No. 22-592

In The Supreme Court of the United States

ARIZONA, ET AL.,
Petitioners,

v.

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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF FORMER CDC OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Pratik A. Shah
Counsel of Record
Martine E. Cicconi
Aleena Ijaz*
AKIN GUMP STRAUSS HAUER & FELD LLP
2001 K Street, NW
Washington, DC 20006
(202) 887-4000
pshah@akingump.com

* Licensed to practice in Maryland only and under the direct supervision of a partner of Akin Gump Strauss Hauer & Feld LLP who is an enrolled active member of the District of Columbia Bar; application for admission to the D.C. Bar pending.

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

INTEREST OF *AMICI CURIAE*[1]

Amici are all former Centers for Disease Control and Prevention (CDC) officials, many of whom have held significant positions in government and academia, including at the height of the COVID-19 pandemic. With experience as physicians, epidemiologists, and emergency response officials, *amici* have substantial expertise in public health measures like the appropriate use of isolation and quarantine. *Amici* are deeply committed to Americans' health and to the continued success of CDC—the agency tasked with protecting it.

Amici include:

- **Joseph Amon, PhD, MSPH**. Professor Amon received his PhD from the Uniformed Services University of the Health Sciences, and served as a Lieutenant in the U.S. Public Health Service and as an Epidemic Intelligence Officer at CDC. He is currently Director of Global Health at Drexel University's Dornsife School of Public Health.
- **Beth P. Bell, MD, MPH.** Dr. Bell worked at CDC in infectious diseases for over 20 years until retiring in January 2017. Between 2010 and 2017, she directed the

[1] No counsel for either party authored this brief in whole or in part, nor did any party or other person or entity other than *amici curiae* or their counsel make a monetary contribution to the brief's preparation or submission.

National Center for Emerging and Zoonotic Infectious Diseases.

- **S. Patrick Kachur, MD, MPH**. Dr. Kachur was a CDC employee from 1993 to 2018, where he contributed to responses to pandemic H1N1 influenza, Ebola, and Zika Virus Disease. He served as the Acting/Interim Principal Deputy for the Center for Global Health and was recognized with the Agency's highest service award.
- **Achyut Kc, MD, Msc, MIH.** Dr. Kc is a medical epidemiologist with 25 years of experience working in low- and middle-income countries, with research and training in the fields of medicine, epidemiology, and international health. Dr. Kc served at CDC in the same capacity for 14 years.
- **Leslie Roberts, MPH, PhD**. Dr. Roberts is an epidemiologist and a Professor Emeritus in the Program on Forced Migration and Health at the Columbia University Mailman School of Public Health. Most of his work over the past three decades has been related to refugee and emergency public health, including working for four years at CDC, starting in the Refugee Health Branch and later serving as the Director of Health Policy at the International Rescue Committee.

- **Sharmila Shetty, MD**. Dr. Shetty served as a medical epidemiologist at CDC's Immigrant, Refugee and Migrant Health, and Emergency Response and Recovery Branches. She is currently the Vaccines Medical Advisor at the Medecins sans Frontieres Access Campaign.
- **Laurence Slutsker, MD, MPH, FASTMH**. Dr. Slutsker worked at CDC for 29 years until retiring in 2016. He held a number of leaderships positions in infectious diseases, including Associate Director for Science and Director of Parasitic Diseases and Malaria in the Center for Global Health.
- **Paul B. Spiegel, MD, MPH**. Dr. Spiegel is the Director of the Johns Hopkins Center for Humanitarian Health and Professor of the Practice in the Department of International Health at the Johns Hopkins Bloomberg School of Public Health. He previously worked as a medical epidemiologist in the International Emergency and Refugee Health Branch at CDC and as the Deputy Director of Programme Support and Chief of Public Health at the United Nations High Commission on Refugees.
- **Ronald Waldman, MD, MPH**. Dr. Waldman is Professor Emeritus of Global Health at the Milken Institute School of Public Health of the George Washington University (GWU) and the

Founding Director of the Program on Forced Migration and Health at the Mailman School of Public Health of Columbia University and the Humanitarian Health Program at GWU. His CDC career spanned 25 years, including serving as Director of the Technical Support Division of the International Health Program Office.

- **Bradley A. Woodruff, MD, MPH.** Dr. Woodruff is a physician epidemiologist who spent 20 years at CDC working in communicable diseases, humanitarian emergencies, and nutrition. He was Acting Branch Chief of the International Emergency and Refugee Health Branch for one year and has earned several U.S. Public Health Service citations for his domestic and international work during his CDC career.

INTRODUCTION AND SUMMARY OF ARGUMENT

Science and public health needs did not support CDC's use of Title 42 authority to prohibit the entry of migrants in March 2020, as senior CDC officials acknowledged, and certainly did not support the extension of that policy in August 2021. By the time CDC elected to continue Title 42 expulsions over a year and a half into the COVID-19 pandemic, testing, vaccines, and therapeutics had become widely available and rates of death and hospitalizations due to COVID-19 had dropped dramatically. Circumstances have continued to improve since then, with most other aspects of American life free from pandemic-related public health mandates. Accordingly, it is beyond dispute that there is no public health justification for continued reliance on Title 42 to expel migrants.

Among other errors, CDC failed to acknowledge or explain its departure from the established "least restrictive means" standard in its Title 42 Orders, as the district court correctly held. Petitioners' attack on the district court's decision on this ground is both gratuitous (given this Court's limited grant of certiorari) and incorrect.

Regardless of whether this Court overturns the D.C. Circuit's decision on intervention, there is no basis for this Court to stay the effect of the district court's underlying decision pending further adjudication on the merits. No party in this case contends that the standard for invoking Title 42 is met today based on the current state of the COVID-19 pandemic. To the contrary, petitioners readily

acknowledge, as they must, that "the COVID-19 pandemic has significantly abated." Pet. Br. 48. Once the question of intervention is resolved, therefore, this Court should immediately lift the stay it imposed upon granting certiorari and permit CDC to wind down its Title 42 orders.

ARGUMENT

PUBLIC HEALTH CIRCUMSTANCES DEMAND CESSATION OF CDC'S TITLE 42 ORDERS

A. Public Health Needs Did Not—And Certainly No Longer—Support CDC's Title 42 Orders

Title 42 affords CDC the authority to prohibit "the introduction of persons" from countries in which communicable diseases are present when "there is serious danger of the introduction of such disease into the United States" *and* "this danger is so increased by the introduction of persons *** from such country that a suspension of the right to introduce such persons *** is required in the interest of the public health." 42 U.S.C. § 265. According to expert consensus, as *amici* can attest, that high bar has not been met here.

1. Even early in the pandemic, when aggressive measures to fight the spread of COVID-19 were widespread and vaccines and therapeutics were months away, high-ranking CDC officials questioned the propriety of implementing a prohibition order under Title 42.

According to Dr. Anne Schuchat, CDC's Principal Deputy Director from 2015 until her retirement in October 2021, the March 2020 Title 42 order was "not

necessary to prevent the spread of coronavirus in the U.S. at that time." House Select Subcommittee to Investigate the Coronavirus Crisis, Transcribed Interview of Dr. Anne Schuchat 141 (Oct. 1, 2021) (Schuchat Interview) ("Q: Do you believe that [the Title 42] order was necessary to prevent the spread of coronavirus in the U.S. at that time *** ? A: No.").[2] Dr. Schuchat noted that "there was a lot more disease in the U.S. than south of the border" and "[t]he focus on reducing spread on our side of the border was critically needed." *Id.* at 140-141. Dr. Schuchat posited that Dr. Martin Cetron, then Director of the Division of Global Migration and Quarantine, declined to sign the order because "the facts on the ground didn't call for this from a public health reason." *Id.* at 142.

In his own interview with congressional investigators, Dr. Cetron confirmed that he "refused to sign" the March 2020 order. House Select Subcommittee to Investigate the Coronavirus Crisis, Transcribed Interview of Dr. Martin Cetron 46 (May 2, 2022) (Cetron Interview).[3] Like Dr. Schuchat, Dr. Cetron stressed the need to "assess where the infection pressure is coming from and whether it's truly *** coming from the perceived source or an actual source of risk." *Id.* at 48. As Dr Cetron explained, "it's one thing to use a travel ban in January with a single focus of infection," but "[t]he continuation of the use of travel

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[2] *Available at* https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/2021.10.01%20SSCC%20Interview%20of%20Anne%20Schuchat%20-%20REDACTED.pdf.

[3] *Available at* https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/2022.05.02%20SSCC%20Interview%20of%20Martin%20Cetron%20-%20REDACTED.pdf.

bans as a tool once there's widespread *** infection in the U.S. starts to become diminished." *Id.* at 51. Dr. Cetron also observed that "other things ha[d] not been tried and were being recommended and had been recommended in [the] past in similar settings," highlighting the fact that the border closure order was not the least restrictive means available to reduce the risk of COVID-19 transmission. *Id.* According to Dr. Cetron, rather than "hard core border closures," "things that are most needed in terms of the public health readiness are issues around cohorting -- *** isolation, quarantine, detection, various approaches to mitigation, engagements, use of masking and other types of tools." *Id.* at 47-48.

2. By the time CDC superseded its original Title 42 order with a new continuing order in August 2021, the public health justifications for prohibiting entry of migrants into the United States had become weaker still. *See* CDC, Public Health Reassessment and Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 86 Fed. Reg. 42828-02 (Aug. 5, 2021) (eff. Aug. 2, 2021) ("August 2021 Order").

As several *amici* explained in declarations submitted to the district court, by that time, vaccines were widely available to all Americans free of charge; around 70% of Americans had received at least one dose; and more than half of the country had completed the two-dose vaccine series. Supplemental Decl. of Former CDC Officials, Dist. Ct. Dkt. 118-8, at 2 (Aug. 11, 2021) ("Supplemental Declaration"). Vaccination rates among elderly Americans—a group particularly

vulnerable to severe illness and death from COVID-19—were even higher, with over 80% fully vaccinated. *Id.*

The widespread availability of vaccines dramatically reduced the severity of disease among COVID-19 patients, leading to a drastic reduction in hospitalizations and deaths by August 2021. Supplemental Declaration at 2. According to CDC's own data from that time period, only 0.001% of vaccinated individuals who contracted COVID-19 died as a result. *Id.* at 5. Although breakthrough cases of the then-dominant Delta strain were possible, CDC reported that mitigation methods like masking, social distancing, and ventilation remained effective ways of preventing transmission of COVID-19. *Id.*

Critically, the Delta variant was already the dominant strain of COVID-19 in the United States at the time CDC re-issued its Title 42 order. The agency presented no evidence that the strain had emerged from migrants crossing the border. Supplemental Declaration at 8 (footnote omitted). Rather, CDC's own data presented in support of its decision to extend Title 42 demonstrated that, on a per capita basis, the United States had twice the number of COVID-19 cases as Mexico. *Id.* at 11. Accordingly, a central predicate for CDC's August 2021 order—that a Title 42 prohibition was necessary to prevent the "introduction" of COVID-19 into the United States—was unsupported by facts or science. August 2021 Order at 42829.

In addition, CDC failed to grapple with the fact that migrants subject to Title 42 policies "represent[ed] a very small fraction of the hundreds of

thousands of inbound people allowed to cross the Southwest border each day (without COVID-19 testing or vaccination requirements)." Supplemental Declaration at 8. U.S. citizens, green-card holders, visa holders, and all manner of commercial traffic traveled into the United States without testing, vaccinations, or monitoring. As a consequence, the individuals subject to CDC's Title 42 orders "[could not] plausibly [have] constitute[d] a meaningful additional COVID-19 risk to the U.S. public." *Id.*

Indeed, as some *amici* pointed out to the district court, the practices government agencies used to carry out Title 42 expulsions actually *increased* the risk of transmission on both sides of the border. Notably, the government moved migrants through parts of the United States as they were being expelled without testing them for COVID-19, sometimes after holding them in congregate settings for extended periods. Supplemental Declaration at 6. And the risk those practices posed was unjustified because border agents were already using CDC-recommended tools to safely process migrants into the country. *See* August 2021 Order at 42835 ("All CBP facilities adhere to CDC guidance for cleaning and disinfection. Surgical masks are provided to all persons in custody. *** Personal protective equipment (PPE) and guidance are regularly provided to CBP personnel."); *see also id.* at 42833 ("[A]dditional testing [is] available through antigen tests."); *id.* at 42835 ("[E]nhanced physical distancing and cohorting remain key to preventing transmission and spread of COVID-19, particularly in congregate settings."); *id.* at 42834 ("[U]niversal masking in indoor public spaces *** prevent[s] further spread.").

By failing to engage with the likely consequences of the August 2021 order, CDC ignored the "basic public health concept *** that *** positive and negative effects [of actions] *** must be weighed against each other." Supplemental Declaration at 6; *see also* Cetron Interview at 51 ("It's not always going to be appropriate and sometimes more harm than good will come out of trying to put into place travel bans, which also have collateral damage, including the movement of goods and services, *** the supply chain, many other things that come into play.").

3. In April 2022, eight months after CDC elected to continue Title 42 expulsions, the agency terminated its Title 42 orders. CDC explained that it had conducted a "thorough assessment" and had "determined that an Order suspending the right to introduce migrants into the United States [was] no longer necessary" given "current public health conditions and an increased availability of tools to fight COVID-19 (such as highly effective vaccines and therapeutics)." Media Statement, CDC, Public Health Determination and Termination of Title 42 Order (April 1, 2022).[4]

4. In the ten months since CDC terminated its Title 42 orders, public health metrics concerning COVID-19 have improved in significant respects.

At the time of termination, "over 209 million in the United States 12 years of age or older (73.9% of the

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[4] *Available at* https://www.cdc.gov/media/releases/2022/s0401-title-42.html#:~:text=In%20consultation%20with%20the%20Department,resumption%20of%20regular%20migration%20under.

[relevant] population ***) ha[d] been fully vaccinated and over 245 million people in the United States 12 years or older (86.6%) [had] received at least one dose." 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, 19949 (Apr. 6, 2022) ("April 2022 Order"). The vaccination rate is now even higher, with over 219 million in the country over 12 years of age (77.3%) fully vaccinated, and over 255 million people 12 years or older (90.2%) having received at least one dose. *See* CDC, COVID-19 Vaccinations in the United States.[5] Moreover, while in its April notice CDC could only hope that "[c]hildren ages six months through four years may soon become eligible for a COVID-19 vaccine," April 2022 Order at 19950, all children above six months are now officially eligible. CDC, COVID-19 Vaccination for Children.[6]

The cause-specific mortality rate from COVID-19 has also dropped since the April 2022 Order. For the week of January 25, 2023, the weekly rate per 100,000 people was 1.13, compared with 1.53 for the week March 30, 2022—a 26 percent decrease. And the January 2023 rate reflects an even larger 38 percent decrease from the weekly mortality rate (1.84) in August 2021. *See* CDC, Trends in Number of COVID-

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[5] *Available at* https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-admin-rate-total (last updated Feb. 1, 2023).

[6] *Available at* https://www.cdc.gov/vaccines/covid-19/planning/children.html .(last visited Feb. 6, 2023)

19 Cases and Deaths in the US Reported to CDC, by State/Territory.[7]

As one expert observed, "[i]n 2022, COVID-19 illness was less severe and less deadly compared to 2020 and 2021, and no new variant has emerged with the capacity to fuel a major wave of cases." Jackie Powder, COVID-19 in 2022: A Year-End Wrap-Up, Johns Hopkins Bloomberg School of Public Health (Dec. 15, 2022).[8] That explains why, consistent with a broad public health consensus, nearly every other facet of American life—*e.g.*, schooling, travel, dining, sporting events, business, and social life—has returned (more or less) to pre-pandemic operation. The Title 42 orders stand as an unjustifiable outlier.

B. CDC Failed To Explain The Departure From Its Established "Least Restrictive Means" Standard

Despite this Court's order limiting the grant of certiorari to the question of intervention, petitioners allege several flaws in the district court's decision invalidating CDC's August 2021 order.[9] None has merit.

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[7] *Available at* https://covid.cdc.gov/covid-data-tracker/#trends_weeklycases_7daydeathsper100k_00 (last visited Jan. 31, 2023).

[8] *Available at* https://publichealth.jhu.edu/2022/covid-year-in-review#:~:text=In%202022%2C%20COVID%2D19%20illness,a%20major%20wave%20of%20cases.

[9] Although the district court invalidated CDC's Title 42 orders on multiple grounds, *see* J.A. 27 ("Defendants Failed to Apply the Least Restrictive Means Standard"); J.A. 34 ("Defendants Failed to Consider the Consequences of Suspending

First, petitioners contend that the district court should not have required CDC to demonstrate that its order barring entry at the border was the least restrictive means of addressing the risk of COVID-19 transmission because "federal courts 'require *** the least restrictive means only when *** strict scrutiny applies.'" Pet. Br. 24 (quoting *United States v. American Libr. Ass'n, Inc.*, 539 U.S. 194, 207 n.3 (2003)). But the district court's decision was (correctly) predicated on the fact that *the agency* had established a policy of applying the least restrictive means standard and thus, under the Administrative Procedure Act (APA), could not depart from that standard without explanation. *See*, *e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("An agency may not *** depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.").

Petitioners brush off CDC's settled practice by speculating that the agency would not have imposed such a limit on its own authority. Pet. Br. 25. But it makes perfect sense that an agency charged with protecting public health would demand of itself a considered assessment that certain significant actions taken in service of that goal (like invoking Title 42) are no more onerous than necessary to meet it. And petitioners' cursory assessment overlooks

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Immigration to Covered Noncitizens"); J.A. 37 ("The Title 42 Policy Failed to Adequately Consider Alternatives); J.A. 44 ("Defendants have not shown that the risk of migrants spreading COVID-19 is 'a real problem'"), petitioners attack only the court's conclusion that CDC improperly departed from the least restrictive means standard.

considerable evidence that CDC indeed had a settled practice of using the least restrictive means standard to assess policy choices regarding public health measures. *See*, *e.g.*, Control of Communicable Diseases, 82 Fed. Reg. 6890, 6912 (Jan. 19, 2017) (2017 Final Rule) ("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."); Public Health Reassessment, 87 Fed. Reg. 15243, 15252 (Mar. 17, 2022) (stating that "CDC is committed to using the least restrictive means necessary" in terminating order applying Title 42 policy to unaccompanied children); Schuchat Interview at 28 (explaining that the "typical" practice at CDC was to use the "least restrictive means possible to protect public health"); Cetron Interview at 171 ("[W]e should attempt to provide the least restrictive means in accomplishing the same public health outcome. We shouldn't go to the most restrictive approach if lesser restrictive means that have fewer collateral consequences and damages and unintended consequences would suffice.").

The district court also correctly rejected petitioners' contention that the language of the 2017 Final Rule does not extend to Title 42. As the court explained, that Rule specifically covered "quarantine, isolation, *or other public health measures*," and cited among examples of policies requiring a least restrictive means analysis several that were not quarantine or isolation *per se.* J.A. 28-33 (emphasis added). In any event, as the district court pointed out, "[t]he 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.'" J.A. 29 (quoting August 2021 Order at 42838)).

Whatever the scope of the 2017 Final Rule, the district court correctly held that it did not purport to *establish* the applicability of the least restrictive means standard, let alone limit the use of that analysis strictly to quarantine and isolation. Rather, the Rule described a *preexisting* agency practice regularly applied to certain public health measures. *See* Schuchat Interview at 141 (describing the least restrictive means analysis as "typical"). Petitioners' gratuitous attack on the district court's decision ignores that crucial point.

C. This Court Should Vacate Its Stay Preventing Immediate Cessation Of CDC's Title 42 Orders

As described above, the public health circumstances surrounding COVID-19 have continued to improve since CDC terminated its Title 42 orders in April 2022. It is hardly surprising, then, that petitioners do not contend that public health needs justify continued reliance on Title 42. Across multiple briefs in the district court, court of appeals, and this Court, petitioners never suggest that the "looming potential disaster that will result when Title 42 is terminated," Pet. Br. 49, is in any way related to COVID-19. To the contrary, petitioners plainly acknowledge that "the COVID-19 pandemic has significantly abated." *Id.* at 48. And in line with that assessment, nearly all of the petitioner States sued the

Biden Administration to enjoin application of the mask mandate on public transportation just days before CDC terminated its Title 42 order. *See Florida et al. v. Walensky*, No. 22-cv-00718 (M.D. Fla. Mar. 29, 2022).

Regardless of whether this Court affirms or reverses the intervention decision, there is no basis to maintain the stay this Court imposed upon granting certiorari. As just noted, no party in this case contends that public health considerations warrant CDC's continuing use of its Title 42 authority. That fact will not change if petitioners are permitted to intervene in this suit, and it will not change if the D.C. Circuit or this Court disagrees with the district court's conclusion that CDC's Title 42 orders contravened the APA.

In short, whatever consequences petitioners seek to avoid by leaving the August 2021 order in place have nothing to do with COVID-19. Accordingly, this Court should immediately lift the stay upon resolving the question of intervention and permit CDC to wind down its use of Title 42 authorities, as the agency itself believes is appropriate.

CONCLUSION

The judgment of the D.C. Circuit should be affirmed and the stay should be vacated.

Respectfully submitted.

Pratik A. Shah
Counsel of Record
Martine E. Cicconi
Aleena Ijaz*
Akin Gump Strauss
Hauer & Feld LLP

* Licensed to practice in Maryland only and under the direct supervision of a partner of Akin Gump Strauss Hauer & Feld LLP who is an enrolled active member of the District of Columbia Bar; application for admission to the D.C. Bar pending.

February 9, 2023