacates and sets aside the Title 42 policy—consisting of the regulation at 42 C.F.R. § 71.40 and all orders and decision memos issued by the Centers for Disease Control and Prevention or the U.S. Department of Health and Human Services suspending the right to introduce certain persons into the United States; and declares the Title 42 policy to be arbitrary and capricious in violation of the Administrative Procedure Act and permanently enjoins Defendants and their agents from applying the Title 42 policy with respect to Plaintiff Class Members; and it is further

ORDERED that any request to stay this Order pending appeal will be denied for the reasons stated in the accompanying Memorandum Opinion.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
November 15, 2022

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NANCY GIMENA HUISHA-HUISHA, *et al.*, Plaintiffs, v. ALEJANDRO MAYORKAS, in his official capacity, Secretary, Department of Homeland Security, *et al.*, Defendants.	Civil Action No. 21-100 (EGS)

MEMORANDUM OPINION

Plaintiffs—a group of asylum-seeking families who fled to the United States—bring this lawsuit against Alejandro Mayorkas, in his official capacity as Secretary of Homeland Security, and various other federal government officials ("Defendants" or the "government") for violations of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq.*; the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101, *et seq.*; and the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), 8 U.S.C. § 1231 note; and the Public Health Service Act of 1944, 42 U.S.C § 201, *et seq.* *See generally* Second Am. Compl., ECF No. 131.[1] Pending before the Court is Plaintiffs' Motion for Partial

[1] When citing electronic filings throughout this Memorandum Opinion, the Court cites to the ECF page number, not the page number of the filed document.

Summary Judgment.[2] *See* Mot. Partial Summ. J., ECF No. 144. Upon consideration of the motion, the responses and replies thereto, the applicable law, the entire record, and for the reasons stated below, the Court **GRANTS** Plaintiffs' motion.

I. Background

A. Factual Background

Since 1893, federal law has provided federal officials with the authority to stem the spread of contagious diseases from foreign countries by prohibiting, "in whole or in part, the introduction of persons and property from such countries." Act of February 15, 1893, ch. 114, § 7, 27 Stat. 449, 452 ("1893 Act"). Under current law:

> Whenever the Surgeon General determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, and that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required in the interest of the public health, the Surgeon General, in accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in

[2] On August 12, 2022, the Court converted Plaintiffs' second motion for preliminary injunction to a motion for partial summary judgment, and consolidated the second motion for preliminary injunction with a determination on the merits with regard to the issue of whether the Title 42 policy is arbitrary and capricious under the Administrative Procedure Act ("APA"). *See* Fed. R. Civ. P. 65(a)(2).

> order to avert such danger, and for such period of time as he may deem necessary for such purpose.

42 U.S.C. § 265 ("Section 265"). In 1966, the Surgeon General's Section 265 authority was transferred to the Department of Health and Human Services ("HHS"), which in turn delegated this authority to the Centers for Disease Control and Prevention ("CDC") Director. *See P.J.E.S. v. Wolf*, 502 F. Supp. 3d 492, 503 (D.D.C. 2020); 31 Fed. Reg. 8855 (June 25, 1966), 80 Stat. 1610 (1966).

On March 20, 2020, as the COVID-19 virus spread globally, HHS issued an interim final rule pursuant to Section 265 that aimed to "provide[] a procedure for CDC to suspend the introduction of persons from designated countries or places, if required, in the interest of public health." Interim Final Rule, Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16559-01, 2020 WL 1330968, (March 24, 2020) ("Interim Final Rule"). Pursuant to the Interim Final Rule, the CDC Director could "suspend the introduction of persons into the United States." *Id.* at 16563. The Interim Final Rule stated, in relevant part:

> (1) Introduction into the United States of persons from a foreign country (or one or more political subdivisions or regions thereof) or

> place means the movement of a person from a foreign country (or one or more political subdivisions or regions thereof) or place, or series of foreign countries or places, into the United States so as to bring the person into contact with persons in the United States, or so as to cause the contamination of property in the United States, in a manner that the Director determines to present a risk of transmission of a communicable disease to persons or property, even if the communicable disease has already been introduced, transmitted, or is spreading within the United States;
>
> (2) Serious danger of the introduction of such communicable disease into the United States means the potential for introduction of vectors of the communicable disease into the United States, even if persons or property in the United States are already infected or contaminated with the communicable disease; and
>
> (3) The term "Place" includes any location specified by the Director, including any carrier, as that term is defined in 42 CFR 71.1, whatever the carrier's nationality.

Id. at 16566-67.

The CDC's interim rule went into effect immediately. *Id.* at 16565. The CDC explained that, pursuant to 5 U.S.C. 553(b)(3)(B) of the APA, HHS had concluded that there was "good cause" to dispense with prior notice and comment. *Id.* Specifically, the CDC stated that "[g]iven the national emergency caused by COVID-19, it would be impracticable and contrary to the public health—and, by extension, the public interest—to delay these implementing regulations until a full public notice-and-comment process is completed." *Id.*

Pursuant to the Interim Final Rule, the CDC Director issued an order suspending for 30 days the introduction of "covered aliens," which he defined as "persons traveling from Canada or Mexico (regardless of their country of origin) who would otherwise be introduced into a congregate setting in a land Port of Entry [("POE")] or Border Patrol station at or near the United States borders with Canada and Mexico." *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. 17060-02, 17061, 2020 WL 1445906 (March 26, 2020) ("March 2020 Order"). The March 2020 Order declared that "[i]t is necessary for the public health to immediately suspend the introduction of covered aliens" and "require[d] the movement of all such aliens to the country from which they entered the United States, or their country of origin, or another location as practicable, as rapidly as possible." *Id.* at 17067. The CDC Director then "requested that [the Department of Homeland Security ("DHS")] implement th[e] [March 2020 Order] because CDC does not have the capability, resources, or personnel needed to do so." *Id.* The CDC Director also noted that U.S. Customs and Border Protection ("CBP"), a federal law enforcement agency of DHS, had already "developed an operational plan for implementing the order." *Id.*

Soon thereafter, the CBP issued a memorandum on April 2, 2020 establishing its procedures for implementing the March 2020 Order. *See* Ex. E to Cheung Decl. ("CAPIO Memo"), ECF No. 57-5 at 15. The CAPIO Memo instructed that agents may determine whether individuals are subject to the CDC's order "[b]ased on training, experience, physical observation, technology, questioning and other considerations." CAPIO Memo, ECF No. 57-5 at 15. If an individual was determined to be subject to the order, they were to be "transported to the nearest POE and immediately returned to Mexico or Canada, depending on their point of transit." *Id.* at 17. Those who are "not amenable to immediate expulsion to Mexico or Canada, will be transported to a dedicated facility for limited holding prior to expulsion" to their home country. *Id.*

On April 22, 2020, the March 2020 Order was extended for an additional 30 days. *See Extension of Order Under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists*, 85 Fed. Reg. 22424-01, 2020 WL 1923282 (April 22, 2020) ("April 2020 Order"). The order was then extended again on May 20, 2020 until such time that the CDC Director "determine[s] that the danger of further introduction of COVID-19 into the United States has ceased to be a serious danger to the public health." *Amendment and Extension of Order*

Under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 31503-02, 31504, 2020 WL 2619696 (May 26, 2020) ("May 2020 Order").

On September 11, 2020, the CDC published the final rule. *See Control of Communicable Diseases; Foreign Quarantine: Suspension of the Right To Introduce and Prohibition of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes*, 85 Fed. Reg. 56424-01, 2020 WL 5439721, (Sept. 11, 2020) (Effective October 13, 2020) ("Final Rule"). The Final Rule "defin[ed] the phrase to '[p]rohibit, in whole or in part, the introduction into the United States of persons' to mean 'to prevent the introduction of persons into the United States by suspending any right to introduce into the United States, physically stopping or restricting movement into the United States, or physically expelling from the United States some or all of the persons.'" *Id.* at 56445. The CDC Director then replaced the March, April, and May 2020 Orders with a new order on October 13, 2020. *Order Suspending the Right To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists*, 85 Fed. Reg. 65806, 65808 (Oct. 16, 2020) ("October 2020 Order").

In February 2021, the President ordered the HHS Secretary and the CDC Director, in consultation with the DHS Secretary, to

"promptly review and determine whether termination, rescission, or modification of the [October order and the September regulation] is necessary and appropriate." Exec. Order No. 14,010, § 4(ii)(A), 86 Fed. Reg. 8267, 8269 (Feb. 2, 2021). On August 2, 2021, the CDC issued the order at issue in this case, "Public Health Assessment and Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists," which replaced and superseded the October 2020 Order. *Public Health Reassessment and Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists*, 86 Fed. Reg. 42828 ("August 2021 Order"). The August 2021 Order stated that "CDC has determined that an Order under 42 U.S.C. § 265 remains necessary to protect U.S. citizens, U.S. nationals, lawful permanent residents, personnel and noncitizens at the ports of entry (POE) and U.S. Border Patrol stations, and destination communities in the United States during the COVID-19 public health emergency." *Id.* at 42829-30. The August 2021 Order continued to prohibit the introduction of "covered noncitizens"—which is defined to include "family units"—into the United States along the U.S. land and adjacent coastal borders. *Id.* at 7. The Court refers to the process developed by the CDC and implemented by the August 2021 Order as the "Title 42 policy."

On April 1, 2022, the CDC terminated the August 2021 Order, with an implementation date of May 23, 2022. *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, 19942. CDC explained that "[w]hile earlier phases of the pandemic required extraordinary actions by the government and society at large," "epidemiologic data, scientific knowledge, and the availability of public health mitigation measures, vaccines, and therapeutics have permitted the country to safely transition to more normal routines." *Id.* The agency explained that "although COVID-19 remains a concern, the readily available and less burdensome public health mitigation tools to combat the disease render a [Title 42 order] . . . unnecessary." *Id.* at 19953. In view of the changed circumstances, CDC stated that "the previously identified public health risk is no longer commensurate with the extraordinary measures instituted by the CDC Orders." *Id.*

B. Procedural History

Plaintiffs filed this action on January 12, 2021. *See* Compl., ECF No. 1. Plaintiffs filed a motion for class certification on January 28, 2021, *see* Mot. Certify Class, ECF No. 23; and they filed a motion for preliminary injunction on February 5, 2021, *see* Mot. Prelim. Inj., ECF No. 57. On September 16, 2021, the Court granted both motions. *See Huisha-*

Huisha, 560 F. Supp. 3d at 155. The Court certified Plaintiffs' class and preliminarily enjoined Defendants from expelling Plaintiffs pursuant to the Title 42 policy. *Id.* In granting the preliminary injunction, the Court concluded that Plaintiffs were likely to succeed on the merits of their claim that Section 265 did not authorize deportations, that Plaintiffs would face grave harm if they were expelled without the opportunity to seek humanitarian relief, and that the balance of the equities and public interest favored an injunction. *Id.* at 167, 172, 174.

Defendants appealed the Court's decision, and the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") affirmed the preliminary injunction in part. *Huisha-Huisha*, 27 F.4th at 735. The circuit court held that, pursuant to Section 265, "the Executive can expel the Plaintiffs from the country," but "it cannot expel them to places where they will be persecuted or tortured." *Id.* at 722. Moreover, the D.C. Circuit agreed with this Court's findings that Plaintiffs have established they will suffer irreparable harm absent a preliminary injunction and that the balance of the equities favored their request. *Id.* at 733.

Although the CDC terminated the August 2021 Order one month after the D.C. Circuit's decision, *see* 87 Fed. Reg. at 19,942; on May 20, 2022, the termination order was preliminarily enjoined in a separate litigation in the United States District

Court for the Western District of Louisiana on the ground that the order violated the APA's notice-and-comment requirements, *see Louisiana v. CDC*, No. 22-cv-885, 2022 WL 1604901 (W.D. La. May 20, 2022). The government appealed the decision but did not seek to undertake notice and comment regarding the termination order.

Plaintiffs filed a second motion for preliminary injunction on August 10, 2022. *See* Pls.' Second Mot. Prelim. Inj., ECF No. 141. On August 12, 2022, the Court issued a Minute Order converting the second motion for preliminary injunction to a motion for partial summary judgment and consolidating the second motion for preliminary injunction with a determination on the merits with regard to the issue of whether the Title 42 policy is arbitrary and capricious under the APA. Min. Order (Aug. 12, 2022). The Court considered the second motion for preliminary injunction to be withdrawn without prejudice. *Id.* In view of the Court's Minute Order, Plaintiffs filed a motion for partial summary judgment on August 15, 2022, *see* Pls.' Mot., ECF No. 144; Defendants filed their opposition on August 31, 2022, *see* Defs.' Opp'n, ECF No. 147; and Plaintiffs filed their reply on September 14, 2022, *see* Pls.' Reply, ECF No. 149-1. The Court granted Defendants' motion for leave to file a surreply on September 22, 2022, and further ordered Plaintiffs to file their response to the surreply on September 30, 2022. *See* Defs.'

Surreply, ECF No. 160; Pls.' Response, ECF No. 159. The motion is ripe for adjudication.

II. Legal Standards

A. Administrative Procedure Act

The APA establishes a "basic presumption of judicial review [for] one 'suffering legal wrong because of agency action.'" *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) (quoting 5 U.S.C. § 702). That presumption can be rebutted by a showing that the relevant statute "preclude[s]" review, § 701(a)(1); or that the "agency action is committed to agency discretion by law," 5 U.S.C. § 701(a)(2). "The former applies when Congress has expressed an intent to preclude judicial review." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). The latter applies: (1) "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); and (2) when "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," *Heckler*, 470 U.S. at 830. "Agency actions in these circumstances are unreviewable because the courts have no legal norms pursuant to which to evaluate the challenged action, and thus no concrete limitations to impose on the agency's exercise of discretion." *Sierra Club v. Jackson*, 648 F.3d 848, 855 (D.C. Cir. 2011) (citation omitted).

If reviewable, courts consider "both the nature of the administrative action at issue and the language and structure of the statute that supplies the applicable legal standards for reviewing that action" in determining whether an action is committed to agency discretion. *Sec. of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 156 (D.C. Cir. 2006) (citation omitted). However, Section 701(a)(2) "provides a 'very narrow exception' that applies only in 'rare instances.'" *Cody v. Cox*, 509 F.3d 606, 610 (D.C. Cir. 2007) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)). Courts "begin with the strong presumption that Congress intends judicial review of administrative action[] unless there is persuasive reason to believe that such was the purpose of Congress." *Ramah Navajo School Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1343-44 (D.C. Cir. 1996) (citations omitted).

B. Summary Judgment

Plaintiffs seek review of an administrative decision under the APA. Therefore, the standard articulated in Federal Rule of Civil Procedure 56 is inapplicable because the Court has a more limited role in reviewing the administrative record. *Wilhelmus v. Geren*, 796 F. Supp. 2d 157, 160 (D.D.C. 2011) (internal citation omitted). "[T]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision

it did." *See Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006)(internal quotation marks and citations omitted). "Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Wilhelmus*, 796 F. Supp. 2d at 160 (internal citation omitted).

III. Analysis

Plaintiffs argue that the Title 42 Process is arbitrary and capricious because: (1) the CDC failed to apply the "least restrictive means" standard when authorizing the policy; (2) the policy does not rationally serve its stated purpose in view of the alternatives; and (3) the CDC failed to consider the harm the policy would inflict on impacted individuals. Pls.' Mot., ECF No. 144-1 at 10-11. For the reasons below, the Court concludes that summary judgment is appropriate for Plaintiffs.

A. Plaintiffs' Claim Is Reviewable

Defendants contend that Plaintiffs' claim is exempted from judicial review under the APA because the decision to "issue, modify, or terminate a Title 42 order" is committed to the CDC's discretion by law, and Title 42 "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." Defs.' Opp'n, ECF No. 147 at 17 (citing 5 U.S.C. § 701(a)(2); *Lincoln v. Vigil*, 508 U.S. 182, 191-93

(1993)). The Court, however, concludes that Defendants have not overcome the "strong presumption of reviewability" under the APA. *Steenholdt v. FAA*, 314 F.3d 633, 638 (D.C. Cir. 2003) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)).

First, the Title 42 Process "does not fall into one of the narrow categories that usually satisfies the strictures of subsection 701(a)(2)." *Cody v. Cox*, 509 F.3d 606, 610 (D.C. Cir. 2007) (citing *Lincoln*, 508 U.S. at 191-92). This case does not involve "second-guessing executive branch decision[s] involving complicated foreign policy matters," *id.* (quoting *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 104 F.3d 1349, 1353 (D.C. Cir. 1997)); "an agency's refusal to undertake an enforcement action," *id.* (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)); or a "determination about how to spend a lump-sum appropriation," *id.* (citing *Lincoln*, 508 U.S. at 192).

Second, and contrary to Defendants' assertion, the fact that CDC's determination under Section 265 may "involve[] a complicated balancing of a number of factors which are peculiarly within the agency's expertise," Defs.' Opp'n, ECF No. 147 at 18; does not on its own compel the conclusion that such decisions are unreviewable, *see, e.g.*, *Louisiana v. CDC*, No. 6:22-cv-00885, 2022 WL 1604901, at *17 (W.D. La. May 20, 2022) (holding that CDC's decision to terminate its prior Title 42

orders was subject to judicial review); *Texas v. Biden*, No. 4:21-cv-0579-P, 2022 WL 658579, at *11–12 (N.D. Tex. Mar. 4, 2022) (finding CDC's July 2021 and August 2021 orders were not committed to agency discretion); *Health Freedom Def. Fund, Inc. v. Biden*, No. 8:21-cv-1693-KKM-AEP, 2022 WL 1134138, at *18–20 (M.D. Fla. Apr. 18, 2022) (reviewing CDC regulation mandating mask usage in certain locations during COVID-19 pandemic); *Florida v. Becerra*, 544 F. Supp. 3d 1241, 1292–94 (M.D. Fla. 2021) (reviewing CDC's "no-sail orders" that halted the cruise industry's operation from March 2020 through October 2020). As Plaintiffs point out, "nearly every agency decision involves a balancing of factors, and frequently involve highly technical issues, so Defendants' rule would essentially gut the APA's strong presumption favoring review." Pls.' Reply, ECF No. 149-1 at 9. Indeed, the D.C. Circuit rejected a similar argument in *Cody v. Cox*, 509 F.3d 606 (D.C. Cir. 2007). In *Cody*, the circuit court addressed whether a provision requiring an agency retirement home to provide "high quality and cost-effective" health care was reviewable under the APA. 509 F.3d at 610. The D.C. Circuit concluded that although the statute gave the agency "broad discretion in administering care" and "'high quality and cost-effective' health care is a tricky standard for a court to apply," the provisions at issue did not commit decisions to agency discretion by law. *Id.*

Moreover, Defendants cite no case law supporting their contention that an agency's public health decisions are outside the judiciary's purview. Rather, Defendants point to a line of cases standing for the proposition that courts typically grant agencies *deference* when reviewing their public health determinations. *See* Defs.' Opp'n, ECF No. 147 at 18-19. However, whether an agency is given deference is a different issue from whether an agency's decision is reviewable in the first instance, and none of the cases Defendants cite involve the application of Section 701(a)(2). *See FDA v. Am. Coll. Of Obstetricians & Gynecologists*, 141 S. Ct. 578, 579 (2021) (Roberts, C.J., concurring in grant of stay application) (stating that the question before the court was "whether the District Court properly ordered the FDA to lift [certain] established requirements because of the court's own evaluation of the impact of the COVID-19 pandemic"); *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (finding that it was "improbable" that California's restrictions on social gatherings during the pandemic were unconstitutional, where party sought emergency relief in an interlocutory posture); *Marshall v. United States*, 414 U.S. 417, 427 (1974) (considering "petitioner's claim that the provisions of Title II of the Narcotic Addict Rehabilitation Act of 1966 . . . deny due

process and equal protection by excluding from discretionary rehabilitative commitment, in lieu of penal incarceration, addicts with two or more prior felony convictions"); *Jacobson v. Massachusetts*, 197 U.S. 11, 30 (1905) (reviewing constitutionality of state provisions relating to vaccination).

Third, the Court also disagrees that Section 265 "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." Defs.' Opp'n, ECF No. 147 at 19. Section 265 mandates that, whenever the CDC Director determines that there is a "*serious danger* of the introduction" of a "communicable" disease into the country, the CDC "shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem *necessary for such purpose*" and when "*required* in the interest of public health." 42 U.S.C. § 265 (emphasis added); *see also* 87 Fed. Reg. 19941, 19955 (Apr. 2022 Order) ("[T]his authority extends only for such period of time deemed necessary to avert the serious danger of the introduction of a quarantinable communicable disease into the United States."). Despite the use of the words "may" and "deem" in the statute, the D.C. Circuit has "regularly found Congress has not committed decisions to agency discretion under far more permissive and indeterminate language." *Cody*, 509 F.3d at 610-11 (citing

Dickson v. Sec'y of Def., 68 F.3d 1396 (D.C. Cir. 1995) (reviewing provision stating that agency "may" take an action if it finds it to be "in the interest of justice"); *see also Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1224 (D.C. Cir. 1993) ("[T]he government, in our view, puts too much emphasis on the word 'deem.'"). The statute, therefore, "limit[s] the agency's discretion in discrete ways." *Sierra Club v. U.S. Fish & Wildlife Serv.*, 930 F. Supp. 2d 198, 209 (D.D.C. 2013).

As the D.C. Circuit has explained, "[t]he mere fact that a statute grants broad discretion to an agency does not render the agency's decisions completely nonreviewable under the 'committed to agency discretion by law' exception unless the statutory scheme, taken together with other relevant materials, provides *absolutely no guidance* as to how that discretion is to be exercised." *Robbins v. Reagan*, 780 F.2d 37 (D.C. Cir. 1985) (emphasis added) ("[G]iven the fact that the statute limits the uses for which the funds can be used, we see no barrier to our assessing whether the agency's decision was based on factors that are relevant to this goal."). Because Section 265 provides meaningful standards against which to examine agency action, Plaintiffs' claim is reviewable.

B. The Title 42 Process Is Arbitrary and Capricious

1. Defendants Failed to Apply the Least Restrictive Means Standard

The D.C. Circuit has explained that "[r]easoned decision-making requires that when departing from precedents or practices, an agency must 'offer a reason to distinguish them or explain its apparent rejection of their approach.'" *Physicians for Social Responsibility v. Wheeler*, 956 F.3d 634, 644 (D.C. Cir. 2020) (quoting *Sw. Airlines Co. v. FERC*, 926 F.3d 851, 856 (D.C. Cir. 2019)). Not "every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance." *Grace v. Barr*, 965 F.3d 883, 900 (D.C. Cir. 2020) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009)). However, the agency may not "gloss[] over or swerve[] from prior precedents without discussion." *Id.* (quoting *Sw. Airlines*, 926 F.3d at 856).

Plaintiffs argue that the Title 42 Process is arbitrary and capricious because the CDC (1) failed to impose the "least restrictive means necessary to prevent the spread of disease" when implementing the policy and (2) failed to explain its departure from this "settled practice." Pls.' Mot., ECF No. 144-1 at 11-12. According to Plaintiffs, CDC had previously "clarif[ied]" this standard in *Control of Communicable Diseases*,

82 Fed. Reg. 6890, 6912 (Jan. 19, 2017) ("2017 Final Rule"). Pls.' Reply, ECF No. 149-1 at 14 (quoting 82 Fed. Reg. 6890, 6912). The 2017 Final Rule amended CDC regulations "governing its domestic (interstate) and foreign quarantine regulations" following the "largest outbreak of Ebola virus disease . . . on record" and the "outbreak of Middle East Respiratory Syndrome (MERS)." 82 Fed. Reg. at 6890-91. The rule was intended to "enhance HHS/CDC's ability to prevent the introduction, transmission, and spread of communicable diseases into the United States and interstate by clarifying and providing greater transparency regarding its response capabilities and practices." *Id.* Among other things, the 2017 Final Rule "clarif[ied]" that "in all situations involving quarantine, isolation, or other public health measures, it seeks to use the least restrictive means necessary to prevent spread of disease." *Id.* at 6912.

Defendants, however, dispute that CDC's Title 42 orders are subject to the "least restrictive means" standard. In Defendants' view, the 2017 Final Rule provided that the standard applies solely in the context of quarantine and isolation, and only with regard to measures implemented "*under this [2017] Final Rule*." Defs.' Opp'n, ECF No. 147 at 28 (quoting 82 Fed. Reg. at 6890). The Court disagrees with Defendants.

First, the Court is not convinced that the Title 42 orders do not fall into the category of a "quarantine, isolation, or

other public health measures," as contemplated by the 2017 Final Rule. The August 2021 Order, after all, specifically concerns "quarantinable communicable diseases," discusses the feasibility of quarantine or isolation of individuals, and lists 42 U.S.C. § 268 as its legal authority, which in turn sets out the "[q]uarantine duties of consular and other officers." 86 Fed. Reg. at 42838; 42 U.S.C. § 268; *see also id.* § 268(b) ("It shall be the duty of the customs officers and of Coast Guard officers to aid in the enforcement of quarantine rules and regulations."). Moreover, Dr. Anne Schuchat, the former CDC principal deputy director in 2020, testified before the House of Representatives that some in the agency did not believe that the agency's adoption of the March 2020 Order was appropriately "based on criteria for *quarantine*."[3] Ex. A to Cheung Decl., ECF No. 144-3 at 7 (emphasis added). She further testified that "the typical issue is, the least restrictive means possible to protect public health is when you exert a quarantine order

[3] The Court considers Dr. Schuchat's extra-record testimony to evaluate the existence of a "least restrictive means" standard with respect to public health measures generally. *See, e.g.*, *Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 386 n.4 (D.C. Cir. 2018) ("The district court struck many of the Project's declarations because they were outside of the administrative record considered by the Labor Department in promulgating its 2015 Rule. But as relevant here, the Project employs the declarations for the distinct and permissible purpose of proving that the Department of Homeland Security has a practice or policy of routinely extending H-2A visa status for three years." (internal citation omitted)).

versus other measures. And the bulk of the evidence at that time did not support this policy proposal." *Id.*

Even the examples the 2017 Final Rule provided of measures requiring the "least restrictive means" test did not include quarantine or isolation as their primary recommendations. Rather, the 2017 Final Rule stated:

> HHS/CDC agrees and clarifies that in all situations involving quarantine, isolation, or other public health measures, it seeks to use the least restrictive means necessary to prevent spread of disease. Regarding quarantine, as an example, during the 2014-2016 Ebola epidemic, HHS/CDC recommended monitoring of potentially exposed individuals rather than quarantine. Most of these people were free to travel and move about the community, as long as they maintained daily contact with their health department. For some individuals with higher levels of exposure, HHS/CDC recommended enhanced monitoring (involving direct observation) and, in some cases restrictions on travel and being in crowded places, but did not recommend quarantine. HHS/CDC has the option of "conditional release" as a less restrictive alternative to issuance of an order of quarantine or isolation.

82 Fed. Reg. at 6912. The August 2021 Order similarly considered the availability of facilities for isolation and quarantine before determining it was not a feasible option. *See e.g.*, 86 Fed. Reg. at 42836 (stating that releasing family units to communities required, among other things, quarantine facilities, but that such facilities would not be available for all individuals). And significantly, the CDC applied the "least

restrictive means" standard in the April 2022 Order terminating the Title 42 policy, stating that the agency had "determined that *less restrictive means* are available to avert the public health risks associated with the introduction, transmission, and spread of COVID-19 into the United States." 87 Fed. Reg. at 19955 (emphasis added); *see also* 87 Fed. Reg. at 15252 (rescinding Title 42 policy as to unaccompanied children and explaining "CDC is committed to using the least restrictive means necessary and avoiding the imposition of unnecessary burdens in exercising its communicable disease authorities.").

Further, whether the specific goals of the 2017 Final Rule does not preclude a finding that the agency's practice was to apply the "least restrictive means" test more broadly. After all, the 2017 Final Rule did not state that it was applying the "least restrictive means" test for the first time; instead, the CDC explained that the intent behind the rule was "to clarify the agency's standard operating procedures and policies." 82 Fed. Reg. at 6931. For example, in noting that the agency had "received several comments requesting the 'least restrictive' means with respect to quarantine and isolation," the CDC not only clarified that it used the "least restrictive means" with respect to those two specific contexts, but also "agree[d] and clarifie[d]" that the agency sought to use that standard "in *all situations* involving quarantine, isolation, or *other public*

measures." 82 Fed. Reg. at 6912 (emphasis added). Defendants' contention that the "least restrictive" standard applies only to U.S. citizens similarly fails because the CDC has clarified that it "appl[ies] communicable disease control and prevention measures uniformly to all individuals in the United States, *regardless of citizenship*, religion, race, or country of residency." 89 Fed. Reg. at 6894 (emphasis added).

Finally, Defendants point to other CDC regulations governing mask mandates and pre-departure COVID-19 testing requirements as examples of measures CDC implemented without applying the standard at issue.[4] Defs.' Opp'n, ECF No. 147 at 28-29 (citing 86 Fed. Reg. 69256 (Dec. 7, 2021); 86 Fed. Reg. 8025 (Feb. 3, 2021); 85 Fed. Reg. 86933 (Dec. 31, 2020)). Defendants argue that these examples demonstrate that "CDC routinely implements [public health] measures without regard" to the standard. *Id.* However, the Court agrees with Plaintiffs that "masking or testing are among the least restrictive COVID-19 measures available," and, by contrast, "Title 42 expulsions are, in the CDC's *own* view, 'among the most restrictive measures CDC has undertaken' against COVID-19.'" Pls.' Reply, ECF No. 149-1

[4] Defendants also cite to "regulations governing medical examinations of certain noncitizens seeking to enter the United States." Defs.' Opp'n, ECF No. 147 at 28-29. This regulation, however, was implemented prior to the 2017 Final Rule's policy clarification.

at 15-16 (quoting 87 Fed. Reg. at 19951). Moreover, the CDC has applied the standard to more comparable public health measures, such as those regarding the introduction of persons into the country during the Ebola virus outbreak. *See Control of Communicable Diseases*, 82 Fed. Reg. 6890, 6896 (stating that "HHS/CDC used the best available science and risk assessment procedures . . . and principles of least restrictive means to successfully ensure that measures to ban travel between the United States and the affected countries were unnecessary" during Ebola outbreak).

Defendants argue, however, that "[i]n any event, CDC's August 2021 order ultimately was in fact the least restrictive means available to prevent the further introduction of COVID-19 into the United States at the borders at the time it was issued." Defs.' Opp'n, ECF No. 147 at 29. They contend that "while CDC may not have expressly used the term 'least restrictive means,' the substance of CDC's August order makes clear that CDC did, in practice, issue an order that was in fact the least restrictive means available to protect the country from further introduction, transmission, and spread of COVID-19." *Id.* at 30. However, a plain reading of the August 2021 Order does not indicate that the CDC instituted the "least restricted means available," and a discussion of potential

mitigation measures does not necessarily mean that the least burdensome measures were selected.

The Court therefore concludes that the August 2021 Order is arbitrary and capricious due to CDC's "failure to acknowledge and explain its departure from past practice." *Grace*, 965 F.3d at 903. (finding that agency's "failure to acknowledge the change in policy is especially egregious given its potential consequences for asylum seekers").

2. Defendants Failed to Consider the Consequences of Suspending Immigration to Covered Noncitizens

Plaintiffs further argue that the Title 42 orders are arbitrary and capricious because the CDC failed to consider the harms to migrants subject to expulsion. Pls.' Mot., ECF No. 144-1 at 26. Defendants, in opposition, argue that the CDC was not required to consider the harms to noncitizens because "neither the statute nor the implementing regulation calls for the CDC Director to engage in any such balancing of harms." Defs.' Opp'n, ECF No. 147 at 41-42. The "sole inquiry," in Defendants' view, is whether a Title 42 order "is required in the interest of the public health." *Id.* at 42.

As an initial matter, consideration of the negative impacts that the measures would have on migrants was required by the least restrictive means standard. *See, e.g.*, 82 Fed. Reg. at 6896 (weighing the necessity of measures to ban travel to the

United States against the "dramatic negative implications for travelers and industry").

Moreover, and as set forth above, the APA requires that agencies engage in "reasoned decisionmaking." *Dep't of Homeland Sec. v. Regents of the Univ. of Calif.*, 140 S. Ct. 1891, 1913 (2020). "Under this narrow standard of review, a court is not to substitute its judgment for that of the agency, but instead to assess only whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* at 1905 (2020) (internal quotation marks omitted) (citation omitted). "That task involves examining the reasons for agency decisions—or, as the case may be, the absence of such reasons." *Judulang v. Holder*, 565 U.S. 42, 53 (2011). Here, the consequences of suspending immigration proceedings for all covered noncitizens was a "relevant factor," or an "important aspect of the problem," that CDC should have considered. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

And contrary to Defendants' argument, the factors that an agency must consider are not limited to those that are expressly mentioned within a statute or regulation. For example, the Supreme Court in *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 18981 (2020), held that the agency was required to consider any reliance interests prior

to terminating Deferred Action for Childhood Arrivals, despite the lack of statute or regulation mandating that the agency do so. *See Regents*, 140 S. Ct. at 1914-15 (considering whether agency appropriately addressed whether there was "legitimate reliance" on DACA program prior to rescission).

Although Defendants are correct that Section 265 is concerned with preventing the introduction of communicable disease into the United States, the *means* of prevention is just as relevant. It is unreasonable for the CDC to assume that it can ignore the consequences of any actions it chooses to take in the pursuit of fulfilling its goals, particularly when those actions included the extraordinary decision to suspend the codified procedural and substantive rights of noncitizens seeking safe harbor. *See Huisha-Huisha*, 27 F.4th at 724-25 (describing the "procedural and substantive rights" of aliens, such as asylum seekers, "to resist expulsion"); *cf. Regents*, 140 S. Ct. at 1914-15 (holding that agency should have considered the effect rescission of DACA would have on the program's recipients prior to the agency making its decision). As Defendants concede, "a Title 42 order involving persons will *always* have consequences for migrants," Defs.' Opp'n, ECF No. 147 at 42, and numerous public comments during the Title 42 policy rulemaking informed CDC that implementation of its orders would likely expel migrants to locations with a "high

probability" of "persecution, torture, violent assaults, or rape." *See* Pls.' Mot., ECF No. 144-1 at 27; *see also id.* at 27-28 (listing groups subject to expulsion under Title 42, including "survivors of domestic violence and their children, who have endured years of abuse"; "survivors of sexual assault and rape, who are at risk of being stalked, attacked, or murdered by their persecutors in Mexico or elsewhere"; and "LGBTQ+ individuals from countries where their gender identity or sexual orientation is criminalized or for whom expulsion to Mexico or elsewhere makes them prime targets for persecution" (citing AR, ECF No. 154 at 28-29, 47, 153) (cleaned up)). It is undisputed that the impact on migrants was indeed dire. *See, e.g.*, *Huisha-Huisha*, 27 F.4th at 734 (finding Plaintiffs would suffer irreparable harm if expelled to places where they would be persecuted or tortured).

The CDC "has considerable flexibility in carrying out its responsibility," *Regents*, 140 S. Ct. at 1914, and the Court is mindful that it "is not to substitute its judgment for that of the agency," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). But regardless of the CDC's conclusion, its decision to ignore the harm that could be caused by issuing its Title 42 orders was arbitrary and capricious.

3. The Title 42 Policy Failed to Adequately Consider Alternatives

Plaintiffs also argue that the Title 42 policy is arbitrary and capricious because CDC failed to adequately consider alternatives and the policy did not rationally serve its stated purpose. *See* Pls.' Mot., ECF No. 144-1 at 10-11.

First, Plaintiffs contend that "CDC failed to adequately consider other 'alternative way[s] of achieving [its] objective' that were raised by commenters and were available from the very beginning—namely self-quarantine and outdoor processing." Pls.' Mot., ECF No. 144-1 at 21.

With regard to self-quarantine measures, the Court disagrees. The record shows that commenters informed CDC that the "vast majority (approximately 92%) of migrants have family or friends already in the United States," and proposed that covered noncitizens could self-quarantine or self-isolate in these homes or in the shelters of community and faith-based organizations. Pls.' Mot., ECF No. 144-1 at 21. In responding to this proposed alternative, CDC stated that even if it "were to assume that many covered aliens have family or close friends in the United States," the commenters had not provided evidence that the "family or close friends had personal residences and, if so, whether they would make them available as self-quarantine or self-isolation locations." 85 Fed. Reg. at 56452. Nor did the

commenters "look at whether residences were suitable for self-quarantine or self-isolation in compliance with HHS/CDC guidelines." *Id.* CDC "maintain[ed] that its implementation of a self-quarantine or self-isolation protocol for covered aliens would consume undue HHS/CDC and CBP resources without averting the serious danger of the introduction of COVID-19 into CBP facilities" and that "[e]xpulsion is a more effective public health measure for CBP facilities that preserves finite HHS/CDC resources for other public health operations." *Id.* Thus, based on the record evidence, it appears that CDC considered the possibility of permitting self-quarantining, but ultimately concluded that lack of resources made it impractical.

However, Defendants failed to consider another "obvious and less drastic alternative" and give a reasoned explanation for its rejection of the alternative. *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 n.36 (D.C. Cir. 1986); *see also Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 997 F.3d 1247, 1255 (D.C. Cir. 2021). In the August 2021 Order, the CDC noted the risk of spreading COVID-19 to others "when people are in close contact with one another . . . , especially in crowded or poorly ventilated indoor settings." 86 Fed. Reg. at 42832. Due to this risk, the CDC indicated that processing under Title 42 presented a safer alternative to processing under Title 8 because "processing an individual for expulsion under the CDC

order takes roughly 15 minutes and generally happens outdoors." *Id.* at 42836. However, the August 2021 Order makes no mention of whether Title 8 processing could also take place outdoors, as suggested by at least one commenter as a less drastic measure to expulsion. *See generally id.*; AR, ECF No. 154 at 9; Pls.' Mot., ECF No. 144-1 at 20-21. And although Defendants state in their opposition brief that "[o]utdoor processing . . . was unavailable in August 2021," they do so without citation to the record. Defs.' Opp'n, ECF No. 147 at 33. It is well-established that courts "look only to what the agency said at the time of the [action]—not to its lawyers' post-hoc rationalizations," *Grace*, 965 F.3d at 903 (quoting *Good Fortune Shipping SA v. Comm'r of Internal Revenue Serv.*, 897 F.3d 256, 263 (D.C. Cir. 2018)). Because Defendants' explanation "falls well short of what is needed to demonstrate the agency grappled with an important aspect of the problem before it considered another reasonable path forward," *Spirit Airlines*, 997 F.3d at 1255; CDC's failure to consider such an important alternative is arbitrary and capricious, *see, e.g.*, *Yakima Valley*, 794 F.2d at 746 n.36 (noting that "[t]he failure of an agency to consider obvious alternatives has led uniformly to reversal"); *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 80 (D.C. Cir. 2000) ("To be regarded as rational, an agency must . . .

consider significant alternatives to the course it ultimately chooses").

Next, Plaintiffs argue that "Defendants could have instituted testing, vaccination, and quarantine protocols, rather than continuing to authorize expulsions." Pls.' Mot., ECF No. 144-1 at 17. Defendants dispute Plaintiffs' contention, arguing that CDC had determined that "[o]n-site COVID-19 testing for noncitizens at CBP holding facilities [was] very limited," off-site testing would harm community healthcare facilities, and "vaccination programs [were] not available at th[at] time." Defs.' Opp'n, ECF No. 147 at 32-33.

"Agencies 'have an obligation to deal with newly acquired evidence in some reasonable fashion,' . . . [and] to 'reexamine' their approaches 'if a significant factual predicate changes.'" *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011) (quoting *Catawba Cty. v. EPA*, 571 F.3d 20, 45 (D.C. Cir. 2009); *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992)). Moreover, an agency's statements "must be one of 'reasoning'; it must not be just a 'conclusion'; it must 'articulate a satisfactory explanation' for its action." *Butte Cty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) (quoting *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001)).

Here, the March 2020 Order listed the lack of vaccines, "approved therapeutics," and rapid testing as justifications for

the emergency measures. *See* 85 Fed. Reg. at 17062. Thus, the relevant "significant factual predicate change[]" with regard to the August 2021 Order was the development and disbursal of COVID-19 vaccines, on-site rapid antigen tests, and effective therapeutics. *See* Pls.' Mot., ECF No. 144-1 at 17-18; *see also* 86 Fed. Reg. at 42833 (mentioning the wide availability of vaccines and antigen tests). The CDC therefore was required to "reexamine" its approach in view of the rapidly changing healthcare environment.

The Court concludes that CDC failed to appropriately consider the availability of effective therapeutics that "reduce[d] the risk of hospitalization" by approximately 70 percent in its August 2021 Order. *See* Pls.' Mot., ECF No. 144-1 at 18; AR, ECF No. 154 at 143 (listing the availability of monoclonal antibody doses and their effectiveness against COVID-19). Defendants do not dispute that the August 2021 Order failed to even mention such treatments or their overall availability. Defs.' Opp'n, ECF No. 147 at 33. Instead, Defendants cite to the April 2022 termination order as explaining that the treatments were not as widespread or as diverse in August 2021 and were difficult to administer. Defs.' Opp'n, ECF No. 147 at 33 (citing 87 Fed. Reg. at 19950); *see also* 87 Fed. Reg. at 19950 ("Although monoclonal antibodies were available in August 2021 and some continue to be effective and were widely used during

the Omicron wave, such treatments must be administered by infusion and are cumbersome to administer."). However, whether CDC analyzed the availability of treatments in April 2022 does not establish that it did so in August 2021. CDC therefore failed to "deal with newly acquired evidence in some reasonable fashion" with regard to therapeutics. *Portland*, 665 F.3d at 187.

With regard to whether Defendants could have "ramped up vaccinations, outdoor processing, and all the other available public health measures," *Butte Cty.*, 613 F.3d at 194, the Court finds that CDC failed to articulate a satisfactory explanation for why such measures were not feasible. Defendants argue that CDC did consider the availability of mitigation measures, but ultimately, they were limited by the "operational reality." Defs.' Opp'n, ECF No. 147 at 32-33. For example, in August 2021, Defendants explained that DHS had not yet begun initiating a vaccination program and on-site testing was "very limited." *Id.* Moreover, quarantine measures were unavailable because CDC "'lacks the resources, manpower, and facilities to quarantine covered aliens' and must rely on the 'Department of Defense, other federal agencies, and states and local governments to provide both logistical support and facilities for federal quarantines.'" *Id.* at 33 (quoting 85 Fed. Reg. at 17,067 n.66). However, CDC's statements are largely conclusory and do not reflect any serious analysis of whether reasonable steps could

have been taken to at least begin instituting vaccination programs, particularly given that all Americans had been eligible for the vaccine for more than three months by that point, and increasing the supply of on-site testing. *See* AR, ECF No. 154 at 56. Further, despite CDC's finding in March 2020 that DHS could "build and start bringing hard-sided facilities online" in "90 days (likely more)," 85 Fed. Reg. at 17067 n.66; there is no indication why those efforts still would not have addressed the public health emergency months later. The Court agrees with Plaintiffs that Defendants cannot rest on the "operational reality" when Defendants themselves had the power to change that reality. *See* Pls.' Reply, ECF No. 149-1 at 22 ("After leaning on DHS to implement Title 42, CDC cannot now turn around and claim that DHS had no responsibility to take steps to avoid the continued human suffering of so many vulnerable asylum-seekers."); *see also Portland*, 665 F.3d at 187 ("It is nothing more than a determination that EPA would not address the problem unless it happened to appear at an inconvenient time—an eventuality over which EPA had full control. The refrain that EPA must promulgate rules based on the information it currently possesses simply cannot excuse its reliance on that information when its own process is about to render it irrelevant.").

Finally, Plaintiffs argue that the Title 42 policy did not rationally serve its stated purpose because "COVID-19 was already rampant in the United States in August 2021, the egregious disjuncture between its stated goal of banning infectious migration and the narrow group of travelers it actually targeted, and the ways the Title 42 Policy *contributed* to spreading disease." Defs.' Reply, ECF No. 149-1 at 22 (internal citations omitted).

The Court finds that the fact that COVID-19 was already "widespread" within the United States at the time of the August 2021 Order is not sufficient to show that the Title 42 policy did not rationally serve its stated purpose. *See* Pls.' Mot., ECF No. 144-1 at 22-23. The relevant regulation defines "serious danger of the introduction of [a] quarantinable communicable disease into the United States" as "the probable introduction of one or more persons capable of transmitting the quarantinable communicable disease into the United States, even if persons or property in the United States are already infected or contaminated with the quarantinable communicable disease." 42 C.F.R. § 71.40(b)(3). Although Plaintiffs contend that CDC's definition "simply cannot be a *rational* public health rule," they otherwise do not provide any arguments regarding why the Court should not defer to CDC's interpretation of the term "serious danger." *See* Pls.' Reply, ECF No. 149-1 at 22-23. In view of CDC's scientific and technical expertise, the Court does not find the definition to be unreasonable.

However, despite the above, Defendants have not shown that the risk of migrants spreading COVID-19 is "a real problem." *District of Columbia v. U.S. Dep't of Agric.*, 444 F. Supp. 3d 1, 27 (D.D.C. 2020) (citing *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 841 (D.C. Cir. 2006)). "Professing that an agency action ameliorates a real problem but then citing no evidence demonstrating that there is in fact a problem is not reasoned decisionmaking." *Id.* (cleaned up); *see Huisha-Huisha*, 27 F.4th at 735 ("[W]e would be sensitive to declarations in the record by CDC officials testifying to the efficacy of the § 265 Order. But there are none."). As Plaintiffs point out, record evidence indicates that "during the first seven months of the Title 42 policy, CBP encountered on average just one migrant per day who tested positive for COVID-19." Pls.' Mot., ECF No. 144-1 at 22 (citing Sealed AR, ECF No. 155-1 at 23). In addition, at the time of the August 2021 Order, the rate of daily COVID-19 cases in the United States was almost double the incidence rate in Mexico and substantially higher than the incidence rate in Canada. *See* 86 Fed. Reg. at 42831 (noting 137.9 daily cases per 100,000 people in the United States, compared to 68.6 in Mexico and 8.0 in Canada). The lack of evidence regarding the effectiveness of the Title 42 policy is especially egregious in view of CDC's previous conclusion that "the use of quarantine and travel restrictions, in the absence of evidence of their utility, is detrimental to efforts to combat the spread of communicable disease," *Control of Communicable Diseases*, 82 Fed.

Reg. 6890, 6896; as well as record evidence discussing the "recidivism" created by the Title 42 policy, which actually increased the number of times migrants were encountered by CBP, *see* AR, ECF No. 154 at 45 (commenter describing recidivism); AR, ECF No. 155-1 at 4 (January/February 2021 statistics showing nearly 40% of family units DHS encountered in January-February 15, 2021 were migrants who had attempted to cross at least once before).

Moreover, it is undisputed that the suspension of immigration under Title 42 covered only approximately 0.1% of land border travelers, *see* Pls.' Mot., ECF No. 144-1 at 23. And though Defendants claim that their focus was on the risk of spreading COVID-19 in congregate settings, *see* Defs.' Opp'n, ECF No. 147 at 39, millions of others were permitted to cross the border under less restrictive measures, even if they traveled in congregate setting such cars, buses, and trains, *see* Pls.' Mot., ECF No. 144-1 at 23-24; *see id.* ("CBP's own data shows that in July 2021 alone, over 11 million people entered from Mexico by land, including over 8.4 million people in cars, buses, and trains.").

In view of the above, the Court concludes that the Title 42 policy is arbitrary and capricious.

C. Remedies

Having concluded that the Title 42 policy is arbitrary and capricious, the question of remedy remains. For the reasons below, the Court shall vacate the Title 42 policy and enjoin

Defendants from applying the Title 42 policy with respect to Plaintiff Class Members.

1. The Title 42 Policy Is Vacated

Plaintiffs first request that the Court vacate the Title 42 policy. Pls.' Reply, ECF No. 149-1 at 30. Defendants oppose the request, contending that "[b]ecause any order granting partial summary judgment would be interlocutory and ineffective until final judgment except in limited circumstances, the Court should not grant any relief premised on any such order but should defer consideration of the issue of remedy until the Court has adjudicated all of Plaintiffs' claims." Defs.' Opp'n, ECF No. 160 at 2.

"[U]nsupported agency action normally warrants vacatur." *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005). However, courts have discretion to remand without vacatur if "there is at least a serious possibility that the [agency] will be able to substantiate its decision," and if "vacating would be disruptive." *Radio-TV News Directors Ass'n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999) (alteration in original) (citation omitted); *see Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) ("The decision whether to vacate depends on the seriousness of the order's deficiencies . . . and the disruptive consequences of an interim change that

may itself be changed." (citation omitted)). "Alternatively, a court may vacate the unlawful action but stay its order of vacatur for a limited time to allow the agency to attempt to cure the defects that the court has identified." *NAACP v. Trump*, 298 F. Supp. 3d 209, 244 (D.D.C. 2018) (citing *Friends of Earth, Inc. v. EPA*, 446 F.3d 140, 148 (D.C. Cir. 2006)).

Here, because this action can be disposed of based on Plaintiffs' arbitrary and capricious claim, the Court finds that vacatur is not premature at this stage. *See, e.g., Child.'s Hosp. Ass'n of Texas v. Azar*, 300 F. Supp. 3d 190, 205 (D.D.C. 2018), *rev'd and remanded on other grounds*, 933 F.3d 764 (D.C. Cir. 2019); *see also Zhang v. USCIS*, 344 F. Supp. 3d 32, 66 & n.10 (D.D.C. 2018). Moreover, the *Allied-Signal* factors do not compel a different result. The CDC has already terminated the August 2021 Order based on "significantly improved public health conditions," and the Title 42 policy only remains in effect because another federal court has preliminarily enjoined the termination order, which Defendants are opposing before the Fifth Circuit. Defs' Opp'n, ECF No. 147 at 9. Given the agency's current position, it is unlikely that the agency would seek to justify a renewal of the policy on remand, and vacatur would not be disruptive given CDC's rescission of the policy. *See id.* at 15-16.

Particularly in view of the harms Plaintiffs face if summarily expelled to countries they may be persecuted or tortured, the Court

therefore vacates the Title 42 policy. *Cf. Nat. Res. Def. Council v. EPA*, 489 F.3d 1250, 1262–64 (D.C. Cir. 2007) (Randolph, J., concurring) ("A remand-only disposition is, in effect, an indefinite stay of the effectiveness of the court's decision and agencies naturally treat it as such.").

2. Plaintiffs Are Entitled to Injunctive Relief

Plaintiffs also request that the Court permanently enjoin Defendants and their agents from applying the Title 42 policy with respect to Plaintiff Class Members. *See* Pls.' Proposed Order, ECF No. 144-2 at 1.

A permanent injunction "is a drastic and extraordinary remedy." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). It "should not be granted as a matter of course," *id.*, and "[s]uccess on an APA claim does not automatically entitle the prevailing party to a permanent injunction," *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 908 F.3d 123, 128 (D.C. Cir. 2020). Rather, a permanent injunction "should issue only if the traditional four-factor test is satisfied." *Monsanto*, 561 U.S. at 157. The four-factor test requires that a plaintiff demonstrate that: (1) "it has suffered an irreparable injury"; (2) "remedies available at law, such as monetary damages, are inadequate to compensate for that injury"; (3) "considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted"; and (4) "the public

interest would not be disserved by a permanent injunction." *Id.* at 156-57 (quoting *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006)).

Having found that Plaintiffs are entitled to summary judgment on their APA claim, the Court first turns to whether Plaintiffs have demonstrated irreparable injury.

"[T]he basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *see also Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (same). The movant must demonstrate that it faces an injury that is "both certain and great; it must be actual and not theoretical," and of a nature "of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (quotation marks and emphasis omitted). This presents a "very high bar." *Beck v. Test Masters Educ. Servs. Inc.*, 994 F. Supp. 2d 98, 101 (D.D.C. 2014) (quoting *Coal. for Common Sense In Gov't Procurement v. United States*, 576 F. Supp. 2d 162, 168 (D.D.C. 2008)).

Plaintiffs argue that they continue to face irreparable harm because, despite the D.C. Circuit's holding in this case that Defendants may not expel Class Members to areas where they would be persecuted or tortured, "[d]ocumented cases of

kidnapping, rapes, and other violence against noncitizens subject to Title 42 have also risen dramatically since last year." Pls.' Mot., ECF No. 144-1 at 30. Defendants, in opposition, contend that "the situation for class members has improved since the D.C. Circuit first stayed this Court's preliminary injunction [in September 2021]." Defs.' Opp'n, ECF No. 147 at 45 (citing *Huisha-Huisha II*, 27 F.4th at 722).

The Court is mindful that "[e]xpulsion is not categorically irreparable harm." *Huisha-Huisha II*, 27 F.4th at 734 (quoting *Nken*, 556 U.S. at 435) (internal quotation marks omitted). Here, however, Defendants do not argue that its guidance to field officers following the D.C. Circuit's opinion in this case has prevented harms to Plaintiffs, only that it has "improved" the situation. *See* Defs.' Opp'n, ECF No. 147 at 45. And while the Court does not doubt that USCIS screenings are a vital tool in preventing the expulsion of individuals to countries in which they could be persecuted, Defendants have not provided any information regarding how many screening have occurred since the D.C. Circuit issued its opinion in March 2022. *See* Pls.' Reply, ECF No. 149-1 at 31. Meanwhile, Plaintiffs have presented evidence demonstrating that the rate of summary expulsions pursuant to the Title 42 policy has nearly doubled since September 2021. *See* Pls.' Mot., ECF No. 144-1 at 30 ("At the time of this Court's original decision, approximately 14% of

families encountered at the southwest border were being summarily expelled pursuant to the Title 42 policy. . . . Now, the rate of expulsions is nearly twice as high, reaching 27%."); *see also* Pls.' Reply, ECF No. 149-1 at 31 ("[I]n the month of July 2022 alone, 9,574 members of family units encountered at the southern border were summarily expelled pursuant to the Title 42 policy."). And "[i]n Mexico alone, recorded incidents" of "kidnapping, rapes, and other violence against noncitizens subject to Title 42" have "spiked from 3,250 cases in June 2021 to over 10,318 in June 2022." Pls.' Mot., ECF No. 144-1 at 30 (citing Neusner Decl., ECF No. 118-4; Human Rights First, *The Nightmare Continues: Title 42 Court Order Prolongs Human Rights Abuses*, Extends Disorder at U.S. Borders, at 3-4 (June 2022)). Accordingly, even if the Court accepts Defendants' unsupported statement that the "situation for class members has improved," the evidence demonstrates that Plaintiffs continue to face irreparable harm that is beyond remediation. *See Huisha-Huisha*, 27 F.4th at 733 ("[T]he record is replete with stomach-churning evidence of death, torture, and rape.").

The Court next addresses the balance of the equities and public interest factors, which "merge when the Government is the opposing party." *Nken*, 556 U.S. at 434.

Defendants argue that "the government and the public have an interest in protecting the integrity of government's valid

orders." Defs.' Opp'n, ECF No. 147 at 45. However, as explained above, this Court has determined that the Title 42 policy is arbitrary and capricious, and "[t]here is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016); *see also Ramirez v. ICE*, 310 F. Supp. 3d 7, 33 (D.D.C. 2018) ("The public interest surely does not cut in favor of permitting an agency to fail to comply with a statutory mandate."); *R.I.L-R*, 80 F. Supp. 3d at 191 ("The Government 'cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns.'"). Because "there is an overriding public interest . . . in the general importance of an agency's faithful adherence to its statutory mandate," *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977); the Court concludes that an injunction in this case would serve the public interest, *see A.B.-B. v. Morgan*, No. 20-cv-846, 2020 WL 5107548, at *9 (D.D.C. Aug. 31, 2020) ("[T]he Government and public can have little interest in executing removal orders that are based on statutory violations . . . .").

Moreover, Defendants do not contend that issuing a permanent injunction would cause them harm or be inconsistent with the public health. Indeed, "CDC recognizes that the current public health conditions no longer require the continuation of

the August 2021 order," Defs.' Opp'n, ECF No. 147 at 44; *see also* Pls.' Mot., ECF No. 144-1 at 30, in view of the "less burdensome measures that are now available," 87 Fed Reg. at 19944; *id.* at 19949–50. The parties also do not dispute that Plaintiffs continue to face substantial harm if they are returned to their home countries, notwithstanding the availability of USCIS screenings. *See, e.g.*, Human Rights First, *The Nightmare Continues: Title 42 Court Order Prolongs Human Rights Abuses*, Extends Disorder at U.S. Borders, at 3-4 (June 2022). As the Supreme Court has explained, the public has a strong interest in "preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm." *Nken*, 556 U.S. at 436.

Therefore, the balance of the equities also favors Plaintiffs.

IV. Conclusion

For the reasons stated above, the Court hereby **GRANTS** Plaintiffs' Motion for Partial Summary Judgment, ECF No. 144. The Court vacates and sets aside the Title 42 policy—consisting of the regulation at 42 C.F.R. § 71.40 and all orders and decision memos issued by the Centers for Disease Control and Prevention or the U.S. Department of Health and Human Services suspending the right to introduce certain persons into the United States; and declares the Title 42 policy to be arbitrary

and capricious in violation of the Administrative Procedure Act and permanently enjoins Defendants and their agents from applying the Title 42 policy with respect to Plaintiff Class Members. An appropriate Order accompanies this Memorandum Opinion.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
November 15, 2022

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.

Civ. A. No. 21-100 (EGS)

[~~Proposed~~] Final Judgment Under Rule 54(b) and Stay of Proceedings

Upon consideration of Defendants' Unopposed Motion for Entry of Partial Final Judgment ("Motion"), it is hereby ORDERED that the Motion is GRANTED. Accordingly, it is

ORDERED that, for the reasons identified in the Motion and the Court's November 15, 2022 memorandum opinion and order, ECF Nos. 164, 165, the Court "expressly determines that there is no just reason for delay" to enter partial final judgment. Fed. R. Civ. P. 54(b). It is further

ORDERED that final judgment as to Count Six of Plaintiffs' Second Amended Complaint, ECF No. 131 ¶¶ 107–11, is ENTERED in favor of Plaintiffs and against Defendants pursuant to Federal Rule of Civil Procedure 54(b) on the grounds set forth in the Court's memorandum opinion and order, ECF Nos. 165, 165.

Proceedings before this Court on Plaintiffs' remaining claims are STAYED pending further order of this Court. The parties shall submit a joint status report informing the Court how they wish to proceed 60 days from today.

HON. EMMET G. SULLIVAN
U.S. DISTRICT JUDGE

Date: 11/22/2022

DOCKET PROCEEDINGS (320)

Entry #:	Date:	Description:	
183	12/09/2022	MOTION to Stay re 170 Order on Motion for Entry of Final Judgment, Order on Motion to Stay by STATE OF ALABAMA, STATE OF ALASKA, STATE OF ARIZONA, STATE OF KANSAS, STATE OF KENTUCKY, STATE OF LOUISIANA, STATE OF MISSISSIPPI, STATE OF MISSOURI, STATE OF MONTANA, STATE OF NEBRASKA, STATE OF OHIO, STATE OF OKLAHOMA, STATE OF SOUTH CAROLINA, STATE OF TENNESSEE, STATE OF TEXAS, STATE OF UTAH, STATE OF VIRGINIA, STATE OF WEST VIRGINIA, STATE OF WYOMING. (Ensign, Drew) (Entered: 12/09/2022)	View Add to request
	12/09/2022	USCA Case Number 22-5325 for 180 Notice of Appeal to DC Circuit Court, filed by XAVIER BECERRA, CHRIS MAGNUS, ALEJANDRO N. MAYORKAS, RAUL L. ORTIZ, PETE FLORES, ROCHELLE P. WALENSKY, TAE D. JOHNSON. (znmw) (Entered: 12/09/2022)	Send Runner to Court
	12/09/2022	MINUTE ORDER denying 183 motion to stay pending appeal for the reasons stated in 165 Memorandum Opinion. Signed by Judge Emmet G. Sullivan on 12/9/2022. (lcegs1) (Entered: 12/09/2022)	Send Runner to Court
182	12/08/2022	Supplemental Record on Appeal transmitted to US Court of Appeals re 180 Notice of Appeal to DC Circuit Court, ; (zjm) (Entered: 12/08/2022)	View Add to request
181	12/08/2022	Transmission of the Notice of Appeal, Order Appealed (Memorandum Opinion), and Docket Sheet to US Court of Appeals. The Court of Appeals docketing fee was not paid because the appeal was filed by the government re 180 Notice of Appeal to DC Circuit Court,. (zjm) (Entered: 12/08/2022)	View Add to request
	12/08/2022	MINUTE ORDER. In view of 179 Notice, proposed intervenors	Send Runner to Court

		# 7 Exhibit St John Decl. Ex 3D, # 8 Exhibit St John Decl. Ex 4, # 9 Exhibit St John Decl. Ex 5, # 10 Exhibit St John Decl. Ex 6, # 11 Exhibit St John Decl. Ex 7, # 12 Exhibit St John Decl. Ex 8, # 13 Exhibit St John Decl. Ex 9, # 14 Exhibit St John Decl. Ex 10)(Ensign, Drew) (Entered: 11/21/2022)	
167	11/21/2022	Unopposed MOTION for Entry of Final Judgment (Partial), Unopposed MOTION to Stay Proceedings by XAVIER BECERRA, PETE FLORES, TAE D. JOHNSON, CHRIS MAGNUS, ALEJANDRO N. MAYORKAS, RAUL L. ORTIZ, ROCHELLE P. WALENSKY. (Attachments: # 1 Text of Proposed Order)(Robinson, John) (Entered: 11/21/2022)	View Add to request
	11/16/2022	MINUTE ORDER granting 166 Unopposed Emergency Motion for Temporary Stay of the Court's November 15, 2022 Order ("Emergency Mot."). The government states that "[t]he requested temporary stay... is not for the pendency of appeal but rather for only a temporary period." Emergency Mot., ECF No. 166 at 3. The government further states that "DHS requires a short period of time to prepare for the transition from Title 42 to Title 8 processing, given the need to resolve resource and logistical issues that it was unable to address in advance without knowing precisely when currently operative August 2021 Title 42 order would end. Cf. 87 Fed. Reg. at 19,95456 (setting effective date of Termination Order for 52 days from date of issuance to, among other things, provide DHS with additional time to ready operational plans). During this period of time, DHS will need to move additional resources to the border and coordinate with stakeholders, including non-governmental organizations and state and local governments, to help prepare for the transition to Title 8 processing. This transition period is critical to ensuring that DHS can continue to carry out its mission to secure the Nation's	Send Runner to Court

		borders and to conduct its border operations in an orderly fashion. See, e.g., AARP v. EEOC, 292 F. Supp. 3d 238, 241 (D.D.C. 2017) (staying effective date of vacatur order for about one year to avoid the potential for disruption); NAACP v. Trump, 298 F. Supp. 3d 209, 24445 (D.D.C. 2018) (staying vacatur order for 90 days to avoid disruption)." Id. Plaintiffs do not oppose the motion. Pursuant to Federal Rules of Civil Procedure 59 and 60, the Court's inherent authority, and in view of the lack of opposition by Plaintiffs, the government's representation that the request for a temporary stay is not for the pendency of appeal, but rather to enable the government to make preparations to implement the Court's Order, the Court, WITH GREAT RELUCTANCE, grants the request. The Court's November 15, 2022 Order is stayed for five weeks, from November 15, 2022 to December 20, 2022. The Order will take effect at midnight on December 21, 2022. Signed by Judge Emmet G. Sullivan on 11/16/2022. (lcegs1) (Entered: 11/16/2022)	
166	11/15/2022	Unopposed MOTION to Stay re 165 Memorandum & Opinion, 164 Order on Motion for Partial Summary Judgment (Emergency Motion) by XAVIER BECERRA, PETE FLORES, TAE D. JOHNSON, CHRIS MAGNUS, ALEJANDRO N. MAYORKAS, RAUL L. ORTIZ, ROCHELLE P. WALENSKY. (Attachments: # 1 Text of Proposed Order)(Robinson, John) (Entered: 11/15/2022)	View Add to request
165	11/15/2022	MEMORANDUM OPINION. Signed by Judge Emmet G. Sullivan on 11/15/2022. (lcegs1) (Entered: 11/15/2022)	View Add to request
164	11/15/2022	ORDER granting 144 Motion for Partial Summary Judgment. Signed by Judge Emmet G. Sullivan on 11/15/2022. (lcegs1) (Entered: 11/15/2022)	View Add to request
	10/05/2022	MINUTE ORDER. The Court has determined that a motion hearing is unnecessary for the resolution of the pending motion(s). Accordingly, the Court HEREBY CANCELS	Send Runner to Court

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nancy Huisha-Huisha et al., *Plaintiff-Appellees,* v. Alejandro N. Mayorkas, *Defendant-Appellants* and States of Arizona, Louisiana, Alabama, Alaska, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Tennessee, Utah, Virginia, West Virginia, and Wyoming. *Proposed Intervenor-Defendants.*	Case No. 22-5325

DECLARATION OF JAMES K. ROGERS

I, James K. Rogers, declare as follows:

1. I am an attorney licensed to practice law in Arizona. I am a Senior Litigation Counsel with the Arizona Office of the Attorney General.

2. Attached hereto as **Exhibit A** is a true and correct copy of **Morgan Phillips, *Biden administration wants $3 BILLION to deal with a migrant surge when Title 42 ends*, DAILY MAIL (Dec. 9, 2022), https://www.msn.com/en-us/news/politics/biden-administration-wants-dollar3-billion-to-deal-with-a-migrant-surge-when-title-42-ends/ar-AA156exA.**

3. Attached hereto as **Exhibit B** is a true and correct copy of **Julia Ainsley, *The Biden administration wants more than $3 billion to prep for a possible migrant surge at the border after Covid ban ends*, NBC NEWS (Dec. 9, 2022), https://www.nbcnews.com/politics/immigration/biden-admin-wants-2-billion-migrant-surge-border-covid-ban-ends-rcna60659.**

4. Attached hereto as **Exhibit C** is a true and correct copy of **Anna Giaritelli, *White House asks Congress for $3B to cover anticipated rush of illegal immigrants*, WASHINGTON EXAMINER (Dec. 9, 2022),**

https://www.washingtonexaminer.com/policy/immigration/white-house-asks-congress-for-3-billion-end-title-42.

5. Attached hereto as **Exhibit D** is a true and correct copy of **Jack Newman, *Around 1,000 migrants line the Rio Grande waiting to cross into US as Title 42 is set to lapse*, DAILY MAIL (Dec. 12, 2022), https://www.msn.com/en-us/news/world/around-1000-migrants-line-the-rio-grande-waiting-to-cross-into-us-as-title-42-is-set-to-lapse/ar-AA15bpdv.**

6. Attached hereto as **Exhibit E** is a true and correct copy of **Adam Shaw, Bill Melugin, and Griff Jenkins, *Border officials seeing massive migrant numbers, large groups ahead of Title 42's end*, FOX NEWS (Dec. 10, 2022), https://www.foxnews.com/politics/border-officials-seeing-massive-migrant-numbers-large-groups-ahead-title-42s-end.**

7. Attached hereto as **Exhibit F** is a true and correct copy of **Mark Moore, *Democratic senators express 'deep concerns' over Biden ending Title 42*, NY POST (Nov. 29, 2022), https://nypost.com/2022/11/29/senators-have-deep-concerns-about-end-of-title-42/.**

8. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, and that this declaration was issued on December 12, 2022, in Phoenix, Arizona.

s/ *James K. Rogers*
James K. Rogers

Exhibit A

Biden administration wants $3 BILLION to deal with a migrant surge when Title 42 ends

The Department of Homeland Security is requesting an additional $3 billion to deal with the impending onslaught of migrants as Title 42 is slated to end December 21.

That is on top of the $56.7 billion President Biden requested to be included in the fiscal year 2023 spending bill Congress is currently negotiating for the department (DHS).

Senior DHS officials told NBC News they put the request for further funding to the White House Office of Management and Budget and the White House has now taken it to Congress.

Republicans may be hesitant to approve the new funds as they have said they want to see stricter border security before pouring in more money.

Venezuelan migrants get in line to receive donations of clothing and food at the camp area on the banks of the Rio Grande that divides Ciudad Juarez, Mecixo and El Paso, Texas

Mexican municipal police take measures as Venezuelan migrants are evicted from the camp area on the banks of the Rio Grande that divides Ciudad Juarez and El Paso, Texas

The Covid-era Title 42 allows border agents to immediately expel migrants and has been used more than 2.4 million times to keep border crossers from claiming asylum since former President Trump instated the policy in 2020.

The number of migrant encounters at the U.S.-Mexico border has already reached 7,500-8,000 per day and in a worst-case scenario could swell up to 18,000 a day, officials predict. Border Patrol have previously said their resources are stretched to the max when they see 5,000 encounters per day.

'We are in the hole for millions, even without Title 42 lifting,' one of the DHS officials told NBC.

Once Title 42 is no longer effective, migrants will have the chance to stay in the U.S. and claim asylum. Further funding is needed to process, shelter and transport them.

Though the policy is scheduled to end in less than two weeks, that date us still in flux as a number of Republican states have asked to defend it in court.

The Biden administration on Wednesday launched an appeal of the court ruling by U.S. District Judge Emmett Sullivan that ended the policy. DHS said it is not looking to continue Title 42-based expulsions - only arguing that its past expulsions were lawful.

The appeal seeks to preserve the Centers for Disease Control (CDC) authority to impose public health orders to regulate migration.

Last month, Sullivan deemed the policy unlawful and the Biden administration asked for a five-week stay to prepare for the end of its key border enforcement policy.

The CDC declared Title 42 unnecessary to curb the spread of Covid-19 in April, but Republican-led states challenged the Biden administration's attempt to end the policy and a federal judge in Louisiana halted the termination at the time.

This week Sens. Kyrsten Sinema and Thom Tillis worked out a framework on immigration reform and border security that would extend Title 42 for at least one year, but it's unlikely Congress will act on the proposal in time for December 21.

Central American migrants surrender to Border Patrol in Texas

Exhibit B

CORONAVIRUS

The Biden administration wants more than $3 billion to prep for a possible migrant surge at the border after Covid ban ends

DHS wants more than $3 billion from Congress to prep for a migrant surge expected when Covid restrictions end Dec. 21, money Republicans may not be willing to approve.

Migrants seek shelter in a church in Piedras Negras, Mexico, on Nov. 16. Sergio Flores / AFP via Getty Images file

Dec. 9, 2022, 4:30 AM MST

By Julia Ainsley

As the Biden administration braces for the record number of migrants crossing the southern border daily to rise still more when Covid restrictions end this month, the Department of Homeland Security wants more than $3 billion from Congress to fight the surge, money Republicans may not be willing to approve.

Three senior DHS officials familiar with the planning say DHS sent a request for billions to the White House's Office of Management and Budget. A source familiar with the matter said the White House has now asked Congress for more than $3 billion. The money comes on top of the president's budget requests as part of a fiscal year 2023 technical assistance package.

Republicans have been reluctant to approve additional funding for the Democratic administration's border efforts, saying they want the border secured before more money is spent.

In a statement, a White House spokesperson said, "If Republicans in

Congress are serious about border security, they would ensure that the men and women of the Department of Homeland Security have the resources they need to secure our border and build a safe, orderly, and humane immigration system."

Mexican authorities evict Venezuelan migrants from border camps

Covid-19 restrictions known as Title 42 have kept migrants from claiming asylum more than 2.4 million times since the policy began under former President Donald Trump in 2020. A federal judge has ruled that the policy must lift on Dec. 21; several Republican states have sued to keep it in place.

The number of undocumented crossings at the U.S.-Mexico border is already near record highs, at 7,500 to 8,000 a day.

"We are in the hole for millions, even without Title 42 lifting," one of the DHS officials said.

— Migrants cross the street in Piedras Negras, Mexico, on Nov. 16. Sergio Flores / AFP via Getty Images file

The number of attempted crossings is projected to increase by as much as 2,500 a day when the Covid ban ends, DHS officials said, and it could reach 10,000.

And when the ban ends, instead of being sent back across the border, more migrants will have the chance to stay in the U.S. and claim asylum. The extra money is needed to process, shelter and transport them.

Without more space in border processing centers, the facilities could get

overcrowded, just as they did in 2019, when migrants said they were being held in spaces too small to lie down to sleep.

Recommended

ELECTIONS

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CONGRESS

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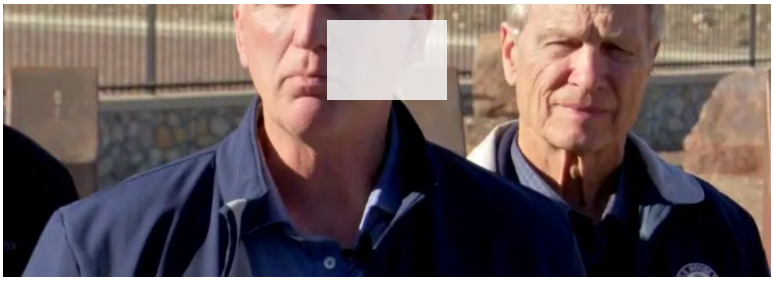
They could also end up being released onto the street in border cities or bused by Republican governors to cities inside the U.S.

What border policy could look like with a GOP-controlled House



The Biden administration appealed the federal court ruling that lifted Title 42 on Wednesday, saying the Centers for Disease Control and Prevention was correct in implementing it. But the administration did not ask the judge to keep Title 42 in place.

A senior DHS official told NBC News it could be the perfect time to lift Title 42, because southern border migration is typically at its lowest around the holidays. In addition, Republicans who campaigned on platforms of tighter border security have wrapped their midterm campaigns, and the 2024 presidential election is nearly two years away, so chaos at the border is less likely to hurt Biden and Democrats at the polls than it would if Title 42 lifted closer to an election, the official said.

The Biden administration has long planned for the lifting of Title 42 by streamlining the asylum process, allowing Border Patrol officers to conduct interviews and quickly deporting migrants. But it has warned that improving the process could take time and funding, claiming "it won't be achieved overnight."

DHS did not respond to a request for comment.

Julia Ainsley

Julia Ainsley is homeland security correspondent for NBC News and covers the Department of Homeland Security and the Justice Department for the NBC News Investigative Unit.

Exhibit C

TITLE 42

White House asks Congress for $3B to cover anticipated rush of illegal immigrants

by Anna Giaritelli, Homeland Security Reporter |
December 09, 2022 03:34 PM

The Biden administration is privately soliciting $3 billion from Congress to cover the anticipated rising cost of responding to illegal immigration at the U.S.-Mexico border, according to a new report.

Senior Homeland Security officials recently asked the White House Office of Management and Budget for the emergency money just weeks before the Biden administration must stop expelling illegal immigrants back to Mexico, according to an NBC News report Friday. The White House signed off on the ask and sent it to lawmakers on Capitol Hill for approval.

But Republicans could prevent the DHS from getting the money that it wants — despite Democrats saying it would go to responding to the border crisis. Historically, Republicans have traded improvements in physical border security infrastructure or

More from Midterms

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December 12, 2022 09:06 AM

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Washington Examiner MIDTERMS ★ 2022 ★

Opinion

tightening of immigration policies with Democrats.

The U.S. government has spent an unknown amount of money over the past two years reimbursing nonprofit organizations up and down the southern border for costs accrued while caring for the more than 1.5 million people who were released by Border Patrol and Immigration and Customs Enforcement rather than being expelled at the border.

OVER 700 IMMIGRANTS CROSS INTO TEXAS BORDER TOWN AT ONE TIME: 'THEY KEPT COMING'

Nonprofit groups also pay for illegal immigrants to fly or take buses to family or friends across the country, costs that the government helps cover. The Heritage Foundation

"The investigation confirmed that a host of NGOs are actively facilitating the Biden border crisis," the Heritage Foundation's Oversight Project wrote in a statement. "Overflow from Customs and Border Protection is being transferred to these organizations so that Border Patrol avoids overcrowded facilities. These organizations apply for, and receive, taxpayer money to provide processing and transportation services and infrastructure to facilitate the migration of illegal aliens into the interior of the country."

It is these types of costs that Republicans would likely protest on the basis that they entice more immigrants to cross the border illegally.

The Biden administration defended the request and blasted Republicans ahead of the potential pushback.

"If Republicans in Congress are serious about border security, they would ensure that the men and women of the Department of Homeland Security have the resources they need to secure our border and build a safe, orderly, and humane immigration system," a White House official told NBC.

Back in May, when the DHS had planned to end the Title 42 public health protocol more than two years after it was implemented, it anticipated needing $2 billion to cover the policy change.

However, the DHS is forecasting fewer illegal immigration attempts when Title 42 is slated to end on Dec. 20 than in May, yet its ask this time around is greater than the spring.

In May, the DHS was planning for up to 18,000 arrests of illegal immigrants per day. That termination was blocked in federal court, but the same judge ordered this fall that DHS end Title 42 this month.

CLICK HERE TO READ MORE FROM THE WASHINGTON EXAMINER

DHS now anticipates up to 10,000 arrests per day.

The US cares about religious freedom abroad, but at home? Not so much
By: Grace Melton and Simon Hankinson

Biden's terrible hostage policy
By: John Bolton

The 'Twitter Files' are the final nail in the media's credibility
By: Peter Laffin

The Debrief: Jim Antle on how

Barrett 'identified the real issue' in

The Debrief: David Mark on

Reporter's Notebook: The future of

Newsletters

During the 2019 crisis at the border, when far fewer immigrants were encountered illegally entering the country than each month in the past 20 months, the Trump administration asked Congress for more than $4 billion.

Exhibit D

Around 1,000 migrants line the Rio Grande waiting to cross into US as Title 42 is set to lapse

A caravan of around 1,000 migrants is preparing to enter the US after a perilous months-long trek through Central America, amid an expected surge at the southern border.

The group, mostly from Cuba, Venezuela, and Nicaragua, is hoping to cross into the country when Title 42 is set to lapse next week. The policy expanded the expulsion of migrants over Covid concerns.

The travellers are lining up on the banks of the Rio Grande in Juarez where they are spending the night in shelters as Joe Biden pleads for an extra $3billion to cope with the impending wave.

Their arrival came hours after hundreds of migrants were caught crossing illegally back into the US just hours after they had been bussed out of the US and sent south of the border with a police escort.

Migrants cross the Rio Grande river to turn themselves in to US Border Patrol agents to request asylum in El Paso, Texas

Border Patrol facilities and shelters are already stretched beyond capacity, with almost 5,000 migrants being held in the Central Processing Center, which is supposed to only hold 3,500 people temporarily.

In October, Customs and Border Patrol figures showed a record 2,378,944 illegal immigrants intercepted at the border in the previous 12 months, and the numbers show no sign of slowing.

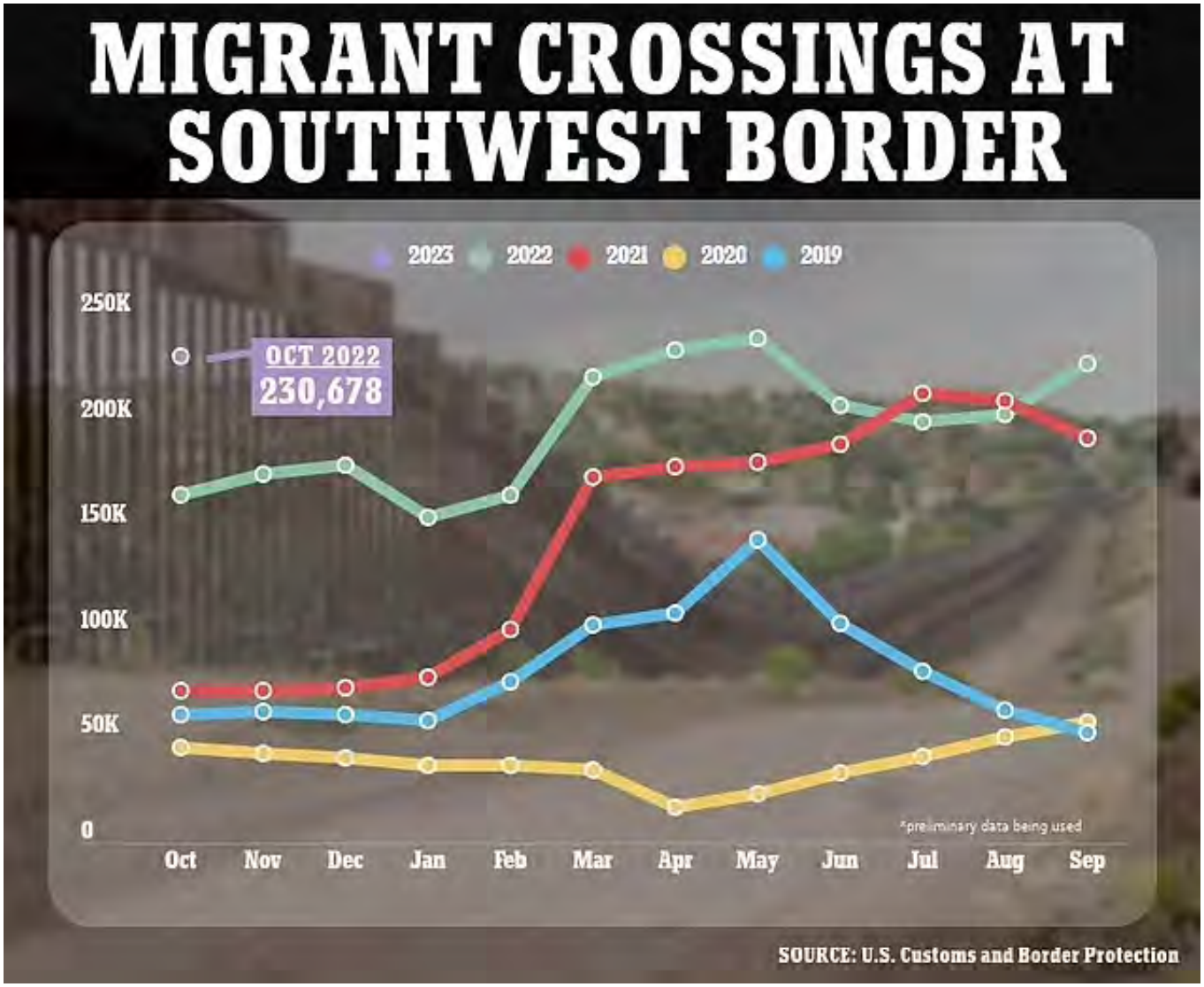
The latest caravan had been stopped in Jimenez on Thursday by Chihuahua state officials who warned them Juarez was already at breaking point.

But the group continued on their way to the border city across from El Paso, Texas.

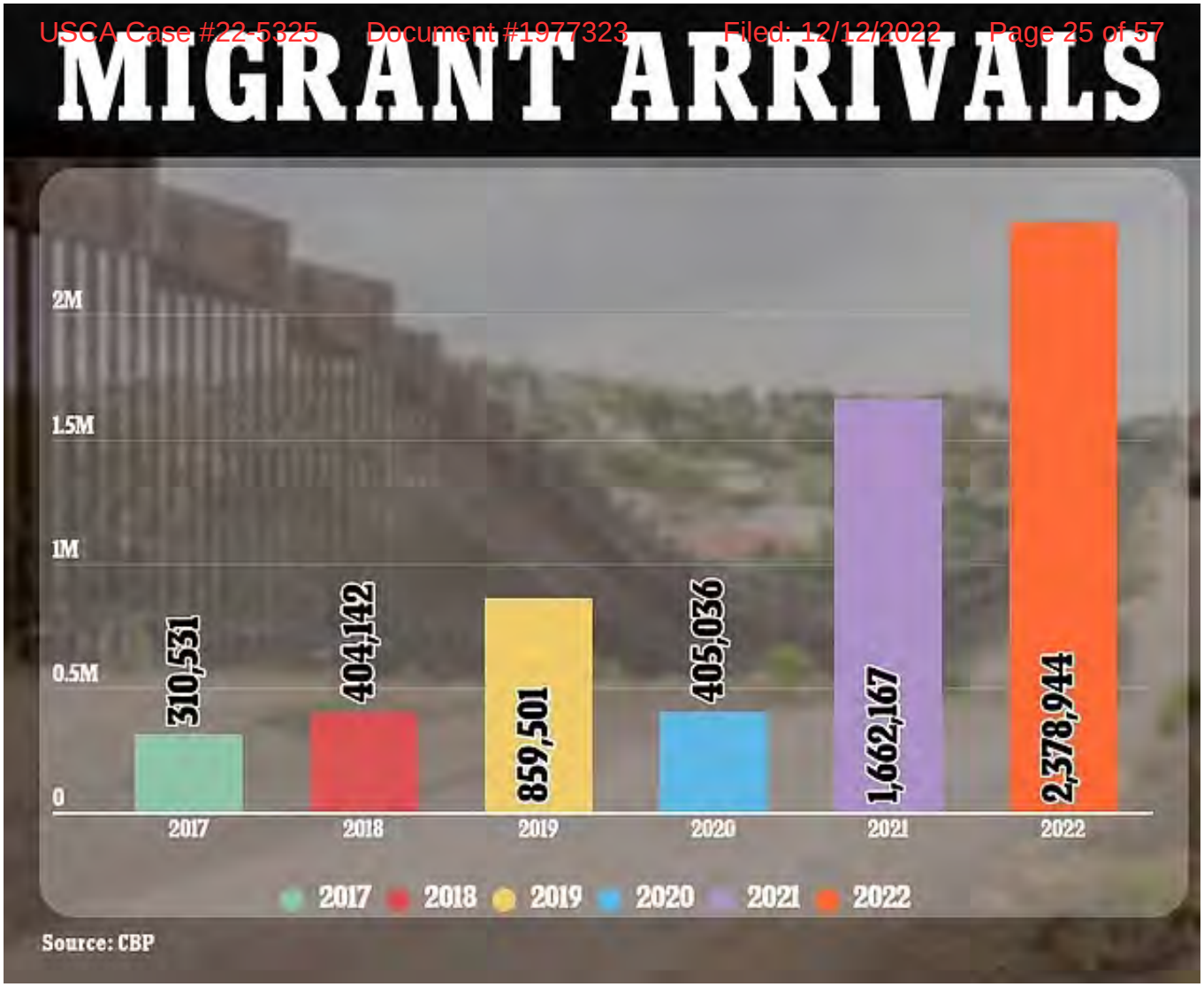
Marjorie and her six-year-old son were among those forming the line across the El Paso side of the Rio Grande, according to El Paso Matters.

Many gathered around fires to stay warm while others crossed back into Juarez to bring back food and water while they wait in line.

Carmen, a 29-year-old woman from Peru, said: 'I am traumatized from threats in my country and I am traumatized from the kidnapping here.



The first month of Fiscal Year 2023 showed more than 230,000 encounters with CBP, the third-highest month in recent history - the only months with higher figures also occurred under President Joe Biden



For the Fiscal Year ending September 30, there were 2,378,944 encounters - the highest level ever recorded by the department

The group, mostly from Cuba, Venezuela and Nicaragua, is hoping to cross into the country when Title 42 is set to lapse next week

A caravan of around 1,000 migrants is preparing to enter the US after a perilous months-long trek through Central America

The travellers are lining up on the banks of the Rio Grande in Juarez where they are spending the night in shelters

Asylum-seeking migrants stand near the border wall after crossing the Rio Bravo river

Mexican police brought 20 buses full of migrants back across the border into Ciudad Juarez, the city across the border from El Paso

Juarez sits directly across the southern border from El Paso, Texas

'All I want is to arrive at a place that is safe. That is all we're asking for.'

On December 3, a number of the migrants in the traveling group were targeted by kidnappers in Durango.

Men in police uniforms halted the group and directed them to a house where they held them against their will for six days and stole their belongings.

They were eventually rescued by the

What is Title 42 and why was it introduced?

The scheme was implemented by the Trump administration in March 2020, and designed amid the pandemic to limit the spread of COVID-19.

Migrants were no longer allowed to be processed in the US and instead, were sent back across the border to Mexico.

President Joe Biden attempted to lift it and set a date for May 23, arguing that the pandemic-era justification had passed, but was blocked by a federal court in Louisiana, which ruled on May 20 that the policy must stay in place.

Last month, District Judge Emmet Sullivan in Washington DC ruled that Title 42 should be

Mexican military but were unable to retrieve their stolen phones, passports and money.

Officials are seeing a migration wave at the southern border with Title 42 expected to end on December 21.

Title 42 was expanded under Donald Trump to allow for the rapid expulsion of migrants due to the pandemic, and an estimated 2.4million people have been turned away at the border since March 2020.

lifted, describing it as an 'arbitrary and capricious in violation of the Administrative Procedure Act.'

In a case brought by the ACLU against the Biden administration, Sullivan ruled that Title 42 went too far, and that it would be lifted immediately.

Supporters of Title 42 have said its repeal paves the way for a surge in migrant crossings, which the United States is not able to handle.

Those arguing for its repeal say ending Title 42 has lifted one of the last remaining Trump administration barriers to lawful asylum claims.

Last month, a court struck down the public health order as unlawful, and it is now set to end next week, pending a potential appeal from the government.

The Justice Department said in response: 'The government respectfully disagrees with this Court's decision and would argue on appeal, as it has argued in this Court, that CDC's Title 42 Orders were lawful.'

Since October, an estimated 485,000 migrants have crossed into the US and the numbers are expected to reach half a million by the weekend, sources told Fox News.

The figures are a surge on this time last year when 517,000 had reached the shores of the US between October 1 and December 31.

With migrant numbers already soaring, there are fears among border agents that the end of Title 42 could spark further chaos.

The latest caravan had been stopped in Jimenez on Thursday by Chihuahua state officials who warned them Juarez was already at breaking point

Migrant girls, who are traveling with their family, are seen aboard a highway police patrol

Border Patrol facilities and shelters are already stretched beyond capacity, with almost 5,000 migrants being held in the Central Processing Center

On December 3, a number of the migrants in the traveling group were targeted by kidnappers in Durango, Mexico

Title 42 was expanded under Donald Trump to allow for the rapid expulsion of migrants due to the pandemic

Last month, a court struck down the public health order as unlawful, and it is set to end next week, pending a potential appeal from the government

According to the Texas governor's website, Gov. Greg Abbott has sent more than 8,400 migrants to Washington DC since April, and a further 5,000 to New York and Chicago - many of whom have ended up in homeless shelters or on the streets.

He has even dropped some outside Vice President Kamala Harris's residence.

Yesterday evening, hundreds of migrants were caught on camera crossing illegally into the US from Juárez just hours after they'd been bussed out of the US and back south of the border with a police escort.

Video shot by a reporter on the banks of the Rio Grande on the El Paso side of the border captured images of long lines of migrants waiting to cross over.

Some may have already have been in the US earlier in the weekend after Customs and Border Protection took hundreds back across the border into Mexico by bus with a police escort.

They were released back only for many of them to make the journey across the Rio Grande river once again.

Hundreds of migrants were filmed crossing illegally into El Paso, Texas, from Ciudad Juarez, Mexico, on Sunday night

It had been a busy weekend for CBP officials with reports by El Paso sector of more than 2,600 crossings in the 24 hours between Friday and Saturday

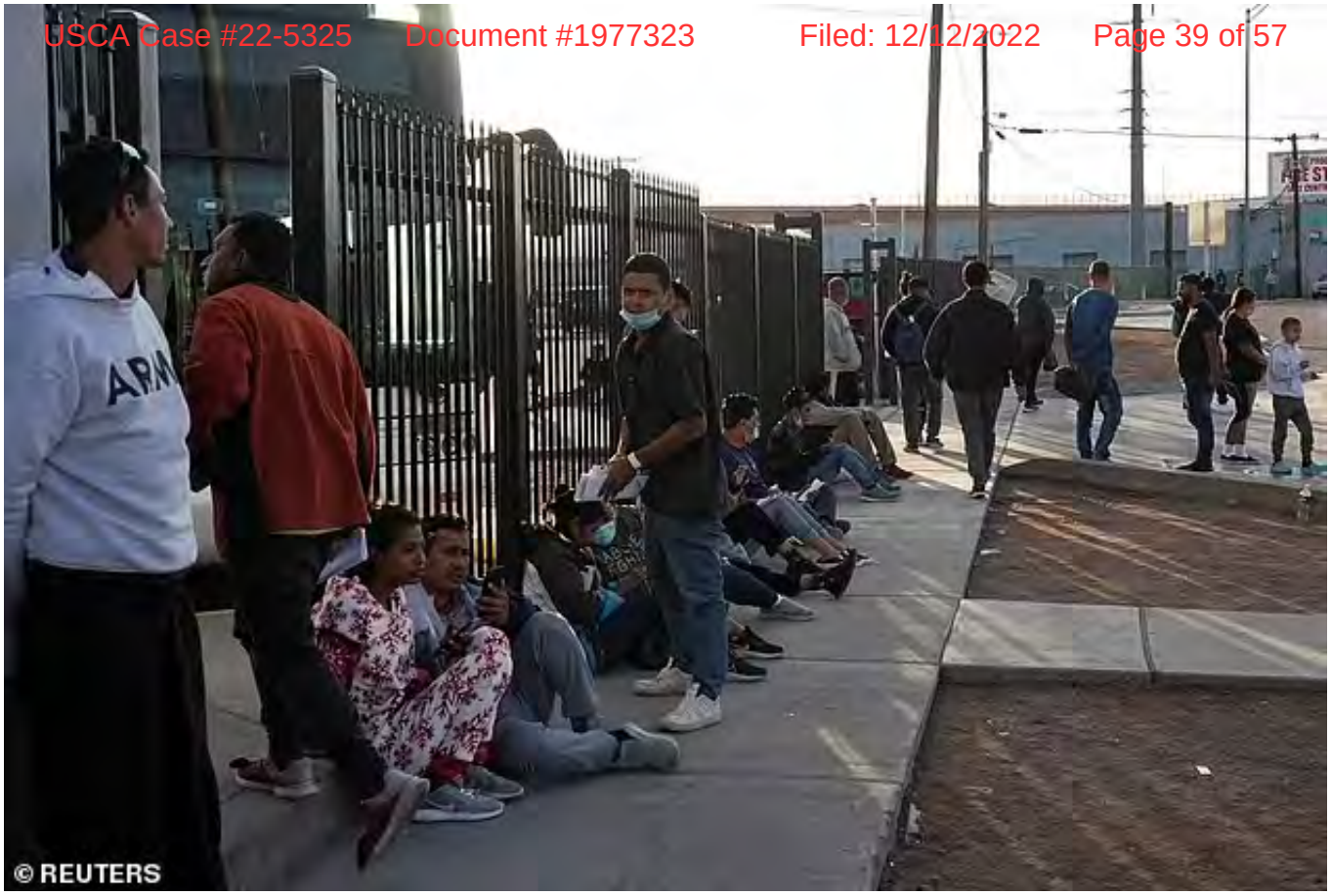
Ahead of the mass crossing, Mexican police brought 20 buses full of migrants back across the border into Ciudad Juarez, the city across the border from El Paso

One of the migrants who was sent back across the border into Mexico shared video of their journey back

Video from one of the passengers inside a migrant bus, showing their Mexican police escort

It's thought many of those who were brought back into Mexico simply repeated the journey in crossing the Rio Grande river, which separates the two cities

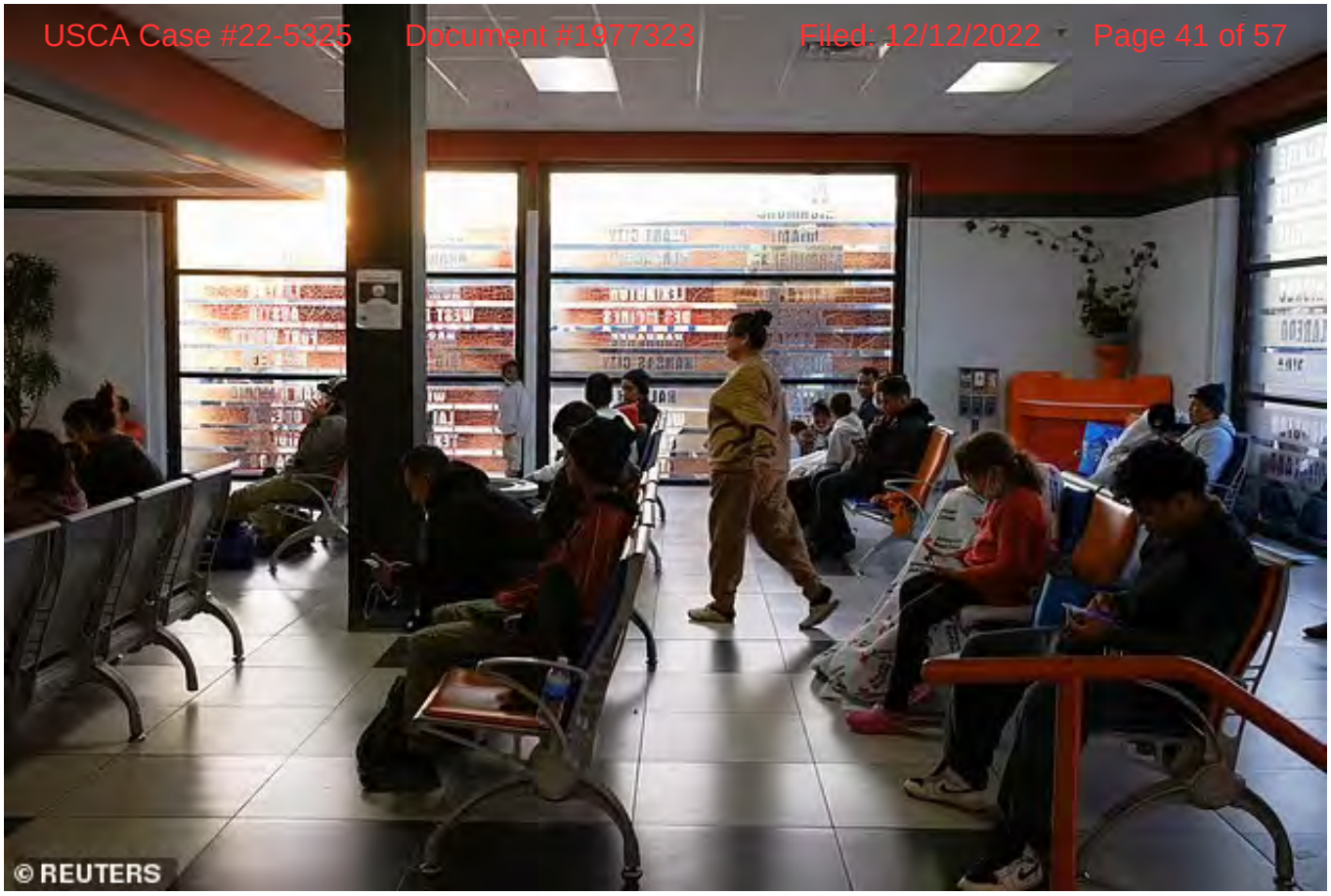
Migrants, mostly from Nicaragua, check their phones after being dropped off at a bus station, pictured on Thursday



Migrants, mostly from Nicaragua, wait at a bus station in Downtown El Paso, where many are dropped off by immigration authorities

This weekend alone, nearly 800 migrants were released from federal custody into El Paso. A group are pictured being released by immigration authorities on Thursday

Officials have described the 'provisional release' as 'a safe and humane release of migrants, who are placed into the community; who are placed into removal proceedings and are pending the next steps in their immigration process'



Migrants at an El Paso bus station. The migrants had been processed and are allowed to remain in the U.S. as they await their immigration hearings

Last week, city officials in El Paso aired their fears over a possible surge in migrants crossing the border. A group are pictured in a downtown bus station following their release on Thursday

U.S. officials have put forth a number of drastic options to stem the flow of migration - including prosecuting more adults who try to evade Border Patrol and expelling those who have not first sought legal entry or applied for protection in other countries, according to Axios.

During November, El Paso released about 2,000 migrants onto the streets after shelters reached capacity.

This weekend alone, nearly 800 migrants were released from federal custody into El Paso, reports CBS4.

286 migrants were released on Saturday with a further 498 released on Sunday.

Officials have described the 'provisional release' as 'a safe and humane release of migrants, who are placed into the community; who are placed into removal proceedings and are pending the next steps in their immigration process.'

The migrants had been processed and are allowed to remain in the U.S. as they await their immigration hearings.

Migrants sleep on streets after eviction from Rio Bravo camp

El Paso Deputy City Manager Mario D'Agostino told city leaders there is no way for their community to be prepared for the end of Title 42 come December 21

Venezuelan migrants in line to receive donations of clothing and food at a camp on the banks of the Rio Grande, which divides Ciudad Juarez and El Paso, pictured in November

Last week El Paso Deputy City Manager Mario D'Agostino told city leaders there is no way for their community to be prepared for the end of Title 42 come December 21.

'It's not a good state. I mean we could see up to thousands a day passing through our community,' said D'Agostino, who is in charge of the city's response to the migrant crisis.

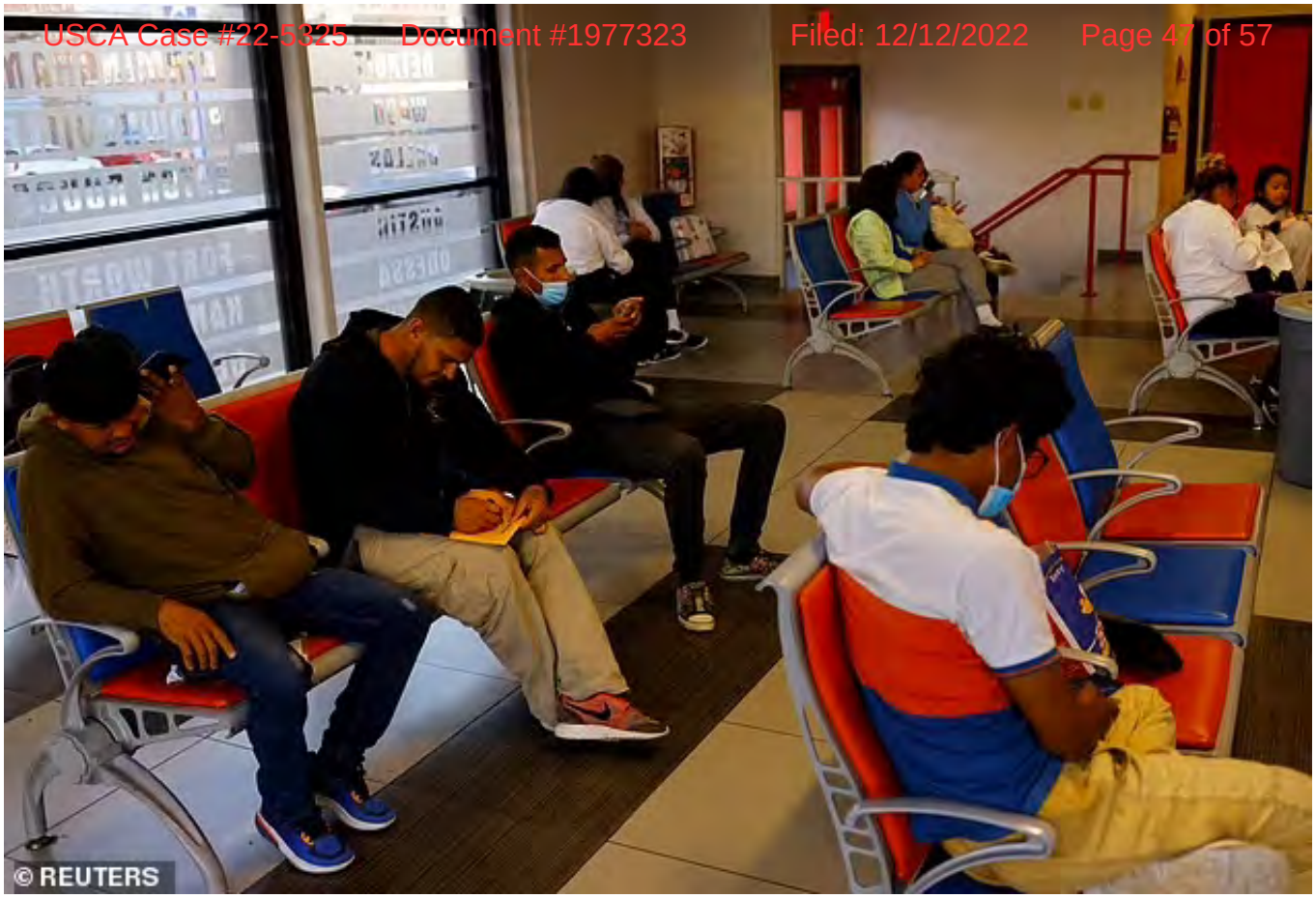
D'Agostino said after talking with FEMA last week it became more clear how dire the situation could be when Title 42, the Covid-era CDC health restriction that allows for immediate expulsion, ends in ten days.

'Nobody can keep up with that; there is no number of shelters you could have for that. It's going to take an all-out effort and a lot of that is going to come on the federal government on what they can do to help decompress our region in our area,' D'Agostino warned, according to CBS 4.

For now, El Paso officials are anxiously waiting for the funding they've requested from the federal government to prepare for the pandemic-era policy's end.

'That additional funding will be for when Title 42 is lifted or with the fact if they continue with street releases and they are unable to find shelter, we would have to step up. But we have been asking for the funding, and we continue to do that,' said D'Agostino.

Migrants, mostly from Nicaragua, board a bus to go to their destination after being released from U.S. Border Patrol custody in El Paso, Texas, December 5



El Paso officials are anxiously waiting for the funding they've requested from the federal government to prepare for the pandemic-era policy's end

The administration has also said that the Centers for Disease Control and Prevention is working on a new regulation that would replace Title 42.

However, the CDC said in April that there was no longer a public health reason to limit asylum.

'Based on the public health landscape, the current status of the COVID-19 pandemic, and the procedures in place for the processing of covered noncitizens ... CDC has determined that a suspension of the right to introduce such covered noncitizens is no longer necessary to protect U.S. citizens,' the CDC had said.

The restrictions were put in place under former President Donald Trump at the outset of the COVID-19 pandemic.

The practice was authorized under Title 42 of a broader 1944 law covering

public health and has been used to expel migrants more than 2.4 million times.

The Biden Administration has made use of the policy to expel even more migrants than the previous administration - as the border has been flooded with people coming from the so-called 'Northern Triangle' countries of Guatemala, Honduras, and El Salvador through Mexico.

Biden hasn't visited the border since becoming president in January 2021.

Exhibit E

Border officials seeing massive migrant numbers, large groups ahead of Title 42's end

By Adam Shaw, Bill Melugin, Griff Jenkins

Published December 10, 2022

Fox News

Officials at the southern border are seeing massive migrant numbers at the southern border, along with a number of large groups, ahead of the expected end of the ability to expel migrants under the Title 42 public health order in a few weeks.

Customs and Border Protection (CBP) sources tell Fox News that migrant numbers for FY 2023, which began in October, are at over 485,000 and are expected to hit the half a million mark this weekend. So far, 156,000 have been expelled under Title 42.

That order, implemented during the Trump administration in response to the COVID-19 pandemic, has allowed the rapid expulsion of migrants at the border, However, it is due to expire on Dec. 21 after a court order ruled that its implementation was unlawful, leading to widespread and bipartisan fears of a surge on top of a surge.

The nearly half-million encountered since October means the numbers are outpacing FY 2022, when there were over 517,000 encounters by the end of December, and FY 21 where there were just over 216,000 in the same period. In FY 2020, there were only 458,058 encounters for the entire fiscal year.

FOX NEWS CREW WITNESSES DRAMATIC HUMAN SMUGGLING BUSTS BY TEXAS AUTHORITIES

Dec. 10 2022: Migrants apprehended at the border in Texas.

These numbers, coming in typically quieter months at the border, are leaving Border Patrol agents overwhelmed as agents get hit with enormous migrant groups. In the last 24 hours, there were more than 2,100 illegal crossings in Del Rio Sector.

In Eagle Pass, Texas, Fox News witnessed as a massive group of 650 migrants crossing illegally into Eagle Pass. At the same time, another 350 crossed into the other side of town — meaning 1,000 people crossed in an hour.

TEXAS LAUNCHES TASK FORCE WITH K9S, DRONES TO STOP ILLEGAL IMMIGRANT 'GOTAWAYS' AMID SPIKE IN NUMBERS

In the El Paso Sector, Fox obtained video showing hundreds crossing into El Paso from across the river, before forming a single line and surrendering to authorities. Sources in the sector tell Fox that there have been more than 2,600 illegal crossings in the last 24 hours alone in the sector — numbers that are unheard of for December.

The numbers are likely only to fuel concerns about the impending ending of Title 42. The Department of Homeland Security has said repeatedly that it has a six-point plan in place to cope with what it accepts will be an immediate surge in numbers.

That plan includes an increase of resources and manpower, as well as a greater use of alternative authorities such as expedited removal and punishments for illegal crossings. The administration has also emphasized its anti-smuggling campaigns and cooperation with Western Hemisphere countries.

But a number of Republicans and Democrats have said that plan is insufficient to deal with the historic numbers that agents may face. In recent days, lawmakers in the Senate have been thrashing out a potential agreement on a framework that would extend Title 42 for a year and provide additional border security funding in exchange for a pathway to citizenship for two million illegal immigrants who came to the U.S. as minors.

However, that proposal has already seen opposition from Democrats and Republicans, and it is unclear whether lawmakers can get a deal in place before Congress recesses on Dec. 21 and before Republicans take control of the House in January.

Adam Shaw is a politics reporter for Fox News Digital, primarily covering immigration and border security.

He can be reached at adam.shaw2@fox.com or on Twitter.

Exhibit F

NEWS

Democratic senators express ‘deep concerns’ over Biden ending Title 42

By Mark Moore

November 29, 2022 | 10:18am | Updated

MORE ON:
US BORDER

Arizona gov stacks shipping containers to create ‘border wall’ that feds say is illegal

Letters to the Editor — Dec. 12, 2022

Authorities hunting for ‘Ted Bundy’-like serial killer after 3 found dead in Tijuana

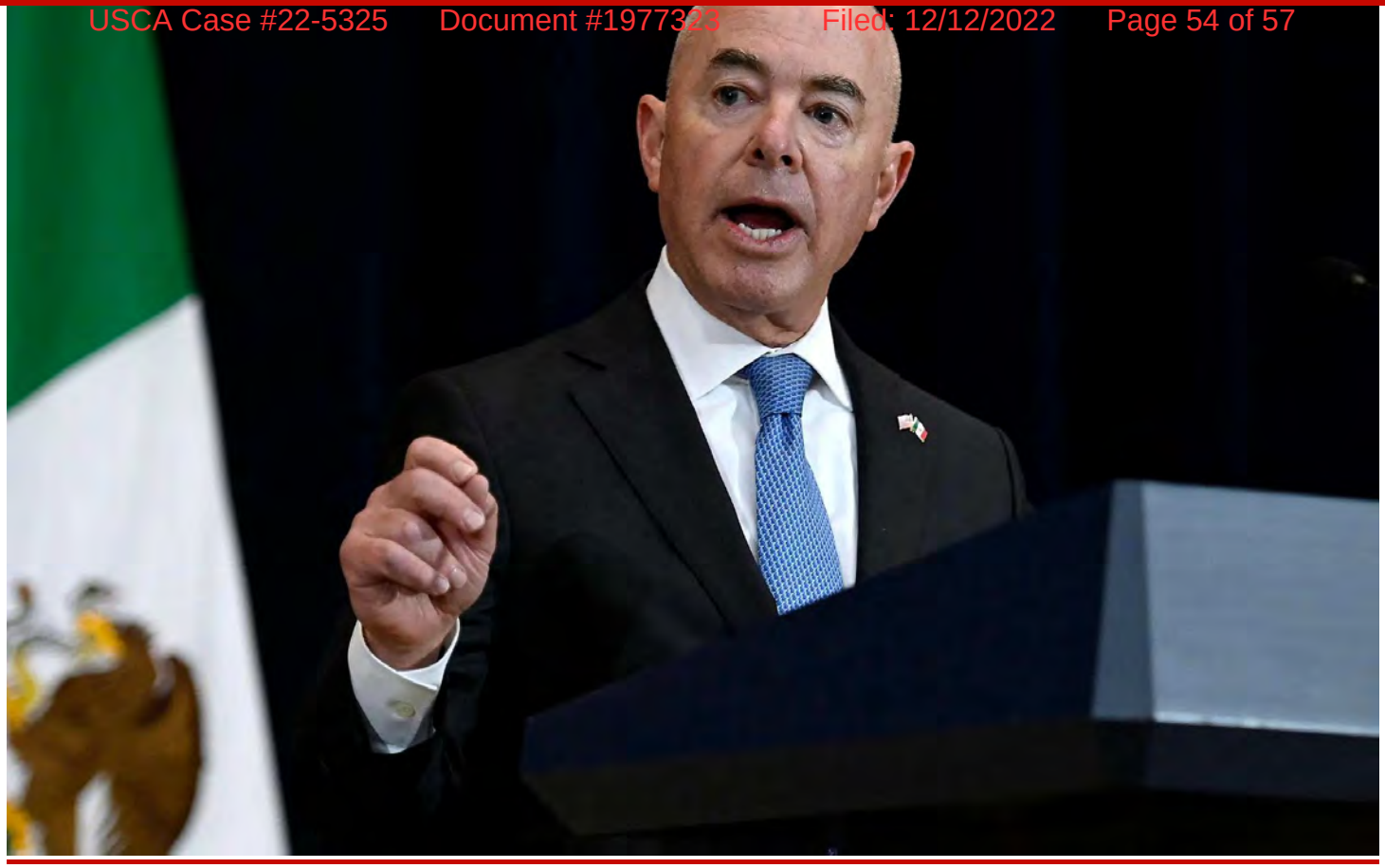
NY Post reporter: The Biden administration barred me from doing a border ride-along

Four Democratic senators have told Homeland Security Secretary Alejandro Mayorkas they have “deep concerns” about the Biden administration’s plans for ending the Title 42 health policy, which is expected to bring a surge of migrants to the United States.

The Trump administration enacted Title 42 during the early days of the coronavirus pandemic in March 2020 to allow for the quick removal of migrants at the border — but a federal judge ruled Nov. 15 the rule was “arbitrary and capricious” and no longer in line with public health conditions in the country.

The policy will expire on Dec. 21.

“We have expressed concern with DHS’ preparations for the end of Title 42, especially as the situation has deteriorated at times. Record annual encounters have led to untenable situations,” Sens. Mark Kelly and Kyrsten Sinema of Arizona, Maggie Hassan of New Hampshire and Jon Tester of Montana wrote in the letter made public on Monday.



Four Democratic senators sent a letter to Homeland Security Secretary Alejandro Mayorkas seeking answers on how the administration will handle the end of Title 42.
AFP via Getty Images

"In Arizona, shelters have been forced well beyond capacity. This month, El Paso has seen over 700 migrants released directly onto city streets due to overcrowding. This is not safe, and creates a dangerous situation for migrants and communities," the letter continued.

Title 42 has been used to remove more than 2.3 million migrants since March 2020 and White House officials believe the end of the policy could lead to as many as 18,000 migrants crossing the southern border each day.

Samuel Guerra, a migrant from Venezuela, told The Post earlier this month that he will be among an "avalanche" of immigrants entering the US once Title 42 expires.

Guerra is one of thousands of migrants living in a tent city a stone's throw away from El Paso, Texas.

Sen. Kyrsten Sinema of Arizona expressed her concern to Mayorkas.

AP

Sen. Jon Tester represents Montana.

Getty Images

“Once Title 42 goes away, it just means we’re going to be releasing even more people into the United States — which, of course, just encourages more people to come,” Brandon Judd told The Post earlier this month.

Mayorkas, appearing before the Senate Homeland Security Committee earlier this month, insisted the administration has a plan to deal with the consequences of Title 42.

Sen. Mark Kelly represents Arizona.

Antranik Tavitian/The Republic / USA Today Network/Sipa USA

Sen. Maggie Hassan represents New Hampshire.
Getty Images

"We are enhancing the consequences for unlawful entry, especially with respect to individuals who seek to evade law enforcement, including removal, detention and criminal prosecution when warranted," he said at the Nov. 17 hearing.

Republicans, who won control of the House in the midterm elections, plan to launch a series of investigations into the administration's lax border policies, and Minority Leader Rep. Kevin McCarthy, expected to be elected House speaker, has already said Mayorkas should step down or face potential impeachment.

"We will use the power of the purse and the power of subpoena. Let me be clear: Those responsible for this disaster will be held accountable," McCarthy (R-Calif.) told reporters last week in El Paso.

"If Secretary Mayorkas does not resign, House Republicans will investigate every order, every action and every failure to determine whether we can begin impeachment inquiries."

FILED UNDER DEMOCRATS, DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION, KEVIN MCCARTHY, TITLE 42, US BORDER, 11/29/22

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IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nancy Huisha-Huisha et al., *Plaintiff-Appellees,* v. Alejandro N. Mayorkas, *Defendant-Appellants* and States of Arizona, Louisiana, Alabama, Alaska, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Tennessee, Utah, Virginia, West Virginia, and Wyoming. *Proposed Intervenor-Defendants.*	Case No. 22-5325

SECOND DECLARATION OF JAMES K. ROGERS

I, James K. Rogers, declare as follows:

1. I am an attorney licensed to practice law in Arizona. I am a Senior Litigation Counsel with the Arizona Office of the Attorney General.

2. Attached hereto as **Exhibit A** is a true and correct copy of **Stef W. Kight, *Biden braces for potentially 14,000 migrants a day*, AXIOS (Dec. 13, 2022), https://www.axios.com/2022/12/14/title-42-migrant-surge-mexico-border.**

3. Attached hereto as **Exhibit B** is a true and correct copy of **Adam Shaw and Rich Edson, *Biden admin seeks $4 billion in additional border funding, predicts post-Title 42 border surge*, FOX NEWS (Dec. 13, 2022), https://www.foxnews.com/politics/ biden-admin-seeks-4-billion-additional-border-funding-predicts-post-title-42-border-surge.**

4. Attached hereto as **Exhibit C** is a true and correct copy of **Priscilla Alvarez and Phil Mattingly, *Biden administration prepares for surge of migrants ahead of the forced end of a Trump-era border policy*, CNN (Dec. 14, 2022), https://www.cnn.com/2022/12/14/politics/biden-administration-prepares-surge/index.html.**

5. Attached hereto as **Exhibit D** is a true and correct copy of **Timothy H.J. Nerozzi, *Newsom says California about to 'break' amid flood of illegal migrants when Title 42 expires*, FOX NEWS (Dec. 14, 2022), https://www.foxnews.com/politics/newsom-says-california-break-flood-illegal-migrants-title-42-expires.**

6. Attached hereto as **Exhibit E** is a true and correct copy of **Nick Allen, *Joe Biden's border policies risk breaking my state, says governor in his own party*, THE TELEGRAPH (Dec. 14, 2022), https://www.telegraph.co.uk/world-news/2022/12/14/joe-bidens-border-policies-risk-breaking-state-says-gavin-newsom/.**

7. Attached hereto as **Exhibit F** is a true and correct copy of **CBS News, *Deputy Attorney General Lisa Monaco on end of Title 42 border policy*, CBS NEWS (Dec. 14, 2022), https://www.cbsnews.com/news/title-42-deputy-attorney-general-lisa-monaco-norah-odonnell-interview/.**

8. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, and that this declaration was issued on December 15, 2022, in Mesa, Arizona.

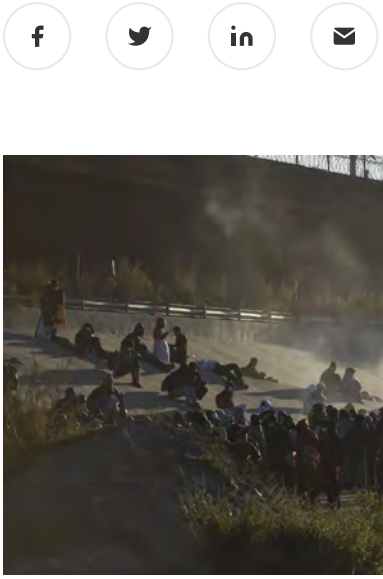
s/ *James K. Rogers*
James K. Rogers

Exhibit A

14 hours ago - Politics & Policy

Biden braces for potentially 14,000 migrants a day

Stef W. Kight



Hundreds of migrants wait to cross the border on the banks of the Rio Grande that divides Ciudad Juárez in Mexico and El Paso, Texas. Photo: Jose Zamora/Anadolu Agency via Getty Images

The possibility of 14,000 migrant crossings a day is pushing the Biden administration toward a new rule that would severely limit migrants' ability to qualify for asylum at the southern border, Axios has learned.

Why it matters: Officials are concerned that Border Patrol stations will face acute overcrowding and Department of Homeland Security resources will be overwhelmed when the pandemic-era Title 42 policy ends on Dec. 21, according to sources familiar with the plans.

Driving the news: Title 42, implemented during the Trump administration and extended by President Biden, allows for the rapid expulsion of migrants and asylum seekers at the border. It's scheduled to be lifted in less than two weeks, barring last-minute court intervention.

- Encounters with migrants at the southern border are already at record levels, with the daily tally surpassing 9,000 three times in the first week and a half of December, the sources told Axios.

- Officials now are preparing for the possibility of between 12,000 to 14,000

migrants attempting to cross every day.

Behind the scenes: A draft rule that would impose an asylum ban for roughly five months — initially — has been circulated internally.

- It would apply to both migrant single adults and families who cross the border illegally — as well as those who arrive at legal ports of entry without already having proper authorization to enter.
- A final decision on adopting the new rule hasn't been made.
- A White House spokesperson referred Axios to a recent tweet by press secretary Karine Jean-Pierre that emphasized "no such decisions have been made" regarding policy changes.
- "The Administration is committed to continuing to secure our borders while maintaining safe, orderly and humane

The big picture: The consideration of a drastic move such as automatically rejecting people from asylum — similar to efforts under the Trump administration — is a sign of just how concerned top Biden

officials are about the situation at the U.S.-Mexico border.

- It also builds upon similar moves officials believe were critical in lowering the number of Ukrainians and Venezuelans attempting to cross the border.

- The new strategy for Venezuelans and Ukrainians offers new — and legal — pathways for people fleeing their home countries, paired with stricter consequences for attempting to cross the border illegally.

- NBC News reported Tuesday that the administration was also solidifying plans to cut the number of people who qualify for asylum while considering expanding pathways to parole for Nicaraguans, Haitians and Cubans.

Details: The new rule is still in the process of being finalized but would lead to people

being considered ineligible for asylum (as was previously reported by Axios) unless they meet any of the following criteria:

- Applied for legal pathways to the U.S. like refugee status or new parole processes, such as the one created for Venezuelans in October.
- First sought protection in a country they had to travel through to get to the U.S.
- Scheduled a meeting at a legal entry point ahead of time through an app run by border authorities — a brand new process.
- Are facing extreme circumstances, such as a medical emergency or other immediate, severe harm.

The bottom line: Biden officials know they have both a political and potential humanitarian crisis on their hands. The very consideration of these rules is an indication of how seriously they are taking the problem.

Exhibit B

Biden admin seeks $4 billion in additional border funding, predicts post-Title 42 border surge

By Adam Shaw, Rich Edson

Published December 13, 2022

Fox News

The Biden administration is requesting billions in additional funding for the border as it predicts an enormous spike in migrant encounters when the Title 42 authority to quickly expel migrants due to the COVID-19 pandemic ends later this month.

According to a congressional aide, the Biden administration is seeking $2 billion for additional funding for Customs and Border Protection (CBP) , as well as $2 billion for Immigration and Customs Enforcement (ICE).

That request, Fox is told, is based off the Department of Homeland Security's estimation of daily encounters once Title 42 is ended on Dec. 21. A court ordered the administration to stop using the authority -- which has been used since March 2020 to quickly return migrants to Mexico -- after finding it to be unlawful.

That "flow estimation" predicts between 9,000 and 15,000 migrant crossings a day once Title 42 ends. For context, the average for fiscal year 2022 -- in which there were a record 2.3 million migrant crossings -- was approximately 6,500 crossings a day.

FOX NEWS FOOTAGE SHOWS MASS RELEASE OF MIGRANTS INTO US, AS NUMBERS HIT 500,000 FOR FY 23

Migrants stand across the Rio Grande from El Paso, Texas. Thousands of migrants have illegally crossed into the city in recent days, prompting concerns from city officials. (Border Patrol)

The $4 billion funding request would fund "border management" and DHS would use it on soft-sided facilities, migrant care, transportation, processing, and the Emergency Food and Shelter program. That is part of a six-point plan the administration has released that includes surging resources to the border, anti-smuggling operations and an increased use of alternative expulsion authorities such as expedited removal.

In a statement to Fox News Digital, the White House called on Republicans to support the funding request.

"If Republicans in Congress are serious about border security, they would ensure that the men and women of the Department of Homeland Security have the resources they need to secure our border and build a safe, orderly, and humane immigration system," White House Assistant Press Secretary Abdullah Hasan said.

The request comes as authorities at the border have already been overwhelmed with the high numbers they have been encountering in recent weeks. Fox News reported on Tuesday that there have been more than 500,000 encounters already this

fiscal year, which began in October. There have been over 503,000 encounters, averaging at just under 7,000 a day. Of those, 162,547 have been expelled under Title 42.

That number is on track to outpace prior years. There were 517,000 encounters by the end of December in FY 2022, and FY 21 where there were just over 216,000 in the same period. In FY 2020, there were only 458,058 encounters for the entire fiscal year.

Fox News captured footage this week of migrants who have been released in El Paso after a huge migrant caravan hit the border on Monday -- dozens of migrants could be seen camping out on a street corner.

Agents in the El Paso Sector have made 2,416 encounters in the last 24 hours. One Border Patrol agent told Fox that the numbers "continue to overwhelm exhausted Border Patrol agents, who continue to do their best in spite of the evident lack of support and leadership."

MIGRANT CARAVAN OF MORE THAN 1,000 CROSSES ILLEGALLY INTO EL PASO, TEXAS, VIDEO SHOWS

CBP acknowledged that it has seen a spike in encounters along the border in recent days.

"Customs and Border Protection's El Paso Sector on the Texas border with Mexico has seen an increase in encounters," CBP said in a statement to Fox News on Monday afternoon. "In order to process individuals as safely and expeditiously as possible, Border Patrol agents from Big Bend and CBP Officers from El Paso Field Office are assisting with processing."

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Meanwhile, in Brownsville, Texas, Fox News witnessed repeated mass releases of several hundred migrants in a parking garage. Migrants were dropped off by the hundreds, at which point they walked across to a local non-governmental organization where they were given travel paperwork. From there they are free to take a flight or bus across the country.

Fox News' Bill Melugin and Griff Jenkins contributed to this report.

Adam Shaw is a politics reporter for Fox News Digital, primarily covering immigration and border security.

He can be reached at adam.shaw2@fox.com or on Twitter.

Exhibit C

Biden administration prepares for surge of migrants ahead of the forced end of a Trump-era border policy

By Priscilla Alvarez and Phil Mattingly, CNN
Published 6:00 AM EST, Wed December 14, 2022

Ivan Pierre Aguirre/Reuters

Migrants queue near the border wall to request asylum in the US city of El Paso, Texas as seen from Ciudad Juarez, Mexico December 12, 2022.

(CNN) — As administration officials considered a border proposal reminiscent of the Trump era this month, Senate Majority Leader Chuck Schumer called Ron Klain, President Joe Biden's chief of staff, with concerns, according to three sources with knowledge of the call.

The call – one of many that have come in from lawmakers to the White House – was indicative of the politically precarious position for Biden as officials try to fend off Republicans pounding the administration over its handling of the border and appease Democrats concerned about barring asylum seekers from the US.

The Biden administration now faces a December deadline to terminate a public health authority, known as Title 42, that was invoked at the onset of the coronavirus pandemic and allowed officials to turn away migrants encountered [illegible] southern border – putting

onset of the coronavirus pandemic and allowed officials to turn away migrants encountered at the US southern border – putting immigration back at the forefront.

The termination of the authority is expected to lead to an increase in border crossings since authorities will no longer be able to quickly expel them as has been done since March 2020.

During the call between Schumer and Klain, the Senate majority leader raised concerns about the administration's preparation for the looming termination and whether officials were indeed considering a new asylum policy, according to two sources with knowledge of the call.

Schumer and Klain speak regularly and often daily or more in critical moments like the year-end legislative sprint currently underway. But the border issue's emergence in discussion provides a window into a complex policy and political moment.

RELATED ARTICLE
Legal fight over termination of Trump-era border policy intensifies as GOP-led states ask appeals court to rule by Friday

Schumer, a New York Democrat who has long pressed the administration to terminate Title 42, is far from alone. Administration officials have received a steady stream of calls from lawmakers as well as state and local officials, reflecting often sharply divergent views on the merits of the authority, people familiar with the matter said. The calls, however, all echoed consistent concerns about the termination of Title 42 and what it will mean along the border in recent weeks.

It's a dynamic that has played out as the Biden administration intensively prepares for a moment officials have long grappled with how to navigate. To some degree, it's the latest phase of an effort that has long been underway, with officials keenly aware since the opening days in office that at some point the pandemic-era policy would come to an end. Personnel and technology infrastructure have been directed to key entry points, with increased levels and resources expected to be announced in the days ahead.

Asked about concerns inside the administration about the potential for a surge at the border once Title 42 goes away, White House press secretary Karine Jean-Pierre listed off a series of personnel, processing and infrastructure efforts that have been put into place.

"We're going to do the work, we're going to be prepared, and we're going to make sure we have a humane process moving forward," Jean-Pierre told reporters Tuesday at the White House briefing.

Still, the cross-cutting viewpoints on border policy have converged with the significant diplomatic component tied to managing a rapid shift in the countries of origin of the migrants apprehended at the border, one that has added a new layer of difficulty for the administration.

Throughout, administration officials have stressed that the only viable long-term solution will come from congressional action, noting encouragement with a bipartisan framework released in the Senate last week.

But there are no clear signs that effort has gained traction and despite a legal process that remains up in the air, officials are deep into preparation as they stare down ominous signs of what may come next.

Already, over the weekend, more than 2,400 migrants crossed into the United States each day in only one section of the border, according to a senior Border Patrol official, marking what he described as a "major surge in illegal crossings" in the El Paso, Texas, sector.

Homeland Security officials have described the mood within the administration as concerned and worried about an influx in the near term.

Border planning underway

In the face of losing Title 42 and amid concerns of a surge, officials have weighed what immigrant advocates have described as a draconian approach by creating hurdles for migrants seeking asylum in the United States. The asylum proposal was included in a memo sent from the Department of Homeland Security to the White House, one source told CNN.

White House officials have also been in daily conversations with DHS officials about planning, sources told CNN. The National Security Council, which has been heavily involved in migration management amid mass movement across the Western hemisphere, has also played a critical role, sources said.

“The team has been working really hard to ensure we’re taking steps to manage the expiration of Title 42 and put in place a process that’s orderly and humane. And we believe in doing so, we can protect our security concerns,” national security adviser Jake Sullivan said Monday.

If adopted, the asylum proposal would be reminiscent of a policy put in place during the Trump administration that dramatically limited the ability of migrants to claim asylum in the US if they resided or traveled through other countries prior to coming to the US. No decision has been made on the proposal.

Administration officials have also set other plans in motion in anticipation of a surge of migrants when Trump-era Covid restrictions are lifted this month following a court order blocking the use of Title 42. The legal fight intensified this week when 19 Republican-led states asked a federal appeals court to rule on their request to suspend the termination of the policy by Friday, according to a court filing.

Since March 2020, when the authority was invoked, border officials have turned away migrants at the US-Mexico border more than two million times.

The Department of Homeland Security is preparing temporary facilities to process migrants, including in El Paso, as well as discussing ways to return non-Mexican migrants to Mexico through existing legal mechanisms aside from Title 42, according to two Homeland Security officials who stressed there’s been hourslong meetings daily to plan for an influx of migrants.

In a document outlining border security preparedness and obtained by CNN, DHS broke down its six-pillar plan, which was released in the spring and has since been updated. It includes scaling up ground and air transportation capabilities to transport migrants for processing and remove them, leaning on a CBP One mobile application to process asylum seekers, and increasing referrals for prosecutions for repeat border crossers, the document said.

In it, DHS also stressed the need for congressional action to update outdated statutes and help create a functioning asylum system, as the current one is under immense strain.

But just days away from the anticipated end of Title 42, plans are still being sorted out.

“The 21st (is) going to be a disaster. There are so many things in the pipeline, but nothing is ready (to) go,” one official said, referring to December 21 when Title 42 is set to end.

Homeland Security Secretary Alejandro Mayorkas underscored the whole of government approach in a statement, noting that mass movement of people around the globe has posed a uniquely difficult challenge.

“Despite our efforts, our outdated immigration system is under strain; that is true at the federal level, as well as for state, local, NGO, and community partners. In the absence of congressional action to reform the immigration and asylum systems, a significant increase in migrant encounters will strain our system even further,” he said.

“Addressing this challenge will take time and additional resources, and we need the partnership of Congress, state and local officials, NGOs, and communities to do so,” he added.

Democratic Rep. Henry Cuellar of Texas, however, has called Title 42 critical and criticized what he called a “whack a mole” approach to the issue.

“If there’s a surge in the valley, they’ll move people down there. If there is more people crossing let’s say, Del Rio, Eagle Pass they’ll move agents over there. Now they’re moving agents to El Paso. This is not the way to secure the border,” Cuellar said Wednesday on “CNN This Morning,” adding a call for Biden to visit the border and see the situation for himself.

“I don’t know why they keep avoiding the border and saying there’s other things more important than visiting the border,” he said. “If there’s a crisis, show up. Just show up.”

Major surge in arrivals expected

Officials have already been contending with thousands of migrants crossing the border daily. They expect these numbers to increase in the

Officials have already seen encountering with thousands of migrants crossing the border daily and expect those numbers to increase in the coming days and weeks, overwhelming already-strained resources.

CNN previously reported that DHS is preparing for multiple scenarios, including projections of between 9,000 to 14,000 migrants a day, more than double the current number of people crossing.

Over the weekend, US border authorities apprehended more than 16,000 people, US Border Patrol Chief Raul Ortiz said on Twitter. Among the cities seeing an influx in migrants is El Paso, which has previously grappled with a surge of migrants.

El Paso city officials said Tuesday they're monitoring the situation and are in ongoing discussions with federal, state, and local partners. Mayorkas also visited El Paso on Tuesday where he met with the Customs and Border Protection workforce and local officials.

The Biden administration is also asking Congress for more than $3 billion as it prepares for the end of Title 42, according to a source familiar with the ask.

The request is intended to shore up resources for border management and technology and is part of broader funding discussions. It is not specific to the end of Title 42, the source said.

"If Republicans in Congress are serious about border security, they would ensure that the men and women of the Department of Homeland Security have the resources they need to secure our border and build a safe, orderly, and humane immigration system," White House spokesperson Abdullah Hasan said in a statement.

Other border cities are also bracing for an influx of arrivals, including Laredo, Texas.

Cuellar, who represents Texas' 28th District, told CNN he's in close touch with the city of Laredo about preparations, adding that the city may bus migrants to other locations as they've done in the past if nonprofits can't handle the influx of arrivals.

CNN's Shawna Mizelle contributed to this report.

Exhibit D

Newsom says California about to 'break' amid flood of illegal migrants when Title 42 expires

By Timothy Nerozzi

Published December 14, 2022

Fox News

Democratic Gov. Gavin Newsom of California warned Monday that President Biden's plan to reverse former President Donald Trump's border policies could "break" his state.

The Biden administration is planning to lift the Trump-era Title 42 policy, which allows police and border officers to expedite the expulsion of illegal immigrants.

Newsom, speaking to ABC News on Monday, said, "The fact is, what we've got right now is not working and is about to break in a post-42 world unless we take some responsibility and ownership."

CALIFORNIA REPARATIONS PROPOSAL COULD MEAN $223K PER PERSON IN PAYMENTS FOR BLACK RESIDENTS

California Gov. Gavin Newsom speaks during a press conference in San Francisco, California. (Justin Sullivan/Getty Images)

"I'm saying that as a father," the governor added. "I'm saying that as someone that feels responsible for being part of the solution and I'm trying to do my best here."

Newsom claimed the U.S. government is sending "more and more" migrants to California because the state is "taking care of folks."

"The more we do, the burden is placed disproportionate on us," he said.

"We're already at capacity at nine of our sites," Newsom continued. "We can't continue to fund all of these sites because of the budgetary pressures now being placed on this state and the offsetting issues that I have to address.… The reality is, unless we're doing what we're doing, people will end up on the streets."

Newsom's comments come as a surprise after years of championing policies to accommodate and expand protections to illegal migrants entering California.

NEWSOM PROPOSES UNIVERSAL HEALTH CARE FOR ILLEGAL IMMIGRANTS

Migrants stand across the Rio Grande from El Paso, Texas. Thousands of migrants have illegally crossed into the city in recent days, prompting concerns from city officials. (Border Patrol)

About 22% of California's nearly 11 million immigrants are in the United States illegally, according to the Public Policy Institute of California.

In September, Newsom signed a bill allowing illegal immigrants to obtain state ID, saying, "We're a state of refuge – a majority-minority state, where 27% of us are immigrants."

In January, Newsom unveiled his 2022-23 California budget plan, which included universal health care benefits for all low-income residents, including illegal migrants.

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About 22% of California's nearly 11 million immigrants are in the United States illegally, according to the Public Policy Institute of California. (John Moore/Getty Images)

The Biden administration is requesting billions in additional funding for the border as it predicts an enormous spike in migrant encounters when the Title 42 authority to quickly expel migrants due to the COVID-19 pandemic ends later this month.

A court ordered the administration to stop using the authority – which has been used since March 2020 to quickly return migrants to Mexico – after finding it to be unlawful.

Timothy Nerozzi is a writer for Fox News Digital. You can follow him on Twitter @timothynerozzi and can email him at timothy.nerozzi@fox.com

Exhibit E

Joe Biden's border policies risk breaking my state, says governor in his own party

Gavin Newsom says California under pressure with power that allows illegal immigrants to be sent back to Mexico about to lapse

Josie Ensor, US Correspondent, in New York 14 December 2022 • 8:51pm

Gavin Newsom is seen by some as a likely successor to Joe Biden Credit: Anadolu

Gavin Newsom, the Democrat governor of California, has accused Joe Biden of risking "breaking" his state by allowing an immigration crisis to develop at the US-Mexico border.

His comments come just a week before an order introduced by Donald

Trump during the pandemic under which illegal immigrants can be immediately expelled to Mexico - known as Title 42 - is set to be lifted, raising fears of a surge of arrivals at the US border.

Mr Biden has committed to ending the ruling, which aimed to stop the spread of Covid-19, rather than waiting for court dates in the United States.

It is currently expected to lapse on Dec 21 and border states including California are bracing for heightened numbers of border crossings.

Speaking on a visit to the border Mr Newsom said: "The fact is, what we've got right now is not working, and it's about to break in a post-42 world unless we take some responsibility and ownership."

"I'm saying that as a Democrat. I'm not saying that to point fingers. I'm saying that as a father, I'm saying that as someone that feels responsible for being part of the solution, and I'm trying to do my best here."

A sign reads 'good trip' as migrants walk across the Rio Grande in Texas Credit: AFP

The comments by Mr Newsom, who is seen by many as the party's most probable successor to Mr Biden, were also taken as a swipe at his fellow Californian, vice president Kamala Harris, who was placed in charge of

efforts to solve border problems.

He added: "The federal government is sending more and more flights, and more and more buses, directly here to California because this state is doing what no other state's doing."

He said California was "doing health care screenings, and taking care of folks" but the "burden is placed disproportionately on us".

The state was already at capacity at nine of its sites for migrants and "the reality is, unless we're doing what we're doing, people will end up on the streets," he said.

Under Title 42, Mexico accepts returning Mexicans, Guatemalans, Salvadorans, Hondurans and Venezuelans. A court has ruled that Title 42 is unlawful but several Republican-led states have challenged that, and may appeal to the US Supreme Court.

Mr Newsom, 55, was re-elected to the governorship of California in a landslide in last month's midterm elections.

He has increased his national profile, giving speeches in other states, and running TV adverts in Florida against its governor Ron DeSantis, the favourite for the Republican presidential nomination in 2024.

Mr Newsom has also previously criticised his own party's leadership for not being "aggressive" enough in attacking Republicans.

There has been uneasiness in the White House that he could launch a primary challenge against Mr Biden in 2024.
However. last month, Mr Newsom publicly and privately assured Mr Biden that he had no such intention.

The latest Democrat spat came as Eric Adams, the Democrat mayor of New York, criticised the city's press for negative coverage of its crime problem,

Eric Adams has told crime reporters they are damaging his city Credit: AP

Mr Adams, who was elected last year on an anti-crime platform, told journalists they were harming New York's economic recovery.

He said: "We have to tell our news publications: enough. Enough. Enough."

The mayor suggested that bad news did not make the front pages of newspapers so relentlessly elsewhere in the world.
He recently returned from a visit to Qatar for the World Cup.

Mr Adams said: "Don't point at every scar we have. We have a face, New York, and that face is not always perfect. But we don't need to look at the worst part of our day and highlight that again and again and again."

Crime is up in New York City by 30 per cent this year, including a 33 per cent increase in robberies, and an 11 per cent increase in rapes, according to New York Police Department figures.

More stories

Exhibit F

Deputy Attorney General Lisa Monaco on end of Title 42 border policy

December 14, 2022 / 6:16 PM

With Title 42 set to end next week, Deputy Attorney General Lisa Monaco said she is "concerned about the increase in illegal immigration" as well as "human smuggling" and "drug smuggling."

"There is a growing concern that there will now be a tsunami of fentanyl flowing through the southern border when Title 42 ends next week. Is that something you're concerned about?" "CBS Evening News" anchor and managing editor Norah O'Donnell asked Monaco in an interview Wednesday.

"Absolutely we're concerned about that, which is why we are focusing, as I said, relentlessly on these two ruthless criminal drug organizations, the Sinaloa Cartel and the Jalisco New Generation Cartel," Monaco said.

CBS Evening News
@CBSEveningNews · **Follow**

There's growing concern there could be an influx of fentanyl through the southern border when Title 42 ends next week. When asked about it, Deputy AG Lisa Monaco tells @NorahODonnell: "I'm concerned about the increase in illegal migration...I'm concerned with drug smuggling."

Watch on Twitter

3:41 PM · Dec 14, 2022

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Monaco, who oversees the Drug Enforcement Administration, said the agency is using "intelligence," "cyber means," "informants" and "data" to "attack" the supply chain.

A court ruling invalidated Title 42, a public health order that the U.S. has used to expel migrants en masse from the border during the COVID-19 pandemic. The Justice Department said it would appeal the ruling.

Watch more of Norah O'Donnell's interview with Deputy Attorney General Lisa Monaco tonight on the "CBS Evening News."

In:

- Immigration
- Mexico-United States Border

First published on December 14, 2022 / 6:16 PM

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NANCY GIMENA HUISHA-HUISHA, et al.,

Plaintiffs,

v.

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

Defendants.

Civ. A. No. 21-100 (EGS)

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Since the onset of the COVID-19 pandemic in March 2020, the Centers for Disease Control and Prevention ("CDC") has issued a series of orders ("Title 42 orders") invoking its authority under the Public Health Service Act, 42 U.S.C. § 265 ("Section 265"), to temporarily suspend the right to introduce into the United States certain noncitizens traveling from Mexico and Canada who would otherwise be held in congregate settings in ports of entry or U.S. Border Patrol stations. The currently operative order was issued in August 2021, when the highly transmissible Delta variant was raging in the United States, driving a stark increase in COVID-19 cases, hospitalizations, and deaths. After conducting a comprehensive assessment of the public health conditions as applied to border facilities, CDC determined that unlike unaccompanied children, excepting noncitizen single adults and family units from the order would pose a significant public health risk. CDC thereafter terminated the August order based on significantly improved public health conditions, but another federal court has preliminarily enjoined that termination order.

Plaintiffs and class members are noncitizen family units subject to the August 2021 order. They previously moved for and obtained a preliminary injunction based on their statutory claims, but the D.C. Circuit held that, subject to certain limitations, CDC likely has statutory authority to expel the class members, thus narrowing the scope of the preliminary injunction. Plaintiffs now move for partial summary judgment on their remaining claim that CDC's "Title 42 Policy" is arbitrary and capricious under the Administrative Procedure Act ("APA"), focusing primarily on the operative August order.

This Court should deny the motion. As a threshold matter, CDC's decision in issuing the August 2021 order is committed to the agency's discretion by law and not reviewable under the APA. This is so because CDC's exercise of its Section 265 authority involved a complicated analysis of a variety of factors uniquely within CDC's expertise and scientific judgment, and the statute provides no standards to guide the Court's review of the public health determination that the August order was necessary to prevent the serious danger of the introduction of COVID-19 into the United States.

On the merits, Plaintiffs' arbitrary and capricious claim fails as a matter of law. Despite Plaintiffs' attempt to challenge the rationality of the August 2021 order based on more current public health conditions, this Court's review is limited to the administrative record before CDC at the time of the August order. Here, the administrative record amply demonstrates that the August order was the result of reasoned decision-making. Central to CDC's public health determination was the rapid spread of the Delta variant, which was a particularly formidable threat to the unvaccinated, especially those in congregate settings. And yet, a significant number of incoming covered noncitizens who otherwise would be held in the border facilities' congregate setting for hours to days were coming from countries with low vaccination rates. Moreover, border facilities are ill-equipped to manage an outbreak and must rely on local healthcare systems for medical care to noncitizens, but there were worrisome signs of stress in healthcare resources in the southern regions of the United States. The United States was also experiencing a migratory surge of noncitizens entering the United States that threatened to lengthen the time noncitizens spent in border facilities. In the face of a confluence of factors, CDC reasonably concluded that the August 2021 order was necessary in the interest of public health.

Plaintiffs' attempts to argue otherwise are unavailing. They contend that CDC unreasonably deviated from its alleged "least restrictive means" standard for implementing public health measures. But CDC has no such all-encompassing agency policy. The 2017 CDC regulation Plaintiffs cite that adopted such a standard was in the specific context of quarantine orders applicable to U.S. citizens and others, which can implicate constitutionally protected liberty interests. Even if the standard were applicable here, the August order clearly met it because CDC considered and rejected various alternatives to expulsion precisely because those alternatives were either unavailable or inadequate to protect the public health.

Ultimately, Plaintiffs' challenge boils down to the idea that the government should have done more to resume normal immigration processing, either by building up more processing capacity, setting up testing and vaccination programs, or constructing facilities to quarantine the tens of thousands of migrants seeking to cross the border between ports of entry or present themselves at a

port of entry without valid travel documents. But Plaintiffs do not, and cannot, assert a "failure to act" claim, which requires them to identify a nondiscretionary duty unequivocally commanding Defendants to scale up those mitigation measures. While Plaintiffs evidently believe that CDC should have tried to protect the public health through different means (rather than invoking Section 265), this Court's review of CDC's expert judgment is highly deferential. Because CDC has reasonably explained its decision after considering the relevant issues, this Court should not substitute Plaintiffs' policy judgment for that of the agency.

For these reasons, and those stated below, this Court should deny Plaintiffs' motion for partial summary judgment.

BACKGROUND

I. CDC'S TITLE 42 AUTHORITY TO RESTRICT ENTRY

Section 362 of the Public Health Service Act of 1944 provides the CDC Director "the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as [the CDC Director] shall designate," whenever CDC "determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States" and that "a suspension of the right to introduce such persons and property is required in the interest of the public health." 42 U.S.C. § 265. The provision is nearly identical to its predecessor statute, the Act of February 15, 1893, ch. 114, § 7, 27 Stat. 449, 452, except that the 1893 Act lodged the authority in the President.[1] Before the COVID-19 pandemic, the authority to restrict the entry of persons had been invoked only once—in 1929 by President Herbert Hoover during a meningitis outbreak in parts of Asia. *See Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 727 (D.C. Cir. 2022); Exec. Order No. 5143 (June 21, 1929).

[1] In re-enacting the 1893 Act, Congress placed the authority in the Surgeon General. *See* H.R. Rep. No. 78-1364, at 25 (1944); 42 U.S.C. § 265. The authority was later transferred to the HHS Secretary and then delegated to the CDC Director. *See* 85 Fed. Reg. 56,424 (Sept. 11, 2020).

II. CDC'S INVOCATION OF TITLE 42 AUTHORITY

In March 2020, as the world faced a historic, unprecedented outbreak of COVID-19, CDC issued an interim final rule implementing its Title 42 authority, 85 Fed. Reg. 16,559 (Mar. 24, 2020), and simultaneously issued an order suspending the right to introduce into the country certain noncitizens (most commonly those who lack valid travel documents) traveling from Canada or Mexico who would otherwise be introduced into a congregate setting in a port of entry or Border Patrol station at or near the border, 85 Fed. Reg. 17,060 (Mar. 26, 2020) ("March 2020 order"). As CDC explained, these border facilities were "not designed for, and [were] not equipped to, quarantine, isolate, or enable social distancing," and the introduction of persons into congregate settings in such facilities "increase[d] the already serious danger to the public health" posed by COVID-19. *Id.* at 17,061. Moreover, CDC explained that the "infection control procedures" then employed at the border facilities "[were] not easily scalable for large numbers of [noncitizens]." *Id.* at 17,065. In addition, the public health tool of conditional release was "not a viable solution in this context." *Id.* at 17,067. CDC assessed that many covered noncitizens might lack homes or other places in the United States where they could effectively self-quarantine, self-isolate, or otherwise comply with existing social distancing guidelines. *Id.* And, in any event, "CDC lack[ed] the resources and personnel necessary to effectively monitor such a large number of persons." *Id.*; *see also* 85 Fed. Reg. 31,503, 31,508 (May 26, 2020) (same). CDC later extended and amended the order, and reassessed it periodically to determine its continued necessity. *See* 85 Fed. Reg. 22,424 (Apr. 22, 2020); 85 Fed. Reg. at 31,509; AR22458–472; AR23096–98.

In September 2020, following notice-and-comment rulemaking, CDC promulgated a regulation to govern its future exercise of Title 42 authority. *See* 42 C.F.R. § 71.40; *see also* 85 Fed. Reg. 56,424 (Sept. 11, 2020) ("Final Rule"). As with the statute, the regulation authorizes the CDC Director to issue a Title 42 order "in the interest of public health" and "for such period of time that the Director deems necessary to avert the serious danger of the introduction of a quarantinable communicable disease" into the United States. 42 C.F.R. § 71.40(a). The regulation defines "serious danger of the introduction of [a] quarantinable communicable disease into the United States" to mean "the probable

introduction of one or more persons capable of transmitting the quarantinable communicable disease into the United States, even if persons or property in the United States are already infected or contaminated with the quarantinable communicable disease." *Id.* § 71.40(b)(3). The Final Rule also explains that the regulatory definition does not require the CDC Director to make a numerical finding or a quantitative or empirical showing of probability in order to prohibit the introduction of persons. 85 Fed. Reg. 56,446. Instead, the Director may make a qualitative determination that the introduction of one or more persons capable of transmitting the quarantinable communicable disease is probable. *Id.*

In October 2020, CDC issued a new order pursuant to the regulation, superseding the prior orders. *See* 85 Fed. Reg. 65,806 (Oct. 16, 2020). The following month, this Court preliminarily enjoined the application of the October order to unaccompanied children. *P.J.E.S. ex rel. Francisco v. Wolf*, 502 F. Supp. 3d 492 (D.D.C. 2020). The D.C. Circuit stayed the injunction pending appeal, *see P.J.E.S. v. Pekoske*, No. 20-5357 (D.C. Cir. Jan. 29, 2021), but shortly thereafter, CDC temporarily paused the expulsion of unaccompanied children under Title 42, *see* 86 Fed. Reg. 9942 (Feb. 17, 2021).

III. THE PRESIDENT'S EXECUTIVE ORDER AND CDC'S REASSESSMENT

In February 2021, the President ordered the Secretary of Health and Human Services and the CDC Director, in consultation with the Secretary of Homeland Security, to "promptly review and determine whether termination, rescission, or modification of the [October order and the September regulation] is necessary and appropriate." Exec. Order No. 14,010, § 4(ii)(A), 86 Fed. Reg. 8,267, 8,269 (Feb. 2, 2021). By July 2021, CDC determined that it was appropriate to except unaccompanied children from the October 2020 order given the COVID-19 mitigation measures in place for this population. *See* 86 Fed. Reg. 38,717 (July 22, 2021) ("July Exception"). In August 2021, CDC completed its "comprehensive reassessment of the October Order," as directed by the Executive Order, and issued a new order replacing and superseding the October order. 86 Fed. Reg. 42,828, 42,831 (Aug. 5, 2021) ("August 2021 order"). The August 2021 order incorporated the July Exception by reference but determined that the public health conditions continued to require the order for covered single adults and family units. *Id.* at 42,829 n.3. In reaching that conclusion, CDC considered,

among other things, the "current status of the COVID-19 public health emergency and ongoing public health concerns, including virus transmission dynamics, viral variants, mitigation efforts, the public health risks inherent to high migration volumes, low vaccination rates among migrants, and crowding of immigration facilities." *Id.* at 42,840.

Critically important to the August 2021 order was the rapid spread of the highly transmissible Delta variant, *id.* at 42,832, which had increased COVID-19 cases by approximately 400% in the weeks before the August order, *id.* at 42,831. "[H]ospitalization rates [were] once again soaring nationally," *id.* at 42,837, and there were "signs of distress" in the healthcare and community resources in the southern regions of the United States, *id.* at 42,835. Although vaccines were widely available in the United States, vaccination uptake had "plateaued," slowing nationally with wide variations by state (33.9% to 67.2%) and by county (8.8% to 89.0%). *Id.* at 42,8334 & n.55. And there was a rising number of breakthrough infections. *Id.* at 42,832, 42,834. Moreover, countries of origin for the majority of incoming covered noncitizens had "markedly lower vaccination rates." *Id.* at 42,834 & n.57. Because the risk of COVID-19 transmission was "acutely present in congregate settings," where "even a single asymptomatic case can trigger an outbreak," *id.* at 42,833, there was "heightened risk of morbidity and mortality" to unvaccinated covered noncitizens in the border facilities, *id.* at 42,834.

CDC noted that while U.S. Customs and Border Protection ("CBP") had attempted to implement a variety of mitigation measures, those measures were insufficient because of space constraints and because an ongoing surge in migrants had "caused CBP to exceed COVID-constrained capacity and routinely exceed its non-COVID capacity." *Id.* at 42,835. Various other constraints also increased the amount of time covered noncitizens spent in the border facilities; by August 2021, the average time spent at CBP facilities for family units was as long as 62 hours, which "would likely increase significantly" in the absence of the August order. *Id.* at 42,836. Finally, CDC differentiated unaccompanied children from single adults and family units because there was "appropriate infrastructure in place to protect the children, caregivers and local and destination communities," *id.* at 42,838, concluding that while excepting that population would not pose a "significant public health risk, the same [was] not true for [single adults] and [family units]," *id.*

CDC thereafter reassessed the August order every 60 days to determine its continued necessity in light of the most current public health conditions. *See id.* at 42,830; AR23485–508, AR23514–17. By the time of the second reassessment in late November 2021, the "sudden emergence of the Omicron variant" led CDC to find that the August order continued to be necessary in the interest of public health. 87 Fed. Reg. 19,941, 19,948 (Apr. 6, 2022) (termination order); *see also* AR23500. Indeed, the United States recorded its highest seven-day moving average number of cases on January 15, 2022. 87 Fed. Reg. at 19,948.

IV. CDC'S TWO TERMINATION ORDERS

In March 2022, the U.S. District Court for the Northern District of Texas preliminarily enjoined the government from enforcing the July Exception and the August 2021 order "to the extent that they except unaccompanied alien children from the Title 42 procedures based solely on their status as unaccompanied alien children." *Texas v. Biden*, --- F. Supp. 3d. ---, 2022 WL 658579, at *21 (N.D. Tex. Mar. 4, 2022). That court also stayed the injunction for seven days to allow the government to seek emergency relief at the appellate level. *Id.* at *24. Before the injunction became effective, CDC terminated all prior suspension orders to the extent they applied to unaccompanied children. 87 Fed. Reg. 15,243, 15,248 (Mar. 17, 2022). By this point, the most recent wave of the pandemic caused by Omicron was "receding." 87 Fed. Reg. at 19,947.

On April 1, 2022, the CDC terminated the August 2021 order entirely, with an implementation date of May 23, 2022. 87 Fed. Reg. at 19,942. CDC explained that the status of the COVID-19 pandemic was substantially different from the environment in which the August 2021 order or the earlier suspension orders were issued. Among other things, there was "widespread population immunity and a generally lower overall risk of severe disease due to the nature of the Omicron variant." *Id.* at 19,948. "While earlier phases of the pandemic required extraordinary actions by the government and society at large," CDC explained, "epidemiologic data, scientific knowledge, and the availability of public health mitigation measures, vaccines, and therapeutics have permitted the country to safely transition to more normal routines." *Id.* Moreover, testing was widely used and available, and a significant percentage of the population (including 86% of the CBP workforce on the U.S.-

Mexico border) had been vaccinated. *Id.* at 19,949, 19,951. There were also higher levels of vaccination and infection-induced immunity globally as well as in the countries of origin for the current majority of covered noncitizens. *Id.* at 19,952 & n.144. And since the August order, the Department of Homeland Security ("DHS") had worked with state, local, tribal, territorial, and non-governmental partners to develop robust testing and quarantine programs along the southwest border. *Id.* at 19,951. Furthermore, effective treatments for COVID-19 were more widely available, including oral antiviral medications and a monoclonal antibody. *Id.* at 19,950 & nn.125, 127. Accordingly, CDC judged that "although COVID-19 remains a concern, the readily available and less burdensome public health mitigation tools to combat the disease render a [Title 42 order] … unnecessary." *Id.* at 19,953. "At this point in the pandemic," CDC concluded, "the previously identified public health risk is no longer commensurate with the extraordinary measures instituted by the CDC Orders." *Id.*

On May 20, 2022, the U.S. District Court for the Western District of Louisiana preliminarily enjoined the termination order on the basis that CDC likely was required to conduct notice-and-comment rulemaking in issuing the termination order but failed to do so. *Louisiana v. CDC*, --- F. Supp. 3d. ---, No. 6:22-CV-00885, 2022 WL 1604901, at *22–23 (W.D. La. May 20, 2022). The government has appealed that preliminary injunction, and briefing will be complete in September.

V. THIS LITIGATION

Plaintiffs brought this suit in January 2021 on behalf of a putative class of noncitizen family units to challenge CDC's "Title 42 Process" or "Title 42 Policy," which Plaintiffs characterized as consisting of "a new regulation, several orders, and an implementation [DHS] memo." *See* Compl., ¶ 1, ECF No. 1; 1st Am. Compl., ECF No. 22; 2d Am. Compl., ECF No. 131. Plaintiffs thereafter moved for a preliminary injunction on the grounds that Section 265 did not authorize expulsions and that the Title 42 expulsions violated certain immigration laws affording humanitarian protections, ECF No. 57, which covered the first five counts of the six-count complaint, *see* 2d Am. Compl. ¶¶ 77–106.

In September 2021, this Court certified the class and preliminarily enjoined the application of the "Title 42 Process"—defined by the Court as "the process developed by the CDC and implemented by the August 2021 Order," *Huisha-Huisha v. Mayorkas*, 560 F. Supp. 3d 146, 159 (D.D.C. 2021)—to

the class. The Court found that the statute, 42 U.S.C. § 265, likely did not authorize the government to expel noncitizens once they have crossed the border into the United States. *Id.* at 166–71; *see also* ECF No. 122. The government appealed, and obtained a stay of the preliminary injunction pending appeal. On March 4, 2022, the D.C. Circuit affirmed the preliminary injunction in part, holding that Section 265 likely authorizes the expulsion of covered noncitizens, but that such expulsion may not be "to places where [the noncitizens] will be persecuted or tortured." *Huisha-Huisha*, 27 F.4th at 722. The mandate was issued on May 23, 2022.

Plaintiffs now move for partial summary judgment on Count VI of the operative complaint, which alleges an arbitrary-and-capricious claim under the APA. *See* ECF Nos. 141, 141-1. Their motion focuses on CDC's August 2021 order, except that they also cite material concerning the March 2020 order.

STANDARD OF REVIEW

In actions under the APA, summary judgment is the mechanism for "deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Oceana, Inc. v. Locke*, 831 F. Supp. 2d 95, 106, (D.D.C. 2011). In such cases, the standard set forth in Rule 56 of the Federal Rules of Civil Procedure "does not apply because of the limited role of a court in reviewing the administrative record." *Forest Cnty. Potawatomi Cmty. v. United States*, 330 F. Supp. 3d 269, 278 (D.D.C. 2018). Rather, "a federal district court sits as an appellate tribunal to review the purely legal question of whether the agency acted" reasonably and otherwise in accordance with the APA. *Franks v. Salazar*, 816 F. Supp. 2d 49, 55–56 (D.D.C. 2011).

ARGUMENT

I. CDC'S PUBLIC HEALTH DETERMINATIONS UNDER SECTION 265 ARE UNREVIEWABLE

As a threshold matter, Plaintiffs' arbitrary-and-capricious claim is unreviewable because Congress committed the decision to issue, modify, or terminate a Title 42 order to CDC's discretion by law. *See* 5 U.S.C. § 701(a)(2) (precluding review of decisions "committed to agency discretion by law"). Although courts presume reviewability under the APA, review is generally unavailable in two

circumstances. First, review is precluded for "administrative decisions that courts traditionally have regarded as committed to agency discretion"—particularly judgments that "require[] a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise" and "area[s] of executive action in which courts have long been hesitant to intrude." *Lincoln v. Vigil*, 508 U.S. 182, 191–93 (1993). Second, review is unavailable when "the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Id.* at 191.

Although either one of these circumstances would be sufficient to preclude review, both are present here. The CDC Director's discretionary determination under Section 265 "involves a complicated balancing of a number of factors which are peculiarly within the agency's expertise." *Lincoln*, 508 U.S. at 191. While neither the statute nor the regulation requires the consideration of any specific factors, the preamble to the Final Rule lists a number of facts and circumstances that CDC "may, in its discretion," consider when determining whether a Title 42 order is required in the interest of public health in a particular situation. 85 Fed. Reg. at 56,444; *see also id.* (noting that CDC may "consider a wide array of facts and circumstances"). The Title 42 orders consistently examined a range of public health factors and evaluated how those factors impacted CBP's border facilities and the personnel and noncitizens in those facilities, including whether the impact varied by categories of noncitizens. In issuing the operative August 2021 order, for example, CDC considered, among other things, the manner of COVID-19 transmission, the emerging variants of the SARS–CoV–2 virus, the risks specific to certain types of facilities or congregate setting, the availability of testing, vaccines and other mitigation measures, and the impact on U.S. communities and healthcare resources. *See, e.g.*, 86 Fed. Reg. at 42,831. It then judged those factors against the context of CBP's processing of covered noncitizens in the border facilities, including by different categories of noncitizens. The balancing of various public health factors to determine whether a Title 42 order remained in the interest of the public health directly implicates the agency's scientific knowledge and expert judgment.

Because these decisions require a complicated balancing of factors that are peculiarly within the agency's expertise, courts have traditionally given deference to public health officials when they exercise their expert judgment to address public health emergencies. *See, e.g.*, *FDA v. American Coll. of*

Obstetricians & Gynecologists, 141 S. Ct. 578, 579 (2021) (Roberts, C.J., concurring in the grant of application for stay) (noting deference owed "concerning government responses to the pandemic"); *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (explaining that the latitude "to guard and protect" "[t]he safety and the health of the people" "must be especially broad" when acting "in areas fraught with medical and scientific uncertainties"); *Marshall v. United States*, 414 U.S. 417, 427 (1974) (courts may not substitute their judgment for an agency's "in areas fraught with medical and scientific uncertainties"); *Jacobson v. Massachusetts*, 197 U.S. 11, 30 (1905) ("[i]t is no part of the function of a court or a jury to determine" how best to protect the public from a disease). Accordingly, the CDC Director's determination under Section 265 is an administrative decision that courts "traditionally have regarded as committed to agency discretion" and is thus "unreviewable" under the APA. *Lincoln*, 508 U.S. at 191–93.

The relevant statute is also drawn so that a court would have no meaningful standard against which to judge the agency's exercise of its discretion. Section 265 entrusts the decision whether to issue a Title 42 order to the CDC Director's judgment. If the Director determines that an order "is required in the interest of the public health" to prevent the "serious danger" of "the introduction of [a communicable] disease into the United States," then the Director "shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger." 42 U.S.C. § 265. Section 265 does not provide judicially manageable standards to guide a court's review of CDC's determination; nor does it define what constitutes a "serious danger" in this context. *See* 85 Fed. Reg. at 56,446 (noting that Congress "did not explain when the danger of the introduction of a communicable disease becomes [serious]"). Rather, the statute leaves the public health determination to the CDC Director's expert judgment.[2]

[2] In *Louisiana v. CDC*, ---F. Supp. 3d ---, 2022 WL 1604901, at *17 (W.D. La. May 20, 2022), the court found that Section 265 provides "meaningful standards" to review the agency action because it "limits the CDC's authority to regulating 'communicable' diseases and, more importantly, requires the CDC to exercise that discretion only when "required in the interest of public health." Defendants respectfully disagree with that ruling for the reasons explained herein. Again, the statute does not explain what standards CDC must apply to determine that a Title 42 order would be "in the interest of public health."

Besides the lack of statutory standards to review the CDC Director's exercise of discretion, the statute also contains discretion-conferring language, providing that Title 42 orders should last "only for such period of time as [the CDC Director] *may deem necessary*." 42 U.S.C. § 265 (emphasis added). The Supreme Court has "repeatedly observed" that "the word 'may' *clearly* connotes discretion." *Biden v. Texas*, 142 S. Ct. 2528, 2541 (2022). The D.C. Circuit has likewise recognized that the word "deem" demonstrates that the "determination calls upon [an agency's] expertise and judgment unfettered by any statutory standard whatsoever." *Zhu v. Gonzales*, 411 F.3d 292, 295 (D.C. Cir. 2005); *see also Webster v. Doe*, 486 U.S. 592, 600-01 (1988) (termination decision committed to agency discretion by law where the statute provided that termination was appropriate whenever the agency director "shall deem such termination necessary or advisable in the interests of the United States").

CDC's regulation implementing Section 265—which Plaintiffs' motion does not challenge—makes clear the public health determination is left to the agency's discretion. *See* 42 C.F.R. § 71.40(a) ("The Director *may* prohibit, in whole or in part, the introduction into the United States of persons from designated foreign countries (or one or more political subdivisions or regions thereof) or places, only for such period of time that the Director *deems* necessary to avert the serious danger of the introduction of a quarantinable communicable disease." (emphasis added)). Although the regulation "clarifies that the danger of introduction becomes serious when one or more additional persons capable of disease transmission would more likely than not be introduced into the United States," the preamble to the Final Rule also makes clear that this regulatory definition does not require the Director to make "a numerical finding or a quantitative or empirical showing of probability in order to prohibit the introduction of persons." 85 Fed. Reg. at 56,445. Rather, "[t]he Director may make a *qualitative* determination, based on the known facts and circumstances, that the introduction of one or more persons capable of transmitting the quarantinable communicable disease is probable." *Id.* (emphasis added). The statute and regulation thus lack any "meaningful standard" against which to judge the CDC Director's exercise of discretion. *Lincoln*, 508 U.S. at 191; *see also Sierra Club v. EPA*, No. 20-1121, --- F. 4th ---, 2022 WL 3694866, at *6 (D.C. Cir. Aug. 26, 2022) (EPA's decision whether to

make and publish a finding of nationwide scope or effect was committed to agency discretion because statute offered "no meaningful standard" against which to judge EPA's decision); *Sierra Club v. Jackson*, 648 F.3d 848, 856 (D.C. Cir. 2011) (EPA Administrator's determination whether to prevent construction of facility was unreviewable because the statute provided "no guidance" to reviewing court); *United States v. Simmons*, No. CR 18-344 (EGS), 2022 WL 1302888, at *11 (D.D.C. May 2, 2022) (Sullivan, J.) (collecting cases holding that agency action was committed to agency discretion by law).[3] The CDC Director's determination under Section 265 "is accordingly unreviewable under [5 U.S.C.] § 701(a)(2)." *Lincoln*, 508 U.S. at 193.

II. PLAINTIFFS' ARBITRARY AND CAPRICIOUS CHALLENGE FAILS AS A MATTER OF LAW

A. This Court's Review of CDC's Decision Is Highly Deferential

Judicial review under the APA's arbitrary-and-capricious standard is "highly deferential." *Zevallos v. Obama*, 793 F.3d 106, 112. "[A] court may not substitute its own policy judgment for that of the agency," *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021), and "is not to ask whether [an agency's] decision is the best one possible or even whether it is better than the alternatives," *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). Rather, a court "simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Prometheus Radio Project*, 141 S. Ct. at 1158. Even if the agency decision is "of less than ideal clarity," it must be upheld "if the agency's path may reasonably be discerned." *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The court only considers "whether there has been a clear error of judgment." *Id.*

[3] In *Texas v. Biden*, --- F. Supp. 3d. ---, 2022 WL 658579, at *11 (N.D. Tex. Mar. 4, 2022), the court found that the August order was reviewable because 42 C.F.R. § 71.40(c) purportedly "establishe[d] the parameters the CDC must consider." The provision, however, merely lists information that the Director must specify in a Title 42 order, *see* 42 C.F.R. § 71.40(c)(1)-(5), including the "countries … from which the introduction of persons shall be prohibited," *id.* § 71.40(c)(1), and "[t]he period of time or circumstances under which the introduction of any persons … shall be prohibited," *id.* § 71.40(c)(2). That information plainly is designed to inform the public of the CDC Director's invocation of Section 265 authority and the precise scope of the Title 42 order, not to inform *how* the Director should exercise her discretion, let alone what factors to consider in issuing a Title 42 order. Accordingly, the provision does not provide a meaningful standard against which to judge the Director's exercise of discretion in issuing a Title 42 order.

This deference to the agency is heightened in cases such as this one, which calls for the application of scientific and technical expertise. Courts "give an extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise," *West Virginia v. EPA*, 362 F.3d 861, 871 (D.C. Cir. 2004), for a court "cannot decide … whether technical evidence beyond [its] ken supports the proposition it is asserted to support," *Simpson v. Young*, 854 F.2d 1429, 1434 (D.C. Cir. 1988). *Cf. South Bay United Pentecostal Church*, 141 S. Ct. at 716 (Roberts, C.J., concurring in the partial grant of application for injunctive relief) ("[F]ederal courts owe significant deference to politically accountable officials with the background, competence, and expertise to assess public health."). Moreover, where, as here, an agency's decision involves predictive judgments, the court's review is likewise "particularly deferential." *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009); *see also FCC v. Nat'l Citizens Comm. for Broad.,* 436 U.S. 775, 813–14 (1978); *EarthLink, Inc. v. FCC,* 462 F.3d 1, 12 (D.C. Cir. 2006).

Importantly, in evaluating CDC's August 2021 order, the Court considers only the material that was before the CDC Director *at the time* of that order, not the facts and circumstances as they exist today, because "the focal point for judicial review" is the administrative record that was before the agency at the time of the decision. *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam); *see also 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."); *accord IMS, P.C. v. Alvarez*, 129 F.3d 618, 623–24 (D.C. Cir. 1997). "If a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision." *Water O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984).

B. The August 2021 Order Was the Result of Reasoned Decisionmaking

Here, the administrative record amply demonstrates that the August 2021 order satisfies the highly deferential standard of review and is the result of reasoned decisionmaking. In issuing the order, CDC comprehensively examined the following public health factors: "(1) [t]he manner of COVID-19 transmission, including asymptomatic and pre-symptomatic transmission; (2) the

emerging variants of [COVID-19]; (3) the risks specific to the type of facility or congregate setting; (4) the availability of testing and vaccines and the applicability of other mitigation efforts; and (5) the impact on U.S. communities and healthcare resources." 86 Fed. Reg. 42,832–42,835; *see, e.g.*, AR3975 (CDC, Emerging Infectious Diseases, Transmission Dynamics of Severe Acute Respiratory Syndrome Coronavirus 2 in High-Density Settings, Minnesota, USA, March-June 2020, Aug. 2021); AR3186 (CDC, SARS-CoV-2 Transmission, May 7, 2021); AR3154 (CDC, SARS-CoV-2 and Surface Fomite Transmission for Indoor Community Environments, Apr. 5, 2021); AR4020 (JAMA, SARS-CoV-2 Transmission from People Without COVID-19 Symptoms, Jan. 7, 2021); AR2905 (CDC, Update on Emerging SARS-CoV-2 Variants and COVID-19 Vaccines, June 29, 2021); AR2585 (CDC, Morbidity and Mortality Weekly Report, COVID-19 Vaccination Coverage Among Adults—United States, December 14, 2020-May 22, 2021, June 25, 2021); AR7070 (CDC, COVID-19 Daily Update, July 21, 2021); AR7463 (CDC, COVID Data Tracker Weekly Review, Interpretive Summary for July 30, 2021); AR22347 (CDC, Community Profile Report, July 26, 2021). CDC then evaluated the impact of those factors on CBP's immigration processing at border facilities and on the personnel and noncitizens in those facilities, including assessing whether those impacts varied by category of noncitizens. 86 Fed. Reg. at 42,831, 42,835–42,838.

Of "critical significance" for the August 2021 order was the rapid spread of the Delta variant. *Id.* at 42,832. "[M]ore than two times as transmissible as the original strains of [the virus]," *id.* at 42,834, the Delta variant "[had] driven a stark increase in COVID–19 cases, hospitalizations, and deaths," with cases increasing by approximately 400% in the weeks before the August order. *Id.* at 42,831; *see also id.* (noting that the Delta variant, along with other variants of concern, could cause "more severe disease"); *see, e.g.*, AR3501 (Morbidity and Mortality Weekly Report, Guidance for Implementing COVID-19 Prevention Strategies in the Context of Varying Community Transmission Levels and Vaccination Coverage, July 30, 2021). "[B]oth the United States and Mexico [were] experiencing high or substantial incidence rates." 86 Fed Reg. at 42,831. Over 70% of the U.S. counties along the U.S.-Mexico border were experiencing "high or substantial levels of community transmission." *Id.* at 42,834; *see, e.g.*, AR7138 (CDC, COVID Daily Update, July 28, 2021).

Although vaccines were widely available in the United States for those 12 years of age and older and provided significant protection against COVID-19, there was a rising number of breakthrough infections. 86 Fed. Reg. at 42,832, 42,834. "[E]merging evidence" further "suggested that fully vaccinated persons who do become infected with the Delta variant are at risk for transmitting it to others." *Id.* at 42,833. Moreover, vaccination uptake had "plateaued, particularly in those under the age of 65 years," which, in combination "with the extreme transmissibility of the Delta variant has resulted in rising numbers of COVID-19 cases, primarily and disproportionately affecting the unvaccinated population." *Id.* at 42,834. CDC forecasted increased hospital admissions in the coming weeks, and noted "worrisome trends in healthcare and community resources," including "[s]igns of stress" already present in the southern regions of the United States. *Id.* at 42,835; *see, e.g.*, AR16029 (CDC, COVID-19 Response Update Report, July 22, 2021). As CDC recognized, "the flow of migration directly impacts not only border communities and regions, but also destination communities and healthcare resources of both." 86 Fed. Reg. at 42,835.

The Title 42 order, of course, is specifically focused on congregate settings in CBP's border facilities. Because the spread of COVID-19 is more likely when people are "in close contact with one another … especially in crowded or poorly ventilated indoor settings," 86 Fed. Reg. at 42,832, CDC assessed that "the risk [of transmission] is acutely present in congregate settings," *id.* at 42,833. "[E]ven a single asymptomatic case can trigger an outbreak that may quickly exceed a facility's capacity to isolate and quarantine residents." *Id.* CDC noted that in the border facilities, noncitizens undergoing immigration processing at CBP facilities typically are held in close proximity to one another "anywhere from several hours to several days." *Id.* at 42,835; *see also* 85 Fed Reg. at 17,066 (noting that "a typical Border Patrol station is designed to temporarily hold a maximum of 150 to 300 people standing shoulder-to-shoulder," and has only between two to five separate holding areas for to segregating noncitizens based on demographic factors such as age, gender, and family status, as required by law). Although CBP had sought to enhance physical distancing and COVID-19 cohorting of noncitizens in the border facilities (in addition to complying with existing cohorting requirements), there was a migratory surge of noncitizens entering the country at that time, which caused CBP to

exceed its COVID-constrained capacity and even its non-COVID capacity. 86 Fed. Reg. at 42,835, 42,836 n.79. This "extreme population density and the resulting increased time spent in custody by noncitizens," combined with the other factors described above, presented a "serious risk of increased COVID-19 transmission in CBP facilities" at that time. *Id.* at 42,836.

Other constraints also increased the risk of transmission in border facilities. For example, only a "limited number" of family units could be transferred to Family Staging Centers operated by the U.S. Immigration and Customs Enforcement, whose capacity was limited by COVID-19 mitigation protocols. *Id.* Although other family units could be released to communities, CDC had to factor in the capacity of state and local agencies and non-governmental organizations ("NGOs") partnered with DHS to provide testing, vaccination where possible, and consequence management (*e.g.*, facilities for isolation and quarantine). *Id.* But those partners' resources were "limited," "already stretched thin, and certainly not available for all [family units] who would be processed under Title 8 in the absence of [a Title 42 order]." *Id.* In addition, foreign governments have imposed restrictions on the United States' ability to expel certain family units to their countries, further adding to the congestion at border facilities. *Id.* CDC found that the average time spent at CBP facilities for family units was as long as 62 hours, which "would likely increase significantly" in the absence of the August order. *Id.* at 42,837. As CDC noted, normal immigration processing under Title 8 of the U.S. Code of a noncitizen can take up to eight times as long as Title 42 processing. *Id.*

CDC also considered the availability of mitigation measures at CBP's border facilities. It recognized that CBP had implemented a variety of mitigation efforts to prevent the spread of COVID-19, including by investing in engineering upgrades, adhering to CDC guidance on cleaning and disinfection, and providing masks and Personal Protective Equipment to CBP personnel. *Id.* at 42,835. But on-site testing was "very limited," and CBP could not appropriately minimize spread or transmission of COVID-19 within its facilities due to space constraints. *Id.* at 42,837. "Of particular note," the CDC explained, border facilities "are ill-equipped to manage an outbreak" and are "heavily reliant on local healthcare systems for the provision of more extensive medical services to noncitizens." *Id.* CDC assessed that "[t]ransfers to local healthcare systems for care could strain local

or regional healthcare resources," particularly given that "hospitalization rates [were] once again soaring nationally" due to the Delta variant. *Id.* Yet, "[e]nsuring the continued availability of healthcare resources is a critical component of the federal government's overall public health response to COVID-19." *Id.*

The concern about COVID-19 transmission in border facilities was magnified also because, at the time, countries of origin for the majority of incoming covered noncitizens had "markedly lower vaccination rates." *Id.* at 42,834; *see id.* at 42,834 n.57 (noting fully vaccinated rates ranging from 1.6% to 22% for the top five countries of origin for covered noncitizens). Thus, in CDC's expert judgment, there was a "heightened risk of morbidity and mortality" to covered noncitizens in the border facilities "due to the congregate holding facilities at the border and the practical constraints on implementation of mitigation measures in such facilities." *Id.* CDC further concluded that "[o]utbreaks in these settings [would] increase the serious danger of further introduction, transmission, and spread of COVID-19 and variants into the country." *Id.*

Finally, CDC differentiated unaccompanied children from single adults and family units in light of the government's "greater ability to care for [unaccompanied children] while implementing appropriate COVID-19 mitigation measures." *Id.* at 42,837-38; *see also* July Exception, 86 Fed. Reg. 38,717 (discussing the infrastructure in place to care for unaccompanied children). Importantly, unaccompanied children are released to a sponsor only after having undergone testing, quarantine and/or isolation, and vaccination when possible, and their sponsors are provided with appropriate medical and public health direction. 86 Fed. Reg. at 42,838. CDC judged that there was a "very low likelihood" that processing unaccompanied children under Title 8 would result in an "undue strain on the U.S. healthcare systems or healthcare resources." *Id.* As a result, CDC reasonably concluded that unaccompanied children could be excepted from the order "without posing a significant public health risk," while "the same [was] not true for [single adults] and [family units]." *Id.* CDC then "considered various possible alternatives (including but not limited to terminating the application of [a Title 42 order] for some or all [single adults] or [family units] …)," *id.* at 42,838, but ultimately determined that single adults and family units should continue to be subject to the August order "pending further

improvements in the public health situation," *id.* at 42,837, and "greater ability to implement COVID-19 mitigation measures in migrant holding facilities," *id.* at 42,838.

In challenging CDC's conclusion as arbitrary and capricious, Plaintiffs ask the Court to consider events that post-date the agency's decision. *See* Br. at 12–13 (discussing CBP's efforts in March 2022 related to Ukrainians fleeing Russian aggression, and CDC's April 2022 termination order). Under basic administrative law, however, the Court may not take into account the evolving public health conditions following the August 2021 order in assessing whether the order itself was arbitrary and capricious when issued. *See Boswell Mem'l Hosp.*, 749 F.2d at 792 (noting that in analyzing agency action, courts "should have before it neither more nor less information than did the agency when it made its decision"). Plaintiffs' reliance on subsequent events, therefore, is unavailing. Plaintiffs also seek to rely on the D.C. Circuit's March 2022 decision on the government's appeal of this Court's preliminary injunction, *see* Br. at 10, in which the D.C. Circuit noted that "CDC's § 265 order look[ed] in certain respects like a relic from an era with no vaccines, scarce testing, few therapeutics, and little certainty." *Huisha-Huisha*, 27 F.4th at 734. But Plaintiffs take the D.C. Circuit's comment out of context. The D.C. Circuit's decision was focused on assessing CDC's statutory authority to expel noncitizens under the August order, not the rationale behind the August order. The court's comment on the August order being a "relic" was made in the context of its balance-of-the-equities analysis and was comparing the August order to the public health situation in "March 2022." *Id.* The D.C. Circuit's comment therefore is inapposite to the question whether the August order is arbitrary and capricious at the time it was issued. On that question, Plaintiffs ask the Court to substitute their own judgment for that of the agency's expert public health determination. As discussed below, their arguments have no merit.

C. CDC's Title 42 Orders Are Not Subject to any "Least Restrictive Means" Standard

Plaintiffs argue that the August 2021 order is arbitrary and capricious because CDC allegedly "disregarded" a purportedly "established policy" of using the "least restrictive means" to prevent the spread of communicable diseases. Br. at 5–10. This argument fails for at least two reasons: (1) CDC's Title 42 orders are not subject to the "least restrictive means" standard, and (2) even if they were, the

August order was the "least restrictive means" available to "avert the serious danger of the introduction of a quarantinable communicable disease" into the United States, 42 C.F.R. § 71.40(a).

First, Plaintiffs are incorrect that CDC has adopted a "least restrictive means standard" that governs the use of any and all public health measures. They cite a 2017 Final Rule that amended CDC's quarantine regulations issued under 42 U.S.C. § 264, including regulations authorizing the apprehension, detention, and physical examination of individuals, including citizens. *See Control of Communicable Diseases*, 82 Fed. Reg. 6890, 6968–6978 (Jan. 19, 2017); *see also* 42 C.F.R. § 70.15(c); *id.* § 71.38(c).[4] In that Final Rule, CDC stated that it would "seek to use the least restrictive means necessary to prevent the spread of communicable disease" in "implementing quarantine, isolation, or other public health measures *under this Final Rule*." *Id.* at 6890 (emphasis added). Thus, the Final Rule amended CDC regulations to provide that when the CDC Director issues an order requiring the quarantine of an individual, for example, the Director must reassess within 72 hours whether the quarantine remains necessary or whether "less restrictive alternatives would adequately serve to protect the public health." 42 C.F.R. § 70.15(c). The requirement to use the least restrictive means was appropriate in the context of quarantine and isolation, including of citizens, because such measures often implicate liberty interests protected by the Due Process Clause. *See, e.g.*, 82 Fed. Reg. at 6900 (discussing due process concerns).

But the 2017 Final Rule did not "establish" a blanket policy of applying "least restrictive means" to any public health measures designed to prevent the spread of a communicable disease. Br. at 5. To the contrary, CDC routinely implements such measures without regard to the "least restrictive means." For example, CDC has issued regulations governing medical examinations of certain noncitizens seeking to enter the United States without applying a "least restrictive means" analysis. *See, e.g.*, *Medical Examination of Aliens—Revisions to Medical Screening Process*, 73 Fed. Reg. 58047 (Oct. 6, 2008); *see also* 42 C.F.R. part 34. Similarly, when issuing orders requiring a negative pre-departure

[4] Although the 2017 Final Rule also cites Section 265 as statutory authority, the regulations adopted by the Final Rule based on Section 265 do not contain a "least restrictive means" standard. *See, e.g.*, 42 C.F.R. § 71.63 (regulation regarding suspension of entry of animals, articles, or things from designated foreign countries).

COVID-19 test result or documentation of recovery from COVID-19 for all airline or other aircraft passengers arriving into the United States from any foreign country, CDC did not apply a "least restrictive means" test. *See, e.g.*, 86 Fed. Reg. 69,256 (Dec. 7, 2021); 85 Fed. Reg. 86,933 (Dec. 31, 2020). Nor did CDC apply such a standard when it issued orders requiring persons to wear masks when traveling on any conveyance (*i.e.*, various modes of transportation) into or within the United States. *See, e.g.*, 86 Fed. Reg. 8025 (Feb. 3, 2021).

The August order was issued pursuant to 42 U.S.C. § 265 and implementing regulations at 42 C.F.R. § 71.40—distinct authorities from those governing the relevant portion of the 2017 Final Rule. Nor is it a quarantine or isolation order applicable to citizens. *See Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1983 (2020) (due process rights of noncitizen seeking entry are limited to "only those rights regarding admission that Congress has provided by statute"). Thus, the "least restrictive means" standard is inapplicable.[5]

In any event, CDC's August 2021 order ultimately was in fact the least restrictive means available to prevent the further introduction of COVID-19 into the United States at the borders at the time it was issued. Section 265 authorizes the CDC Director to issue a Title 42 order only where "necessary" to prevent the "serious danger" of the introduction of a communicable disease into the United States. 42 U.S.C. § 265. As discussed above, the August 2021 order explains in detail why that

[5] To be sure, as a matter of best public health practices, scientists at the CDC may strive to avoid imposing public health measures that are more restrictive than necessary. For example, Plaintiffs note that in a 2005 paper, Dr. Martin Cetron, the former director of CDC's Division of Global Migration and Quarantine, endorsed the view that pandemic responses "should be proportional, necessary, relevant, equitably applied, and done by least restrictive means." Br. at 9 n.7 (quoting Martin Cetron et al., *Public Health and Ethical Considerations in Planning for Quarantine*, 78 Yale J. of Biology & Med. 325, 329 (Oct. 2005), https://perma.cc/MAM9-38AS). But that paper—which predates the COVID-19 pandemic by almost two decades—references using "least restrictive means" in the context of "recommendations" developed by the Toronto Joint Centre for Bioethics. 78 Yale J. of Biology & Med. at 329. Plaintiffs also note that CDC referenced "least restrictive means" in a "Public Health Law 101" course. Br. at 7. But, again, the course mentioned the principle in the context of an "ethics guide" for public health decisionmaking. *See* CDC, *Public Health Law 101: A CDC Foundational Course for Public Health Practitioners*, at 24 (Jan. 16, 2009), https://perma.cc/FUE5-WK5G. That is, the use of "least restrict means" is an aspirational goal that must be assessed in context of the specific public health threats and countermeasures at issue. In any event, contrary to Plaintiffs' argument, these public health best practices do not constitute an "established policy" that CDC may not "depart from" without explanation. *See* Br. at 5 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

statutory standard was met and why various other alternatives were unavailable or inadequate. It was not until April 2022 that CDC assessed that "the previously identified public health risk is no longer commensurate with the extraordinary measures instituted by the CDC Orders." 87 Fed. Reg. at 19,951. As CDC explained in April 2022, "[w]hile earlier phases of the pandemic required extraordinary actions by the government and society at large, epidemiologic data, scientific knowledge, and the availability of public health mitigation measures, vaccines, and therapeutics have permitted the country to safely transition to more normal routines." *Id.* at 19,948. "[A]lthough COVID–19 remains a concern," CDC judged that "the readily available and less burdensome public health mitigation tools to combat the disease render a [Title 42 order] … unnecessary." *Id.* at 19,953.

Further, where less restrictive means were available prior to the April 2022 termination order, CDC used them. CDC did not extend its August 2021 order to unaccompanied children, explaining that the government had a greater ability to care for such children so that there was a "very low likelihood" that processing them under Title 8 would unduly strain healthcare resources. 86 Fed. Reg. 42,838. As to family units, CDC noted that releasing families to communities would necessitate robust testing and vaccination by partner agencies and organizations whose resources were already "stretched thin" and "certainly not available for all [family units] who would be processed under Title 8 in the absence of [a Title 42 order]." *Id.* at 42,836. Still, the August order allowed for "case-by-case exceptions based on the totality of the circumstances where appropriate," including for humanitarian reasons. *Id.* at 42,840–41. Under this case-by-case humanitarian exception, CBP officers have excepted tens of thousands of individuals from the August order. *See, e.g.*, Defs.' Monthly Data Report at 6, ECF No. 154, *Louisiana v. CDC*, No. 22-cv-00885 (W.D. La. Aug. 16, 2022) (reporting 11,574 humanitarian exceptions across six ports of entry in July 2022). Thus, while CDC may not have expressly used the term "least restrictive means," the substance of CDC's August order makes clear that CDC did, in practice, issue an order that was in fact the least restrictive means available to protect the country form further introduction, transmission, and spread of COVID-19. *See also* Section II.D, *infra* (discussing other alternatives that CDC considered). Accordingly, any alleged failure in not expressly citing the "least restrictive means" standard was at most a harmless error and cannot serve

as a basis to invalidate the August order. *See Zevallos*, 793 F.3d at 115; 5 U.S.C. § 706 (courts shall take "due account … of the rule of prejudicial error").

In contending otherwise, Plaintiffs principally rely on extra-record excerpts of a congressional interview with Dr. Anne Schuchat, a former Principal Deputy Director of CDC. *See* Br. at 8. Specifically, Plaintiffs cite Dr. Schuchat's statements that CDC "typical[ly]" uses the "least restrictive means possible" when "exert[ing] a quarantine order versus other measures." Decl. of Ming Cheung, Ex. A at 28, ECF No. 144-3; *see also* Br. at 6 (noting that CDC sought to use the least restrictive means when deciding whether to quarantine individuals during the 2014–2016 Ebola epidemic). Even if this Court could appropriately consider such extra-record material in this APA case—which it cannot, *see SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)—the excerpts do not call into doubt the rationality of CDC's decisionmaking in the August 2021 order. As noted above, the August order is not a quarantine order. It is a public health measure that prevents the introduction of a communicable disease into the United States by temporarily suspending the right to introduce noncitizens from a foreign country into the United States. Orders suspending entry are distinct from quarantine orders, which can implicate constitutionally protected liberty interests.

Plaintiffs next cite Dr. Schuchat's statement that, in her view, CDC's March 2020 order "wasn't based on a public health assessment at the time." Br. at 8. But in that same answer, Dr. Schuchat acknowledged that she "d[id]n't have knowledge about the final decision" and "wasn't familiar with" the decisionmaking process that led to the March order. Cheung Decl., Ex. A at 27. Moreover, Dr. Schuchat was discussing only the March 2020 order and not any subsequent orders, including the operative August 2021 order at issue here. *See id.* at 27–28. Thus, the interview excerpts on which Plaintiffs rely are irrelevant to the question whether the August order is arbitrary and capricious. The August 2021 order sets forth CDC's reasons for the order, explaining why the CDC Director believed the order was necessary and thus why other alternatives were unavailable. Those reasons are entitled to a "presumption of regularity," *Biden v. Texas*, 142 S. Ct. 2528, 2546 (2022); *see*

also Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971), and must be upheld because they are supported by the administrative record.[6]

Accordingly, Plaintiffs have not shown that CDC acted arbitrarily and capriciously with respect to the "least restrictive means" standard. The standard is inapplicable here, and even if it were, the administrative record shows that the operative August 2021 order was necessary in the interest of the public health, and, thus, was the least restrictive means to achieve the statutory purpose.

D. CDC Considered Available Alternatives Before Issuing the August Order

Plaintiffs argue that Defendants failed to consider "obvious alternatives" to issuing the August 2021 order, such as "instituting testing, vaccination, and quarantine protocols,"[7] Br. at 10, outdoor processing, and self-quarantining, *id.* at 14. But Plaintiffs' Motion does not identify any available alternative that was not considered by CDC. Rather, Plaintiffs argue that CDC failed to "*adequately* consider alternatives to the drastic Title 42 policy," meaning CDC had considered the alternatives; just not the way Plaintiffs would have. *Id.* (emphasis added). Under basic administrative law, however, the Court may not "ask whether [an agency's] decision is the best one possible or even whether it is better than the alternatives." *Elec. Power Supply Ass'n*, 136 S. Ct. at 782.

In any event, CDC fully considered the availability of other mitigation measures, *see, e.g.*, 86 Fed. Reg. at 42,833 (section entitled, "Availability of Testing, Vaccines, and Other Mitigation Measures"), and concluded that there were no viable alternatives at that time to sufficiently mitigate the risk of spread of COVID-19. For example, CDC noted that "[o]n-site COVID-19 testing for noncitizens at CBP holding facilities [was] very limited," and while off-site testing was potentially available, the noncitizen would have to be transported to community healthcare facilities for medical care, and if local protocols permitted, the noncitizen would then receive testing at such facilities. *Id.*

[6] Although Plaintiffs assert that the March 2020 order was the product of "political pressure" and was initiated for purposes unrelated to public health, Br. at 8, Plaintiffs have also expressly disclaimed any reliance on allegations of pretext in support of their motion, *see* Br. at 4 n.1.

[7] Even Plaintiffs recognize that the public health circumstances underlying the March 2020 order was entirely different. *See* Br. at 11 (recognizing that the Title 42 policy was justified in March 2020 as an "emergency measure at a time when there was 'no vaccine,' 'no rapid test,' and no 'approved therapeutics.'" (quoting 85 Fed. Reg. at 17,062)).

at 42,837. CDC also recognized that "vaccination programs [were] not available at th[at] time." *Id.* at 42,840. In fact, DHS did not begin initiating a vaccination program until the Spring of 2022. *See* 87 Fed. Reg. at 19,955-56. Plaintiffs themselves admit that CBP was "not testing or vaccinating the migrants who came into its custody" in August 2021. Br. at 12. Plaintiffs argue that CBP's rationale for not doing so is "unexplained," *id.*, but CDC must base its decision on the operational reality, not hypothetical circumstances.

Also unavailable as an alternative mitigation measure in this context was the use of therapeutics. As CDC explained in the April 2022 termination order, although therapeutic treatments in the form of monoclonal antibodies were available in August 2021, their use was not as widespread in August 2021, they were cumbersome to administer, and there were not as many varieties of treatments available. 87 Fed. Reg. at 19,950. Outdoor processing similarly was unavailable in August 2021. Plaintiffs cite to extra-record statements from Secretary Mayorkas in April 2022 that DHS would be employing soft-sided facilities and virtual processing. Br. at 13 & n.10, 14. The statements, however, only serve to show that those measures were not in place in August 2021 and could not have been a viable alternative.

As for federal quarantine, CDC made clear from its first Title 42 order that it "lacks the resources, manpower, and facilities to quarantine covered aliens" and must rely on the "Department of Defense, other federal agencies, and states and local governments to provide both logistical support and facilities for federal quarantines." 85 Fed. Reg. at 17,067 n.66. Early in the pandemic, CDC learned valuable lessons regarding the feasibility of large-scale quarantine operations when it quarantined U.S. citizens repatriated from China and cruise ship travelers. *See* 85 Fed. Reg. at 56,426. Together, these two efforts constitute the largest quarantine operation in U.S. history. *Id.* at 56,433. The operational challenges observed during that operation—including locating or constructing physical facilities, arranging necessary staffing, providing required medical and legal assistance to quarantined individuals, and identifying funding—demonstrated to CDC that a similar program could not be undertaken at the border. *Id.* CDC recognized these lessons learned in the preamble to the Final Rule implementing Section 265, noting that "Federal quarantine and isolation … may be scalable

and effective for hundreds of persons, but not thousands of them," and "[e]ven then, Federal quarantine and isolation require substantial resources and are not sustainable for extended periods of time." *Id.*

As for self-quarantine and self-isolation, Plaintiffs admit that CDC considered this option in the Final Rule. *See* Br. at 15 (citing 85 Fed. Reg. at 56,453). They nevertheless argue that CDC overlooked the availability of noncitizens self-quarantining in the homes of friends and family or in shelters. But CDC did consider those options. CDC "assume[d] that many covered [noncitizens] have family or close friends in the United States," but did not believe that such family or close friends would have personal residences available to the noncitizens for self-quarantine or self-isolation in a manner that complied with HHS/CDC guidelines. 85 Fed. Reg. at 56,453. Plaintiffs call this "rank speculation," Br. 15, but that simple assertion is insufficient to show that CDC's assessment was unreasonable.

Nor were shelters a reasonable "backstop," as Plaintiffs suggest. Br. at 15. Plaintiffs argue that "community and faith-based organizations … were available to provide shelter and quarantine to those who may lack a place to quarantine," citing a "April 23, 2019 [sic]" letter from a legal services organization indicating the existence of such resources. Br. at 15 (citing AR 30). But in the August order, CDC noted the assistance of DHS's state, local and NGO partners and concluded that their resources were "limited," "already stretched thin and certainly not available for all [family units] who would be processed under Title 8 in the absence of an order issued under [Title 42]." 86 Fed. Reg. at 42,83. As for Plaintiffs' citation to certain self-quarantine options permitted by Europe and Canada, *see* Br. at 15, the record demonstrates that such options were extremely limited in both regions to specific eligible travelers, *see* 85 Fed. Reg. at 56,434–37, and that policies employed by both Europe and Canada "reinforce[d] the Director's view that [the Title 42] final rule is an important tool for protecting public health in the United States," *id.* at 56,435.

Moreover, CDC had already assessed that the "implementation of a self-quarantine or self-isolation protocol … would consume undue HHS/CDC and CBP resources without averting the serious danger of the introduction of COVID-19 into CBP facilities." 85 Fed. Reg. at 56,453; *see also*

85 Fed. Reg. at 17,067 (discussing that the public health tool of conditional release was not viable because "CDC lacks the resources and personnel necessary to effectively monitor such a large number of persons"). As CDC explained, "if the persons arriving into the United States must first spend time in congregate settings," such as CBP's border facilities, then by the time of the isolation, the disease may already have been spread to other travelers and government personnel, who may in turn spread to the domestic population. 85 Fed. Reg. at 56,426.

In the end, Plaintiffs' arguments about alternative mitigation measures are premised on the idea that the government should have done more. Plaintiffs argue that by August 2021, the government had had "more than enough time to institute alternatives to expulsion," including building out quarantine and processing capacity. Br. at 12. They also seek to rely on a CDC memo from November 2021 in which CDC noted that DHS had not "developed a plan for the resumption of normal border operations in the event of termination of the August order," AR23494. *See* Br. at 13–14. And they generally argue that Defendants should have created infrastructure to protect against COVID-19 for covered family units as they did for unaccompanied children. *See* Br. at 13. But Plaintiffs cannot ask the Court to compel Defendants to operate in the manner of Plaintiffs' choosing. Plaintiffs did not assert a "failure to act" claim under 5 U.S.C. § 706(1), and understandably so, because they cannot make the required showing that Defendants "failed to perform a non-discretionary duty to act"—*i.e.*, a "ministerial or non-discretionary" duty amounting to "a specific, unequivocal command," *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63, 64 (2004); *see also Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 670 (D.C. Cir. 2016) ("Section 706(1) permits judicial review of agency inaction but only within strict limits."); *Elec. Privacy Info. Ctr. v. IRS*, 910 F.3d 1232, 1244 (D.C. Cir. 2018) (judicial authority to "compel agency action 'unlawfully withheld'" exists only "under narrow circumstances").

In sum, CDC acted within a zone of reasonableness; it appropriately utilized its technical and scientific expertise to consider the relevant issues, and reasonably explained its public health determination in issuing the August 2021 Order. The APA requires no more.

E. CDC's August Order Reasonably Advanced Title 42's Statutory Purpose

Plaintiffs next argue that the August order failed to advance the purpose of 42 U.S.C. § 265 because COVID-19 was already widespread in the United States. Br. at 16. This argument is untethered from the regulatory framework. The regulation defines "serious danger of the introduction of [a] quarantinable communicable disease into the United States" as "the probable introduction of one or more persons capable of transmitting the quarantinable communicable disease into the United States, even if persons or property in the United States are already infected or contaminated with the quarantinable communicable disease." 42 C.F.R. § 71.40(b)(3); *see also id.* § 71.40(b)(1) (defining "introduction into the United States" to include situations where "the quarantinable communicable disease has already been introduced, transmitted, or is spreading within the United States").

Plaintiffs' motion does not challenge the regulation, and in any event, CDC's interpretation of its authority under Section 265 is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125 (2016); *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001); *Guedes v. ATF*, 920 F.3d 1, 17-18 (D.C. Cir. 2019). "[W]hen an agency is authorized by Congress to issue regulations and promulgates a regulation interpreting a statute it enforces, the interpretation receives deference if the statute is ambiguous and if the agency's interpretation is reasonable." *Encino Motorcars*, 136 S. Ct. at 2124. The premise of *Chevron* is that when Congress grants an agency the authority to issue statute-implementing regulations, "it presumes the agency will use that authority to resolve ambiguities in the statutory scheme." *Id.* at 2125. Under *Chevron*'s two-step analysis, a court must first determine "whether Congress has directly spoken to the precise question at issue," and if it has, that is the end of the inquiry. *Id.* at 2124–25 (cleaned up). If the statute is ambiguous, the Court "must defer to the agency's interpretation if it is reasonable." *Id.* at 2125 (cleaned up).

As CDC explained in the preamble to the Final Rule, "[i]n the public health context, the term 'serious danger' is ambiguous." 85 Fed. Reg. at 56,446. Because Congress did not define the term, it was "within HHS's delegated statutory rulemaking authority" to do so. *Id.*; *see, e.g., Rodriguez v. Gonzalez*, 451 F.3d 60, 63 (2d Cir. 2006) (affording *Chevron* deference to an agency's "construction of

undefined statutory terms such as 'moral turpitude,'" under federal immigration law "because of the [agency's] expertise applying and construing immigration laws"). Moreover, CDC had the scientific and technical expertise to resolve the ambiguity, which was further informed by "CDC's experience during the COVID-19 pandemic." 85 Fed. Reg. at 56,446. As CDC further explained, the determination of whether there is a "serious danger" is a "qualitative determination," and "does not require the CDC Director to make a numerical finding or a quantitative or empirical showing of probability in order to prohibit the introduction of persons." *Id.*

The CDC Director duly complied with the regulation when she issued the August order, making a qualitative judgment that a suspension of the right to introduce noncitizens was required to prevent the spread of COVID-19, even though the virus was already spreading in the United States. *See* 86 Fed. Reg. at 42,838–40; *see also id.* at 42,839 (recognizing that "COVID-19 has already been introduced and is spreading within the United States"). And as already demonstrated above, the CDC Director's conclusion was reasonable and is amply supported by the administrative record.

Nevertheless, Plaintiffs argue that the August 2021 order was not justified because the record does not show that noncitizens were having a "meaningful impact on the spread of COVID-19 within the United States." Br. at 16.[8] But neither the statute nor the implementing regulation uses a "meaningful impact" standard. Rather, the CDC Director was to make a qualitative judgment whether a Title 42 order was "necessary" to protect the public health in light of the rapid spread of the Delta variant. The CDC Director determined that it was. Indeed, Plaintiffs cannot reasonably argue that in August 2021, noncitizens coming across the southwest border were somehow immune from the highly transmissible Delta variant even while undergoing processing in the congregate settings of CBP's

[8] Plaintiffs selectively quote from an October 2021 interview of Dr. Anthony Fauci in which Dr. Fauci suggested that expelling immigrants was not the solution to stopping the spread of COVID-19. Br. at 16 (citing CNN, *Fauci: Expelling immigrants 'not the solution' to stopping COVID-19 spread* (Oct. 3, 2021)), *available* at https://tinyurl.com/5ua5m4bm. Later in the interview, Dr. Fauci was asked about the CDC's ongoing reeavaluation of the August order and Dr. Fauci responded, "I am not as familiar with the intricacies of that to make any comment about that rule." *Fauci: Expelling immigrants 'not the solution' to stopping COVID-19 spread* at 3:30–4:05. Accordingly, even if this interview could be considered by the Court in this record-review case under the APA, it is irrelevant to the arbitrary and capricious analysis.

border facilities or were incapable of transmitting the virus into the United States. To the contrary, the CDC Director found that "[f]or the unvaccinated, Delta remain[ed] a formidable threat," 86 Fed. Reg. at 42,832, and "[c]ountries of origin for the majority of incoming covered noncitizens have markedly lower vaccination rates," *id.* at 42,834. The CDC Director therefore reasonably determined that their introduction into the United States "present[ed] a heightened risk of morbidity and mortality … due to the congregate holding facilities at the border and the practical constraints on implementation of mitigation measures in such facilities." *Id.*. at 42,834. And "[o]utbreaks in these settings increase the serious danger of further introduction, transmission, and spread of COVID-19 and variants into the country." *Id.*

Plaintiffs also argue that the August order is "underinclusive" because trains and road vehicles are also considered congregate settings. Br. at 17. The argument again relies on an inapposite standard. Underinclusiveness is a concept employed in constitutional scrutiny "to ensure that the proffered state interest actually underlies the law." *Blount v. SEC*, 61 F.3d 938, 946 (D.C. Cir. 1995) (cleaned up). It is particularly used in the First Amendment context where the government is required to show that its restriction on speech is narrowly drawn to serve a compelling government interest. *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 799 (2011). "Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Id.* But even in the First Amendment context, underinclusiveness is not necessarily fatal, and seemingly underinclusive laws have been upheld under strict scrutiny. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015). In contrast, under rational basis review of government action in equal protection cases, a law can be "both underinclusive and overinclusive" because "'perfection is by no means required.'" *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (quoting *Phillips Chem. Co. v. Dumas School Dist.*, 361 U.S. 376, 385 (1960)).

The August 2021 order, of course, does not implicate the First Amendment or otherwise infringe on any constitutional rights. The concept of underinclusiveness is simply inapplicable. The APA does not "require agencies to tailor their regulations as narrowly as possible" to the issues sought to be addressed by the regulations. *Associated Dog Clubs of N.Y. State, Inc. v. Vilsack*, 75 F. Supp. 3d 83,

92 (D.D.C. 2014). As discussed above, "[s]urviving arbitrary and capricious review requires only a reasoned explanation based on the facts found by the agency." *Id.* Here, CDC clearly "has reasonably considered the relevant issues and reasonably explained the decision." *Prometheus Radio Project*, 141 S. Ct. at 1158. For example, a commenter on the interim final rule noted, as Plaintiffs do here, that the rule did not "bar travel by tourists arriving by plane or ship, even though these modes of transportation are explicitly listed as congregate settings with a risk of disease." 85 Fed. Reg. at 56,452. CDC's response was that there were other tools "available to address public health risks in transportation hubs." *Id.* Indeed, by the time of the August 2021 order, "the U.S. government and CDC [had] implemented a number of COVID-19 mitigation and response measures," many of which "involved restrictions on international travel and migration." 86 Fed. Reg. at 42,831 & n.22 (describing restrictions on "non-essential travel along land borders," restrictions on cruise ship passenger operations, and restrictions on air travel). CDC's assessment of the issue was reasonable when viewed in the context of the full panoply of the U.S. government's restrictions on entry into the United States.

Plaintiffs further contend that the August 2021 order was too limited in scope to have any meaningful effect, citing statistics noted by Judge Walker during D.C. Circuit oral argument in this matter that the August order only covers about 0.1% of border crossers of the Canadian and Mexican borders. Br. at 17 (citing Oral Argument Tr. at 5, Cheung Decl., Ex. B). But as discussed above, CDC's public health assessment is not a simple numeric calculation. Rather, the critical consideration for CDC is that covered noncitizens would, under normal circumstances, be processed under Title 8 and held for some time potentially extended period of time in space-constrained congregate settings. 86 Fed. Reg. at 42,835. As CDC noted, "COVID–19 has disproportionately affected persons in congregate settings," and studies have shown that "a single introduction of SARS–CoV–2 into a facility can result in a widespread outbreak." *Id.* at 42,833 n.46; *id.* at 42,833 ("in congregate settings … even a single asymptomatic case can trigger an outbreak").

Again citing extra-record material, Plaintiffs further argue that the August 2021 order likely exacerbated, rather than reduced, COVID-19 transmissions. Br. at 18-20. But even if this Court could appropriately consider such extra-record material, which it cannot, none of it undermines the

CDC's decision-making. For example, Plaintiffs highlight evidence indicating that Title 42 expulsions lead to high rates of recidivist border crossings. Br. at 18. Even so, CDC rationally determined that the August order was appropriate because, among other things, Title 8 processing of a noncitizen can still take up to eight times as long as Title 42 processing. 86 Fed. Reg. at 42,836. The experience of using Title 42 orders since the onset of the pandemic shows that such orders "significantly reduced the length of time covered noncitizen [single adults] and [family units were] held in congregate setting [by DHS]." *Id.* at 42,837. "By reducing congestion in these facilities, the Orders have helped lessen the introduction, transmission, and spread of COVID-19 among border facilities and into the United States while also decreasing the risk of exposure to COVID-19 for DHS personnel and others in the facilities." *Id.* While recidivism may be a by-product of Title 42 orders, courts simply "are not authorized to second-guess agency" decisions that weigh the advantages and disadvantages of any given policy. *Advocs. for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1150 (D.C. Cir. 2005); *see also Bonacci v. Trans. Sec. Admin.*, 909 F.3d 1155, 1162 (D.C. Cir. 2018) (declining to second-guess the Transportation Security Administration's decision to screen crewmembers differently from airport employees).

Plaintiffs next argue that CDC's Title 42 orders keep noncitizens in CBP custody longer than under normal circumstances because certain noncitizens cannot be expelled immediately to Mexico but must await repatriation flights to their home countries. Br. at 19. However, to the extent noncitizens are expelled by flights under the August 2021 order, terminating the order would not have decreased the time family units spent in congregate settings undergoing Title 8 immigration processing. Just the opposite – CDC assessed, based on information provided by DHS, that in the absence of the August order, "both [single adults] and [family units'] time in [CBP] custody would likely increase significantly." 86 Fed. Reg. at 42,837.

Finally, Plaintiffs argue that the August 2021 order requires "needless additional transportation" on planes and buses and actually increases close-quarters exposures, thereby contributing to the spread of COVID-19 across both sides of the border. Br. at 19-20. Plaintiffs contend that this violates the principle set forth in *Judulang v. Holder*, 565 U.S. 42, 58 (2011), that

policies must have a "connection to the goals" of or constitute a "rational operation of" the laws at issue. This case is nothing like *Judulang*. In that case, the Supreme Court invalidated a Board of Immigration Appeals' policy that it found to be "unmoored from the purposes and concerns of the immigration laws," because the policy allowed "an irrelevant comparison between statutory provisions to govern a matter of utmost importance—whether lawful resident aliens with longstanding ties to this country may stay here." *Id.* at 64. Here, in contrast, in enacting Section 265 authorizing the suspension of the right to introduce noncitizens into the United States to address the public health crisis, *Congress* already has determined that the suspension is connected to the goal of promoting public safety from communicable diseases. CDC's extension of its Title 42 authority in August 2021 was thus tied to its public health determination, not unmoored from it. CDC concluded that, as of August 2021, "[c]omplete termination [of its prior Title 42 orders] would increase the number of noncitizens requiring processing under Title 8, resulting in severe overcrowding and a high risk of COVID-19 transmission among those held in the facilities and the CBP workforce, ultimately burdening the local healthcare system." 86 Fed. Reg. at 41,837. Its decision to extend its Title 42 authority was thus in line with the purposes of Section 265.

In sum, Plaintiffs' attempts to poke holes in CDC's public health determination are unavailing, especially given the "extreme deference" owed to the agency's decision-making in this context. *West Virginia*, 362 F.3d at 871; *see also Rural Cellular Ass'n*, 588 F.3d at 1105.

F. CDC Was Not Required to Consider Harms to Noncitizens in Issuing the August 2021 Order

Plaintiffs' final argument is that CDC acted arbitrarily and capriciously by not weighing the "countervailing harms" to noncitizens against the domestic public health benefit when it issued its August 2021 order. Br. at 20–22. But neither the statute nor the implementing regulation calls for the CDC Director to engage in any such balancing of harms. Rather, Section 265 is concerned with preventing the introduction of a "communicable disease in a foreign country" into the United States. Congress enacted Section 265's predecessor statute in 1893 in response to a cholera epidemic. *See* Act of Feb. 15, 1893, ch. 114, § 7, 27 Stat. 449, 452; *Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 723 (D.C.

Cir. 2022). Congress recognized the threat of cholera from Europe, Mexico, and Canada, and sought to prevent the disease "from either entering the country or spreading after it has made its entry." 24 Cong. Reg. at 359; *see also id.* at 363, 364, 370, 371. The sole inquiry under the statute is whether, in the CDC Director's judgment, a Title 42 order "is required in the interest of the public health." 42 U.S.C. § 265; *see also* 42 C.F.R. § 71.40(a)(2) (same standard).

The relevant statute thus limits CDC's authority to addressing a specific and serious danger to public health posed by a communicable disease. Nothing in Section 265 shows an intent by Congress to allow CDC to disregard its public health conclusions based on countervailing harms to migrants. Indeed, by its very nature, a Title 42 order involving persons will *always* have consequences for migrants because such an order operates by allowing CDC to temporarily suspend their entry into the United States. *See* 42 U.S.C. § 265 ("Suspension of entries … to prevent the spread of communicable diseases"); *see also* 24 Cong. Rec. at 470 (Jan. 10, 1893) (statement of Senator George Gray explaining that the exigency posed by "invasion of contagious disease, is sufficient . . . to justify this extraordinary power of the entire suspension of immigration"); *id.* at 393 (statement of Senator George Hoar: "this section should be added, declaring in terms whenever the health or protection of the country from infection requires the total suspension of immigration"); *id.* at 393–94 (similar statement of Senator Chandler). The statute makes clear that CDC's assessment is about the interest of public health *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("[W]e find it implausible that Congress would give to the EPA through these modest words [i.e., 'requisite to protect the public health' with an 'adequate margin of safety,'] the power to determine whether implementation costs should moderate national air quality standards.").

The cases Plaintiffs cite are readily distinguishable. *See* Br. at 20. For example, in *American Wild Horse Preservation Campaign v. Perdue*, 873 F.3d 914 (D.C. Cir. 2017), the relevant statutes and regulations expressly "obligated" the United States Forest Service to "analyze the environmental consequences of proposed federal actions." *Id.* at 919–20. It was in the context of that express statutory requirement that the court held that the Forest Service acted arbitrarily and capriciously by failing to adequately analyze those consequences. *Id.* at 930–32. In *Nat'l Lifeline Ass'n v. FCC*, 921

F.3d 1102, 1111 (D.C. Cir. 2019), the agency was found to have acted arbitrarily and capriciously because "Congressional directives" and agency regulations required the agency to make voice and broadband services more available for low-income consumers, and yet the agency failed to consider that its actions would result in the loss of access for such consumers.

Plaintiffs' reliance on *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), is also misplaced. In *Regents*, the Court held that in rescinding the DACA program, DHS acted arbitrarily and capriciously by failing to consider the "reliance interests" of DACA recipients, many of whom had "enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children." *Id.* at 1914. Plaintiffs point to no similar reliance interests for noncitizens who are not yet in the country, and particularly since Title 42 orders had already been in place for nearly a year at the time CDC issued its August 2021 Order. More fundamentally, Plaintiffs do not, and in fact cannot, contend that any reliance interest they had on immigration processing as it existed before CDC issued its Title 42 order could override the statutory authority granted by Congress to address a public health emergency through the temporary suspension of immigration laws. Indeed, as CDC has explained, its Title 42 orders "are not, and do not purport to be, policy decision about controlling immigration; rather … CDC's exercise of its authority under Section 265 depends on the existence of a public health need." 87 Fed. Reg. at 19,954. CDC's statutory directive is clear, and it need not consider the immigration consequences to noncitizens whose entry is temporarily suspended by a Title 42 order when it determines that the interest of the public health requires such an order.

In any event, while not relevant to the public health determination under Section 265, CDC did not simply "ignore" the consequences that its Title 42 orders would have on noncitizens, as Plaintiffs contend. Br. at 20. As explained, CDC has always recognized that a Title 42 order is an extraordinary measure precisely because it displaces normal immigration processing. *See, e.g.*, 87 Fed. Reg. at 19,956. For that reason, CDC carefully considered alternatives to a blanket suspension order and adopted those alternatives when warranted, including by excepting unaccompanied children and allowing for case-by-case exceptions based on the totality of the circumstances. *See supra* Section II.D.

But as a public health agency charged with protecting the health of the American people, CDC is not required to engage in the kind of balancing of harm to noncitizens that Plaintiffs maintain is required in this context. *See* AR 3378 (CDC's mission is to "serve[] as the national focus for developing and applying disease prevention and control, environmental health, and health promotion and health education activities designed to improve the health of the people of the United States") (emphasis added). CDC has appropriately grounded its public health assessment in the statutory factors that Congress directed the agency to consider. No more is required.

III. AN INJUNCTION IS NOT AN APPROPRIATE FORM OF RELIEF AND, REGARDLESS, EQUITABLE FACTORS FAVOR DEFENDANTS

Because Plaintiffs' arbitrary and capricious claim fails on the merits, the Court need not consider what form of relief is appropriate. But even if the Court were to conclude otherwise, Plaintiffs are not entitled to a permanent injunction. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (a movant for a permanent injunction must show (1) that remedies available at law are inadequate to compensate for that injury; (2) they have suffered an irreparable injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction). "'An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course' or where 'a less drastic remedy … [is] sufficient to redress' the plaintiffs' injury." *O.A. v. Trump*, 404 F. Supp. 3d 109, 154 (D.D.C. 2019) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010)). "An injunction … does not follow from success on the merits as a matter of course." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008); *see also eBay Inc.*., 547 U.S. at 392–93 ("[T]his Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination [of the merits].").

Here, as Plaintiffs admit, CDC recognizes that the current public health conditions no longer require the continuation of the August 2021 order. Br. at 24–25. CDC has issued a termination order whose effect has been preliminarily enjoined by another court and the injunction is currently pending appeal in the Fifth Circuit. That is the only reason the August 2021 order is still in effect. And if

CDC were to use a new Title 42 order in the future restricting the entry of family units into the United States, Plaintiffs, like "any party aggrieved by a hypothetical … decision[,] will have ample opportunity to challenge it, and to seek appropriate preliminary relief." *Monsanto*, 561 U.S. at 164. Of note, in September 2021, the D.C. Circuit stayed this Court's prior preliminary injunction order pending appeal, which stay was dissolved when the D.C. Circuit issued its decision in March 2022. *See* Order, No. 21-5200 (D.C. Cir. Sept. 30, 2021), Doc. No. 1916334. Plaintiffs did not seek a separate preliminary injunction under its arbitrary and capricious claim in the interim. Nor did they move for such relief after the D.C. Circuit issued its decision in March or when the mandate issued in late May. Indeed, the situation for class members has improved since the D.C. Circuit first stayed this Court's preliminary injunction because the D.C. Circuit has since held that Defendants may not expel class members to places where they would be persecuted or tortured. *Huisha-Huisha*, 27 F.4th at 722; *see also id.* at 733 (recognizing that the government did not "attempt to deny that the Plaintiffs will suffer irreparable harm if they are expelled to places where they will be persecuted or tortured").

On the other hand, the government and the public have an interest in protecting the integrity of government's valid orders. To be sure, the public health conditions underlying the August 2021 order no longer exist, and CDC's order seeking to terminate the August order was enjoined by the U.S. District Court for the Western District of Louisiana. But those events do not call into doubt the validity of the August 2021 order or provide a basis to invalidate the August order based on today's facts. This is particularly so when the government is actively pursuing its appeal of the preliminary injunction in the U.S. Court of Appeals for the Fifth Circuit. The orderly administration of justice compels that the August order be judged based solely on the administrative record before the agency and that this highly deferential review process not be used to short-circuit the separate appellate process in the Fifth Circuit.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for partial summary judgment.

Dated: August 31, 2022

Respectfully submitted,

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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.

Civ. A. No. 21-100 (EGS)

DEFENDANTS' SURREPLY IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants respectfully submit this surreply to address Plaintiffs' statement in their reply brief that Defendants "do not contest that vacatur is appropriate if the Title 42 policy is arbitrary and capricious." Pls.' Reply 24. Defendants do not concede that vacatur of the Title 42 policy would be an appropriate remedy. Defendants did not address the appropriateness of vacatur in their opposition brief because Plaintiffs did not analyze the issue in their opening brief and because the issue is premature at this stage, where Plaintiffs are moving only for partial summary judgment on one count of their Second Amended Complaint—their arbitrary-and-capricious claim in Count VI. *See* Second Am. Compl. ¶¶ 107–11, ECF No. 131; Pls.' Mot. for Partial Summ. J., ECF No. 144. If the Court were to grant Plaintiffs' motion for partial summary judgment, that order would be interlocutory and ineffective until the Court enters final judgment.

It is well established that "grants of partial summary judgment are generally considered interlocutory orders." *State of Alaska v. FERC*, 980 F.2d 761, 764 (D.C. Cir. 1992). Under Federal Rule of Civil Procedure 54(b), "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b); *see also* 10

Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2651 (4th ed. Apr. 2022 update) ("[E]ven though denominated a 'judgment,' a nonappealable partial or interlocutory summary judgment under Rule 56 does not qualify as a judgment under Rule 54(a)."). Rather, a partial summary judgment order "is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case." Fed. R. Civ. P. 56 advisory committee notes, 1946 amendment; *see also Alberty-Velez v. Corporacion de Puerto Rico Para La Difusion Publica*, 361 F.3d 1, 6 n.5 (1st Cir. 2004) (same); *Streber v. Hunter*, 221 F.3d 701, 737 (5th Cir. 2000) (same). It follows that if a court nevertheless grants any relief based on the interlocutory order, such relief would not be effective until entry of final judgment, with limited exceptions, such as an interlocutory injunction. *See* 28 U.S.C. § 1292(a)(1).

Because any order granting partial summary judgment would be interlocutory and ineffective until final judgment except in limited circumstances, the Court should not grant any relief premised on any such order but should defer consideration of the issue of remedy until the Court has adjudicated all of Plaintiffs' claims. Notably, Plaintiffs' prayer for relief does not request vacatur of the Title 42 Policy. *See* Second Am. Compl., Prayer for Relief, ECF No. 131. Plaintiffs' prayer for relief seeks a variety of remedies, including that the Court "[d]eclare unlawful the Title 42 Process as applied to Plaintiffs and Class Members" and "[e]nter an order enjoining Defendants from applying the Title 42 Process to Plaintiffs and Class Members." *See id.*

Even if vacatur were an appropriate remedy under the Administrative Procedure Act, whether it should be granted in an individual case would depend on factors that are best considered after the Court has resolved all claims and is preparing to enter final judgment. As the D.C. Circuit has explained, "the decision whether to vacate depends on the seriousness of the order's deficiencies . . and the disruptive consequences of an interim change that may itself be changed." *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)). Neither party has addressed these factors in their briefing on Plaintiffs' motion for partial summary judgment. Nor have they addressed the appropriate scope of any potential vacatur order. Indeed, in their opening brief, Plaintiffs did not explain why vacatur would be an appropriate remedy. Because they only addressed

why injunctive relief would be appropriate, *see* ECF No. 144-1 at 23–26, Defendants correspondingly addressed the propriety of an injunction in their opposition brief, *see* ECF No. 147 at 36–37. Defendants made no concession that vacatur is proper and reserve the right to contest the issue should the Court grant Plaintiffs' motion for partial summary judgment.

Dated: September 22, 2022

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UNITED STATES DISTRICT COURT
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NANCY GIMENA HUISHA-HUISHA, on behalf of herself and others similarly situated,

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Defendants.

Civ. A. No. 21-100 (EGS)

UNOPPOSED EMERGENCY MOTION FOR TEMPORARY STAY OF THE COURT'S NOVEMBER 15, 2022 ORDER

Pursuant to Federal Rules of Civil Procedure 59 and 60 and the Court's inherent authority, Defendants respectfully request a temporary, five-week stay of the Court's November 15, 2022 order (the "Order") to allow the Department of Homeland Security ("DHS") time to prepare to transition to immigration processing under Title 8 of the U.S. Code. Defendants have conferred with Plaintiffs, who do not oppose this motion. In support of this motion, Defendants state as follows:

1. This action challenges a series of orders issued by the Centers for Disease Control and Prevention ("CDC") invoking its authority under the Public Health Service Act, 42 U.S.C. § 265 ("Section 265"), to temporarily suspend the right to introduce into the United States certain noncitizens traveling from Mexico and Canada who would otherwise be held in congregate settings in ports of entry or U.S. Border Patrol stations at or near the border. The currently operative order was issued in August 2021. *See* 86 Fed. Reg. 42,828 (Aug. 5, 2021) ("August 2021 Order").

2. In September 2021, this Court certified a class and preliminarily enjoined the application of the "Title 42" Process to the class. The Court defined the Title 42 Process as "the

process developed by the CDC and implemented by the August 2021 Order." *Huisha-Huisha v. Mayorkas*, 560 F. Supp. 3d 146, 159 (D.D.C. 2021).

3. The government appealed, and obtained a stay of the preliminary injunction pending appeal. On March 4, 2022, the D.C. Circuit affirmed the preliminary injunction in part, holding that Section 265 likely authorizes the expulsion of covered noncitizens, but that such expulsions may not be to places where the noncitizens likely will be persecuted or tortured. *Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 732 (D.C. Cir. 2022).

4. On April 1, 2022, CDC terminated the August 2021 Order, with an implementation date of May 23, 2022. 87 Fed. Reg. 19,941 ("Termination Order"). On May 20, 2022, the U.S. District Court for the Western District of Louisiana preliminarily enjoined the Termination Order on the ground that CDC likely was required to conduct notice-and-comment rulemaking in issuing the termination order but failed to do so. *Louisiana v. CDC*, --- F. Supp. 3d ---, No. 6:22-CV-00885, 2022 WL 1604901 (W.D. La. May 20, 2022), *appeal pending*, No. 22-30303 (5th Cir.).

5. On August 15, 2022, after the D.C. Circuit issued its mandate, Plaintiffs in this case moved for partial summary judgment on Count VI of the operative complaint, which alleges an arbitrary-and-capricious claim under the APA. ECF Nos. 141, 141-1. Defendants opposed the motion. ECF No. 147.

6. On November 15, 2022, the Court granted Plaintiffs' motion and entered an order "vacat[ing] and set[ting] aside the Title 42 policy—consisting of the regulation at 42 C.F.R. § 71.40 and all orders and decision memos issued by the Centers for Disease Control and Prevention or the U.S. Department of Health and Human Services suspending the right to introduce certain persons into the United States." ECF No. 164. The Court "declare[d] the Title 42 policy to be arbitrary and capricious in violation of the Administrative Procedure Act" and "permanently enjoin[ed] Defendants and their agents from applying the Title 42 policy with respect to Plaintiff Class Members." *Id.* The

Court's order indicates that "any request to stay this Order pending appeal will be denied for the reasons stated in the accompanying Memorandum Opinion." *Id.* The requested temporary stay under Rules 59 and 60 and the Court's inherent authority is not for the pendency of appeal but rather for only a temporary period.

7. DHS requires a short period of time to prepare for the transition from Title 42 to Title 8 processing, given the need to resolve resource and logistical issues that it was unable to address in advance without knowing precisely when currently operative August 2021 Title 42 order would end. *Cf.* 87 Fed. Reg. at 19,954–56 (setting effective date of Termination Order for 52 days from date of issuance to, among other things, provide DHS with additional time to ready operational plans). During this period of time, DHS will need to move additional resources to the border and coordinate with stakeholders, including non-governmental organizations and state and local governments, to help prepare for the transition to Title 8 processing. This transition period is critical to ensuring that DHS can continue to carry out its mission to secure the Nation's borders and to conduct its border operations in an orderly fashion. *See, e.g., AARP v. EEOC*, 292 F. Supp. 3d 238, 241 (D.D.C. 2017) (staying effective date of vacatur order for about one year "to avoid the potential for disruption"); *NAACP v. Trump*, 298 F. Supp. 3d 209, 244–45 (D.D.C. 2018) (staying vacatur order for 90 days to avoid disruption).

8. Under the *Louisiana* preliminary injunction, Defendants remain enjoined "from enforcing the April 1, 2022 Order . . . anywhere in the United States." Preliminary Injunction, *Louisiana v. CDC*, No. 6:22-CV-00885, (W.D. La. May 20, 2022), ECF No. 91. Accordingly, Defendants will not enforce the April 1, 2022 Termination Order during the period of the requested five-week stay but would merely make preparations to implement the Court's order as discussed above.

9. Accordingly, Defendants respectfully request that the Court stay its order for five weeks, from November 15, 2022 to December 21, 2022 at midnight.

10. Defendants have conferred with Plaintiffs, who do not oppose this motion. A proposed order is attached.

Respectfully submitted,

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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.

Civ. A. No. 21-100 (EGS)

NOTICE REGARDING DECISION TO APPEAL THE COURT'S NOVEMBER 15, 2022 ORDER AND NOVEMBER 22, 2022 FINAL JUDGMENT

In Defendants' opposition to the States' motion for intervention, Defendants explained that the government was considering whether to appeal this Court's November 15, 2022 memorandum opinion and order and November 22, 2022 final judgment. *See* ECF No. 174 at 2, 6, 17. Defendants now respectfully notify the Court that the Solicitor General has authorized an appeal. *See* 28 C.F.R. § 0.20(b). The government will be filing a notice of appeal forthwith. Defendants also respectfully notify the Court that the Department of Health and Human Services (HHS) and Centers for Disease Control and Prevention (CDC) have decided to undertake notice-and-comment rulemaking to replace 42 C.F.R. § 71.40, the regulation this Court vacated in its November 15 order.

Once the appeal is docketed, the government intends to move the D.C. Circuit to hold the appeal in abeyance pending (i) the Fifth Circuit's decision in *Louisiana v. CDC*, No. 22-30303 (5th Cir.), the government's appeal of the preliminary injunction enjoining implementation of CDC's April 1, 2022 Termination Order, and (ii) the forthcoming rulemaking to replace § 71.40. The government respectfully disagrees with this Court's decision and would argue on appeal, as it has argued in this Court, that CDC's Title 42 Orders were lawful, that § 71.40 is valid, and that this Court erred in vacating those agency actions. But an abeyance is warranted because other events may render it unnecessary for the D.C. Circuit to decide those questions.

This case is primarily a challenge to CDC's Title 42 Orders, and CDC itself has already terminated those orders because it has determined that they are no longer necessary to protect the public health. If the government prevails in the *Louisiana* litigation and the Termination Order takes effect, Plaintiffs' challenge to the Title 42 Orders will be moot. And although § 71.40 is not at issue in *Louisiana*, HHS and CDC have themselves decided to undertake a new rulemaking to reconsider the framework under which the CDC Director may exercise her authority under 42 U.S.C. § 265 to respond to dangers posed by future communicable diseases. The outcome of that rulemaking could likewise moot Plaintiffs' challenge to § 71.40 (to the extent they would even have standing to challenge the regulation alone, if the Title 42 Orders primarily at issue were terminated). The Supreme Court and the D.C. Circuit often place cases into abeyance where, as here, pending regulatory developments may render further litigation unnecessary. *See*, *e.g.*, *Biden* v. *Sierra Club*, 142 S. Ct. 46 (2021) (No. 20-138) (placing case in abeyance pending regulatory developments and subsequently vacating lower court decisions following change in policy); *Mayorkas v. Innovation Law Lab*, 141 S. Ct. 2842 (2021) (No. 19-1212) (placing case in abeyance pending further agency action and subsequently vacating lower court decisions following change in policy); *Whitman Walker Clinic v. HHS*, No. 20-5331 (D.C. Cir. Feb. 18, 2021) (granting abeyance in light of agency's decision to undertake rulemaking); *Samma v. Dep't of Def.*, No. 20-5320 (D.C. Cir. June 30, 2021) (appeal held in abeyance pending agency reconsideration).

Dated: December 7, 2022

Respectfully submitted,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5200 **September Term, 2021**

1:21-cv-00100-EGS

Filed On: October 26, 2021

Nancy Gimena Huisha-Huisha, and her minor child, et al.,

Appellees

v.

Alejandro N. Mayorkas, Secretary of Homeland Security, in his official capacity, et al.,

Appellants

BEFORE: Tatel, Rao, and Walker, Circuit Judges

O R D E R

Upon consideration of the State of Texas's motion for leave to intervene, the oppositions thereto, and the reply, it is

ORDERED that the motion for leave to intervene be denied. The State of Texas has not demonstrated that its motion meets the standards for intervention on appeal. See Amalgamated Transit Union International, AFL-CIO v. Donovan, 771 F.2d 1551 (D.C. Cir. 1985) (per curiam); see also Richardson v. Flores, 979 F.3d 1102, 1104 n.1 (5th Cir. 2020) (distinguishing motions to intervene on appeal from motions to intervene for purposes of appeal). Texas may, however, participate as amicus curiae and must file any amicus brief by October 28, 2021.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Manuel J. Castro
Deputy Clerk

[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NANCY GIMENA HUISHA-HUISHA, on behalf of herself and others similarly situated, Plaintiffs-Appellees, v. ALEJANDRO MAYORKAS, Secretary of Homeland Security, *et al.*, Defendants-Appellants.	No. 21-5200

DEFENDANTS' OPPOSITION TO THE STATE OF TEXAS'S MOTION TO INTERVENE

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federal government, in this appeal, to simultaneously seek to vacate the district court's injunction and to defend against the argument Texas has asserted in a separate action, which has not previously been raised or considered in this litigation – and to do so only in a reply brief, given that Texas proposes that the federal government file its opening brief first, and Texas will file thereafter. In addition, if Texas were permitted to intervene, it could then file any number of substantive or procedural motions, or take other action as a party, which could unnecessarily complicate this litigation to the prejudice of the existing parties. Texas's carefully worded statement that it does not "intend" "at this time" to take such actions provides no assurance at all. Given that Texas could present its arguments as *amicus curiae*, the primary purpose of seeking to intervene appears to be to allow the State to do precisely that.

Finally, the federal government adequately represents Texas's interests in this litigation. Indeed, Texas conceded that until recently, the federal government *was* adequately representing the State's interests. Texas claims that its mind was changed due to recent events. But the State once again relies on facts of which it has been aware for months or years, namely, settlements reached before a complaint was even filed in this litigation, and filings in other litigation restating positions the federal government has consistently taken. Texas contends that recent events show a likelihood that the federal government will settle this case, or

will fail to appeal, to the State's detriment. But recent events show the opposite: the federal government announced that settlement negotiations reached an impasse, and after the district court entered an injunction, the federal government appealed and sought a stay the very next day.

I. Intervention as of Right Should Be Denied.

Intervention as of right requires four elements: "1) the application to intervene must be timely, 2) the party must have an interest relating to the property or transaction which is the subject of the action, 3) the party must be so situated that the disposition of the action may, as a practical matter, impair or impede the party's ability to protect that interest, and 4) the party's interest must not be adequately represented by existing parties to the action." *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1322-23 (D.C. Cir. 2013). The party seeking to intervene as of right must also demonstrate Article III standing. *Id.* at 1323. The putative intervenor must "satisfy all four elements of the Rule in order to intervene as of right." *Jones v. Prince George's County*, 348 F.3d 1014, 1019 (D.C. Cir. 2003).

A. Texas' Motion is Untimely

In assessing the timeliness of a motion to intervene, "timeliness is to be judged in consideration of all the circumstances, *especially weighing the factors of time elapsed since the inception of the suit*." *Smoke v. Norton*, 252 F.3d 468, 471

Further still, if intervention were granted, Texas would "become [a] full-blown part[y] to [the] litigation," *Old Dominion Electric Cooperative v. FERC*, 892 F.3d 1223, 1232 (D.C. Cir. 2018), after which it could seek divided oral argument time, file a petition for rehearing (or for initial rehearing *en banc*), or even petition the Supreme Court for a writ of *certiorari* before judgment or any other unanticipated procedural steps that would unnecessarily complicate the litigation and prejudice the parties. Texas's noncommittal statement – that it does not "at this time" "intend" to make other "substantive" filings "before oral argument," Mot. 15 – is no assurance at all. Given that Texas could set out its legal position by filing an *amicus* brief in this case (and all parties previously informed Texas that they would not oppose its participation as *amicus*), it appears that the purpose of seeking intervention is to allow Texas to make precisely the kind of substantive and procedural filings as a party that would disrupt proceedings and prejudice the parties. There is no compelling reason to allow for those disruptive possibilities at this late stage of the litigation.

B. The Federal Government Adequately Represents Any Interests That Texas Might Have In This Litigation

Nor is Texas's intervention necessary to adequately protect any interests that Texas might have arising out of this litigation – although the federal government certainly does not concede that any such interests exist, or that Texas has standing

to intervene. Texas itself concedes that until recently, the federal government "Defendants *were adequately defending* the Title 42 Process." Mot. 2 (emphasis added). The State argues that this has changed due to "[e]volving circumstances." *Id.* But the only "circumstances" Texas specifies are settlements that pre-date this litigation, Mot. 2-3, and filings in other cases that re-state the federal government's longstanding positions of which Texas has been aware for months, Mot. 3-4. *See also supra* at 11-14. Accordingly, Texas points to no substantial basis for its apparent, and belated, about-face. Regardless, the federal government's position on immigration enforcement in other litigation, and involving different statutory and regulatory programs, has no bearing on whether the federal government's robust and consistent defense of the CDC Order in this case adequately represents Texas's interests in defending the Order.

The State asserts that "the likelihood" that the federal government will settle this case in a way that disadvantages Texas "has increased significantly in recent weeks." Mot. 18. The undisputed record demonstrates that the exact opposite is true. In recent weeks, the federal government and plaintiffs have ended settlement negotiations when the parties reached an impasse. Mot. 10; *see supra* at 4-5. The federal government then proceeded to vigorously defend the lawfulness of the CDC Order, including by submission of a new declaration explaining the continued urgent need for the Order. *See supra* at 5. And when the district court

entered its preliminary injunction, the federal government filed a notice of appeal and an emergency motion for a stay the *very next day* – while Texas did nothing. The State's suggestion that the federal government might now settle the case or abandon litigation is nothing more than speculation devoid of any basis in the record.

Finally, Texas asserts a state interest in protecting the health and well-being of the State's citizens from the risk of COVID-19, as well as its interest in avoiding additional strain on its health-care resources and associated financial costs, Mot. 18, and contends that the federal government does not adequately represent those interests. But the CDC Order – and the federal government's defense of it – is expressly predicated on the interests of protecting the health and well-being of U.S. citizens and residents from the risks of COVID-19 and avoiding additional strain on healthcare resources. *See* Add.74 (discussing need to "protect the public health from an increase in risk of the introduction of COVID-19" and to "reduc[e] risks to * * * the healthcare systems in local communities," particularly "at or near the U.S. borders,"); Add.63-64 ¶ 6 (noting that enjoining the CDC Order "risks overwhelming the local testing, isolation, and quarantine infrastructure * * * and will thus burden local healthcare systems and strain healthcare resources"); Add.66 ¶ 13 ("[T]he CDC Order remains necessary, while the pandemic continues, to prevent COVID-19 exposure risks to * * * border communities."). Indeed, while

Texas relies heavily on disaster declarations in two of the State's counties, Mot. 7-8, the CDC Order notes the "high or substantial levels of community transmission" in "U.S. counties along the U.S.-Mexico border," and singles out those two Texas counties – Hidalgo County and Webb County – as examples. Add.82 & n.58. In the end, even Texas concedes the point, noting elsewhere in its motion that the federal government has already recognized and explained the particular exposure risks of border communities in defending the CDC Order. Mot. 9, 13.

To the extent that Texas is claiming an interest in compelling the federal government to apply the CDC Order to expel *more* noncitizens than it is currently doing – the position the State advances in other litigation, *see supra* at 15 – it lacks any cognizable legal interest in compelling the stricter enforcement of federal law or foreclosing the federal government from permitting humanitarian exceptions as provided for in the Order. *Cf. Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."). But even setting aside that objection, that simply underscores that it would be wrong to permit Texas to intervene at this very late stage of proceedings, nominally on the side of the federal government, to enable it to make arguments never before presented in this litigation that would seek to put additional but different limitations on the federal government's authority than those imposed by the challenged preliminary injunction. This case is not the

appropriate vehicle for adjudication of those arguments, and the federal government would be significantly prejudiced if this Court were to allow intervention for those purposes.

In the end, any legitimate interest that Texas might have that is implicated by this litigation would be protected if the preliminary injunction of the CDC Order were vacated. And the very purpose of the federal government's appeal is to uphold the lawfulness of the CDC Order and to vacate the district court's improper injunction. "[W]hen the party seeking intervention has the same ultimate objective as a party to the suit," courts apply a "presumption of adequate representation." *North Carolina State Conference of NAACP v. Berger*, 999 F.3d 915, 930 (4th Cir. 2021); *see id.* & n.5 (noting that "virtually all our sister circuits have applied [that presumption] for decades" and collecting cases). Thus, the Fifth Circuit affirmed the denial of a motion to intervene by the State of Alabama because the defendant U.S. Environmental Protection Agency was already defending the lawfulness of its water quality standards that Alabama sought to defend. *Associated Industries of Alabama v. Train*, 543 F.2d 1159 (1976). And the Eleventh Circuit affirmed the denial of a motion to intervene by the Florida Department of Environmental Protection because Florida's interests were adequately represented by the defendant U.S. Environmental Protection Agency, which was already "in this case to defend the legality" of the agency's own actions. *Sierra Club v. Leavitt*, 488

ORAL ARGUMENT NOT YET SCHEDULED

No. 21-5200

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

Plaintiffs-Appellees,

v.

ALEJANDRO MAYORKAS, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Columbia
No. 1:21-cv-100
Hon. Emmet G. Sullivan

PLAINTIFFS-APPELLEES' OPPOSITION TO THE STATE OF TEXAS' MOTION TO INTERVENE AS INTERVENOR-DEFENDANT

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this appeal is whether "42 U.S.C. § 265 authorizes Defendants to expel alien family units." Mot. 19. No conduct by Texas is at issue.

Second, Texas makes no exceptional showing of inadequate representation of its interests. *See Amalgamated Transit Union*, 771 F.2d at 1553-54. Texas acknowledges that just over two months ago, Defendants issued a new Title 42 Order "that re-affirms that . . . ['42 U.S.C. 265 remains necessary to protect [the United States] during the COVID-19 public health emergency' and . . . continues to prohibit the introduction of 'non-citizen' 'family units' into the United States." Mot. 6 (quoting 86 Fed. Reg. 42,828 (Aug. 5, 2021)). In attempting to articulate its own supposedly "unique interest" in protecting "border communities" and their "healthcare resources," Mot. 6, Texas notably resorts to quoting from both the latest Title 42 Order and Defendants' latest declaration filed below, *id.* at 9 (quoting 86 Fed. Reg. at 42,835, and Decl. of David Shahoulian). These interests are identical to those Defendants assert in defending their purported statutory authority to carry out the Title 42 Process. *See, e.g.*, Defendants-Appellants' Motion for Emergency Stay Pending Appeal 1-3, 18-19, 21-22.

Indeed, far from "disclaim[ing] any interest" in the dispute, *Richardson*, 979 F.3d at 1105, Defendants swiftly appealed the District Court's preliminary injunction order, obtained an emergency stay of the injunction, and now seek to vacate that injunction. Texas claims that its residents' health and its healthcare

resources *may* be impacted if Defendants' authority to apply the Title 42 Process to families is enjoined, and speculates that Defendants *may* not adequately defend that authority at some later point in this litigation. Mot. 7-10, 17-18. But this Circuit rejected much the same argument in *Amalgamated Transit Union*, explaining that such an "alleged conflict of interest" was "hardly exceptional" and would "exist in *any* appeal to which an agency is a party and a third-party faces some liability or loss of funds if the agency does not prevail." 771 F.2d at 1554 (emphasis in original). Critically, the Court there also pointed out that if the prospective intervenor "wishes to challenge the future exercise of the Secretary's discretion, it may do so by bringing an action against the Secretary, not by intervening in this case." *Id.* (emphasis omitted). Here, Texas *already chose* to contest Defendants' management of the Title 42 Process by bringing a separate action in a different district, rather than by seeking to intervene in the District Court below.

Moreover, Texas' assertions that its interests are inadequately represented are belied by the total overlap of its and Defendants' position. In *Amalgamated Transit Union*, the prospective intervenor sought to intervene to file a petition for rehearing, but acknowledged that the Secretary of Labor had already done so, and the arguments it hoped to raise in its petition were already "reflected in briefs filed by . . . [an] amicus curiae." 771 F.2d at 1553 n.4. The Court reasoned that both

points "directly contradict[ed] [the prospective intervenor's] claim that its position is not now adequately represented." *Id.* The same is true here, where Texas acknowledges that its "position that 42 U.S.C. § 265 authorizes Defendants to expel alien family units has *perfect overlap* with the issues presented in this appeal." Mot. 19 (emphasis added). Thus, as with the failed intervenor in *Amalgamated Transit Union*, Texas seeks the extraordinary measure of intervention on appeal to urge precisely the same outcome, based on the same legal position, that the named Defendants already advance. *See also Pub. Serv. Co. of New Mexico*, 857 F.3d at 1113-14 ("When the applicant and an existing party share an identical legal objective, we presume that the party's representation is adequate.").

Third, Texas has failed to offer any compelling "explanation . . . for its failure to make a request for intervention at the District Court level." *Amalgamated Transit Union*, 771 F.2d at 1553-54. Plaintiffs filed their preliminary injunction motion in February 2021, putting Texas on notice over eight months ago that the District Court might prohibit the application of the Title 42 Process to noncitizen families. *Cf. Richardson*, 979 F.3d at 1104 (intervention on appeal potentially permissible "where [movant's] lack of timely intervention below may be justified by the district court's action without notice") (quoting *United States v. Bursey*, 515 F.2d 1228, 1238 n.24 (5th Cir. 1975)).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

STATE OF LOUISIANA, *et al.*, Plaintiffs, v. CENTERS FOR DISEASE CONTROL & PREVENTION, *et al.*, Defendants.	Civil Action No. 6:22-CV-00885-RRS-CBW

NOTICE OF DECISION VACATING TITLE 42 ORDERS

Defendants respectfully provide notice to the Court of the order of the U.S. District Court for the District of Columbia in *Huisha-Huisha v. Mayorkas*, No. 21-cv-00100, ECF Nos. 164, 165 (D.D.C. Nov. 15, 2022), a case brought on behalf of a class of families. That order "vacat[ed] and set[] aside the Title 42 policy," defined to include, "all orders and decision memos issued by the Centers for Disease Control and Prevention (CDC) suspending the right to introduce certain persons into the United States." The order also "permanently enjoined Defendants and their agents from applying the Title 42 policy with respect to Plaintiff Class Members." Copies of the order and accompanying memorandum opinion are attached.

On November 16, 2022, the court in *Huisha-Huisha* granted the government's emergency motion to stay the order for five weeks until December 20, 2022 to allow the Department of Homeland Security ("DHS") time to prepare to transition to immigration processing under Title 8 of the U.S. Code. Defendants understand that they remain subject to this Court's preliminary injunction, which enjoins the government from "enforcing [CDC's] April 1, 2022 [Termination] Order." ECF No. 91. Accordingly, during the time in which the *Huisha-Huisha* order is stayed and until December 20, 2022, the government will continue to enforce the August 2021 Title 42 Order.

Once the five-week stay expires and the *Huisha-Huisha* order becomes effective at midnight on December 21, 2022, CDC's Title 42 orders will be vacated, and there will thus be no legal authority for the government to continue to enforce the Title 42 policy. Accordingly, as of 12 A.M. EST on December 21, DHS will begin processing all noncitizens entering the United States pursuant to Title 8.

Dated: November 16, 2022

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nancy Huisha-Huisha et al., *Plaintiff-Appellees,* v. Alejandro N. Mayorkas, *Defendant-Appellants* and States of Arizona, Louisiana, Alabama, Alaska, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Tennessee, Utah, Virginia, West Virginia, and Wyoming. *Proposed Intervenor-Defendants.*	Case No. 22-5325

STATES' NOTICE REGARDING PENDING MOTION TO INTERVENE AND ALTERNATIVE RENEWED MOTION TO INTERVENE

NOTICE AND, IN THE ALTERNATIVE, RENEWED REQUEST TO INTERVENE

The States of Arizona, Louisiana, Alabama, Alaska, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Tennessee, Utah, Virginia, West Virginia, and Wyoming ("States") hereby provide notice that their motion to intervene, which was filed in the district court and fully briefed below, should now be pending before this Court due to Federal Defendants taking this appeal. In the alternative, if the States' motion is not currently pending automatically in this Court by operation of law, the States respectfully renew their request to intervene in this action/appeal. That renewed request should be granted for all of the reasons previously explained in briefing below. Copies of the motion, supporting materials, joinders, responses, and reply brief are attached with this notice.[1]

"The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58

[1] Both Plaintiffs and Federal Defendants have opposed the States' motion to intervene.

(1982). For that reason, most circuit courts have held that "an effective notice of appeal deprives a district court of authority to entertain a motion to intervene after the court of appeals has assumed jurisdiction over the underlying matter." *Doe v. Public Citizen*, 749 F.3d 246, 258 (4th Cir. 2014) (citing *Taylor v. KeyCorp*, 680 F.3d 609, 617 (6th Cir. 2012); *Drywall Tapers & Pointers of Greater New York v. Nastasi & Assocs. Inc.*, 488 F.3d 88, 94-95 (2d Cir. 2007); *Roe v. Town of Highland*, 909 F.2d 1097, 1100 (7th Cir. 1990); *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 298, 299 (5th Cir.1984) (adopting rule for Fourth Circuit).

Here, the States sought to intervene to appeal the district court's opinion and order (D. Ct. Docs. 164 & 165), which vacated and enjoined agency actions collectively comprising the Title 42 system. That order was subsequently formalized as a final judgment on November 22. *See* D. Ct. Doc. 170. The States' motion was fully briefed on December 2, but has not yet been decided.

Federal Defendants filed a notice of appeal from the district court's final judgment on December 7, *see* D. Ct. Doc. 180, which was docketed in this Court today.

The States' motion to intervene exclusively concerns matters

relating to the district court's final November 22 judgment and Federal Defendants have filed a proper notice of appeal as to that judgment. As a result, that notice of appeal "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs*, 459 U.S. at 58. Because the States' motion to intervene relates only to "aspects of the case involved in the appeal," the States' motion to intervene was transferred by operation of law to this Court once Federal Defendants filed their notice of appeal.[2]

Alternatively, if the States' motion to intervene is not automatically pending before this Court already, the States respectfully renew their request to intervene in this action, both as of right and permissively. That alternative request should be granted for all of the reasons explained in the briefing below, which the States incorporate by reference.

The States' alternative request should further be granted because subsequent developments have underscored the inadequacy of

[2] The States have not sought to intervene as to matters outside of the claims for which the district court entered its final Rule 54(b) judgment. Because the district court entered a final judgment, Federal Defendants' appeal is not interlocutory in nature either, and instead is a final judgment appeal that triggers the ordinary rule that jurisdiction is transferred to the court of appeals until that court's mandate issues.

Defendants' representation of the States' interests. Federal Defendants have explicitly recognized that the district court "erred in vacating th[e] agency actions" at issue here. D. Ct. Doc. 179 at 1. But despite recognizing that the district court's decision is wrong, Federal Defendants have informed the States that they do not intend to seek a stay pending appeal, thereby ensuring that the harms that the district court's judgment would inflict upon the States will come to pass absent the States' intervention—even though Federal Defendants have admitted elsewhere that the termination of the Title 42 system will cause the States harms (and district courts have found as much).[3]

Indeed, Defendants have gone even further, explaining that they "intend[] to move the D.C. Circuit to hold th[is] appeal in abeyance," *id.*—a request that, if granted, would prevent the district court's acknowledged errors from ever being corrected by appellate review.

In essence, Federal Defendants are knowingly acting to ensure that

[3] *See, e.g.*, *Louisiana v. CDC*, __ F.Supp.3d __, 2022 WL 1604901, at *6 (W.D. La. May 20, 2022) (explaining that termination of Title 42 "will increase the state's costs for healthcare reimbursements. *Defendants did not dispute the facts supporting this finding*. (emphasis added)); *id.* at *22 (holding that the States "satisf[ied] the irreparable harm requirement for a preliminary injunction").

the district court's errors are never corrected, and the States continue to suffer the harms from those admitted legal errors indefinitely, all the while contending that the Federal Government is adequately representing the States' interests. That is specious.

CONCLUSION

For the foregoing reasons, the States respectfully request that this Court decide their pending motion to intervene, which was fully briefed below and has now been transferred by operation of law to this Court.

Alternatively, if this Court determines that the motion to intervene filed by the States below is not pending here already, this Court should grant the States' alternative renewed request to intervene for all of the reasons explained in the briefing below.

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Respectfully submitted,

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