[ORAL ARGUMENT NOT SCHEDULED]

No. 20-5357

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

P.J.E.S., a minor child, by and through his father and next friend, Mario Escobar Francisco, on behalf of himself and others similarly situated,

Plaintiff-Appellee,

v.

Alejandro Mayorkas, Secretary of Homeland Security, et al.

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Columbia

CORRECTED BRIEF FOR APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Defendants-Appellants submit the following Certificate as to Parties, Rulings, and Related Cases in the above-captioned matter pursuant to Circuit Rules 27(a)(4) and 28(a)(1).

1. Parties and Amici.

The named Plaintiff is P.J.E.S., a minor child, by and through his father and Next Friend, Mario Escobar Francisco, on behalf of himself and others similarly situated.

The named Defendants in the district court were Chad F. Wolf, Acting Secretary of Homeland Security, in his official capacity; Mark A. Morgan, Chief Operating Officer and Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection, in his official capacity; Todd C. Owen, Executive Assistant Commissioner, CBP Office of Field Operations, in his official capacity; Rodney S. Scott, Chief of U.S. Border Patrol, in his official capacity; Matthew T. Albence, Deputy Director Of U.S. Immigration and Customs Enforcement, in his official capacity; Alex M. Azar II, Secretary of Health and Human Services, in his official capacity; Dr. Robert R. Redfield, Director of the Centers for Disease Control and Prevention, in his official capacity; and Heidi Stirrup, Acting Director of the Office of Refugee Resettlement, in her official capacity.

Pursuant to Federal Rule of Appellate Procedure 43(c), Alejandro Mayorkas, in his official capacity as Secretary of Homeland Security should replace Chad F. Wolf; Troy A.

Miller, in his official capacity as Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection should replace Mark A. Morgan; William A. Ferrara, Executive Assistant Commissioner, CBP Office of Field Operations, in his official capacity should replace Todd C. Owen; Tae D. Johnson, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity should replace Matthew T. Albence; Norris Cochran, Acting Secretary of Health and Human Services, in his official capacity, should replace Alex M. Azar II; Dr. Rochelle Walensky, Director of the Centers for Disease Control and Prevention, in her official capacity, should replace Dr. Robert R. Redfield; and Ken Tota, Acting Director of the Office of Refugee Resettlement, in his official capacity, should replace Heidi Stirrup.

Appearing as amici in the district court were (1) Scholars of Refugee and Immigration Law; (2) International Refugee Assistance Project; and (3) Immigration Reform Law Institute.

The following filed motions for leave to appear as amici in this Court, which were denied without prejudice on January 29, 2021: (1) Scholars of Refugee and Immigration Law; (2) Historians Ruth Ellen Wasem, Ph.D., et al.; and (3) International Refugee Assistance Project.

2. Rulings Under Review.

The notice of appeal seeks this Court's review of the district court's order, dated November 18, 2020, granting a preliminary injunction and provisionally granting class certification.

3. Related Cases.

There are no related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C). *Huisha-Huisha v. Mayorkas*, No. 21-cv-100-EGS (D.D.C), involves a challenge to the U.S. Centers for Disease Control and Prevention's Order under 42 U.S.C. § 265 by family groups, but does not involve the same parties as this case. *Poe v. Mayorkas*, No. 21-cv-10218 (D. Mass.), involves a challenge to the U.S. Centers for Disease Control and Prevention's Order under 42 U.S.C. § 265 by individual adults and minors, but does not involve the same parties as this case.

/s/ Joshua Waldman
Joshua Waldman
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GLOSSARY

APA	Administrative Procedure Act
CBP	U.S. Customs and Border Protection
CDC	U.S. Centers for Disease Control and Prevention
DHS	Department of Homeland Security
HHS	Department of Health and Human Services
INA	Immigration and Nationality Act
ORR	Office of Refugee Resettlement
TVPRA	Trafficking Victims Protection Reauthorization Act of 2008

INTRODUCTION

The district court's preliminary injunction deprives the government of any discretion or flexibility to implement critical public-health measures designed to protect against the uncontrolled spread of COVID-19. The Director of the U.S. Centers for Disease Control and Prevention (CDC) exercised his long-standing authority under 42 U.S.C. § 265 (Section 265) to temporarily suspend the introduction of certain noncitizens traveling from Mexico and Canada who would otherwise be held in congregate settings in Ports of Entry or Border Patrol stations at or near the U.S. border—facilities that are not designed or equipped to quarantine, isolate, or enable social distancing. The CDC Director determined in light of the public-health risks that it is imperative to authorize the expulsion of covered noncitizens as quickly as possible.

The injunction prohibits the U.S. Government from expelling from the United States, pursuant to the CDC Order, a putative class of all unaccompanied noncitizen children who are or will be in government custody. Under the district court's reasoning, the government lacks authority to expel those noncitizens quickly, and is left with only one option after an alien enters the United States: the government now must hold them in congregate settings at or near the border—exacerbating the virus-transmission risk—until it can transfer them (including via mass transportation, such as commercial airlines) to facilities run by the Department of Health and Human Services (HHS) Office of Refugee Resettlement. Responding to a dynamic, public-

health emergency requires the flexibility to conduct complex, science-based analyses in real time. CDC takes this responsibility seriously and, as noted below, is currently conducting a reassessment of the Order to ensure that it appropriately responds to the current conditions as they continue to evolve. CDC is temporarily excepting from expulsion unaccompanied noncitizen children encountered in the United States, pending its forthcoming public-health reassessment of the Order. 86 Fed. Reg. 9,942 (Feb. 17, 2021).

The preliminary injunction precludes the government from exercising its lawful discretion under Section 265 to respond in an appropriate, measured, and tailored manner to a serious public-health threat from a communicable disease. The resulting lack of flexibility will further increase the risk of COVID-19 transmission, not only to U.S. Customs and Border Protection (CBP) personnel, but also to noncitizens and the U.S. population at large. And it has the potential to overtax already-stressed healthcare systems, especially those along the border. Because the risks posed by the spread of communicable disease may rapidly evolve, and because events at or near the border are often fluid and unpredictable, it is critical that the government retains its lawful authority and discretion under Section 265 to meet the public-health risks with a response commensurate to what the circumstances may demand.

The district court reached its holding through an improperly cramped understanding of CDC's public-health authority that all but eviscerates the government's Section 265 authority to contain the risk of transmission of

communicable diseases at the border. The court ruled that CDC's authority under 42 U.S.C. § 265 to "prohibit * * * the introduction of persons" from a foreign country does not include the authority to expel such persons if they manage to evade detection and set foot on U.S. soil. 1 Appendix (App.) 125-126. Although the court did not dispute that the government's authority to prohibit the introduction of persons necessarily includes the authority to interrupt, intercept, or halt persons who attempt to enter the country unlawfully, it reasoned that "[e]xpelling persons, as a matter of ordinary language, is entirely different from interrupting, intercepting, or halting the process of introduction." *Id.* Under that reasoning, any noncitizen who crosses into the United States over the nearly 6,000 miles of land border with Canada and Mexico is outside the government's power under 42 U.S.C. § 265, even if the noncitizen is stopped just one step over the border and, most importantly, regardless of the risk of transmission. Neither the statute's text or history, nor common sense, supports that parsimonious interpretation of Section 265. The government is thus likely to succeed on the merits.

In addition to misinterpreting Section 265, the district court's order threatens irreparable harm to the government and the public at large. The COVID-19 pandemic continues to be a highly dynamic public-health emergency, and CDC's discretion concerning whether to prohibit the introduction of persons from particular countries, and in what circumstances, is critical to avoiding irreparable harm to the public at large. Congress charged CDC—not federal courts—with making public-

health judgments about how best to protect the country during a pandemic; the district court's preliminary injunction unjustifiably interferes with the government's ability to implement its expert judgment in order to respond with flexibility to a rapidly evolving public-health crisis. The government respectfully suggests that the balancing of equities weighs against the preliminary injunction entered below, and this Court should therefore vacate the injunction.

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction under 28 U.S.C. § 1331. 1 App. 21. The district court entered a preliminary injunction on November 18, 2020. 1 App. 98-99. The Government filed a timely notice of appeal on November 25, 2020. 1 App. 150-151. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Whether the district court abused its discretion in granting a preliminary injunction enjoining Defendants from expelling the members of the provisionally certified class from the United States pursuant to an Order issued by the Director of the Centers for Disease Control and Prevention.

PERTINENT STATUTES AND REGULATIONS

42 U.S.C. § 265 provides as follows:

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

The provisions of 42 C.F.R. § 71.40 are set forth in the Addendum to this brief.

STATEMENT OF THE CASE

I. Background

The federal government has long had the authority to take actions to prevent the spread of communicable diseases. In 1893, Congress authorized the Executive Branch to enact rules and regulations to prevent the introduction of contagious or infectious diseases from foreign countries into the United States. Act of Feb. 15, 1893, ch. 114, § 7, 27 Stat. 449, 452. The 1893 Act—which was the predecessor statute to the federal government's current authority under 42 U.S.C. § 265—was enacted in response to the cholera epidemic. 24 Cong. Rec. 359 (1893). Congress recognized the threat of cholera from Europe, Mexico, and Canada, and sought to prevent cholera "from either entering the country or spreading after it has made its entry." 24 Cong. Rec. at 359; *see also id.* at 363, 364. Accordingly, the 1893 Act authorized the President to "prohibit * * * the introduction of persons" into the

United States, "whenever" the President is satisfied that "by reason of the existence of cholera or other infectious or contagious diseases in a foreign country there is a serious danger of the introduction of the same into the United States * * * notwithstanding the quarantine defense," such that "a suspension of the right to introduce" is "demanded in the interest of the public health[.]" 27 Stat. at 452.

The 1893 Act was subsequently codified, as amended, at 42 U.S.C. § 111 (1925), where it remained until its current recodification in 1944 as Section 362 of the Public Health Service Act, 42 U.S.C. § 265, 58 Stat. 682, 704 (1944). Section 265 authorizes the Secretary of HHS to "prohibit * * * the introduction of persons" into the United States to "avert" the "serious danger of the introduction of" a "communicable disease," "[w]henever the [Secretary] determines that" "a suspension of the right to introduce such persons" is "required in the interest of the public health." 42 U.S.C. § 265.[1]

In March 2020, in light of the unprecedented COVID-19 global pandemic, HHS and CDC issued an interim final rule under Section 265 to provide a procedure for the CDC Director to temporarily suspend the introduction of certain persons into the United States. 85 Fed. Reg. 16,559 (Mar. 24, 2020). The rule's preamble explained that international travel increases the risk of communicable disease

[1] The statute assigns this authority to the Surgeon General, but the authority was later transferred to the Secretary of HHS. 31 Fed. Reg. 8,855-01(June 25, 1966); 80 Stat. 1610 (1966).

transmission into and through the United States, a risk that "increases when travelers are in congregate settings." *Id.* at 16,560. The rule defined "introduction into the United States of persons" from a foreign country to mean "the movement of a person from a foreign country" into the United States "so as to bring the person into contact with persons 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." *Id.* at 16,566; *see also* 85 Fed. Reg. 56,424, 56,427 (Sept. 11, 2020); 42 C.F.R. § 71.40(b)(1). CDC explained that this definition was intended to "clarify that 'introduction' can encompass those who have physically crossed a border of the United States and are in the process of moving into the interior in a manner the Director determines to present a risk of transmission of a communicable disease." 85 Fed. Reg. at 16,563; *see also* 85 Fed. Reg. at 56,427 (explaining that "introduction" does not "conclude the instant that a person first steps onto U.S. soil"). The rule does not apply to U.S. citizens and lawful permanent residents. 85 Fed. Reg. at 16,567; *see* 42 C.F.R. § 71.40(f).

CDC subsequently explained that "Congress's use of the terms 'suspension' and 'right to introduce' [in Section 265]—rather than just 'introduce'—means that [Section 265] grants the Director the authority to temporarily suspend the effect of any law, rule, decree, or order by which a person would otherwise have the right to be introduced or seek introduction into the U.S." 85 Fed. Reg. at 56,426; *see* 42 C.F.R.

§ 71.40(b)(5). CDC further explained that the "legislative history indicates that Congress, in enacting [Section 265's] predecessor, sought to give the Executive Branch the authority to suspend immigration when required in the interest of public health" and that "[t]his authority is available only in rare circumstances when 'required in the interest of the public health.'" 85 Fed. Reg. at 56,426 (quoting 42 U.S.C. § 265); *see also id.* at 56,441-42, 56,447, 56,450.

CDC also subsequently explained that the "speed and far reach of global travel have been factors in prior outbreaks that expanded to numerous continents." 85 Fed. at 56,427. For example, during the 2009-2010 H1N1 influenza pandemic, "the initial cases of 2009 H1N1 influenza occurred in Mexico," and H1N1 cases were later discovered in several border states, "which suggested cross-border transmission of the disease." *Id.* at 56,428. CDC explained that "[i]t is possible that had HHS/CDC suspended the introduction of persons from Mexico into the United States early in the pandemic, fewer individuals might have fallen ill or died from H1N1 influenza." *Id.*

In March 2020, the CDC Director issued an Order temporarily suspending the introduction of certain noncitizens traveling from Canada and Mexico into the United States. 85 Fed. Reg. 17,060 (Mar. 26, 2020) (CDC Order). The Order applied to "covered aliens," defined as persons "traveling from Canada or Mexico (regardless of their country of origin) who would otherwise be introduced into a congregate setting" at or near the border, "typically aliens who lack valid travel documents." *Id.* at 17,061.

The CDC Order explained that covered aliens may spend hours or days in congregate settings while undergoing immigration processing and that Ports of Entry and Border Patrol stations are "not designed for, and are not equipped to, quarantine, isolate, or enable social distancing by persons who are or may be infected with COVID-19." *Id.* at 17,061, 17,066. The Order also explained that holding covered aliens in congregate settings risks the spread of COVID-19 to CBP personnel and further transmission of COVID-19 to the U.S. population, with a concomitant increased strain on the U.S. healthcare system and supply chain. *Id.* at 17,061. The Order noted that conditional release would "jeopardize * * * the public health" because many covered aliens "may lack homes or other places in the United States where they can self-isolate," and CDC "lacks the resources and personnel necessary to effectively monitor such a large number of persons." *Id.* at 17,067.

CDC explained that on March 12-13, 2020, a United States Public Health Service Scientist officer visited the Paso del Norte Port of Entry in El Paso to observe infection control procedures. 85 Fed. Reg. at 17,066. The officer observed that "covered aliens would present infection control challenges during processing and screening in congregate areas." *Id.* This Port of Entry has "several small waiting rooms" that are used to hold individuals "suspected of exposure to or infection with a contagious disease," *id.*, but these are not isolation rooms "because the HVAC system is shared with the rest of the facility" and the rooms do "not have adequate capabilities to contain COVID-19," *id.* at 17,068. Additionally, "[e]scorting a

contagious individual to and from this room, as well as holding them there, poses a significant risk of exposing nearby CBP personnel." *Id.* at 17,068. The officer also observed that if an individual infected with COVID–19 were subject to the screening processes, the individuals "would be maneuvered throughout various sections of the [Port of Entry], creating a significant risk of COVID–19 exposure to other aliens and CBP officers." *Id.* CDC explained that this Port of Entry was selected because it is "one of CBP's largest and best-equipped Ports of Entry on the Southwest Border" and that other ports of entry have even fewer infection-control capabilities. *Id.* However, the Paso del Norte Port of Entry in El Paso "is representative of other [Ports of Entry] in that it is heavily reliant on local and regional hospitals and [emergency medical technician] services to care for aliens." *Id.* at 17,066.

The Order includes several exceptions. In particular, it does not apply to U.S. citizens, lawful permanent residents, and other persons whom the government determines "should be excepted based on the totality of the circumstances, including consideration of significant law enforcement, officer and public safety, humanitarian, and public health interests." 85 Fed. Reg. at 17,061. *See also* 42 C.F.R. § 71.40(e), (f). CDC requested the assistance of the Department of Homeland Security (DHS) in implementing the Order because CDC lacks the capability and resources to do so. 85 Fed. Reg. at 17,067; *see also* 42 U.S.C. § 268(b).

In April 2020, CDC extended the duration of the Order by 30 days, explaining that "the determinations made in support of the March 20, 2020 Order remain

correct," and "[i]f anything, they have become more compelling." 85 Fed. Reg. 22,424, 22,425 (Apr. 22, 2020).

In May 2020, CDC again extended the duration of the Order, subject to CDC's recurring 30-day review. 85 Fed. Reg. 31,503, 31,503 (May 26, 2020). CDC explained that "[r]ecent data from [DHS] indicates [that] the Order has mitigated the specific public health risks identified in the March 20, 2020 Order by significantly reducing the population of covered aliens held in [Ports of Entry] and Border Patrol stations" but that "there remains a serious risk to the public health that COVID-19 will continue to spread to unaffected communities within the United States, or further burden already affected areas." *Id.* at 31,504.

In September 2020, HHS and CDC published a final rule permitting the CDC Director to "prohibit, in whole or in part, the introduction into the United States of persons from designated foreign countries" "for such period of time that the Director deems necessary to avert the danger of the introduction of a quarantinable communicable disease." 85 Fed. Reg. at 56,425 (codified at 42 C.F.R. § 71.40). The CDC Director then issued a new Order that suspends the introduction of all covered aliens into the United States, subject to certain exceptions, until he determines that "the danger of further introduction of COVID-19 into the United States has ceased to be a serious danger to the public health," based on recurring 30-day reviews by CDC. 85 Fed. Reg. 65,806, 65,807-08 (Oct. 16, 2020).

On February 11, 2021, CDC issued a notice of its decision to temporarily except from expulsion unaccompanied noncitizen children encountered in the United States, pending its forthcoming public-health reassessment of the Order. 86 Fed. Reg. 9,942. *See also* 86 Fed. Reg. 8,267 (directing "[t]he Secretary of HHS and the Director of CDC, in consultation with the Secretary of Homeland Security, [to] promptly review and determine whether termination, rescission, or modification of the [the CDC Order and Final Rule] is necessary and appropriate."). CDC explained that the COVID-19 pandemic continues to be a highly dynamic public-health emergency, and that it is in the process of reassessing the overall public-health risk at the United States' borders and the Order based on the most current information regarding the COVID-19 pandemic and the situation at the Nation's borders. 86 Fed. Reg. 9,942.

II. Facts and District Court Proceedings

Plaintiff is a fifteen-year-old from Guatemala who was apprehended in August 2020 after illegally crossing the U.S.-Mexico border. 1 App. 100. DHS determined that plaintiff was a "covered alien" subject to expulsion under the CDC Order.

On August 14, plaintiff brought suit on behalf of a putative class of "[a]ll unaccompanied noncitizen children who (1) are or will be detained in U.S. government custody in the United States, and (2) are or will be subjected to" the CDC Order. 1 App. 39. As relevant here, plaintiff asserted that the CDC Order exceeds CDC's authority under 42 U.S.C. § 265, and conflicts with various provisions of the Immigration and Nationality Act (INA) and the Trafficking Victims Protection

Reauthorization Act of 2008. 1 App. 41-46. Plaintiff subsequently moved for class certification and a classwide preliminary injunction. D. Ct. Dkt. 15.

After bringing suit, plaintiff was excepted from the CDC Order, transferred to Office of Refugee Resettlement custody, and processed pursuant to the immigration procedures in Title 8 of the U.S. Code. D. Ct. Dkt. 15-1, at 11.

On September 25, the magistrate judge issued a report recommending that the district court provisionally grant plaintiff's motion for class certification and a preliminary injunction. 1 App. 48-97.

On November 18, the district court rejected the government's objections to the magistrate judge's report and recommendation, and granted provisional class certification and a classwide preliminary injunction. 1 App. 98-149. The district court defined the provisional class as "consisting of all unaccompanied noncitizen children who (1) are or will be detained in U.S. government custody in the United States, and (2) are or will be subjected to expulsion from the United States under the CDC Order Process, whether pursuant to "an Order issued by" the CDC Director "under the authority granted by the Interim Final Rule" or an Order issued under the Final Rule. 1 App. 98-99 (internal citations omitted).

The district court concluded that Section 265 likely does not authorize the government to expel noncitizens once they have crossed the border into the United States, reasoning that "[e]ven accepting that the phrase, 'prohibit[ing] * * * the introduction of,' means 'intercepting' or 'preventing,'" "[e]xpelling persons" "is

entirely different from interrupting, intercepting, or halting the process of introduction." 1 App. 125-126. The court further reasoned that Section 265's neighboring statutory provisions frequently reference "quarantine" and do not explicitly authorize expulsion, "suggesting that the CDC's powers were limited to quarantine and containment." 1 App. 127-132. In an attempt to harmonize Section 265 with the INA, the court concluded that "the language of Section 265 contains no 'clear intention' to authorize the suspension of" provisions of Title 8 of the U.S. Code that establish procedures for general immigration processing. 1 App. 135. The court also concluded that, even assuming the term "introduction" is ambiguous, CDC's interpretation is not entitled to *Chevron* deference because CDC's interpretation does not implicate the agency's scientific and technical expertise, even though the agency indisputably administers Section 265 and issued the Order in accordance with Administrative Procedure Act (APA) procedures. 1 App. 136-137.

Finally, the court concluded that the remaining preliminary injunction factors weigh in favor of plaintiff. 1 App. 138-146. The court enjoined the government from expelling class members from the United States under the CDC Order issued under the interim and final rules. 1 App. 147.

On January 29, 2021, this Court stayed the preliminary injunction pending appeal. Doc. 1882899.

SUMMARY OF ARGUMENT

1. The district court incorrectly reasoned that Section 265's authority to prohibit the "introduction" of persons permits CDC to stop a person's introduction before it is complete, but does not authorize the agency to remove a person who has already been introduced. Even accepting that reasoning, the district court's conclusion is still wrong. A person's "introduction" into the United States is not complete the moment he or she steps over the border, and thus removing or expelling a person who happens to cross the border nonetheless occurs before that person's "introduction" into the United States is finished. More fundamentally, however, the district court's premise was mistaken. The statutory authority to prohibit a person's "introduction" includes the related authority to expel that person if he or she crosses the border notwithstanding the prohibition. The district court's contrary conclusion defies common sense, rendering CDC powerless to act under Section 265, even in the face of a serious threat of communicable disease, so long as a person evades the statute's lawful restrictions long enough to cross a line on a map.

Plaintiff's alternative argument—that Section 265 authorizes nothing more than the regulation of common carriers—makes even less sense. That construction illogically transforms a broad grant of statutory authority to address the serious threat of communicable disease into the mere regulation of transportation entities, leaving the agency without any authority to prohibit the spread of disease by those traveling over a land border without the assistance of a transportation company. Plaintiff's

construction disregards the contrast between Section 265, which refers to the "introduction of persons," and the surrounding statutory provisions expressly regulating "vessels." It also overlooks Congress's specific rejection of a narrow statute prohibiting only "passenger travel."

Contrary to the district court's conclusion, Section 265 does not irreconcilably conflict with provisions of immigration laws. Section 265 applies only under narrow and specific circumstances of a public-health emergency, where 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." In contrast, generally applicable immigration provisions apply under normal circumstances and in ordinary times. Even if there were an irreconcilable conflict, moreover, Section 265 would prevail. Congress expressly provided that the authority under Section 265 should operate as a "suspension of the right to introduce such persons and property," 42 U.S.C. § 265, and the statute's legislative history makes unmistakably clear that the authorization "to prohibit * * * the introduction of person" included, but was not limited to, the suspension of immigration.

If there were any remaining doubt, CDC's interpretation is entitled to *Chevron* deference. CDC unquestionably administers Section 265, part of the Public Health Service Act. The statute authorizes the agency to issue orders to protect public health that have the force and effect of law, as the Order at issue in this case indisputably does. In doing so, CDC is exercising its expert epidemiologic judgment with respect

to whether the introduction of persons from certain foreign countries or places may spread a communicable disease; whether permitting certain persons to remain in congregate settings at Ports of Entry or Border Patrol stations will exacerbate the serious threat of introducing such disease into the United States; and whether alternative mitigation measures are adequate to address that threat. CDC's interpretation of Section 265 to permit the agency to address the scope of the communicable disease threat it perceives is entitled to *Chevron* deference.

2. The district court also erred in concluding that the remaining preliminary injunction factors weigh in favor of plaintiff. The preliminary injunction threatens irreparable harm to the government and the public at large. The COVID-19 pandemic continues to be a highly dynamic public-health emergency, and CDC's discretion concerning whether to prohibit the introduction of persons from particular countries and in what circumstances, as well as its discretion to except certain classes of people from that prohibition, is critical to avoiding irreparable harm. Congress charged CDC—not federal courts—with making public-health judgments about how best to protect the country during a pandemic; vacating the preliminary injunction is necessary so that the government can implement its expert judgment in order to respond with flexibility to a rapidly evolving public-health crisis. The government respectfully suggests that the balancing of equities weighs against a preliminary injunction.

STANDARD OF REVIEW

This Court reviews a grant of a preliminary injunction for an abuse of discretion, reviewing the district court's legal conclusions *de novo* and its findings of fact for clear error. *In re Navy Chaplaincy*, 697 F.3d 1171, 1178 (D.C. Cir. 2012); *Serono Labs. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998).

ARGUMENT

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008). The district court abused its discretion in granting a preliminary injunction. The district court's interpretation of Section 265 – which this Court reviews *de novo* – was incorrect as a matter of law, and thus the government is likely to succeed on the merits. In addition, the balance of equities and public interest weigh against an injunction.

I. The Government is Likely to Succeed on the Merits

The district court's injunction is premised on the erroneous legal conclusion that the CDC Order exceeds the agency's statutory authority under 42 U.S.C. § 265.

A. Prohibiting the "Introduction" of Persons from a Foreign Country with a Serious Danger of Communicable Disease Includes the Authority to Expel Such Persons

Section 265 authorizes CDC "to prohibit, in whole or in part, the introduction of persons and property" from a foreign country "[w]henever" the agency

"determines" that, "by reason of the existence of any communicable disease in a foreign country," the "introduction of persons or property from such country" presents a "serious danger" of introducing that "communicable disease * * * into the United States," and the prohibition "is required in the interest of the public health." 42 U.S.C. § 265. The district court incorrectly concluded that this statutory authority does not provide CDC with any authority to remove or expel persons from the United States once they cross the border.

The district court reasoned that the words "prohibit * * * the introduction" authorize CDC to "stop[] something before it begins," but not to "remedy[] it afterwards." 1 App. 125. Thus, in the court's view, CDC has the power to stop covered aliens and property before they cross the border—but should they manage to evade those restrictions and illegally enter the country or present at a Port of Entry, the government is powerless to act under Section 265 to expel those persons and property from the United States.

Even assuming the district court's interpretation was correct—that "prohibit[ing] * * * the introduction" is limited to "stopping something before it begins, rather than remedying it afterwards," 1 App. 125—the court still erred in holding that the CDC Order exceeds the agency's authority under Section 265. An "introduction" into the United States is a continuing process that does not stop at the border. *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020) ("an alien who is detained shortly after unlawful entry cannot be said to have 'effected an entry'"); *Castro v. DHS*,

835 F.3d 422, 445 (3d Cir. 2016) (aliens who are "apprehended within hours of surreptitiously entering the United States" are still treated as "'alien[s] seeking initial admission to the United States'"); *United States v. Steinfels*, 753 F.2d 373, 377 (5th Cir. 1985) (finding that "introduction into commerce commences upon the arrival of imported goods upon United States soil, but introduction does not necessarily end there"). The "introduction" of a person or property into the United States is not completed, and does not come to an end, merely because that person or property crosses a line on a map. The district court incorrectly assumed that noncitizens who have crossed the border are "already introduced" into the United States merely by stepping over the border, but in fact such noncitizens are still "in the process of being introduced." 1 App. 125. Accordingly, under the court's own reasoning, the CDC Order is authorized by Section 265 because it applies to noncitizens who have not yet completed their "introduction" in the United States.

More fundamentally, the district court erred in concluding that CDC's statutory authority to prohibit the "introduction" of a person does not include the authority to expel that person from the United States, if he or she is interdicted after crossing the border and while in the process of being "introduced" into the United States, notwithstanding the fact that the serious danger of the introduction of a communicable disease into the United States is the same in both instances. The district court's wooden construction of the statute defies common sense.

A statute prohibiting persons or property from entering certain protected areas is most naturally and reasonably read to include both the power to prevent those persons or property from entering in the first instance and also the power to expel them if they mistakenly or surreptitiously enter in contravention of that prohibition. For example, the authority to "prevent [a dangerous] individual from boarding an aircraft," 49 U.S.C. § 114(h)(3)(B), is most naturally understood to authorize the individual's removal from the aircraft if he or she somehow manages to board; the authority does not cease once the individual enters the plane or jetway. The same principle applies here.

Section 265's evident purpose is "to avert" the "serious danger of the introduction * * * into the United States" of "any communicable disease in a foreign country" "in the interest of the public health" if that "danger is so increased by the introduction of persons * * * from such country." 42 U.S.C. § 265. Such a public-health emergency is in no way diminished by the fact that an noncitizen has already arrived at a Port of Entry, or has crossed the border unlawfully, and the district court offered no sound public-health reason why Congress would have intended for CDC's Section 265 authority to be rendered toothless in those circumstances. *See* 85 Fed. Reg. at 16,560, 16,563 (because the "further introduction of COVID-19 into the United States" can occur if "infected persons walk[] across the land border," CDC defines "introduction" to "encompass those who have physically crossed a border of the United States and are in the process of moving into the interior in a manner the

Director determines to present a risk of transmission of a communicable disease"); *see also* 85 Fed. Reg. at 56,445 ("[W]hen a person on U.S. soil moves further into the United States," he or she may "come[] into contact with new persons or property in ways that increase the risk of spreading the quarantinable communicable disease" and thus "'[i]ntroduction' does not necessarily conclude the instant that the person first steps onto U.S. soil."). Congress, in enacting Section 265's predecessor statute in 1893, was aware of the danger presented by infected persons arriving from abroad and surreptitiously crossing the border. *See* 24 Cong. Rec. at 373 ("[I]t is an open and notorious fact that for want of patrol people were escaping from the ships and getting to shore more or less during that whole quarantine * * * ."). That point is further underscored by Congress's use of the word "into" when addressing the "serious danger of the introduction of such disease *into* the United States" that is "increased by the introduction of persons * * * from such country." 42 U.S.C. § 265 (emphasis added). The word "into" means "[t]o the inside or interior of." American Heritage Dictionary 934 (3d ed. 1992). Accordingly, that language suggests that Congress was concerned not only with stopping the communicable disease, and the persons who may carry it, before they cross the border, but with preventing further introduction of the disease, or the person, into the interior of the country even if they should cross the border.

The district court likewise reasoned that "[i]n view of current immigration laws" in which Congress expressly authorized removal, "one would expect the term

[removal] to appear" in Section 265, 1 App. 128, 133, and deemed its absence "significant," *id.* at 129; *see id.* at 128, 132-134 (citing 1 App. 74-77). But Section 265 is a public-health statute, not an immigration law, and thus the lack of the word "removal" is not especially significant or surprising even if its absence might be meaningful in the immigration context. *Russello v. United States*, 464 U.S. 16, 25 (1983) ("Language in one statute usually sheds little light upon the meaning of different language in another statute * * * ."). Indeed, immigration law's use of the term "removal" did not become the prevailing statutory term until 1996, *see, e.g., Judulang v. Holder*, 565 U.S. 42, 45-46 (2011), and thus its absence from Section 265 – first enacted more than a century earlier – is not surprising.

The district court similarly reasoned that because neighboring provisions of the Public Health Service Act are "shot through with references to quarantine," 1 App. 130-131, it "suggest[s] that the CDC's powers were limited to quarantine and containment," *id.* at 132. But Congress made it clear that Section 265 *expanded* the government's authority beyond the power to quarantine alone. When Section 265's predecessor statute was originally enacted in 1893, Congress conferred the authority to prohibit the introduction of persons "notwithstanding the quarantine defense," 27 Stat. at 452, making it clear that the authority to prohibit the introduction of persons

was different from, and in addition to, the authority to quarantine.[2] Nor was the district court correct that all of the provisions in the Public Health Service Act, including Section 265, "are referred to as 'quarantine laws.'" 1 App. 131-132. Section 265 is entitled "*Suspension of Entries* and Imports from Designated Places," 58 Stat. at 704 (emphasis added), making clear that this statutory provision was not aimed exclusively at quarantines but included authority to suspend the entry of persons into the United States altogether. *See Almendarez–Torres v. United States*, 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.").

More broadly, the district court's approach – assuming that the express provision for certain authorities implicitly forecloses actions not expressly enumerated – gets matters exactly backwards. That approach, which would unrealistically require Congress to anticipate and expressly enumerate the precise manner in which CDC should respond to a pandemic, makes no sense for a statute meant to address "extraordinary" and "unprecedented" public-health emergencies. 1 App. 130. Rather,

[2] Congress removed the "notwithstanding the quarantine defense" language when it recodified the statute in 1944, 58 Stat. at 704, but in doing so Congress specified that its recodification was "merely a restatement of the laws" then existing, and "[l]arge portions of the bill consist merely of reenactment of existing legislation with minor textual changes proposed in the interest of clarity and consistency." H.R. Rep. No 78-1364 at 1-2 (1944). While "[t]he section by section explanation of the bill * * * indicates the additions to and changes in substantive law which would be effected by the bill," *id.* at 3, the Report's analysis of Section 265 did not indicate any substantive change intended by the removal of the language "notwithstanding the quarantine defense," *id.* at 25.

Section 265, and the other provisions of the Public Health Service Act, delegate flexible authority to scientific experts so they may avert the introduction of communicable diseases, in recognition of the fact that a legislative body cannot know beforehand what the most effective public-health mitigation measures for a pandemic might be. In that context, there is no sound reason to require Congress to spell out in advance all actions that CDC may appropriately take.

In addition, other regulations promulgated under Section 265 reflect the understanding that the authority to prohibit the introduction of *property* presenting a serious danger of transmission of a communicable disease includes the authority to expel that property even after it arrives at a Port of Entry or crosses the border. For example, 42 C.F.R. § 71.63(a), promulgated under Section 265, authorizes CDC to "suspend the entry into the United States of animals, articles, or things from designated foreign countries" to prevent the introduction of a communicable disease. CDC has explained that if such animals or articles "do arrive at a U.S. port of entry, HHS/CDC will take measures as needed to protect the public's health" including "confinement, *re-exportation*, or destruction. Re-exportation may be considered if there is no public health risk during travel." 82 Fed. Reg. 6890, 6929 (Jan. 19, 2017) (emphasis added). Similarly, 42 C.F.R. § 71.51(b)(1), also promulgated under Section 265, authorizes the exclusion of dogs and cats with communicable diseases when they "arrive at a U.S. port," *id.*, and specifies that such animals "shall be *exported* or destroyed," *id.* § 71.51(g) (emphasis added). *See also* 42 C.F.R. § 71.53(a), (d)-(e) (CDC

regulation "to prevent the transmission of communicable disease from nonhuman primates" includes authority to prohibit "importing" such animals as well as authority to "export" them if they pose a public-health threat or are imported outside an authorized port of entry). Because Section 265 makes no distinction between "persons" and "property," there is no textual basis to conclude that CDC's authority regarding the former is more curtailed than its authority regarding the latter.[3]

The district court further suggested that Section 265 cannot include the power to expel because doing so would raise grave constitutional questions if applied to U.S. citizens. 1 App. 136 n.7 (citing 1 App. 78). The final rule, however, does not apply to U.S. citizens. 85 Fed. Reg. at 56,448; 42 C.F.R. § 71.40(f); 1 App. 106. Indeed, Congress conferred on CDC the authority to prohibit the introduction of persons "in whole or in part" precisely so that the agency had the flexibility necessary to exempt certain persons, including U.S. citizens. *See* 24 Cong. Rec. at 471 (amending Section 265's predecessor statute to add the words "in whole or in part" to permit "a partial as well as a total prohibition"); *id.* at 470 ("I do believe that we can discriminate wisely between those who come on that account [for immigration purposes] and those who

[3] To the extent these regulations rely on the authority in 42 U.S.C. § 264(a) to take "other measures" with respect to property, those regulations must still be "necessary to prevent the introduction" of communicable disease, *id.* These regulations thus confirm that preventing the introduction of communicable disease via property includes both the authority to prevent the property from entering the United States and the authority to re-export property that has already arrived.

already have a vested interest in citizenship and home in this country, to whom this country already belongs.").

Moreover, the district court's construction of Section 265 does not even avoid the very constitutional concerns it noted with respect to U.S. citizens. That is, even on the district court's understanding, Section 265 permits CDC to prohibit people from entering the United States if it does so before those people cross the border. But if that prohibition were applied to U.S. citizens—to prevent indefinitely their re-entry to the country from abroad—it would raise similar constitutional concerns. The doctrine of constitutional avoidance provides no basis to misconstrue a statutory text contrary to its plain meaning, and it certainly provides no basis for adopting a construction that does not even avoid the constitutional concerns identified by the court. Rather, if CDC were to invoke Section 265 to expel citizens (or indefinitely bar their entry into the United States), a court could—at that time and in an appropriate case—address whether that invocation is unconstitutional *as applied* to citizens, *cf. Reno v. Flores*, 507 U.S. 292, 305-06 (1993), or whether the Constitution creates an implicit exception for citizens to the otherwise valid expulsion authority, *cf. Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).

B. Section 265 is Not Limited to Regulating Transportation Entities

Plaintiff alternatively argued that Section 265 does nothing more than allow CDC to bar common carriers (such as buses or airplanes) from transporting people

into the United States. 1 App. 129 (citing 1 App. 83). On that understanding, a common carrier could transport passengers just up to the border, after which infected individuals could disembark and travel by foot into the United States—and the government would lack any authority under Section 265 to stop them. Or, if an individual traveling by common carrier managed to evade screening and cross the border, the government would have no authority under Section 265 to prohibit the passenger from disembarking within the United States.

That argument defies common sense. It does not address why Congress would have addressed the "serious danger" of transmission of "communicable disease" in such a circumscribed fashion that would be inapplicable for those crossing thousands of miles of land borders without the aid of a transportation entity.

Furthermore, plaintiff's argument that Section 265 is limited to regulating common carriers does not comport with the statutory text. Unlike the neighboring provisions of the Public Health Service Act, which explicitly refer to the regulation of "vessels" or "aircraft," *see* 42 U.S.C. §§ 267(b), 269, 270, 271(b), Section 265 refers (twice) to "the introduction of persons" without any textual limitation on the means of introduction, and without any reference to vessels or common carriers. When Congress wanted to control the spread of communicable disease by regulating common carriers it did so expressly, as it had three years before in enacting Section 265's predecessor statute. *See* 26 Stat. 31, 32 (1890) (providing penalties for "any

common carrier" that "willfully violate[s] any of the quarantine laws of the United States").

In fact, Congress rejected a proposal that would have confined the statute to the regulation of common carriers. Specifically, in enacting Section 265's predecessor in 1893, Congress considered an amendment to bar "passenger travel" or "all passenger travel," 24 Cong. Rec. at 470, but it was immediately objected "that something more would be necessary in order to protect the public interest than the mere restriction upon passenger travel," *id.*, and the proposal was defeated, *id.* at 471. Instead, Congress adopted the language prohibiting "the introduction of persons," *id.*, which was plainly intended to be broader than a mere restraint on passenger travel.

Furthermore, plaintiff's argument is based on the incorrect premise that when Congress originally enacted Section 265 in 1893, it was concerned exclusively with communicable disease brought by passengers arriving in the United States by ship. In fact, Congress was well aware that the threat of communicable diseases could come not just from passengers arriving by ship from across the ocean, but also from persons arriving over land borders – the very threat that plaintiffs claim Congress did not address. *See* 24 Cong. Rec. at 370 (noting the "terrible ravages [that] cholera was going to bring to this country" could "come from Mexico"); *id.* at 359 (noting immigration "coming through Alaska and Mexico"); *id.* at 364 (noting possibility of "cholera-breeding immigration which will come into this country by land" though Canada); *id.* at 371 (noting "how many people are annually pouring across the line

from the north into our States, by whom we might expect cholera to be brought, [from] Canada"). Accordingly, Congress meant to address not just common carriers alone, but the introduction of persons whether they arrive by boat or over land.[4]

C. There is No Irreconcilable Conflict Between Section 265 and Immigration Provisions and in Any Event Section 265 Would Control

The district court also opined that "the Government's reading of Section 265 * * * 'conflicts with various rights granted in the [Trafficking Victims Protection Reauthorization Act] and the INA,'" 1 App. 132 (quoting 1 App. 79), and that Section 265 contains no "clear intention" to suspend those immigration provisions, 1 App. 135 (citing *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018)). While "repeals by implication are 'disfavored'" and courts should avoid "too easily finding irreconcilable conflicts" between statutes, those principles are not implicated where the court can easily "'give effect to both'" and the "two statutes can[] be harmonized." *Epic Sys.*, 138 S. Ct. at 1624. That is the case here.

Section 265 is an emergency public-health provision that applies only in specific, limited circumstances, when CDC "determines that by reason of the

[4] The Supreme Court, in contemporaneously construing similar language in a state statute authorizing officials to "prohibit the introduction [of] * * * persons" into certain areas of the State in light of a contagious or infectious disease, understood the statute to authorize the "exclu[sion of] persons from a locality" in order "to keep down, as far as possible, the number of persons to be brought within danger of contagion or infection," and not merely to regulate third-party transportation companies. *Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health, Louisiana*, 186 U.S. 380, 385 (1902) (emphasis omitted).

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." 42 U.S.C. § 265. Immigration provisions, by contrast, apply generally in ordinary, normally prevailing conditions and in the absence of such extraordinary and rare public-health crises. There is no irreconcilable conflict in such circumstances, where the specific provision is a limited and rarely invoked exception applicable only under emergency conditions. *RadLAX Gateway Hotel v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("To eliminate the contradiction, the specific provision is construed as an exception to the general one.").

The district court mistakenly reasoned that general immigration laws take precedence over the more specific Section 265 because the latter "is a public health provision" that is not "specifically targeted to matters of immigration." 1 App. 135-136. But that view turns the specific-governs-the-general canon on its head. In this context, a statute limited to addressing rare and extraordinary public-health dangers—and specifically including the authority to prohibit the introduction of persons into the country—necessarily is more specific and narrowly targeted than generally applicable immigration provisions. The district court likewise reasoned that Section 265 "cannot be the more specific statute" for the class members "who are entitled to protections under the relevant" immigration laws, 1 App. 136, but that circular

reasoning simply assumes the answer that, if the statutes are irreconcilable, provisional class members *are* entitled to the protection of those immigration laws notwithstanding Section 265.

The district court also opined that if Congress intended Section 265 to permit the suspension of immigration, it could have used the phrase "notwithstanding any other provision of law." 1 App. 134. But that argument proves little, if anything, given that the same is true of the immigration provisions, which also could have used such language if Congress had intended them to override the public-health authority in Section 265.

If there were an irreconcilable conflict, Section 265 would prevail. Congress gave its clear indication that the Section 265 authority should control over immigration provisions by expressly providing for a "suspension of the right to introduce such persons and property." 42 U.S.C. § 265. *See* 85 Fed. Reg. at 56,426 ("Congress's use of the terms 'suspension' and 'right to introduce'—rather than just 'introduce'—means that that [Section 265] grants the Director the authority to temporarily suspend the effect of any law, rule, decree, or order by which a person would otherwise have the right to be introduced or seek introduction into the U.S.").

The drafting history of Section 265 confirms this understanding. As originally proposed, the 1893 statutory predecessor to Section 265 expressly provided for the suspension of immigration:

> That whenever it shall be shown to the satisfaction of the President that by reason of the existence of cholera or yellow fever in a foreign country there is serious danger of the introduction of the same into the United States, and that notwithstanding the quarantine defense this danger is so increased *by immigration* that *a suspension of the same* is demanded in the interest of the public health, the President shall have power *to suspend immigration* from such countries or places and for such period of time as he may deem necessary.

24 Cong. Rec. at 358 (emphasis added).

Members of Congress, however, repeatedly objected that this provision was too narrow because the serious danger of introducing cholera or yellow fever into the United States was not limited to immigrants, but extended as well to tourists and other temporary foreign visitors. *See* 24 Cong. Rec. at 361 (noting "passengers coming as tourists, or for pleasure, or temporarily"); *id.* at 363 ("[T]here would be just as much danger of bringing contagion into this country by permitting aliens to come in who do not come here to reside or to settle on lands, but simply come here as temporary visitors, as there would be from the other class."); *id.* at 374 ("Cholera is no respecter of persons. * * * It may be brought as well by the subject of a foreign country who comes to this country to visit the country. It may be brought as well by vessels and those who come for a temporary sojourn in the United States as by those who come here to make their home in this country and become permanent residents. So I have not a particle of faith, I repeat, in being able to protect this country against the coming of cholera by simply suspending immigration.").

In response to that concern of under-inclusiveness, Congress amended the proposal, in relevant part, by changing the references from the danger resulting from "immigration" and the power to "suspend immigration" to a danger resulting from "the introduction of persons or property" and the "suspension of the right to introduce the same." 24 Cong. Rec. at 470-71. At the same time, Congress made it clear that the purpose of this amendment was "to provide that [the President] may, if the exigency demands, exclude all other passenger travel *as well as immigration*." *Id.* at 471 (emphasis added). Congress could not have been clearer that the language it adopted subsumed and included the power to suspend immigration, though a prohibition in "the introduction of persons" was not limited to that end alone. In keeping with the understanding the statutory authority included the power to suspend immigration, Section 7 of the 1893 statute – what eventually became Section 265 – was entitled "Suspension of immigration during existence of contagious diseases," *see* 27 Stat. at 452, a title that remained until the law was re-codified as Section 265 in 1944, *see* 42 U.S.C. § 111 (1940) (entitled "Suspension of immigration").

D. CDC's Interpretation is Entitled to *Chevron* Deference

At a minimum, Section 265 is ambiguous and thus CDC's interpretation is entitled to deference under *Chevron v. NRDC*, 467 U.S. 837 (1984). The district court held that even assuming ambiguity, *Chevron* deference was unwarranted because CDC's statutory interpretation does not "implicate[] its scientific and technical expertise." 1 App. 137. This holding is incorrect both as a matter of law and as a

matter of fact. It is incorrect as a matter of law because CDC indisputably administers Section 265, and the challenged Order indisputably carries the force of law and was issued under the authority of an Interim Final Rule or Final Rule promulgated in accordance with the APA—which is sufficient to warrant *Chevron* deference. *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).

It is also incorrect as a matter of fact. CDC explained that its interpretation of "introduction" was rooted in its scientific judgment that "those who have physically crossed a border of the United States and are in the process of moving into the interior * * * present a risk of transmission of a communicable disease," and may potentially spread "communicable disease into the United States." 85 Fed. Reg. at 16,563, 16,567; *see* 1 App. 105. CDC explained that Ports of Entry and Border Patrol stations, where covered aliens might ordinarily be held in congregate settings, were "not designed for, and are not equipped to, quarantine, isolate, or enable social distancing," presenting a risk of COVID-19 transmission to the noncitizens and CBP personnel, as well as to the public at large. 85 Fed. Reg. at 17,061, 17,066. CDC further explained that the "infection control procedures" employed at Ports of Entry and Border Patrol stations "are not easily scalable for large numbers of aliens." *Id.* at 17,065. In addition, CDC found that "a public health tool called conditional release * * * is not a viable solution" because "there is significant uncertainty that covered

aliens would be able to effectively self-quarantine, self-isolate, or otherwise comply with existing social distancing guidelines, if they were conditionally released." 85 Fed. Reg. at 31,508; *see* 1 App. 108. CDC also analyzed the risk of COVID-19 spreading from Canada and Mexico, explaining that "confirmed cases of COVID-19" in Canada are believed to be "travel-related" or related to "close contact[] [with] travelers," 85 Fed. Reg. at 17,063, and that Mexico "has been slower to implement public health measures" and thus "[t]he existence of COVID-19 in Mexico presents a serious danger of the introduction of COVID-19 into the United States," *id.* at 17,064-65. These are precisely the kinds of judgments based on scientific and technical expertise for which judicial deference is warranted.

Accordingly, CDC's interpretation of Section 265 is entitled to *Chevron* deference. For the reasons explained above, the agency's interpretation is at a minimum reasonable and the district court erred in refusing to defer to CDC's construction of its statutory authority to "prohibit * * * the introduction of persons * * * from * * * countries" in which "there is [a] serious danger of the introduction" of "any communicable disease" "into the United States." 42 U.S.C. § 265. The agency's expert epidemiologic judgment – concerning such matters as identifying potential risks for the introduction of communicable disease into the United States from abroad; determining whether holding persons in congregate settings at Ports of Entry and Border Patrol stations will exacerbate the serious threat of introducing such disease into the United States; evaluating the scalability of infection control

procedures; analyzing whether alternative mitigation measures are adequate to address the enormity of the threat; and analyzing the risks of the spread of a contagious disease based on the public-health conditions in other countries – is entitled to deference when brought to bear in interpreting the breadth of the statutory authority conferred upon the agency by Congress. The district court erred in concluding otherwise.[5]

II. The Remaining Preliminary Injunction Factors Do Not Support An Injunction

The district court also erred in concluding that the remaining preliminary injunction factors weigh in favor of plaintiff. The preliminary injunction threatens irreparable harm to the government and the public at large.

As noted above, CDC recently issued a notice of its decision to temporarily except from expulsion unaccompanied noncitizen children encountered in the United States, pending its forthcoming public-health reassessment. 86 Fed. Reg. at 9,942. The COVID-19 pandemic continues to be a highly dynamic public-health emergency.

[5] The district court also provisionally granted class certification, 1 App. 119-121, despite the fact that the putative class representative's case was moot at the time of certification because plaintiff had been excepted from the CDC Order, transferred to Office of Refugee Resettlement custody, and processed pursuant to the immigration procedures that he requested, *see supra* at 13. Defendants recognize that conclusion is consistent with *J.D. v. Azar*, 925 F.3d 1291, 1307-12 (D.C. Cir. 2019) (per curiam), but reserve the right to seek further review of that decision because it improperly relaxes Article III's strict requirement of a case or controversy, *see Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013), and does not comport with long-standing principles underlying the Rule 23 class-action vehicle.

Id. CDC's discretion to respond to the public-health emergency—including both its decision about whether to prohibit the introduction of persons from particular countries and in what circumstances, and its authority to except certain classes of people from expulsion under its Order—is critical to avoiding irreparable harm to the public at large.

The challenged Order is intended to prevent irreparable harm to the public by reducing the risk of transmission of COVID-19 in circumstances that pose a particular risk. The CDC Order explained that covered aliens may spend hours or days in congregate settings while undergoing immigration processing, and that Ports of Entry and Border Patrol stations are "not designed for, and are not equipped to, quarantine, isolate, or enable social distancing by persons who are or may be infected with COVID-19." 85 Fed. Reg. at 17,061, 17,066. The Order also explained that holding covered aliens in congregate settings risks the spread of COVID-19 to CBP personnel and further transmission of COVID-19 to the U.S. population, with a concomitant increased strain on the U.S. healthcare system and supply chain. *Id.* at 17,061. CDC further explained that that conditional release would "jeopardize * * * the public health" because many covered aliens "may lack homes or other places in the United States where they can self-isolate," and CDC "lacks the resources and personnel necessary to effectively monitor such a large number of persons." *Id.* at 17,067.

CDC is in the process of reassessing the Order and the overall public-health risk at the United States' borders based on the most current information regarding the COVID-19 pandemic and the situation at the Nation's borders, 86 Fed. Reg. at 9,942, and will continue to reassess the public-health need as the pandemic evolves. The public-health crisis is a dynamic situation in which the number of COVID-19 infections and the strain on healthcare systems is often in flux; in addition, new variants of the disease are rising and spreading, further impacting the public-health response. To combat COVID-19, CDC must have the flexibility and discretion to adapt its Order and the scope of its Order to respond to the changing public-health facts on the ground, based on its expert epidemiologic judgment.

Congress authorized the CDC Director to make these kinds of determinations concerning public health, 42 U.S.C. § 265, and the CDC Director determined that the introduction of certain noncitizens into the United States during the pandemic is dangerous to the public health, 85 Fed. Reg. at 17,060; 85 Fed. Reg. at 65,806. Even outside the public-health context, "'[a]ny time a [government] is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). And that is especially true where the decisions of public officials entrusted with "the safety and the health of the people" in "areas fraught with medical and scientific uncertainties" are "second-guess[ed] by an unelected federal judiciary," *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14 (2020) (mem.)

(Roberts, C.J., concurring) (alteration and quotation marks omitted), particularly where, as here, the district court's opinion did not rest on constitutional grounds.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the preliminary injunction vacated.

Respectfully submitted,

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February 2021

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 10,138 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Joshua Waldman
Joshua Waldman

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2021, I electronically filed the foregoing corrected brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

/s/ Joshua Waldman
Joshua Waldman

ADDENDUM

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, by issuing an order in which the Director determines that:

(1) By reason of the existence of any quarantinable communicable disease in a foreign country (or one or more political subdivisions or regions thereof) or place there is serious danger of the introduction of such quarantinable communicable disease into the United States; and

(2) This danger is so increased by the introduction of persons from such country (or one or more political subdivisions or regions thereof) or place that a suspension of the right to introduce such persons into the United States is required in the interest of public health.

(b) For purposes of this section:

(1) Introduction into the United States 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 or property in the United States, in a manner that the Director determines to present a risk of transmission of a quarantinable

communicable disease to persons, or a risk of contamination of property with a quarantinable communicable disease, even if the quarantinable communicable disease has already been introduced, transmitted, or is spreading within the United States;

(2) Prohibit, in whole or in part, the introduction into the United States of persons means 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;

(3) Serious danger of the introduction of such quarantinable communicable disease into the United States means 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;

(4) 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 flag, registry, or country of origin; and

(5) Suspension of the right to introduce means to cause the temporary cessation of the effect of any law, rule, decree, or order pursuant to which a person might otherwise have the right to be introduced or seek introduction into the United States.

(c) Any order issued by the Director under this section shall include a statement of the following:

(1) The foreign countries (or one or more political subdivisions or regions thereof) or places from which the introduction of persons shall be prohibited;

(2) The period of time or circumstances under which the introduction of any persons or class of persons into the United States shall be prohibited;

(3) The conditions under which that prohibition on introduction shall be effective in whole or in part, including any relevant exceptions that the Director determines are appropriate;

(4) The means by which the prohibition shall be implemented; and

(5) The serious danger posed by the introduction of the quarantinable communicable disease in the foreign country or countries (or one or more political subdivisions or regions thereof) or places from which the introduction of persons is being prohibited.

(d) When issuing any order under this section, the Director shall, as practicable under the circumstances, consult with all Federal departments or agencies whose interests would be impacted by the order. The Director shall, as practicable under the circumstances, provide the Federal departments or agencies with a copy of the order before issuing it. In circumstances when it is impracticable to engage in such consultation before taking action to protect the public health, the Director shall consult with the Federal departments or agencies as soon as practicable after issuing

his or her order, and may then modify the order as he or she determines appropriate. In addition, the Director may, as practicable under the circumstances, consult with any State or local authorities that he or she deems appropriate in his or her discretion.

(1) If the order will be implemented in whole or in part by State and local authorities who have agreed to do so under 42 U.S.C. 243(a), then the Director shall explain in the order the procedures and standards by which those authorities are expected to aid in the enforcement of the order.

(2) If the order will be implemented in whole or in part by designated customs officers (including any individual designated by the Department of Homeland Security to perform the duties of a customs officer) or Coast Guard officers under 42 U.S.C. 268(b), or another Federal department or agency, then the Director shall, in coordination with the Secretary of Homeland Security or other applicable Federal department or agency head, explain in the order the procedures and standards by which any authorities or officers or agents are expected to aid in the enforcement of the order, to the extent that they are permitted to do so under their existing legal authorities.

(e) This section does not apply to:

(1) Members of the armed forces of the United States and associated personnel if the Secretary of Defense provides assurance to the Director that the Secretary of Defense has taken or will take measures such as quarantine or isolation, or other

measures maintaining control over such individuals, to prevent the risk of transmission of the quarantinable communicable disease into the United States; or

(2) Other United States government employees or contractors on orders abroad, or their accompanying family members who are on their orders or are members of their household, if the Director receives assurances from the relevant head of agency and determines that the head of the agency or department has taken or will take, measures such as quarantine or isolation, to prevent the risk of transmission of a quarantinable communicable disease into the United States.

(f) This section shall not apply to U.S. citizens, U.S. nationals, and lawful permanent residents.

(g) Any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this section and shall not affect the remainder thereof or the application of the provision to persons not similarly situated or to dissimilar circumstances.