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

Nancy Huisha-Huisha et al.,

Plaintiff-Appellees,

v.

Alejandro N. Mayorkas,

Defendant-Appellants

and

States of Arizona, Louisiana, Alabama, Alaska, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Tennessee, Utah, Virginia, West Virginia, and Wyoming.

Proposed Intervenor-Defendants/Movants.

Case No. 22-5325

STATES' EMERGENCY MOTION FOR A STAY PENDING APPEAL

Relief Requested By Evening Of Friday, December 16

(District Court's Vacatur and Injunction Presently Stayed Until December 21)

CERTIFICATE PURSUANT TO CIRCUIT RULES 8 AND 27(F)

Pursuant to Circuit Rules 8 and 27(f), Proposed Intervenor-Defendants the States of Arizona, Louisiana, Alabama, Alaska, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Tennessee, Utah, Virginia, West Virginia, and Wyoming (the "Proposed Intervenor States" or "States") respectfully submit this certificate in connection with their emergency motion for a stay pending appeal of the judgment and injunction of the district court pending appeal.

This case involves a challenge to the Title 42 System for expelling certain migrants attempting to enter the United States without authorization to do so. *See generally Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 722 (D.C. Cir. 2022). The district court previously enjoined that system, which this Court stayed on an emergency basis and subsequently reversed. *Id.* at 726-31.

On remand, the district court again granted a permanent injunction against the Title 42 System on alternative grounds, and also vacated the relevant agency actions. APP-1-53. Upon the joint request of Plaintiffs and Federal Defendants, the district court granted a stay of its injunction

and vacatur until 12:01am on December 21, 2022. *See* D. Ct. Doc. 166 & APP-171-72.

Six days after the district court's opinion/injunction/vacatur, 15 of the 19 States moved to intervene on November 21. *See* D. Ct. Doc. 168. They were joined shortly thereafter by four additional states, collectively comprising the 19 moving States here. *See* D. Ct. Docs. 171, 176. The States' motion to intervene was fully briefed in the district court on December 2, 2022. APP-59-94.

Federal Defendants filed a notice of appeal on December 7, APP-165, and this appeal was docketed in this Court on December 9. Also on December 9, the States filed a notice with this Court that they believed that their motion to intervene was now pending before this Court by operation of law following Defendants' notice of appeal. They alternatively renewed their motion to intervene in this Court.

Stay Sought And Denied Below. Before the States moved to intervene, the district court announced that "any request to stay this Order pending appeal w[ould] be denied." APP-51.

Nonetheless, in an abundance of caution, the States informed Plaintiffs and Federal Defendants that they would seek a stay pending

appeal within 24 hours of Federal Defendants filing their notice of appeal. They then filed a motion for stay in the district court on December 9 within 30 minutes of receiving both of their respective positions. *See* D. Ct. Doc. 183. The district court denied the motion the same day in a minute order "for the reasons stated in [165] Memorandum Opinion." APP-166.

Nature of the Emergency. The district court's judgment/vacatur/injunction is only stayed until 12:01am on December 21. The States will suffer irreparable harm absent a stay from the termination of Title 42 for the reasons discussed in the motion, and as previously found by the Western District of Louisiana in *Louisiana v. CDC*, __ F.Supp.3d __, 2022 WL 1604901 (W.D. La. May 20, 2022).

The States therefore file this request as an emergency motion under Circuit Rule 27(f). The States, Plaintiffs, and Federal Defendants also jointly respectfully request that this Court decide this motion by the evening of December 16, 2022 (*i.e.*, before the judgment below takes effect on December 21). This request is made only one business day after this Court docketed this appeal, and it was not feasible to seek relief earlier.

Notice to Clerk's Office and Opposing Parties. Counsel for the State provided notice to Plaintiffs and Federal Defendants by email that they intended to seek an emergency stay pending appeal at 12:25am EST today, and sought their positions as to this request and the States' proposed schedule. The States also provided notice to the Clerk's office regarding this motion, and discuss logistics and related matters with Special Counsel to the Clerk.

Proposed Schedule. To facilitate a decision by the requested date of December 19, the States, Plaintiffs, and Federal Defendants have agreed upon the following proposed schedule:

- Monday, December 12: States file their emergency motion.
- Wednesday, December 14: Plaintiffs and Defendants' Responses due.
- Thursday, December 15: States' Reply to Responses due.

The States alternatively proposed to Plaintiffs and Federal Defendants that they would agree to a less expedited schedule if they would agree to a short administrative stay to permit a more typical briefing schedule without the stay expiring in the interim. Both Plaintiffs

and Federal Defendants oppose the issuance of any administrative stay, however.

Request for Administrative Stay. In the event that this Court denies the States' request for a full stay pending appeal, they alternatively request that this Court issue a 7-day administrative stay so that the States can seek relief from the U.S. Supreme Court in an orderly fashion.

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GLOSSARY

Abbreviation	Description
APP-__	The Appendix submitted with this motion along with pin cite to the appropriate page
CDC	Centers for Disease Control and Prevention
DHS	Department of Homeland Security
Huisha-Huisha I	*Huisha-Huisha v. Mayorkas*, 560 F. Supp. 3d 146 (D.D.C. 2021).
Huisha-Huisha II	*Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022).
Huisha-Huisha III	The decision on review here: *Huisha-Huisha v. Mayorkas*, __ F.Supp.3d __, 2022 WL 16948610 (D.D.C. Nov. 15, 2022).
Intervention Mot.	The November 21 motion to intervene filed by the States, re-filed in this Court on December 9.
Intervention Reply Br.	The December 2 reply brief filed by the States in support of their motion to intervene, re-filed in this Court on December 9.
Louisiana	*Louisiana v. CDC*, __ F.Supp.3d __, 2022 WL 1604901 (W.D. La. May 20, 2022).
States	The moving 19 States here: Arizona, Louisiana, Alabama, Alaska, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Tennessee, Utah, Virginia, West Virginia, and Wyoming.
Termination Order	April 1, 2022 Order issued by CDC Director Walensky, titled "Public Health Determination and Order Regarding the Right to Introduce Certain Persons from Countries Where a

	Quarantinable Communicable Disease Exists." 87 Fed. Reg. 19,941 (Apr. 6, 2022).
Texas	*Texas v. Biden*, 589 F. Supp. 3d 595 (N.D. Tex. 2022)
Title 42 or Title 42 System or Title 42 Orders	The series of orders issued by CDC pursuant to 42 U.S.C. § 265 and 42 C.F.R. § 71.40.

INTRODUCTION

This appeal is this case's second trip to this Court. On the first appeal, this Court had little difficulty unanimously concluding that the district court's invalidation of the Title 42 System was deeply flawed and that a stay pending appeal was warranted. *Huisha-Huisha v. Mayorkas ("Huisha-Huisha II")*, 27 F.4th 718 (D.C. Cir. 2022).

Past was prologue here and all of these things remains true: the district court's second invalidation of the Title 42 System also suffers pervasive legal errors, and a stay pending appeal of its erroneous decision is once again warranted, as all of the equitable stay factors continue to support issuance of such a stay.

To be sure, this time the district court's decision was based on APA claims rather than statutory reasoning, but the district court's second-choice grounds of decision are even less defensible than its first, which this Court decisively found wanting in *Huisha-Huisha II*. Nor was this even the first time that this Court saw the need to stay the same district judge's attempt to invalidate part of the Title 42 System. *See P.J.E.S. v. Pekoske*, No. 20-5357, 2021 WL 9100552, at *1 (D.C. Cir. Jan. 29, 2021) (unanimously granting stay pending appeal of district court's

preliminary injunction against implementation of part of the Title 42 System).

As was the case the first time around, the impending cancellation of the Title 42 System will cause an enormous disaster at the border. Indeed, DHS has predicted as much, with the termination of Title 42 "resulting in an increase in daily border crossings," which "could be as large as a three-fold increase to 18,000 daily border crossings." *Louisiana v. CDC*, __ F.Supp.3d __, 2022 WL 1604901, at *22 (W.D. La. May 20, 2022). More recently, DHS has itself sought an additional $3 billion from Congress specifically to address the impending calamity that termination of the Title 42 System will cause. *See* Rogers Decl. Exs. A-C.

The major change this time around is the position of Federal Defendants. Curiously, the change has nothing to do with the merits: as with *Huisha-Huisha II*, Federal Defendants continue to regard the district court's reasoning as hopelessly flawed, telling that court that it "erred in vacating [the challenged] agency actions." APP-143. And with good reason.

Nonetheless, Defendants sensed opportunity in their erroneous litigation loss. Immediately upon receiving the district court's decision,

they collusively agreed with Plaintiffs on a short stay for preparatory purposes the same day. APP-149-52. In doing so, Defendants recreated through artifice *precisely* the Termination Order that the *Louisiana* court had enjoined: *i.e.*, one that attempted to terminated Title 42, did so with a delayed effective date, and did not comply with notice-and-comment rulemaking requirements. Defendants are thus employing strategic surrender to achieve results through collusion what they could not through rulemaking.

Nor is this the first time that DHS has pulled this trick of exploiting calculated surrender to eliminate unwanted rules without complying with the APA. The agency previously employed this ploy to rid itself of the Public Charge Rule, doing so "with military precision to effect the removal of the issue from [the Supreme Court's] docket and to sidestep notice-and-comment rulemaking" for repealing the unwanted rule. Transcript,[1] *Arizona v. San Francisco*, 142 S. Ct. 1926, 45-46 (2022) (Alito, J.); *see also id.* at 48 ("The real issue to me is the evasion of notice-and-comment. And, I mean, basically, the government bought itself a

[1] *Available at* https://bit.ly/3VDDOfZ.

bunch of time [through the acquiesced-in vacatur] where the rule was not in effect.") (Kagan, J.). The same military precision is at work here.

Fortunately, Rule 24 permits the States to intervene to avoid Defendants' artifices from imposing enormous injuries on them from an order that both they *and Federal Defendants agree* is legally unsustainable. The States' motion to intervene should be granted as well as this emergency request for a stay pending appeal.

Just as in *Huisha-Huisha II*, this case comes to this Court from a judgment riddled with legal errors that will cause irreparable harm if not stayed, and the balance of harms and public interest continue to tilt overwhelmingly in favor of a stay. This Court should therefore once again grant a stay pending appeal.

BACKGROUND

A. Prior Appeal In This Court

This Court's *Huisha-Huisha II* decision sets forth the regulatory, factual and prior-litigation background of this case in extensive detail. *See* 27 F.4th at 722-27. This case involves both statutory and APA challenges to the Title 42 System. In *Huisha-Huisha I*, the district court had held that the system violated applicable statutory requirements and

enjoined it. *Id.* 726. This Court first stayed and then reversed that statutory decision; both decisions were unanimous. *Id.* at 726-31.

This Court separately affirmed a different aspect of the *Huisha-Huisha I* decision, holding that "the Executive cannot expel those aliens [excluded by Title 42] to places where they will be persecuted or tortured." *Id.* at 725, 731-33. That portion of *Huisha-Huisha II* is not at issue here.

B. Termination Order And *Louisiana* Injunction

Not long after this Court reversed the district court's first injunction, CDC promulgated a rule that purported to terminate Title 42. *See* Termination Order, 87 Fed. Reg. 19,941 (Apr. 6, 2022).

A group of States, eventually numbering 24 in all, challenged the Termination Order as (1) violating notice-and-comment rulemaking requirements and (2) arbitrary and capricious, thus violating the APA. *Louisiana*, 2022 WL 1604901, at *12.

The district court in *Louisiana* concluded that the States had Article III standing to challenge the attempted termination of Title 42, and that the Termination Order (1) was reviewable, (2) illegally circumvented APA notice-and-comment rulemaking requirements, and

fell within neither the "good cause" nor "foreign affairs" exceptions, and (3) would cause the States irreparable harm; the court also concluded that enjoining the termination of the Title 42 System was supported by the balance-of-harms and public-interest factors. *Id.* at *10-23. The *Louisiana* court therefore granted a preliminary injunction against implementation of the Termination Order. *Id.*

Federal Defendants appealed the issuance of that injunction but did not seek a stay pending appeal. *See Louisiana v. CDC*, No. 22-30303 (5th Cir.). That appeal is fully briefed but not yet set for argument.

C. Second Injunction On Remand

Following this Court's *Huisha Huisha II* decision invalidating the district court's statutory reasoning, the district court granted a second injunction (and also a vacatur) on November 15. *See Huisha-Huisha III*, APP-1-49. This time, the district court's holding relied entirely on APA grounds, largely reasoning that CDC failed to employ a "least restrictive means" standard that putatively applied and failed adequately to consider alternatives. APP-20-40.

The district court further announced that "any request to stay this Order pending appeal w[ould] be denied." APP-51.

Within hours of the *Huisha-Huisha III* decision, Plaintiffs and Federal Defendants agreed upon, and filed, a request for a stay of the injunction/vacatur until December 21. APP-149-52. The district court granted that request the next day "WITH GREAT RELUCTANCE." APP-172 (all caps in original). The district court separately entered a Rule 54(b) judgment on the relevant APA claims on November 22. APP-52.

Because it appeared that Federal Defendants had effectively arranged to recreate the Termination Order that they had obtained an injunction against, 15 States moved to intervene for purposes of appealing the district court's six-days-prior order on November 21, with four additional states joining the motion shortly thereafter. APP-54, 153, 159. That motion to intervene was fully briefed on December 2.

Despite previously telling the Western District of Louisiana that "effective at midnight on December 21, 2022, CDC's Title 42 orders will be vacated," without even mentioning the possibility of appeal, APP-142, Federal Defendants nonetheless filed a notice of appeal on December 7, along with a notice making clear their position that the district court had "erred in vacating" the Title 42 Orders. APP-143, 165. Federal

Defendants confirmed to the States the next day that they would not be seeking a stay pending appeal. APP-146.

The States sought a stay pending appeal from the district court two days later, which the district court denied the same day. APP-166. Now, one business day later, the States seek a stay pending appeal from this Court and request a decision by the evening of December 16 under Circuit Rule 27(f).

LEGAL STANDARD

This Court applies a four-factor standard for evaluating a request for a stay pending judicial review: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Clean Air Council v. Pruitt*, 862 F.3d 1, 8 (D.C. Cir. 2017) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)).

ARGUMENT

I. The States Are Likely To Succeed On The Merits.

A. The States Have Standing To Appeal And Seek Relief Here

For the reasons explained in greater depth in their motion to intervene, the States have protectable interests in this suit and standing to challenge the district court's judgment based on (1) their rights under the *Louisiana* injunction and the APA, and (2) the injuries that the district court's vacatur/injunction will cause them. *See* Intervention Mot.10-15; Intervention Reply Br.5-15 (APP-239-44, 68-78). But even if that were otherwise, Federal Defendants unquestionably have standing to appeal here and have done so, thereby establishing this Court's jurisdiction.

1. The Threatened Destruction Of The Rights That The States Enjoy Under The *Louisiana* Injunction Confers Article III Standing.

The 19 States here (and five others) obtained an injunction specifically against CDC's attempted termination of the Title 42 System. *Louisiana*, 2022 WL 1604901, at *22-23. As a result, they possess enforceable rights under that injunction. *See*, *e.g.*, *NBA v. Minn. Pro. Basketball, Ltd. P'ship*, 56 F.3d 866, 871-72 (8th Cir. 1995) ("A

preliminary injunction confers important rights."). And it is undisputed here that the district court's injunction/vacatur, if not stayed, would effectively destroy those rights under the *Louisiana* injunction.

As a result, the States have cognizable injury here. *See* Intervention Mot.10-15; Intervention Reply Br.5-8 (APP-239-44, 68-71). In addition, the States have interests in avoiding circumvention of the *Louisiana* injunction through artifices like Defendants' collusive actions here. *See*, *e.g.*, *Institute of Cetacean Rsch. v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 949 (9th Cir. 2014); Intervention Reply Br.8-9 (APP-71-72).

2. The States Also Have Standing To Challenge The District Court's Termination Of Title 42

The *Louisiana* court has already concluded, on a record that included much of the States' evidence here, that the States had Article III (and prudential) standing to challenge the termination of the Title 42 System. 2022 WL 1604901, at *10-16. The district court's vacatur/injunction here would effectuate the *exact same* termination, and the States' standing is thus established here too. (The evidence submitted to the *Louisiana* court is only a subset of the evidence submitted here, although all of the *Louisiana* evidence has been submitted to this Court.)

Similarly, the Northern District of Texas has similarly determined that even a *partial* exemption/termination from the Title 42 System (there unaccompanied children) would cause Texas cognizable injury that established Article III standing. *Texas v. Biden*, 589 F. Supp. 3d 595, 610-13 (N.D. Tex. 2022). Standing to challenge a complete termination of Title 42 is thus established here *a fortiori*.

In addition to the evidence that led to positive standing determinations in *Louisiana* and *Texas*, the States have also submitted the deposition of Border Patrol Chief Raul Ortiz and declaration of Stephen Manning, which both further support the States' standing. *See* Intervention Mot.11-12 (APP-240-41).

Notably, the Supreme Court has unanimously held that standing may be premised on the "predictable effect of Government action on the decisions of third parties." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). Here DHS itself has already predicted just such an effect, estimating that termination of Title 42 "will result in an increase in daily border crossings and that this increase could be as large as a three-fold increase to 18,000 daily border crossings." *Louisiana*, 2022 WL 1604901, at *22.

Those additional migrants will predictably cause the States to spend additional funds on law enforcement, education, and healthcare—often as a direct result of federal mandates. *Texas v. Biden*, 20 F.4th 928, 969 (5th Cir. 2021) *rev'd on other grounds* 142 S.Ct. 2528 (2022); *Texas v. Biden*, 10 F.4th 538, 548-49 (5th Cir. 2021); *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (education mandate for aliens not lawfully present in U.S.); 42 C.F.R. § 440.255(c) (emergency healthcare mandate for same). And DHS's projection—and the resulting harm to the States—is further confirmed by DHS's request to Congress for another $3 billion in funding to ameliorate the calamity that Federal Defendants intend to effectuate here. Rogers Decl. Exs. A-C.

That emergency funding request amply confirms the States' threatened injuries here. (There is strikingly no corresponding request by the Administration for funding to offset the *States'* resulting harms.) Particularly given the fact that the States "bear[] many of the consequences of unlawful immigration," *Arizona v. United States*, 567 U.S. 387, 397 (2012), the prospect that DHS alone will have increased costs as a result of terminating the Title 42 System is fanciful.

Finally, the States' standing is further supported by the doubly relaxed standard that applies here. Standing requirements are relaxed here a first time because the States are asserting procedural injuries (harms arising from procedural APA claims). *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992). And they are relaxed a second time because the States are entitled to "special solicitude" in the standing analysis. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

3. Federal Defendants' Injuries Establish This Court's Jurisdiction In Any Event

Even if the States did not have standing to appeal here, this Court would still possess jurisdiction. The invalidation of Federal Defendants' orders and regulations through vacatur and a permanent injunction plainly causes cognizable injury to Defendants, giving them standing to appeal—which they have done. And because they have standing to appeal, this Court has jurisdiction over this entire appeal. *See*, *e.g.*, *Massachusetts*, 549 U.S. at 518 ("Only one of the petitioners needs to have standing" to establish Article III jurisdiction).

This Court thus has jurisdiction to grant a stay pending appeal if the States were only granted permissive intervention and otherwise lacked standing, or even just simply *sua sponte*.

B. The District Court's APA Reasoning Is Deeply Flawed

The district court's second attempt to invalidate the Title 42 System fares no better—and indeed worse—than the first time. Federal Defendants and the States are therefore likely to prevail on their challenge to its decision. *See also* APP-95-140.

1. The District Court's "Least Restrictive Means" Holding Cannot Withstand Scrutiny

The centerpiece of the district court's opinion was its conclusion that the Title 42 System violates a "least restrictive means" standard. There is no mistaking the centrality of this premise: the district court repeated that standard a total of *22 times*. APP-1-49. But the problem for Plaintiffs is that no such "least restrictive means" requirement actually exists. Instead, the linchpin of the district court's analysis is legally flawed for four reasons.

First, the district court's "least restrictive means" standard both inverts the proper legal standard and squarely contravenes the precedents of this Court. Under the APA, "*the government does not have to show that it has adopted the least restrictive means* for bringing about its regulatory objective." *National Cable & Telecommunications Ass'n v. FCC*, 555 F.3d 996, 1002-03 (D.C. Cir. 2009) (emphasis added) (applying

same standard for commercial speech and APA claims). Indeed, federal courts "require the Government to employ the least restrictive means only when ... strict scrutiny applies." *United States v. Am. Libr. Ass'n, Inc.*, 539 U.S. 194, 207 n.3 (2003).

Ultimately, the "least restrictive means" standard bears no resemblance to the governing arbitrary-and-capricious standard here, which generally requires only "a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (cleaned up). The district court plainly erred in applying a "least restrictive means" standard for an APA claim.

Second, the governing 2020 Rule itself contains no such "least restrictive means" requirement, and was perfectly clear that it was *amending* the prior standards adopted under CDC's relevant authority, 42 U.S.C. § 265—which notably did not previously permit CDC to prohibit the exclusion of "persons." *Control of Communicable Diseases*, 85 Fed. Reg. 16,559, 16,560 (Mar. 24, 2020) (2020 interim Title 42 rule noting that "[c]urrent regulations ... only address suspension of the introduction of property into the United States"). The 2020 Rule thus

explicitly acknowledged it was changing policy and gave its reasons for doing so. *Id.* (noting that rule is new "regulatory mechanism to ... suspend the introduction of persons"). The district court's conclusion that the change was unexplained, APP-25-27, is thus unsustainable.

Third, the district court's reliance on language in the *preamble* of the 2017 Final Rule (Control of Communicable Diseases, 82 Fed. Reg. 6,890, 6,912 (Jan. 19, 2017)) was improper. "The preamble to a rule is not more binding than a preamble to a statute. 'A preamble ... is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers.'" *National Wildlife Fed'n v. EPA.*, 286 F.3d 554, 569 (D.C. Cir. 2002); *accord Mejia-Velasquez v. Garland*, 26 F.4th 193, 202 (4th Cir. 2022); *Peabody Twentymile Mining, LLC v. Sec'y of Lab.*, 931 F.3d 992, 998 (10th Cir. 2019).

Fourth, even if the 2017 preambulatory language could be binding here, that language *expressly disclaims* any effect here. Instead, that 2017 preamble says that it applies only to "quarantine, isolation, or other public health measures *under this Final Rule*." 2017 Final Rule, 82 Fed. Reg. 6,890 (Jan. 19, 2017) (emphasis added). *None* of the challenged orders here were issued under the 2017 Rule—which no one contends

could have served as the basis for the Title 42 System. Instead, the challenged Title 42 System was issued under the 2020 Rule and the amended 42 C.F.R. § 71.40, and thus could not be governed by the 2017 preambulatory language even if that language were binding (which it is not).

For all of these reasons, the district court's "least restrictive means" reasoning is plainly erroneous.

2. The District Court's Remaining APA Reasoning Lacks Merit

As Federal Defendants persuasively explained in their briefing below, the orders at issue are not arbitrary and capricious. In particular, while the district court concluded that CDC had not adequately considered alternatives, CDC actually provided an entire section in the 2021 rule doing so; it was appropriately enough titled, "Availability of Testing, Vaccines, and Other Mitigation Measures" and considered alternatives in depth. 86 Fed. Reg. 42,828, 42,833 (Aug. 5, 2021). CDC further considered "[t]he availability of testing, vaccination, and other mitigation measures at migrant holding facilities" but concluded they were not viable because of "[s]pace constraints," "increase[d] community transmission rates," "[o]n-site COVID-19 testing ... is very limited," and

because facilities "are ill-equipped to manage an outbreak and ... are heavily reliant on local healthcare systems.... [which] could strain local or regional healthcare resources.... [and] increase the pressure on the U.S. healthcare system and supply chain." 86 Fed. Reg. at 42,837.

While the district court obviously disagreed with that analysis, its decision merely "substitute[d] [its] judgment for the agency's"—*i.e.*, precisely what the APA denies it authority to do. *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1310-11 (D.C. Cir. 2010) (citations omitted).

The district court also fixated on the possibility of outdoor processing. APP-31-33. But that alternative was not distinctly raised in comments. APP-33 (citing Doc. 154 at 9, suggesting only that processing of aliens might be conducted "in the field," without further elaboration or explanation). Rather, as Federal Defendants rightfully noted, that potential option actually originated from "extra-record statements from Secretary Mayorkas in April 2022," APP-127, and thus provided no basis for invalidating CDC's orders.

Moreover, the August 2021 Order noted a key difference between Title 8 and Title 42 that makes obvious why outdoor processing was not viable: processing "under Title 8 ... takes … [up to] two hours per

person… [while] processing [under Title 42] takes roughly 15 minutes and generally happens outdoors." 86 Fed. Reg. at 42,836. The logistical challenges of decreasing outdoor processing capacity by nearly 90% (*i.e.*, by increasing processing times eight-fold) are obvious.

The district court next criticizes the CDC for not considering the "the development and disbursal of COVID-19 vaccines, on-site rapid antigen tests, and effective therapeutics." APP-35. But the August 2021 Order specifically considered just those factors. 86 Fed. Reg. at 42,833-37. Indeed, the August 2021 Order considered "[t]he availability of COVID-19 vaccines" and determined vaccination was not a viable alternative because arriving aliens "have markedly lower vaccination rates" and this "presents a heightened risk of morbidity and mortality to this population due to the congregate holding facilities at the border…. Outbreaks in these settings increase the serious danger of further introduction, transmission, and spread of COVID-19...." 86 Fed. Reg. at 42,834. Processing aliens under Title 8 would require gathering large groups of unvaccinated aliens in close contact for extended periods of time before they would be fully vaccinated (a process requiring *weeks*).

Finally, the district court wrongly reasoned that CDC failed to consider the impacts to aliens excluded under Title 42. APP-27-30. The statute (42 U.S.C. § 265) itself provides that preventing introduction of persons is warranted when CDC makes the requisite determinations, as it has here, as Defendants correctly argued below. APP-135-38. In any event, CDC did consider such hardships, and has exempted unaccompanied children and created case-by-case exceptions on that very basis. APP-137-38; 87 Fed. Reg. at 19,956. While the district court would have preferred, as a policy matter, that CDC strike a different balance, CDC did consider these very factors, which resulted in specific exemptions based on these precise considerations. In doing so, CDC did not violate the APA.

For all of these reasons, the States and Federal Defendants are likely to prevail on their challenges to the remainder of the district court's APA reasoning as well.

II. The States Will Suffer Irreparable Harm Without A Stay

As the *Louisiana* court already found, the termination of the Title 42 System will cause the States irreparable harm. *Louisiana*, 2022 WL 1604901, at *4-*9, *22. In particular, the greatly increased number of

migrants that such a termination will occasion will necessarily increase the States' law enforcement, education, and healthcare costs. *Id.*; *see also Texas*, 589 F. Supp. 3d at 611-12.

Because of sovereign immunity, the States cannot recover such costs from Federal Defendants. And it is well-established that irrecoverable injuries are irreparable injuries. *See East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 677 (9th Cir. 2021); *Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994); *Temple Univ. v. White*, 941 F.2d 201, 214-15 (3d Cir. 1991).

The likelihood of irreparable harm to the States is underscored by the fact that DHS has felt compelled to request *$3 billion* in emergency funding to deal with the imminent calamity that the district court's decision will occasion. And the prospect that DHS will alone bear the burden of this manmade disaster is fanciful as States "bear[] many of the consequences of unlawful immigration." *Arizona*, 567 U.S. at 397. Moreover, a surge of migrants approaching the border in anticipating of the December 21 stay expiration has *already* occurred, underscoring the States' harms. *See* Rogers Exs. D-F.

The States will also suffer sovereign injuries from the termination of Title 42 and the enormous surge in unlawful migration that it will occasion. The "defining characteristic of sovereignty" is "the power to exclude from the sovereign's territory people who have no right to be there." *Id.* at 417 (Scalia, J., concurring in part and dissenting in part). Under DHS's own projections, the States will suffer substantial injuries to this "definining characteristic of sovereignty," as hugely increased numbers of migrants will attempt to cross illegally into the United States and into the States.

III. The Balance Of Equities And The Public Interest Support Petitioner's Request For A Stay.

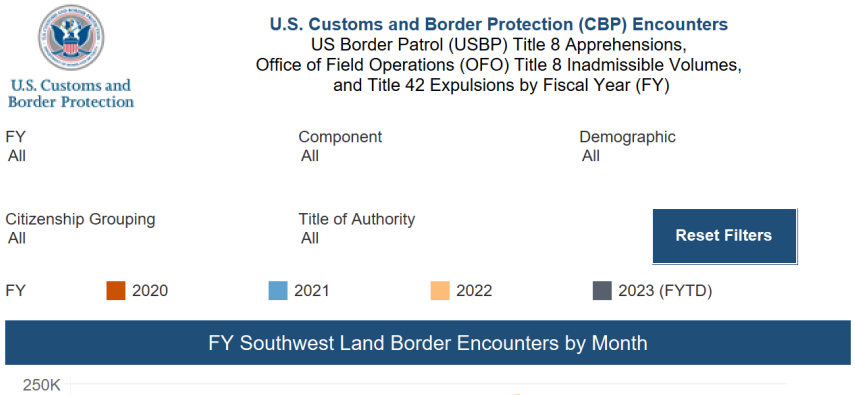
Finally, the balance of equities and public interest also favor a stay pending appeal here for four reasons.

First, the States will suffer enormous harms absent a stay pending appeal, as the *Louisiana* court has already found. *Louisiana*, 2022 WL 1604901, at *4-*9, *22. Moreover, that court already balanced strikingly similar harms/public interest concerns and concluded that a preliminary injunction against termination of Title 42 was warranted in that case. *Id.* at *22-23. So too is a stay pending appeal against the impending termination here.

Second, a stay will not meaningfully harm Defendants. Indeed, it would leave their orders in place and protect them from vacatur of orders that they correctly have argued do *not* violate the APA. Staying invalidation of CDC's own orders will cause that agency no harm.

Moreover, a stay will likely create significant *benefits* for Defendants. Notably, DHS is currently pressing to Congress an emergency request for $3 billion in new funding to deal with the crisis that termination of Title 42 will cause. *See* Rogers Decl. Exs. A-C. A stay will save DHS those billions of dollars. Moreover, avoiding a preventable migrant surge will avoid pouring gasoline on the fire that is DHS's existing loss of operational control of the border, as exemplified by Table 1 next. As that table shows, the number of illegal crossings is reaching all-time highs, without any relief in sight.

Table 1: DHS Southwest Land Border Encounters By Month



	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	Total
2023 (FYTD)	230,678												230,678
2022	164,837	174,845	179,253	154,874	166,010	222,574	235,785	241,136	207,834	200,162	204,087	227,547	2,378,944
2021	71,929	72,113	73,994	78,414	101,099	173,277	178,795	180,597	189,034	213,593	209,840	192,001	1,734,686
2020	45,139	42,643	40,565	36,585	36,687	34,460	17,106	23,237	33,049	40,929	50,014	57,674	458,088

https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters

Third, a stay will not substantially harm Plaintiffs. The plaintiff class told the district court "they continue to face irreparable harm because, despite [this Court's] holding … that Defendants may not expel Class Members to areas where they would be persecuted or tortured,

documented cases of kidnapping, rapes, and other violence against noncitizens subject to Title 42 have also risen dramatically since last year." APP-44-45 (quotations and alterations omitted). The district court agreed. APP-45.

But there is no evidence that enjoining Title 42 would prevent those harms. *See Winter v. NRDC*, 555 U.S. 7, 20 (2008) (requiring a showing of "irreparable harm in the *absence* of preliminary relief") (emphasis added). Even in the absence of the Title 42 policy, the INA does not guarantee admission into the United States—or even prolonged detention in federal facilities. *See* 8 U.S.C. § 1225(b)(1)(A), (B); *Huisha-Huisha*, 27 F.4th at 735 (noting expedited removal permits "the Executive [to] quickly expel aliens with non-credible claims for relief under § 1231(b)(3)(A) and the Convention Against Torture"). Thus, this Court has indicated that the true irreparable harm at issue was the loss of withholding-of-removal or CAT withholding and subsequent expulsion to places "where [class members] will be persecuted or tortured." *See Id.* at 733 (linking those protections to the violent crimes discussed). And so the injunctive relief this Court affirmed allows "the Executive [to] expel

Plaintiffs, but only to places where they will not be persecuted or tortured." *Id.* at 735.

But the district court's injunction and vacatur here changes none of that: whether that injunction/vacatur is stayed or not, the prohibition on expelling migrants to places where they would be persecuted or tortured will remain fully intact in all events. *Id.* More generally, "[f]or purposes of … withholding of removal, it is not enough that a person comes from a wretched place, where life will most probably be far worse than if he remains in the United States." *Barajas-Romero v. Lynch*, 846 F.3d 351, 357 (9th Cir. 2017). Thus, an "increase in general crime" does not justify withholding of removal. *Melgar de Torres v. Reno*, 191 F.3d 307, 314 (2d Cir. 1999).

For the same reason, the class has not shown they are likely to be "subjected to torture." 8 U.S.C. §1231 note; *see* 8 C.F.R. §208.18(a)(1)–(8). But if they can do so, the Executive will be prohibited from expelling them to anywhere where there is such a risk under this Court's *Huisha-Huisha II* decision. 27 F.4th at 731-32. A stay pending appeal here thus will not cause the feared harms.

There is thus no evidence that the continuation of Title 42—as modified by the relief this Court fashioned in the first appeal—would result in the plaintiff class being "expelled to places where they will be persecuted or tortured" as §1231 uses those terms. *Huisha-Huisha*, 27 F.4th at 733. Staying the judgment will, therefore, not substantially injure the class.

Fourth, a stay is also in the public interest. The Title 42 System limits the number of border crossings at a time when the border is in crisis; retaining it is in the public interest. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) ("The Government makes a convincing demonstration that the public interest demands effective measures to prevent the illegal entry of aliens at the Mexican border."); *Louisiana*, 2022 WL 1604901, at *22-23.

Furthermore, the public interest is served by having this dispute resolved on the merits, rather than through Defendants' collusive actions that circumvent APA notice-and-comment rulemaking. *See*, *e.g.*, *Patriot, Inc. v. Dep't of Hous. & Urban Dev.*, 963 F. Supp. 1, 6 (D.D.C. 1997) ("[T]he public interest is best served by having federal agencies comply

with the requirements of federal law, particularly the notice and comment requirements of the APA.").

But absent a stay, the enormous harms that the district court's judgment will occasion—which are premised on legal errors that Federal Defendants explicitly *admit* exist—will become a *fait accompli*. Nor is there any suggestion that DHS will be able to unscramble this egg if this Court were to reverse but without first granting a stay pending appeal.

IV. This Court Should Grant An Administrative Stay Even If It Denies A Stay Pending Appeal

Even if this Court concludes that a full stay pending appeal is not warranted, it should grant a 7-day administrative stay so that the States can seek relief from the Supreme Court in an orderly fashion. Similarly, if this Court requires additional time to decide this motion, it should grant an administrative stay while it is considering this motion.

V. This Court Should Expedite Briefing And Consideration Of This Appeal

Given the enormous, imminent harms at issue here, this Court should also expedite briefing and argument along the similar lines as *Huisha-Huisha II*. The States therefore request a 30 days/30 days/21

days schedule for opening/answering/reply briefs beginning after this Court's stay decision, with oral argument set for April.

CONCLUSION

For the foregoing reasons, this Court should grant the States' emergency motion for a stay pending appeal.

Dated: December 12, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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s/ Drew C. Ensign
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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of December, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF filing system. Counsel for parties that are registered CM/ECF users will be served by the CM/ECF system pursuant to the notice of electronic filing.

s/ Drew C. Ensign
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IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nancy Huisha-Huisha et al.,

Plaintiff-Appellees,

v.

Alejandro N. Mayorkas,

Defendant-Appellants

and

States of Arizona, Louisiana, Alabama, Alaska, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Tennessee, Utah, Virginia, West Virginia, and Wyoming.

Proposed Intervenor-Defendants.

Case No. 22-5325

APPENDIX TO STATES' EMERGENCY MOTION FOR A STAY PENDING APPEAL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OPINION

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

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

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

I. Background

A. Factual Background

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

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

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

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

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

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

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

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

Id. at 16566-67.

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

Pursuant to the Interim Final Rule, the CDC Director issued an order suspending for 30 days the introduction of "covered aliens," which he defined as "persons traveling from Canada or Mexico (regardless of their country of origin) who would otherwise be introduced into a congregate setting in a land Port of Entry [("POE")] or Border Patrol station at or near the United States borders with Canada and Mexico." *Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists*, 85 Fed. Reg. 17060-02, 17061, 2020 WL 1445906 (March 26, 2020) ("March 2020 Order"). The March 2020 Order declared that "[i]t is necessary for the public health to immediately suspend the introduction of covered aliens" and "require[d] the movement of all such aliens to the country from which they entered the United States, or their country of origin, or another location as practicable, as rapidly as possible." *Id.* at 17067. The CDC Director then "requested that [the Department of Homeland Security ("DHS")] implement th[e] [March 2020 Order] because CDC does not have the capability, resources, or personnel needed to do so." *Id.* The CDC Director also noted that U.S. Customs and Border Protection ("CBP"), a federal law enforcement agency of DHS, had already "developed an operational plan for implementing the order." *Id.*

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

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

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

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

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

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

On April 1, 2022, the CDC terminated the August 2021 Order, with an implementation date of May 23, 2022. *Public Health Determination and Order Regarding Suspending the Right To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists*, 87 Fed. Reg. 19941, 19942. CDC explained that "[w]hile earlier phases of the pandemic required extraordinary actions by the government and society at large," "epidemiologic data, scientific knowledge, and the availability of public health mitigation measures, vaccines, and therapeutics have permitted the country to safely transition to more normal routines." *Id.* The agency explained that "although COVID-19 remains a concern, the readily available and less burdensome public health mitigation tools to combat the disease render a [Title 42 order] . . . unnecessary." *Id.* at 19953. In view of the changed circumstances, CDC stated that "the previously identified public health risk is no longer commensurate with the extraordinary measures instituted by the CDC Orders." *Id.*

B. Procedural History

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

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

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

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

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

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

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

II. Legal Standards

A. Administrative Procedure Act

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

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

B. Summary Judgment

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

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

III. Analysis

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

A. Plaintiffs' Claim Is Reviewable

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

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

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

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

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

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

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

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

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

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

B. The Title 42 Process Is Arbitrary and Capricious

1. Defendants Failed to Apply the Least Restrictive Means Standard

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The Title 42 Policy Failed to Adequately Consider Alternatives

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Remedies

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

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

1. The Title 42 Policy Is Vacated

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

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

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

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

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

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

2. Plaintiffs Are Entitled to Injunctive Relief

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Therefore, the balance of the equities also favors Plaintiffs.

IV. Conclusion

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

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

SO ORDERED.

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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

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

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

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

SO ORDERED.

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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiffs,

v.

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

Defendants.

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

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

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

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

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

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

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

Date: 11/22/2022

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NANCY GIMENA HUISHA-HUISHA, on behalf of herself and others similarly situated, *et al.*, Plaintiffs, *v.* ALEJANDRO MAYORKAS, Secretary of Homeland Security, *et al.*, Defendants.	Civ. A. No. 21-100 (EGS)

MOTION TO INTERVENE BY THE STATES OF ARIZONA, LOUISIANA, ALABAMA, ALASKA, KANSAS, KENTUCKY, MISSISSIPPI, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, VIRGINIA, WEST VIRGINIA, AND WYOMING

Pursuant to Federal Rule of Civil Procedure 24, the States of Arizona, Louisiana, Alabama, Alaska, Kansas, Kentucky, Mississippi, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Virginia, West Virginia, and Wyoming hereby respectfully move to intervene in this action, both as of right and permissively.

In support of this Motion, the States submits the accompanying Memorandum of Law and [Proposed] Order.

Dated: November 21, 2022

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NANCY GIMENA HUISHA-HUISHA, on behalf of herself and others similarly situated, *et al*., Plaintiffs, *v.* ALEJANDRO MAYORKAS, Secretary of Homeland Security, *et al*., Defendants.	Civ. A. No. 21-100 (EGS)

REPLY MEMORANDM IN SUPPORT OF MOTION TO INTERVENE BY THE STATES OF ARIZONA, LOUISIANA, ALABAMA, ALASKA, KANSAS, KENTUCKY, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, TENNESSEE, UTAH, VIRGINIA, WEST VIRGINIA, AND WYOMING

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INTRODUCTION

For most of 2022, it has been clear that CDC/DHS wanted three things: (1) to end Title 42, (2) to do so with a delayed effective date so that DHS could prepare for the *enormous* challenges that termination would cause—with DHS projecting that it would lead to an increase in attempted unlawful border crossings from around 7,000 per day to as much as 18,000 per day, and (3) to effectuate such termination without complying with APA notice-and-comment rulemaking procedures.

CDC's first attempt to achieve these objectives came in the April 1 Termination Order, 87 Fed. Reg. 19,941 (2022). But 24 States challenged that Termination Order as violating the APA's notice-and-comment requirements and successfully obtained a preliminary injunction against implementation of the Termination Order on that basis. *See Louisiana v. CDC,* __ F.Supp.3d __, 2022 WL 1604901 (W.D. La. May 20, 2022). Although CDC/DHS appealed that decision, they did not seek a stay pending appeal or expedition, and thus that *Louisiana* injunction remains in full force to this day.

Then came this Court's November 15 Order, when Defendants hatched Plan B to obtain their objectives. Sensing an opportunity in their litigation defeat, Defendants sought to achieve through collusion what they could not through rulemaking: a delayed end to Title 42 without APA notice-and-comment compliance. Defendants thus agreed with Plaintiffs on a collusive arrangement in which the parties jointly sought a 5-week stay that effectively recreates the Termination Order but without the burden of APA compliance. In return, it is apparent that Defendants intend to avoid taking any steps to obtain a stay that would prevent Title 42 from ending on December 21—and indeed they have taken *no such steps* since this Court's November 16 entry of the stay until this day. Left to their own devices, Defendants have given *every* indication

that Title 42 will end, as planned, on December 21.

Nor is this the first time that DHS has pulled this trick of employing strategic surrender to eliminate unwanted rules without complying with the APA. The agency previously employed this artifice to rid itself of the Public Charge Rule, and did so "with military precision to effect the removal of the issue from [the Supreme Court's] docket and to sidestep notice-and-comment rulemaking" for repealing the unwanted rule. Transcript,[1] *Arizona v. San Francisco*, 142 S. Ct. 1926, 45-46 (2022) (Alito, J.); *see also id.* at 48 ("The real issue to me is the evasion of notice-and-comment. And, I mean, basically, the government bought itself a bunch of time [through the acquiesced-in vacatur] where the rule was not in effect.") (Kagan, J.). The same military precision is at work here.

To give a sense of the magnitude of the collusion at play here, consider the contradictions in DHS's/DOJ's positions. Those Departments have argued in the Supreme Court *this year* that both (1) the APA does not authorize vacatur as a remedy[2] and (2) nationwide injunctions are impermissible.[3] Yet this Court's order granted *both* a vacatur and a nationwide injunction. *See* Doc. 165. And Defendants have given every indication that they intend to acquiesce in *both* of those remedies that they are simultaneously arguing to the Supreme Court are categorically unlawful. Except, apparently, when the Federal Government favors entry of them. Defendants' "it's legal when we say it's legal" premise violates bedrock rule-of-law principles.

The fundamental problem for Defendants' attempted APA circumvention is that the

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[1] *Available at* https://bit.ly/3VDDOfZ.

[2] *See* Brief for Federal Defendants at 40-44, *United States v. Texas*, No. 22-58 (U.S. Sept. 12, 2022), *available at* https://bit.ly/3Uotirj (arguing that the APA "Does Not Authorize Vacatur").

[3] *Transcript*, *Arizona v. San Francisco*, at 71 (statement of U.S. Deputy Solicitor General that the Federal Government has "pretty consistently" argued that "district courts lack the power to issue nationwide injunctions").

Federal Rules specifically provide a mechanism for outside parties to thwart collusive arrangements like this one: intervention under Rule 24. And the States here satisfy all of the requirements for both intervention as of right and permissive intervention.

As to intervention of right, potential impairment appears undisputed if the States possess a protectable interest here. Which they do. While Plaintiffs and Defendants (collectively, "Existing Parties") spill much ink wrongly contending that the States lack Article III standing in the underlying suit, this issue can be readily resolved on a far simpler ground: the *Louisiana* injunction that the States obtained. It is undisputed that once this Court's judgment/vacatur/injunction goes into effect, it will effectively moot—*i.e.* destroy—the *Louisiana* injunction. And that *Louisiana* injunction creates rights for the States, which will be incontestably impaired if intervention is denied and Defendants' planned acquiescence takes effect. *See*, *e.g.*, *NBA v. Minn. Pro. Basketball, Ltd. P'ship*, 56 F.3d 866, 871-72 (8th Cir. 1995) ("A preliminary injunction confers important rights."). The *de facto* destruction of the rights that the States possess under the *Louisiana* injunction thus readily satisfies the protectable interest and potential impairment requirements. And that threatened destruction likewise establishes standing.

But, in any event, the States possess Article III standing in this controversy based on all of the evidence that they have submitted—particularly when weighed against the *complete absence* of contrary evidence offered by Existing Parties, including the evidence from *two prior cases* that found State(s) had standing in Title 42 challenges, and the Ortiz Deposition. And the States further have protectable interests in securing compliance with APA notice-and-comment rulemaking requirements *before* Title 42 is Terminated, which they have already vindicated with the *Louisiana* injunction.

The States' motion to intervene is also timely under the Supreme Court's decisions in

United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977) and *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002 (2022). Here the States moved to intervene a mere six days after it became apparent that Defendants "would no longer" defend Title 42 meaningfully, and instead intended to acequisce in a delayed termination beginning on December 21. *United Airlines,* 432 U.S. at 394. And the States' motion was filed a day *before* the deadline to appeal began running, and thus was plainly "within the time period in which the named plaintiffs could have taken an appeal." *Id*. at 395-96.

The States' minimal burden in demonstrating the inadequacy of Federal Defendants' representation here is also readily satisfied: Federal Defendants have expressly disavowed seeking a stay pending appeal, and have instead acquiesced in termination of Title 42 occuring on December 21, which will cause the States' extensive harms (which Federal Defendants conceded in the *Louisiana* case). That knowing infliction of harms upon the States readily satisfies their minimal burden here.

Finally, permissive intervention should be granted even if the requirements for intervention as of right were not satisfied. All the requirements for permissive intervention are met here, and a favorable exercise is warranted so that this case can be decided on the merits, rather than through the expedient of collusive surrender.

ARGUMENT

I. THE STATES HAVE SATISFIED ALL REQUIREMENTS FOR INTEREVENTION AS OF RIGHT

Here the States have established all of the requirements for intervention as of right here. Notably, the potential impairment requirement does not appear to be contested. And the protectable interest/Article III standing, timeliness, and inadequate representation factors are all readily satisfied here too.

A. The States Have Protectable Interests And Article III Standing Here

The issue of whether termination of Title 42 will cause the States cognizable harm does not come to this on a blank slate. Instead, that *precise issue* was hotly contested in the *Louisiana* case, and squarely resolved in the States' favor in a lengthy opinion. 2022 WL 1604901, at *10-16. The States have provided that same evidence here, as well as the evidence found sufficient to create standing in *Texas v. Biden*, 589 F. Supp. 3d 595, 610-13 (N.D. Tex. 2022), and also 30(b)(6) deposition testimony of Border Patrol Chief Raul Oritz, who provided party admissions binding against DHS that further support the States' standing here. The combination of all of this evidence makes plain that the States have Article III standing to challenge the *de facto* termination of Title 42 occasioned by this Court's judgment, and presently stayed until December 21.

But this Court need not even reach that issue because the States' protectable interests here can be resolved even more readily based on the *Louisiana* preliminary injunction alone. That injunction conveys rights to the States that this Court's judgment will concededly impair. That alone resolves the "protectable interest" inquiry in favor of the States here. Moreover, the States' rights under the APA to participate in notice-and-comment rulemaking—a right they were entitled to exercise *before* termination of Title 42 and which the *Louisiana* injunction protects—further provides a protectable interest supporting standing.

1. The States Have A Protectable Interest In The *Louisiana* Injunction They Obtained, Which Would Be Destroyed By This Court's Judgment

The Moving States here have rights under the *Louisiana* injunction, which Existing Parties concede would be mooted/eliminated if this Court's judgment becomes effective. That readily resolves the protectable interest and potential impairment requirements for intervention as of right.

The *Louisiana* injunction creates important rights for the States—rights enforceable even through contempt. *See*, *e.g.*, *NBA*, 56 F.3d at 871-72 ("A preliminary injunction confers important

rights."); *Lindland v. U.S. Wrestling Ass'n, Inc.*, 227 F.3d 1000, 1003 (7th Cir. 2000); *In re Y & A Grp. Sec. Litig.*, 38 F.3d 380, 382 (8th Cir. 1994) ("[T]he All Writs Act indirectly confers on injunction beneficiaries the right to judicial enforcement."). Indeed, the *Louisiana* injunction is even a judgment under Rule 54 and it creates rights strong enough to justify injunctions against parallel suits notwithstanding the Anti-Injunction Act. *NBA*, 56 F.3d at 871-72.

Notably, the rights that the States possess under the *Louisiana* injunction are independent from the underlying merits—Federal Defendants are bound to that injunction even if the Western District of Louisiana's standing holding were erroneous (which it was not): "An injunction duly issuing out of a court of general jurisdiction with equity powers … must be obeyed by [the enjoined parties], however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming, but void law going to the merits of the case." *United States v. United Mine Workers of Am.*, 330 U.S. 258, 293-94 (1947) (cleaned up). Ultimately, "until [the injunction] decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished." *Id.* at 294.

Thus, even if all of Existing Parties' standing arguments were correct (which they are not), the rights that the States possess under the *Louisiana* injunction continue to exist until either the Fifth Circuit or Supreme Court reverses that injunction. Until then, the States hold rights under the *Louisiana* injunction that qualify as protectable interests, which could be impaired—indeed will be effectively destroyed—by this Court's judgment if it becomes operative.

The States thus possess a protectable interest here, and further possess Article III standing given the cognizable injury that mooting of the *Louisiana* injunction will necessarily occasion.

Existing Parties' responses to these protectable interests are scant and unavailing. Federal Defendants contend (at 14) that "[t]he fact that the *Louisiana* suit could be rendered moot by this Court's November 15 order by no means shows that Proposed Intervenors' procedural rights are impaired." But that contention is offered *completely* without any supporting citation, and is nothing more than a naked *ipse dixit*. Moreover, that argument ignores that it is not merely the "*Louisiana* suit [that] could be rendered moot," but rather also the *injunction* issued in that suit that would also be mooted. And that injunction further secures the States' underlying interests here.

Federal Defendants never explain why the *Louisiana* injunction does not establish protectable rights. But what could they say?

Plaintiffs similarly contend (at 19) that "[t]he States cannot manufacture a legally protected interest in this case merely because they have sued over that subsequent CDC termination decision." But once again, it is not "merely" that the States "have sued," but that they have done so *and obtained an injunction*, which is an indendent source of rights. Plaintiffs never explain how that injunction does not create protectable interests, instead pretending that the States have done nothing more than "merely" bringing suit.

A simple example demonstrates the flaw in Existing Parties' arguments. Suppose that the Fifth Circuit were to reverse issuance of the *Louisiana* injunction. Under Existing Parties' arguemnts, that reversal would cause the States no cognizable injury and they thus would lack standing to seek Supreme Court review because they had no protectable/cognizable interests in the injunction that they originally obtained but was subsequently reversed by the intermediate appellate court. But that is simply not the law. Indeed, standing to seek Supreme Court review is so self-evident in that posture so as to be beyond the need for analysis or even mention. *See*, *e.g.*, *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2381 (2021) (reversing Ninth Circuit's

reversal of injunction issued by district court without even mentioning whether Plaintiffs, whose injunction was eliminated by the Ninth Circuit's decision, had Article III standing to seek Supreme Court review).

So it is here too: the potential destruction of the *Louisiana* injunction, and the rights that the States possess under it, that this Court's judgment would effectuate establishes both Article III standing for, and the protectable interests of, the States.

2. The States Have Protectable Procedural Rights

The States also have protectable interests in participating in notice-and-comment rulemaking and preventing Federal Defendants from circumventing APA notice-and-comment requirements. That same interest supported entry of the *Louisiana* injunction.

Because that injunction has issued, the States also have protectable procedural interests in preventing Defendants from using procedural artifices to circumvent that injunction and the APA notice-and-comment requirements it is enforcing: An injunction cannot "be avoided on merely technical grounds" so long as its thrust gives litigants "fair warning of the acts that it forbids." *United States v. Christie Indus., Inc.*, 465 F.2d 1002, 1007 (3d Cir. 1972). Indeed, a court may "find a breach of the decree in a violation of the spirit of the injunction, even though its strict letter may not have been disregarded." *Inst. of Cetacean Rsch. v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 949 (9th Cir. 2014); *accord Youakim v. McDonald*, 71 F.3d 1274, 1283 (7th Cir. 1995) (A party's conduct may "violate an injunction if it threatens the spirit if not the literal language of the earlier order").

Here, Defendants' actions violate the States' protectable interests in securing APA notice-and-comment compliance before the Title 42 orders are terminated, as well as their procedural interest in avoiding circumvention of the *Louisiana* injunction that they obtained.

It would be one thing if Federal Defendants were litigating this case to judgment and

through the chain of federal courts, and acquiesced in defeat only after full appellate review. That would not violate the spirit and thrust of the *Louisiana* injunction, and would not constitute an improper end-run around notice-and-comment requiremnets.

But that has not occurred here. Instead, through collusive agreement with Plaintiffs, Federal Defendants have managed to recreate the enjoined Title 42 Termination Order to a "T": that agreement not only provides for effective termination of Title 42, but also secures a delayed effective date of the termination that DHS always insisted upon—*just like the Termination Order*. And also just like the Termination Order, Federal Defendants have secured that preferred outcome without undergoing notice-and-comment rulemaking.

Through their collusive bargain that recreates all of the essential features of the (enjoined) Termination Order, Defendants have violated both the spirit and thrust of the *Louisiana* injunction, as well as the underlying procedural interests in participating in notice-and-comment rulemaking that the *Louisiana* injunction was issued to secure.

Plaintiffs are thus wrong in contending (at 19) that "the States' choice to bring a procedural APA challenge to the termination decision, which is not at issue here, cannot supply the missing legally protected interest in *this* case." The States' interest in securing Defendants' compliance with APA notice-and-comment requirements, which is secured by the *Louisiana* injunction, applies to all actions that violate the spirit of that injunction—including Defendants' end-run around notice-and-comment rulemaking through the expedient of strategic surrender here.

3. The States Have Article III Standing And Protectable Interests In This Suit

Even aside from the States' rights under the *Louisiana* injunction and their procedural interests in securing CDC compliance with APA notice-and-comment requirements and avoiding circumvention of the spirit of the *Louisiana* injunction, the States also have Article III standing in

the underlying case here. Notably, the Western District of Louisiana has already squarely held that termination of the Title 42 Orders would injure the States in a manner that confers Article III standing. *Louisiana*, 2022 WL 1604901, at *13-14. The same result should obtain here *a fortiori* given: (1) the applicable standard of review, which requires accepting the States' allegations as true, (2) the additional evidence submitted here and lack of *any* contrary evidence, and (3) the lack of response to the Ortiz deposition. And Existing Parties' request for this Court to reach a different determination on an even stronger record based on putative differences in circuit precedent is unavailing. As is Existing Parties' attempt to deny that the States enjoy "special solicitude" in the standing analysis here.

Standard of Review. Existing Parties' arguments notably flout the applicable standard of review here. "Courts are to take all well-pleaded, nonconclusory allegations in the motion to intervene, the proposed complaint or answer in intervention, and declarations supporting the motion as true absent sham, frivolity or other objections." *Connecticut v. DOI*, 344 F.Supp.3d 279, 296 (D.D.C. 2018) (citation omitted); *accord Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981) ("[M]otions to intervene are usually evaluated on the basis of well pleaded matters in the motion, the complaint, and any responses of opponents to intervention.").

This has particular force here as most of Defendants' challenges to the States' standing deal with traceability. "Article III [traceability] 'requires no more than *de facto* causality.'" *Department of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (citation omitted). And the States' allegations and arguments, if accepted as true, easily establish that much, particularly as "[t]he 'but-for causation inquiry' is 'purely a question of fact.'" *Anthoine v. N. Cent. Cntys. Consortium*, 605 F.3d 740, 752 (9th Cir. 2010) (citation omitted); *accord Davis v. United States*, 670 F.3d 48, 53 (1st Cir. 2012); *Grand Canyon Tr. v. Bernhardt*, 947 F.3d 94, 96 (D.C. Cir. 2020).

As a result, *all* of Existing Parties' arguments that refuse to accept the truth of the States' allegations/arguments/evidence are simply out of bounds for present purposes.

Additional Evidence and Lack of Contrary Evidence. The States' evidence is notably even stronger here than it was in *Louisiana*, as it is supplemented by the (1) *Texas* standing evidence, (2) the Manning Declaration, and (3) the Ortiz deposition. Neither Plaintiffs nor Defendants even attempt to answer the Ortiz declaration, which alone demonstrates the States' standing as previously explained (at 11-12). Nor do either attempt to address any of the *Texas* evidence. *See* Mot. at 12-13.

Federal Defendants protest (at 16) that, given the timing, "the parties will not have a meaningful opportunity to challenge this alleged evidence or provide contrary evidence of their own." That is specious. Federal Defendants were also defendants in *Louisiana* and *Texas*, as well as the suit that the Ortiz declaration was taken in, and had ready access to all of the evidence in all of those cases. They could easily have assembled and submitted their own evidence from those cases here had they been so inclined. They simply weren't, and instead elected to allow *all* of the States' evidence to go entirely unrebutted by *any* evidence from Existing Parties. In doing so, Existing Parties have all but conceded Article III standing.

Governing Law. Existing Parties do not appear to contest meaningfully that the States have Article III standing to challenge the termination of Title 42 under Fifth Circuit precedent. But they suggest that D.C. Circuit precedent is somehow fundamentally different. *See* Fed Opp. at 10-13; ACLU Opp. at 5-12. It is not.

Existing Parties place heavy reliance on *Arpaio v. Obama*, 797 F.3d 11, 14 (D.C. Cir. 2015). But that case is both distinguishable and, if Existing Parties' reading of it were correct, overruled by intervening authority. In *Arpaio*, the plaintiff, an Arizona county sheriff, challenged

DACA and DAPA and argued that he had standing based on what he alleged would be a resulting increase in migration *by those to whom DACA and DAPA did not apply* and, in turn, alleged concomitant increase in crime. *Arpaio*, 797 F.3d at 21-22. That rested on unsupported speculation that migrants ineligible for DACA or DAPA status would nonetheless migrate illegally into the United States as a result of policies that did not apply to them.

No such speculation is required here. The Supreme Court has made plain that states can establish Article III standing based on the "predictable effect of Government action on the decisions of third parties." *New York*, 139 S. Ct. at 2566. And here *DHS itself* has made just such a prediction, estimating that elimination of the Title 42 system "will result in an increase in daily border crossings and that this increase could be as large as a three-fold increase to 18,000 daily border crossings." *Louisiana*, 2022 WL 1604901, at *22. Where Federal Defendants *themselves* have admitted that a particular injury-causing result is the "predictable effect of Government action on the decisions of third parties," *New York*, 139 S. Ct. at 2566, there simply is no basis for denying standing here. And to the extent that *Arpaio* might provide differently (although correctly read, it doesn't), it would have been overruled by *New York*'s unanimous "predictable effect" standard. Moreover, the States' injuries here are *far* less downstream than in *New York*.[4]

[4] In *New York*, the plaintiff states asserted that the inclusion of a citizenship question on the Census form would lead to those states losing federal funds. *Id.* at 2565. But several things would have to happen first for that to occur. First, individuals would have to refuse to fill out the Census—which is a federal crime. 13 U.S.C. §221. And the criminal actions of third parties often eliminate proximate cause, *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457-58 (2006), but not standing. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014) ("Proximate causation is not a requirement of Article III standing[.]").

But even non-completion would cause New York and the other plaintiff states no harm on its own. Second, Congress or federal agencies would need to adopt funding formulas based on Census data. *New York,* 139 S. Ct. at 2565. And even then, third, New York would likely only be harmed if the non-completion rates were *relatively* higher in New York than the rest of the U.S. If, for example, the challenged question caused completion rates to go down nationally by 10% but only down 5% in New York, New York would likely receive *more* federal funds as a result of its

Once the Defendants' own estimates of surging migration are considered, it is simple math that the States will have to spend additional moneys on education, healthcare, and law enforcement. *See*, *e.g.*, *Texas v. Biden*, 20 F.4th 928, 969 (5th Cir. 2021) *overruled on other grounds* 142 S. Ct. 2528 (2022) (Explaining that "if the total number of in-State aliens increases, the States will spend more on healthcare" (cleaned up)). Such costs readily establish standing.[5]

More generally, D.C. Circuit precedent is also highly favorable to establish the States' standing here. That court, for example, has permitted downstream injuries resulting from third party actions to suffice, finding state standing based on "harm … due to unlawful emissions from upwind states." *New Jersey v. EPA*, 989 F.3d 1038, 1047 (D.C. Cir. 2021) (collecting cases). The D.C. Circuit further "has 'frequently upheld claims of standing based on allegations of a

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relatively greater population count. But despite being downstream of all of those contingencies and hypothesized third-party law breaking, the Supreme Court still *unanimously* held that the State had Article III standing. *Id.* at 2565.

[5] Existing Parties' reliance on *Arizona v. Biden*, 40 F.4th 375, 386 (6th Cir. 2022) is also unavailing. That decision denied standing because the States' injuries were "'capable of estimate in money.'" *Id.* at 386 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 518-19 (2007)). But New York makes clear that is simply wrong, as the Supreme Court unanimously found standing premised on potential loss of federal funds—*i.e.*, *money*. *New York*, 139 S. Ct. at 2565.

More generally, money is fungible, and there is thus no difference in economic substance between losing federal funds and being forced to expend additional state funds as a result of illegal federal government action. Nor can the Sixth Circuit's "capable of estimate in money" reasoning withstand scrutiny. *Arizona*, 40 F.4th at 386. Notably, the Bay State's alleged injuries in *Massachusetts* were the alleged loss of coastal lands. But land is eminently "capable of estimate with money"—appraisers literally do that every day. On the flipside of the coin, the States' harms here are not so easily measurable in money either. If, for example, the forced diversion of State healthcare resources causes a diagnosis of treatable cancer in one of the States' citizens to be missed, is that resulting avoidable cancer death readily "capable of estimate with money"? The Sixth Circuit certainly thought so, but only by abstracting the injuries and improperly analogizing the States to mere private companies.

More fundamentally, the Sixth Circuit's States-are-no-different-than-private-companies reasoning would likely be perfectly correct for a unitary state, such as the United Kingdom or New Zealand. There, provincial and local governments really are nothing more than artificial legal entities chartered by the national government and completely subject to that government's control. But that is not our system.

'substantial risk' of future injury.'" *Id.* (citation omitted). Here, DHS's own projections of an enormous resulting surge in unlawful migration establish just such a "substantial risk of future injury." That is particularly true as States "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012).

Indeed, within this circuit it is now "well-established standing precedent [that] it suffices to point to 'third party conduct that is voluntary but reasonably predictable.'" *New Jersey*, 989 F.3d at 1049 (citation omitted). Here DHS has made such reasonable predictions, as has Border Patrol Chief Ortiz, whose admissions are binding on Federal Defendants as party admissions from his 30(b)(6) deposition.

Special Solicitude. The States are also entitled to "special solicitude" in the standing analysis here. *Massachusetts*, 549 U.S. at 520. Just as in *Massachusetts*, the States have a quasi-sovereign interest at stake: *i.e.*, their "quasi-sovereign interest[s] in the health and well-being—both physical and economic—of its residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982). By diverting the States' healthcare, education, and law enforcement resources as a result of the surge in unlawful immigration that *DHS predicts* will occur once Title 42 is terminated, those quasi-sovereign interest are impaired, just as in *Massachusetts*. 549 U.S. at 520 (permitting Massachusetts to assert its "stake in protecting its *quasi-sovereign interests"* and not merely sovereign interests (emphasis added)). Moreover, the States submitted evidence of environmental harm here. *See* Ex. 3, Mot. at 14 n.3. That further establishes the States' standing. *See Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907) ("[T]he state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.").

Federal Defendants' attempt (at 12) to limit *Massachusetts* to a state asserting an "interest in preserving its 'sovereign territory'" is thus unavailing: *Massachusetts* is perfectly clear that it extends to situations where, as here, the States assert "quasi-sovereign interests." *Id.*

Existing Parties appear to suggest that the chain of causation was less attenuated in *Massachusetts* than here. Not so. In *Massachusetts*, the state had premised standing on EPA's non-regulation of carbon emissions in the transportation sector over the course of the next *century*, which would allegedly affect Massachusetts's coastline in unknowable amounts and places, in the teeth of international carbon emissions beyond the scope of any conceivable federal regulation; moreover, the regulations that EPA would issue if Massachusetts won were completely unknown and unknowable (and still not all that clear 15 years later); but *all* of that uncertainty did not preclude Article III standing. *Massachusetts*, 549 U.S. at 521-26.

Massachusetts's injuries were thus not just downstream of innumerable third parties (*e.g.*, drivers' decisions and preferences, foreign nations' and corporations' decisions) and unknown federal regulations, but also of immense amounts of time. But Massachusetts's injuries were nonetheless cognizable because "U.S. motor-vehicle emissions [would] make a *meaningful contribution* to greenhouse gas concentrations." *Id.* at 525 (emphasis added).

Here, the causal chain is *far* less attenuated. DHS itself has projected that termination of Title 42 will, *almost instantly*, cause as much as a "three-fold increase to 18,000 daily border crossings." *Louisiana*, 2022 WL 1604901, at *22. Those harms are not traced over a century through unknowable regulations, foreign nations' actions, and innumerable other contingencies, as was the case in *Massachusetts*. Article III standing is thus established here *a fortiori*.

B. The States' Motion to Intervene Is Timely.

The States' motion to intervene meets each of the tests by which courts typically assess timeliness. *First*, the States quickly sought intervention after it became apparent that the Federal

Government would abandon its defense of Title 42, and did so well within the time for the parties to appeal. The Supreme Court's decisions in *United Airlines* and *Cameron* therefore compel a conclusion that the States' motion is timely here. *Second*, the parties were not prejudiced by the minimal time it took the States to seek intervention.

1. Petitioners Timely Sought To Intervene After The Federal Government Stopped Vigorously Defending The Title 42 Orders

Whether a putative intervenor has filed a timely motion under Rule 24(a) "is to be determined from all the circumstances." *NAACP v. New York*, 413 U.S. 345, 366 (1973). The proposition that the States should have sought to intervene *before* the United States abandoned defense of Title 42 contravenes the Supreme Court's decision in *United Airlines*. That decision recognizes two benchmarks to judge timeliness—both of which confirm that intervention was timely here.

The first *United Airline* benchmark focuses on the "critical fact" of how quickly would-be intervenors acted once it became clear that existing parties "would no longer" protect their interests. *United Airlines,* 432 U.S. at 394. In that case, a member of a putative class (Liane McDonald) learned that class counsel "plaintiffs did not now intend to file an appeal challenging the District Court's denial of class certification[.]" *Id.* at 390. McDonald therefore filed a motion to intervene shortly "after the District Court's final judgment." *Id.* In doing so, "she promptly moved to intervene" as "soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives." *Id*. at 390, 394.

The States' motion is timely under this standard. Once it became apparent that Federal Defendants intended to acquiesce in a termination of Title 42 Orders beginning on December 21, the States moved to intervene within a mere *six days—i.e.*, even faster than in *United Airlines*. This *United Airlines* factor thus all-but compels a conclusion that the States' motion is timely.

So too does the other *United Airlines* benchmark, which considers whether a party "filed [its] motion *within the time period in which the named plaintiffs could have taken an appeal*," and if so, "the [party's] motion to intervene *was timely filed*[.]" *United Airlines,* 432 U.S. at 395-96 (emphasis added); *see also U.S. ex rel. McGough v. Covington Techs. Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992) ("The 'general rule [is] that a post-judgment motion to intervene is timely if filed within the time allowed for the filing of an appeal.'").

Here, the States filed their motion to intervene one day *before* this Court entered final judgment on November 22. *See* Doc. 170. The States thus not only intervened "within the time period in which the named plaintiffs could have taken an appeal," *United Airlines*, 432 U.S. at 395-96, they actually moved so quickly that the appeal deadline clock had not even begun running.

United Airlines is thus entirely dispositive of the timeliness inquiry. But the Federal Government does not even mention *United Airlines* once, even though the States prominently cited it (at 9 & 10). And the Plaintiffs mention it only in passing (at 18), without meaningfully addressing how it makes clear that timeliness is measured by when it becomes clear that existing parties "would no longer" protect their interests. *United Airlines,* 432 U.S. at 394—which here was on November 15 (*see* Doc. 166), when Federal Defendants abandoned their vigorous defense of Title 42 orders and instead acquiesced in termination beginning on December 21.

If the Existing Parties had any way of answering or distinguishing *United Airlines*, they would have provided it. They don't, and instead silently ask this Court to violate it.

The Federal Government claims that the States' motion is untimely because the States should "ha[ve] filed their motion sooner, either immediately after CDC issued its April 1 Termination Order or, at a minimum, after the government notified Proposed Intervenors of Plaintiffs' motion for partial summary judgment in mid-August." (Doc. 174.) But at that point in

time, the States had no reason to believe that the Federal Government would stop defending itself in this action. Indeed, if the States had tried to intervene then, both Plaintiffs and Defendants undoubtedly would have opposed, arguing that the Federal Government adequately represented the States' interests, given the Federal Government's opposition to summary judgment. Nor do the parties even bother to argue otherwise or deny the Catch-22 inherent in their arguments.

Indeed, the Federal Government's prior actions in this case gave every indication that it intended to continue defending this case. When this Court issued an adverse ruling against the Federal Government on September 16, 2021 and granted the Plaintiffs' motion for preliminary injunction (Doc. 122 and 123), the Federal Government filed its notice of appeal the very next day. (Doc. 124.) And they then vigorously sought, and successfully obtained, both a stay pending appeal and reversal on the merits. *Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 726 (D.C. Cir. 2022). The States were thus not on notice of their need to intervene until November 15, and intervened a mere six days later.

Furthermore, the State of Texas *did* attempt to intervene on the early timetable that the Plaintiffs and Defendants now advocate for (in hindsight). *Huisha Huisha v. Mayorkas*, 21-cv-5200, Doc. No. 1917572 (D.C. Cir. Oct. 11, 2021). There, both Existing parties argued that the Federal Government adequately represented Texas's interests. *See Huisha Huisha*, Docs. 1918396 & 1918415 (filed Oct. 15, 2021). And they *prevailed* on their opposition. Existing Parties' arguments that the States could have intervened earlier are thus likely barred by judicial estoppel. *See*, *e.g.*, *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("[J]udicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" (citation omitted)). And even if not, those were party admissions that intervening earlier would not have been possible, given their *successful*

opposition to earlier intervention.

The States thus had no reason to continue seeking intervention in a case in which their intervention had already been denied without a material change in circumstance. Such a change only occurred here on November 15, when Defendants refused to seek a stay for any purpose other than acquiescing in defeat and termination of Title 42 orders.

Additionally, if this Court were to find that the States should have intervened earlier—when the United States was still defending Title 42—it would invite inefficiencies, and essentially require would-be intervenors to seek intervention both early and often. This would not only be a substantial waste of resources for courts and parties, but it would likely also be barred by Rule 24 itself, which requires that an intervenor demonstrate that its interests are not adequately protected. *See* Fed. R. Civ. P. 24(a)(2). Even so, interested parties would likely feel compelled to move to intervene in a host of cases so that they cannot be later accused of intervening too late. If courts denied those motions, interested parties would then need to keep filing *seriatim* motions to intervene upon any new hint of inadequate representation. And they would do so until intervention was granted or the case reached final conclusion.

Because the States "sought to intervene 'as soon as it became clear' that [their] interests 'would no longer be protected' by the parties in the case," they thus satisfied the "most important circumstance relating to timeliness." *Cameron*, 142 S. Ct. at 1012. In *Cameron*, the Sixth Circuit denied intervention by Kentucky's attorney general as untimely, but the Supreme Court reversed by a lopsided 8-1 majority. There, as here, "the attorney general sought to intervene [as the State] 'as soon as it became clear' that the [State's] interests 'would no longer be protected' by the parties in the case." 142 S. Ct. at 1012. There, again as here, the motion to intervene was filed within the relevant deadline to seek further appellate review. *Id.* And further, as here, "[t]he attorney general's

need to seek intervention did not arise until [the defendant] ceased defending the ... law, and the timeliness of his motion should be assessed in relation to that point in time." *Id. Cameron* thus further compels a conclusion that the States' motion to intervene here is timely.

Furthermore, as Justice Kagan emphasized in *Cameron,* a court considering a government official's motion to intervene should take account of "real-world" facts, including the shifting sands of politics. *Cameron,* 142 S. Ct. at 1018 (Kagan, J., concurring). Here, as in *Cameron,* the State's motion to intervene was in "response to a major shift in the litigation," *id.* at 1018: the Federal Government's decision not to seek a stay pending appeal, coupled with its refusal to say whether it would seek further review. In light of those real-world facts, the States have a strong reason for intervening. To paraphrase Justice Kagan in *Cameron,* the States "belong[] in the suit, absent some good cause to exclude [them]." *Id.*

The Supreme Court's decisions in *United Airlines* and *Cameron* thus require a determination that the States' motion to interene is timely.

2. Existing Parties Will Not Suffer Any Cognizable Prejudice From The States' Intervention

More generally, this motion presents no prejudice to the other parties. *See Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994) (holding that the "requirement of timeliness is ... a guard against prejudicing the original parties"). Intervention here only ensures that this case and others will be resolved on *the merits*, rather than through abdication. Denying the parties a potential opportunity to obtain their desired ends through the contrivance of surrender inflicts no cognizable prejudice. Instead, the parties' positions will be "essentially the same as it would have been" had the States intervened earlier in the proceedings. *U.S. ex rel McGough,* 967 F.2d at 1395.

The only prejudice Plaintiffs and Defendants even attempt to claim is "rushed briefing" (Doc. 174 at 17) and "delay of the end of the Title 42 policy" because the States intend to seek a

stay pending appeal. (Doc. 175 at 1, 21.). But they offer no citation for the proposition that an abbreviated briefing deadline constitutes actual prejudice. And the same type of briefing would have occurred, and the same arguments would have been made, if the States had intervened earlier.

Furthermore, even if the States had intervened earlier, they would still have sought a stay pending appeal, and thus potentially delayed the end of the Title 42. Earlier intervention by the States would not have changed this. And a supposed delay in finally resolving the case—due to the time needed to pursue further appellate review—does not constitute a cognizable prejudice. To the contrary, intervention is often *granted* precisely to *enable* a full appellate review. *E.g.*, *Day v. Apoliona*, 505 F.3d 963, 965-66 (9th Cir. 2007) (recognizing lack of prejudice from intervention after panel opinion was issued and stating "the practical result of [the State's] intervention—the filing of a petition for rehearing—would have occurred whenever the state joined the proceedings" and noting that allowing intervention "will ensure that our determination of an already existing issue is not insulated from review simply due to the posture of the parties.").

Finally, as already discussed above, the States are prejudiced by not being permitted to intervene, in three ways: procedurally in this litigation, administratively in future rulemakings, and fiscally through the costs the States must bear if Title 42 is rescinded.

C. The States' Interests Are Not Adequately Represented.

The States' interests will not be adequately represented by the Existing Parties. Even when "there may be a partial congruence of interests, that does not guarantee the adequacy of representation." *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 737 (D.C. Cir. 2003). This is especially so when there are "divergent state and federal interests at issue." *Accrediting Council for Indep. Colleges & Sch. v. Devos*, No. CV-16-2448, 2017 WL 11579470, at *5 (D.D.C. Aug. 31, 2017). And here, because there is not even a "partial congruence," the Existing Parties will not adequately represent the States' interests.

An intervenor's burden to show that its interests will not be adequately represented by existing parties, Fed. R. Civ. P. 24(a)(2), is "minimal" and "not onerous." *Fund For Animals, Inc.*, 322 F.3d at 735 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972) and *Dimond v. District of Columbia,* 792 F.2d 179, 192 (D.C.Cir.1986)). Thus, an intervenor need only show "that representation of [its] interest '*may* be' inadequate. *Id.* (quoting *Trbovich*, 404 U.S. at 538 n.10) (emphasis added). The States easily satisfy this forgiving standard here, where Plaintiffs' position has always been directly opposed to the States' interests and where the Federal Government has now unambiguously abdicated any further defense of Title 42, and indeed affirmatively acquiesced in termination effective December 21. The States' protectable interests in the continued application of Title 42 are thus not adequately represented by the Existing Parties.

Plaintiffs argue (at 21-23) that because the States agreed that the Federal Government would adequately represent the interests of a proposed intervenor in the *Louisiana v. CDC* case, that this somehow forecloses the States' ability to argue that the Federal Government will not represent the States' interests here. In Plaintiffs' telling, because the Federal Government did not seek a stay pending appeal in *Louisiana*, and because the States supported the Federal Government's decision there, the States cannot now argue here that the Federal Government's failure to seek a stay pending appeal in this case is inadequate representation. That argument is illogical for multiple reasons.

First, the States' interests here are different than the interests of the intervenors in *Louisiana*. The consequences of the Federal Government's decision not to seek a stay pending appeal in that case is not in any way comparable to the consequences here, where the Federal Government's own assessments predict that illegal border crossings could triple immediately and continue at that elevated level for a sustained period of time.

Second, there is a fundamental factual difference here as compared to *Louisiana*. In that case, the Federal Government filed a notice of appeal on the same day that the district court issued its preliminary injunction in that case. *See*, *Louisiana v. CDC*, No. 22-CV-00885, ECF Nos. 90 and 91 (W.D. La. May 20, 2022) (memorandum ruling and order granting preliminary injunction) and *Id.* ECF No. 92 (W.D. La. May 20, 2022) (Federal Government notice of appeal, filed the same day). Furthermore, the Federal Government committed to "vigorously defend[] the [Title 42] termination order" at issue in that case. *CDC v. Louisiana*, No. 22-30303, Doc. No. 00516355391 at 12 (5th Cir. Jun. 13, 2022) (Federal Government's Opposition to Proposed Intervenor's Motion for a Stay Pending Appeal). No such commitment is remotely discernable here.

On the other hand, in this case, the Federal Government has been coy about its intent to appeal. But even if it *were* to appeal, this would do nothing to avert the impending catastrophe at the border, since the Federal Government has made clear that it will not seek a stay pending appeal.

Moreover, the purported indecision that Federal Defendants portrayed to this Court about whether it intends to appeal appears to be nothing more than performance art. In a filing in the *Louisiana* case, the Federal Government tipped its hand and made clear it has no intent to appeal here. Rather, it stated explicitly that it intends to let Title 42 definitively expire, and that it *will expire* on December 21 without *any* disclosed contingencies, such as an appeal.

Specifically, the Federal Government made the following representations to the Western District of Louisiana: "Once the five-week stay expires and the *Huisha-Huisha* order becomes effective at midnight on December 21, 2022, CDC's Title 42 orders *will be vacated*, and there will thus be *no legal authority for the government to continue to enforce the Title 42 policy*. Accordingly, as of 12 A.M. EST on December 21, DHS will begin processing all noncitizens entering the United States pursuant to Title 8." *Louisiana,* No. 22-CV-00885, ECF No. 164

(emphasis added) (Notice of Decision Vacating Title 42 Orders). In doing so, Defendants did not even *hint* at the possibility of appeal, and instead cast the termination of Title 42 being effective on December 21 as an absolute certainty without any disclosed contingencies (such as them appealing).

It thus rings hollow for the federal government to claim that the Sates merely have a "difference of opinion" about "litigation strategy." (at 17-18 (citation omitted)). Complete abdication of defense of a case is not a "litigation strategy." Rather, it is a paradigmatic example of the kind of inadequate representation that Rule 24 is designed to address.

II. PERMISSIVE INTERVENTION IS WARRANTED.

As set forth in the States' Motion, all of the requirements for permissive intervention are satisfied here. Existing Parties' contrary arguments merely recycle their timeliness and standing/protectable interest arguments, which fail for the reasons set forth above.

A favorable exercise of discretion is also warranted here. Existing Parties never engage with the States' fundamental argument on permissive intervention: *i.e.*, that "the important issues in this case should be decided on the merits, rather than through surrender." Mot. at 17.

At its base, Federal Defendants are intentionally engaging in conduct that they *know*—and have elsewhere conceded—*will* impose costs on the States. See *Louisiana*, 2022 WL 1604901, at *6 (explaining that termination of Title 42 "will increase the state's costs for healthcare reimbursements. *Defendants did not dispute the facts supporting this finding.*" (emphasis added)). Defendants merely (and wrongly) deny the cognizability of those injuries, not their existence. But they nonetheless contend that the States should be powerless to challenge whether those injuries—which are concededly and knowingly being forced upon them—are lawful.

That fails first because the States are entitled to intervene as of right. But even if that were

not the case, this Court should grant permissive intervention so that the States can challenge the legality of the costs that Federal Respondents admit will be imposed on the States.

Those injuries are particularly problematic because they are being inflicted through collusive surrender, rather than through decision on the merits through appeal. As set forth above, Federal Defendants are attempting to exploit their litigation loss to achieve objectives that they could not obtain through rulemaking, given their persistent unwillingness to conduct the notice-and-comment rulemaking that the APA demands.

Indeed, Defendants previously recognized that the issues presented here were sufficiently important that they not only warranted taking an appeal, but also seeking (and obtaining) an emergency stay pending appeal. *See Huisha-Huisha*, 27 F.4th at 726. Defendants' prior appellate conduct thus underscores why this phase of the case should be subject to appellate review as well, and thereby militates in favor of granting permissive intervention to ensure that occurs.

A favorable exercise of discretion is thus warranted to permit the States to challenge the legality of costs being imposed upon them and to prevent collusive surrender from trumping the legal merits as the basis for final resolution of this case.

CONCLUSION

For the foregoing reasons, the States' motion to intervene should be granted.

Dated: December 2, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 2022, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing, which will send notice of such filing to all registered CM/ECF users.

s/ Drew C. Ensign
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NANCY GIMENA HUISHA-HUISHA, et al.,

Plaintiffs,

v.

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

Defendants.

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

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

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

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

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

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

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

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

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

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

BACKGROUND

I. CDC'S TITLE 42 AUTHORITY TO RESTRICT ENTRY

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

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

II. CDC'S INVOCATION OF TITLE 42 AUTHORITY

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

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

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

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

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

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

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

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

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

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

IV. CDC'S TWO TERMINATION ORDERS

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

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

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

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

V. THIS LITIGATION

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

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

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

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

STANDARD OF REVIEW

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Importantly, in evaluating CDC's August 2021 order, the Court considers only the material that was before the CDC Director *at the time* of that order, not the facts and circumstances as they exist today, because "the focal point for judicial review" is the administrative record that was before the agency at the time of the decision. *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam); *see also Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) ("[I]n reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record."); *accord IMS, P.C. v. Alvarez*, 129 F.3d 618, 623–24 (D.C. Cir. 1997). "If a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision." *Water O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. CDC Considered Available Alternatives Before Issuing the August Order

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated: August 31, 2022

Respectfully submitted,

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

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

NOTICE OF DECISION VACATING TITLE 42 ORDERS

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

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

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

Dated: November 16, 2022

Respectfully submitted,

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Attorneys for Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiffs,

v.

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

Defendants.

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

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

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

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

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

Dated: December 7, 2022

Respectfully submitted,

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RE: Huisha-Huisha v. Gaynor: Federal Defendants' Appeal

Robinson, John J. (CIV) <John.J.Robinson@usdoj.gov>

Thu 12/8/2022 2:24 PM

To:Ensign, Drew <Drew.Ensign@azag.gov>; Lin, Jean (CIV) <Jean.Lin@usdoj.gov>; Tepe, Sean (USADC) <Sean.Tepe@usdoj.gov>;

Cc:St. John, Joseph <StJohnJ@ag.louisiana.gov>; Rogers, James <James.Rogers@azag.gov>; Murrill, Elizabeth <MurrillE@ag.louisiana.gov>;

Drew,

Thank you for your email. The government's November 29 opposition to the States' motion to intervene noted that "the government did not seek a stay pending appeal," explaining that it "would have been challenging" to show irreparable harm to the government "because CDC already determined in April 2022 that the exercise of Title 42 authority is no longer necessary in the interest of public health." ECF No. 174 at 15-16. We can confirm that the government does not intend to change course at this time.

Best,
John

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From: Ensign, Drew <Drew.Ensign@azag.gov>
Sent: Wednesday, December 7, 2022 9:21 PM
To: Lin, Jean (CIV) <Jean.Lin@usdoj.gov>; Robinson, John J. (CIV) <John.J.Robinson@usdoj.gov>; Tepe, Sean (USADC) <STepe@usa.doj.gov>
Cc: St. John, Joseph <StJohnJ@ag.louisiana.gov>; Rogers, James <James.Rogers@azag.gov>; Murrill, Elizabeth <MurrillE@ag.louisiana.gov>
Subject: [EXTERNAL] Huisha-Huisha v. Gaynor: Federal Defendants' Appeal

Hi John, Jean, and Sean,

We saw your notice and notice of appeal today, and believe that appeal could be a positive step towards addressing the States' concerns. Or it could alternatively be an attempt to ensure that the harms to the States that a termination of Title 42 Orders would concededly occasion come to pass with near-absolute certainty. Hence this email.

We noticed that although your notice indicated that Federal Defendants intended to seek to hold their appeal in abeyance, the notice was conspicuously silent as to whether Defendants would be seeking a stay

pending appeal or instead intended for Title 42 to be terminated on December 21 as previously planned (and collusively arranged).

You undoubtedly appreciate our concerns here. Absent a stay pending appeal, your appeal combined with seeking abeyance would be a declaration that the Federal Defendants:

(1) Believe that the district court's decision is legally erroneous and thus any harms inflicted by it are legally unwarranted and unjustifiable;

(2) Believe that the decision should be reversed on appeal when that appellate review occurs;

(3) Admit that termination of Title 42 will cause the States harms as a factual matter, which Defendants have conceded elsewhere, *Louisiana v. CDC*, __ F.Supp.3d __, 2022 WL 1604901, at *6 (W.D. La. May 20, 2022) (explaining that termination of Title 42 "will increase the state's costs for healthcare reimbursements. *Defendants did not dispute the facts supporting this finding*." (emphasis added));

(4) Contend nonetheless that appellate review should be postponed indefinitely, and the resulting harms to the States should instead be allowed to occur even though Federal Defendants believe that the legal reasoning that is the cause of those harms is legally erroneous and should be reversed.

In a nutshell: Federal Defendants know, and have conceded elsewhere, that termination of Title 42 will cause the States harms. And Federal Defendants own notice here contends that the district court's judgment rests on legal error. *See* Doc. 179 at 1 ("The government respectfully disagrees with this Court's decision and would argue on appeal, as it has argued in this Court, that CDC's Title 42 Orders were lawful, that § 71.40 is valid, and that this Court erred in vacating those agency actions.").

In this posture, Federal Defendants' refusal to seek a stay pending appeal would not even conceivably constitute adequate representation of the States' interests and would all-but compel a conclusion that intervention was warranted. Indeed, it would essentially be an attempt to inflict illegal harms upon the States, even though Federal Defendants believe such harms are legally indefensible. You would be contending that such harms should be avoided when appellate review is exercised--and simultaneously that such appellate review should never be exercised.

A refusal to seek a stay pending appeal further would require that the States seek a stay on their own. If you were to oppose such a request, it would further lay bare just how inadequate your representation of the States' interests is.

We therefore request that Federal Defendants inform us whether they intend to seek a stay pending appeal **by 6pm Eastern tomorrow (Thursday)**. Along those lines, we respectfully request that you forward this email to whoever in DOJ Civil Appeals or OSG is working on this matter.

If Federal Defendants do seek a stay pending appeal, we will almost certainly file a brief in support of such a request and would be happy to coordinate on what it would be helpful for us to say in that brief.

Please also let us know if you have any questions or would like to discuss any of this by phone.

Sincerely,
Drew

Drew C. Ensign
Chief Counsel, Civil Appeals and Federalism and Deputy Solicitor General

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiffs,

v.

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

Defendants.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NANCY GIMENA HUISHA-HUISHA, on behalf of herself and others similarly situated, *et al.*, Plaintiffs, *v.* ALEJANDRO MAYORKAS, Secretary of Homeland Security, *et al.*, Defendants.	Civ. A. No. 21-100 (EGS)

STATE OF MONTANA'S UNOPPOSED MOTION FOR JOINDER

Pursuant to Federal Rule of Civil Procedure 20, the State of Montana hereby moves to be joined as a party to the Motion for Intervene, Dkt. 168, filed by the States of Arizona, Louisiana, Alabama, Alaska, Kansas, Kentucky, Mississippi, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Virginia, and West Virginia, and Wyoming because the State of Montana also wishes to intervene in this matter.

Plaintiffs, Defendants, and Proposed Intervenors do not oppose this motion.

In support of this Motion, the State of Montana submits the accompanying Memorandum of Law and [Proposed] Order.

MEMORANDUM

Pursuant to Federal Rule of Civil Procedure 20, the State of Montana respectfully request that this Court join Montana to the Motion to Intervene in this matter filed by the States of Arizona, Louisiana, Alabama, Alaska, Kansas, Kentucky, Mississippi, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Virginia, and West Virginia, and Wyoming (hereinafter "Intervenor States"). *See* Dkt. 168. Montana is a co-plaintiff with many of the Intervenor States in litigation where the States successfully obtained injunctive relief against Defendants' attempts to rescind their Title 42 Orders. *See Louisiana v. Centers for Disease Control & Prevention*, 2022 WL 1604901, at *23 (W.D. La. May 20, 2022). Invalidation of the Title 42 Orders will directly harm Montana in the same way it harms the Intervenor States. For that reason, the Court should grant Montana's Motion for Joinder and permit it to be a part of the Intervenor States' Motion to Intervene.

Rule 20 sets forth guidelines for permissive joinder, providing that parties may join an action if (1) their claims "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences" and (2) "any question of law or fact common to all plaintiffs will arise in the action." Fed. R. Civ. P. 20. Permissive Joinder is "ordinarily allowed … so long as both prongs of the test under Rule 20 are met." *Council on Am.-Islamic Rels. Action Network, Inc. v. Gaubatz*, 793 F. Supp. 2d 311, 323 (D.D.C. 2011). "Attempts to join a party who satisfies the test for permissive joinder should generally not be denied in the absence of undue prejudice, expense, or delay." *Id.*

The State of Montana easily meets both requirements for Rule 20 permissive joinder. Montana's claims and interests in this matter are identical to those of the Intervenor States. The Intervenor States seek to intervene to offer a defense of Title 42 policy so that its validity can be resolved on the merits. Dkt. 168 at 12. As laid out in the Motion to Intervene, the Intervenor States obtained injunctive relief against recission of and exceptions to Title 42. *See* Dkt. 168 at 4–6. Montana is a co-plaintiff with many of the Intervenor States in *Louisiana v. Centers for Disease Control & Prevention,* 2022 WL 1604901 (W.D. La. 2022). Montana's interests in this litigation are thus identical to those identified in the Intervenor States' Motion to Intervene. *See* Dkt. 168 at 10–16. Montana's claims arise out of the exact same transaction, occurrence, or series of transactions or occurrences as the Motion to Intervene filed on November 21, 2022, and involve identical questions of law and fact. Joinder will also not cause any undue prejudice, expense, or delay because Montana will simply join the briefing of the Intervenor States at set forth by this Court's November 22, 2022, order.

For these reasons, the Court should grant Montana's motion for joinder.

Respectfully submitted,

DATED: November 25, 2022

AUSTIN KNUDSEN
Attorney General of Montana

CHRISTIAN B. CORRIGAN
Solicitor General

/s/ Kathleen L. Smithgall
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NANCY GIMENA HUISHA-HUISHA, on behalf of herself and others similarly situated, *et al.*, Plaintiffs, *v.* ALEJANDRO MAYORKAS, Secretary of Homeland Security, *et al.*, Defendants.	Hon. Emmet G. Sullivan Civ. A. No. 21-100 (EGS)

ORDER

The Matter came before the Court on _____, 2022 on the unopposed motion of the State of Montana for joinder to the Motion to Intervene under Federal Rule of Procedure 20. The Court being fully advised in the premises, IT IS HEREBY ORDERED that the State of Montana's Motion for Joinder is GRANTED.

IT IS SO ORDERED.

ENTERED:
By the Court:

Date:_____

_____
Hon. Emmet G. Sullivan
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November, 2022, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing, which will send notice of such filing to all registered CM/ECF users.

/s/ Kathleen L. Smithgall
Attorney for the State of Montana

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NANCY GIMENA HUISHA-HUISHA, on behalf of herself and others similarly situated, *et al.*, Plaintiffs, *v.* ALEJANDRO MAYORKAS, Secretary of Homeland Security, *et al.*, Defendants.	Civ. A. No. 21-100 (EGS)

UNOPPOSED RENEWED MOTION FOR JOINDER
BY THE STATES OF UTAH, MISSOURI, AND TENNESSEE

On November 25, 2022, the States of Utah, Missouri, and Tennessee filed a joinder (Dkt. 173) of the Motion to Intervene by the States of Arizona et al. (Dkt. 168). On November 29, 2022, the Court denied the motion for failure to comply with the duty to confer, LCvR 7(m), and failure to attach a proposed order, LCvR 7(c). The States of Utah, Missouri, and Tennessee respectfully renew that motion to join.

Plaintiffs, defendants, and proposed intervenors do not oppose this Motion.

In support of this Motion, the States of Utah, Missouri, Tennessee submit the accompanying Memorandum of Law and [Proposed] Order.

MEMORANDUM

Pursuant to Federal Rule of Civil Procedure 20, the States of Utah, Missouri, and Tennessee respectfully request that this Court join Utah, Missouri, and Tennessee to the Motion to Intervene in this matter filed by the States of Arizona, Louisiana, Alabama, Alaska, Kansas, Kentucky, Mississippi, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Virginia, and West Virginia, and Wyoming (hereinafter "Intervenor States"). *See* Dkt. 168.

Rule 20 sets forth guidelines for permissive joinder, providing that parties may join an action if (1) their claims "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences" and (2) "any question of law or fact common to all plaintiffs will arise in the action." Fed. R. Civ. P. 20. Permissive Joinder is "ordinarily allowed … so long as both prongs of the test under Rule 20 are met." *Council on Am.-Islamic Rels. Action Network, Inc. v. Gaubatz*, 793 F. Supp. 2d 311, 323 (D.D.C. 2011). "Attempts to join a party who satisfies the test for permissive joinder should generally not be denied in the absence of undue prejudice, expense, or delay." *Id*.

The States of Utah, Missouri, and Tennessee meet both requirements for Rule 20 permissive joinder. Their claims and interests in this matter are identical to those of the Intervenor States. The Intervenor States seek to intervene to offer a defense of Title 42 policy so that its validity can be resolved on the merits. Dkt. 168 at 12. As laid out in the Motion to Intervene, the Intervenor States obtained injunctive relief against recission of and exceptions to Title 42. *See* Dkt. 168 at 4–6. Utah, Missouri, and Tennessee are co-plaintiffs with many of the Intervenor States in *Louisiana v. Centers for Disease Control & Prevention*, 2022 WL 1604901 (W.D. La. 2022). Utah, Missouri, and Tennessee's interests in this litigation are thus identical to those identified in the Intervenor States' Motion to Intervene. *See* Dkt. 168 at 10–16. Their claims arise out of the exact

same transaction, occurrence, or series of transactions or occurrences as the Motion to Intervene filed on November 21, 2022, and involve identical questions of law and fact. Joinder will also not cause any undue prejudice, expense, or delay because Utah, Missouri, and Tennessee will simply join the briefing of the Intervenor States at set forth by this Court's November 22, 2022, order.

For these reasons, the Court should grant Utah, Missouri, and Tennessee's motion for joinder.

Respectfully submitted,

DATED: November 29, 2022

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/s/ Melissa A. Holyoak
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NANCY GIMENA HUISHA-HUISHA, on behalf of herself and others similarly situated, *et al.*, Plaintiffs, *v.* ALEJANDRO MAYORKAS, Secretary of Homeland Security, *et al.*, Defendants.	Civ. A. No. 21-100 (EGS)

ORDER

The Matter came before the Court on _____, 2022 on the unopposed renewed motion of the States of Utah, Missouri, and Tennessee for joinder to the Motion to Intervene (Dkt. 158) under Federal Rule of Procedure 20. The Court being fully advised in the premises, IT IS HEREBY ORDERED that the States of Utah, Missouri, and Tennessee's Motion for Joinder is GRANTED.

IT IS SO ORDERED.

ENTERED:

By the Court:

Date:_____

_____
Hon. Emmet G. Sullivan
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November, 2022, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing, which will send notice of such filing to all registered CM/ECF users.

/s/ Melissa A. Holyoak
MELISSA A. HOLYOAK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiffs,

v.

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

Defendants.

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

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Defendants hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from this Court's November 15, 2022 Memorandum Opinion and Order (ECF Nos. 164 & 165) and November 22, 2022 Final Judgment (ECF No. 170).

Dated: December 7, 2022

Respectfully submitted,

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United States Attorney

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Counsel for Defendants

DOCKET PROCEEDINGS (320)

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

		shall file a supplementary memorandum by no later than December 12, 2022. The parties shall file a response, if any, by no later than December 16, 2022. Signed by Judge Emmet G. Sullivan on 12/8/2022. (lcegs1) (Entered: 12/08/2022)	
	12/08/2022	Set/Reset Deadlines: Parties Proposed Intervenors Supplemental Memorandum due by 12/12/2022. Parties Response, If Any, due by 12/16/2022. (mac) (Entered: 12/08/2022)	Send Runner to Court
180	12/07/2022	NOTICE OF APPEAL TO DC CIRCUIT COURT as to 165 Memorandum & Opinion, 164 Order on Motion for Partial Summary Judgment, 170 Order on Motion for Entry of Final Judgment, Order on Motion to Stay by CHRIS MAGNUS, TAE D. JOHNSON, PETE FLORES, ROCHELLE P. WALENSKY, ALEJANDRO N. MAYORKAS, XAVIER BECERRA, RAUL L. ORTIZ. Fee Status: No Fee Paid. Parties have been notified. (Robinson, John) (Entered: 12/07/2022)	View Add to request
179	12/07/2022	NOTICE Regarding Decision to Appeal the Court's November 15, 2022 Order and November 22, 2022 Final Judgment by XAVIER BECERRA, PETE FLORES, TAE D. JOHNSON, CHRIS MAGNUS, ALEJANDRO N. MAYORKAS, RAUL L. ORTIZ (Robinson, John) (Entered: 12/07/2022)	View Add to request
178	12/02/2022	NOTICE Regarding Timing of Decision Whether to Appeal by XAVIER BECERRA, PETE FLORES, TAE D. JOHNSON, CHRIS MAGNUS, ALEJANDRO N. MAYORKAS, RAUL L. ORTIZ, ROCHELLE P. WALENSKY (Robinson, John) (Entered: 12/02/2022)	View Add to request
177	12/02/2022	REPLY to opposition to motion re 168 MOTION to Intervene filed by STATE OF ALABAMA, STATE OF ALASKA, STATE OF ARIZONA, STATE OF KANSAS, STATE OF KENTUCKY, STATE OF LOUISIANA, STATE	View Add to request

		OF MISSISSIPPI, STATE OF MISSOURI, STATE OF MONTANA, STATE OF NEBRASKA, STATE OF OHIO, STATE OF OKLAHOMA, STATE OF SOUTH CAROLINA, STATE OF TENNESSEE, STATE OF TEXAS, STATE OF UTAH, STATE OF VIRGINIA, STATE OF WEST VIRGINIA, STATE OF WYOMING. (Ensign, Drew) (Entered: 12/02/2022)	
	11/30/2022	MINUTE ORDER granting 176 Motion for Joinder. Signed by Judge Emmet G. Sullivan on 11/30/2022. (lcegs1) (Entered: 11/30/2022)	Send Runner to Court
176	11/29/2022	Unopposed MOTION for Joinder re 168 MOTION to Intervene by STATE OF MISSOURI, STATE OF TENNESSEE, STATE OF UTAH. (Holyoak, Melissa) (Entered: 11/29/2022)	View Add to request
175	11/29/2022	Memorandum in opposition to re 168 Motion to Intervene,, filed by ALL PLAINTIFFS. (Attachments: # 1 Text of Proposed Order)(Gelernt, Lee) (Entered: 11/29/2022)	View Add to request
174	11/29/2022	Memorandum in opposition to re 168 Motion to Intervene,, filed by XAVIER BECERRA, PETE FLORES, TAE D. JOHNSON, CHRIS MAGNUS, ALEJANDRO N. MAYORKAS, RAUL L. ORTIZ, ROCHELLE P. WALENSKY. (Attachments: # 1 Text of Proposed Order) (Robinson, John) (Entered: 11/29/2022)	View Add to request
	11/29/2022	MINUTE ORDER granting 171 Unopposed Motion for Joinder. Signed by Judge Emmet G. Sullivan on 11/29/2022. (lcegs1) (Entered: 11/29/2022)	Send Runner to Court
	11/29/2022	MINUTE ORDER denying 173 Motion for Joinder. Movant has failed to comply with the duty to confer, see LCvR 7(m); and has failed to attach a proposed order, see LCvR 7(c). Signed by Judge Emmet G. Sullivan on 11/29/2022. (lcegs1) (Entered: 11/29/2022)	Send Runner to Court
173	11/25/2022	MOTION for Joinder re 168 MOTION to Intervene by the States of Utah, Missouri, and Tennessee by STATE OF	View Add to request

UTAH. (Holyoak, Melissa)
(Entered: 11/25/2022)

172	11/25/2022	NOTICE of Appearance by Melissa A. Holyoak on behalf of STATE OF UTAH (Holyoak, Melissa) (Entered: 11/25/2022)	View Add to request
171	11/25/2022	Unopposed MOTION for Joinder re 168 MOTION to Intervene by STATE OF MONTANA. (Smithgall, Kathleen) (Entered: 11/25/2022)	View Add to request
170	11/22/2022	ORDER granting 167 Motion for Entry of Final Judgment; granting 167 Motion to Stay. Signed by Judge Emmet G. Sullivan on 11/22/2022. (lcegs1) (Entered: 11/22/2022)	View Add to request
	11/22/2022	MINUTE ORDER granting 169 Proposed Intervenor States' Emergency Motion for Expedited Briefing and Consideration of their Motion to Intervene and for a Stay Pending Appeal. Plaintiffs and Defendants shall respond by no later than November 29, 2022 at 8:00 pm EST. Proposed Intervenors shall reply by no later than December 2, 2022 at 12:00 pm. Signed by Judge Emmet G. Sullivan on 11/22/2022. (lcegs1) (Entered: 11/22/2022)	Send Runner to Court
	11/22/2022	Set/Reset Deadlines: Joint Status Report due by 1/21/2023 (mac) (Entered: 11/22/2022)	Send Runner to Court
	11/22/2022	Set/Reset Deadlines: Plaintiffs And Defendants Response due no later than 8:00PM on 11/29/2022. Proposed Intervenors Reply due no later than 12:00PM on 12/2/2022. (mac) (Entered: 11/22/2022)	Send Runner to Court
169	11/21/2022	Unopposed MOTION to Expedite by States of Arizona, Louisiana, Alabama, Alaska, Kansas, Kentucky, Mississippi, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Virginia, West Virginia, and Wyoming. (Ensign, Drew) (Entered: 11/21/2022)	View Add to request
168	11/21/2022	MOTION to Intervene by States of Arizona, Louisiana, Alabama, Alaska, Kansas, Kentucky, Mississippi, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Virginia, West Virginia, and Wyoming. (Attachments: # 1 Affidavit St John Declaration, # 2 Exhibit St John Decl. Ex 1, # 3 Exhibit St John Decl. Ex 2, # 4 Exhibit St John Decl. Ex 3A, # 5 Exhibit St John Decl. Ex 3B, # 6 Exhibit St John Decl. Ex 3C,	View Add to request

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

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

		the motion hearing scheduled for October 11, 2022. Signed by Judge Emmet G. Sullivan on 10/5/2022. (lcegs3) (Entered: 10/05/2022)		
159	09/29/2022	RESPONSE re 157 MOTION for Leave to File Surreply Sur-surreply in Support of Plaintiffs' Motion for Partial Summary Judgment filed by ALL PLAINTIFFS. (Gelernt, Lee) (Entered: 09/29/2022)	View	Add to request
163	09/28/2022	SEALED DOCUMENT filed by ALL PLAINTIFFS re 153 MOTION for Partial Summary Judgment filed by ALL PLAINTIFFS. (This document is SEALED and only available to authorized persons.)(ztth) (Entered: 09/30/2022)	View	Add to request
162	09/28/2022	SEALED DOCUMENT filed by ALL PLAINTIFFS. re 152 Second MOTION for Preliminary Injunction filed by ALL PLAINTIFFS. (This document is SEALED and only available to authorized persons.) (ztth) (Entered: 09/30/2022)	View	Add to request
161	09/28/2022	SEALED REPLY TO OPPOSITION filed by ALL PLAINTIFFS re 153 Motion for Partial Summary Judgment (This document is SEALED and only available to authorized persons.) (ztth) (Entered: 09/30/2022)	View	Add to request
160	09/28/2022	SURREPLY to 153 MOTION for Partial Summary Judgment filed by XAVIER BECERRA, PETE FLORES, TAE D. JOHNSON, CHRIS MAGNUS, ALEJANDRO N. MAYORKAS, RAUL L. ORTIZ, ROCHELLE P. WALENSKY. (ztth) (Entered: 09/30/2022)	View	Add to request
	09/28/2022	MINUTE ORDER granting 157 Defendants' motion for leave to file surreply. It is FURTHER ORDERED that Plaintiffs shall file any brief in response to the surreply by no later than September 30, 2022. Signed by Judge Emmet G. Sullivan on 9/28/2022. (lcegs3) (Entered: 09/28/2022)	Send Runner to Court	
	09/28/2022	MINUTE ORDER granting 149 Plaintiffs' consent motion for leave to file under seal the unredacted reply in support of motion for partial summary judgment. However, given the strong presumption in favor of public access to judicial records, see, e.g., Nixon v. Warner Commc'ns, Inc., 435 U.S. 589,	Send Runner to Court	

	597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."), and the ease with which confidential and proprietary information may be redacted from documents before they are filed publicly, Plaintiffs are directed to file a redacted version of its sealed document on the public record within five business days of this Order. Plaintiffs are cautioned that redactions shall be made solely to the extent necessary to preserve the confidential or proprietary nature of the relevant information. Signed by Judge Emmet G. Sullivan on 9/28/2022. (lcegs3) (Entered: 09/28/2022)	
09/28/2022	MINUTE ORDER granting 151 Plaintiffs' consent motion for leave to file briefs under seal. However, given the strong presumption in favor of public access to judicial records, see, e.g., Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."), and the ease with which confidential and proprietary information may be redacted from documents before they are filed publicly, Plaintiffs are directed to file a redacted version of its sealed documents on the public record within five business days of this Order. Plaintiffs are cautioned that redactions shall be made solely to the extent necessary to preserve the confidential or proprietary nature of the relevant information. Signed by Judge Emmet G. Sullivan on 9/28/2022. (lcegs3) (Entered: 09/28/2022)	Send Runner to Court
09/28/2022	MINUTE ORDER granting 155 Plaintiffs' consent motion for leave to file under seal protected portions of the administrative record. Signed by Judge Emmet G. Sullivan on 9/28/2022. (lcegs3) (Entered: 09/28/2022)	Send Runner to Court
09/28/2022	Set/Reset Deadlines: Plaintiff's Response To The Surreply due	Send Runner to Court

		by 9/30/2022 (mac) (Entered: 09/28/2022)	
	09/28/2022	Set/Reset Deadlines: Redacted Version Of Sealed Documents due by 10/5/2022. (mac) (Entered: 09/28/2022)	Send Runner to Court
158	09/23/2022	NOTICE OF WITHDRAWAL OF APPEARANCE as to INTERNATIONAL REFUGEE ASSISTANCE PROJECT. Attorney Kathryn S. Austin terminated. (Austin, Kathryn) (Entered: 09/23/2022)	View Add to request
157	09/22/2022	MOTION for Leave to File Surreply by XAVIER BECERRA, PETE FLORES, TAE D. JOHNSON, CHRIS MAGNUS, ALEJANDRO N. MAYORKAS, RAUL L. ORTIZ, ROCHELLE P. WALENSKY. (Attachments: # 1 Exhibit A Proposed Surreply, # 2 Exhibit B Proposed order)(Robinson, John) (Entered: 09/22/2022)	View Add to request
156	09/20/2022	NOTICE Notice of Filing Certified Index of Amended Administrative Record by XAVIER BECERRA, PETE FLORES, TAE D. JOHNSON, CHRIS MAGNUS, ALEJANDRO N. MAYORKAS, RAUL L. ORTIZ, ROCHELLE P. WALENSKY (Tepe, Sean) (Entered: 09/20/2022)	View Add to request
155	09/20/2022	SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL filed by ALL PLAINTIFFS (This document is SEALED and only available to authorized persons.) (Attachments: # 1 Appendix of Relevant Administrative Record)(Gelernt, Lee) (Entered: 09/20/2022)	View Add to request
154	09/20/2022	JOINT APPENDIX by ALL PLAINTIFFS. (Gelernt, Lee) (Entered: 09/20/2022)	View Add to request
153	09/16/2022	MOTION for Partial Summary Judgment by ALL PLAINTIFFS. (Attachments: # 1 Memorandum in Support of Partial Summary Judgment (Re-filed and Redacted), # 2 Declaration of Ming Cheung, # 3 Text of Proposed Order)(Gelernt, Lee) (Entered: 09/16/2022)	View Add to request
152	09/16/2022	Second MOTION for Preliminary Injunction by ALL PLAINTIFFS. (Attachments: # 1 Memorandum in Support of Classwide Preliminary Injunction (Re-filed and Redacted), # 2 Declaration of Ming Cheung, #	View Add to request

		3 Text of Proposed Order)(Gelernt, Lee) (Entered: 09/16/2022)	
151	09/16/2022	SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL filed by ALL PLAINTIFFS (This document is SEALED and only available to authorized persons.) (Attachments: # 1 Memorandum in Support of Classwide Preliminary Injunction, # 2 Memorandum in Support of Summary Judgment)(Gelernt, Lee) (Entered: 09/16/2022)	View Add to request
150	09/14/2022	REPLY to opposition to motion Redacted Reply in Support of Summary Judgment re 144 Motion for Partial Summary Judgment filed by ALL PLAINTIFFS. (Gelernt, Lee) Modified on 9/16/2022 to add docket relationship (zed). (Entered: 09/14/2022)	View Add to request
149	09/14/2022	SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL filed by ALL PLAINTIFFS (This document is SEALED and only available to authorized persons.) (Attachments: # 1 Memorandum in Support Reply in Support of Summary Judgment)(Gelernt, Lee) (Entered: 09/14/2022)	View Add to request
148	09/14/2022	ENTERED IN ERROR.....SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL filed by ALL PLAINTIFFS (This document is SEALED and only available to authorized persons.) (Attachments: # 1 Memorandum in Support of Motion for Partial Summary Judgment)(Gelernt, Lee) Modified on 9/15/2022 counsel refiled at entry 149 (zjm). (Entered: 09/14/2022)	View Add to request
147	08/31/2022	Memorandum in opposition to re 144 Motion for Partial Summary Judgment filed by XAVIER BECERRA, PETE FLORES, TAE D. JOHNSON, CHRIS MAGNUS, ALEJANDRO N. MAYORKAS, RAUL L. ORTIZ, ROCHELLE P. WALENSKY. (Attachments: # 1 Text of Proposed Order)(Robinson, John) (Entered: 08/31/2022)	View Add to request
146	08/31/2022	NOTICE of Appearance by John Robinson on behalf of All Defendants (Robinson, John) (Entered: 08/31/2022)	View Add to request
145	08/31/2022	NOTICE of Appearance by Jonathan D. Kossak on behalf of	View Add to request

		All Defendants (Kossak, Jonathan) (Entered: 08/31/2022)	
	08/18/2022	Set/Reset Deadlines: Plaintiffs Motion For Partial Summary Judgment due by 08/15/2022. Defendants Response To Plaintiffs' Motion due by 08/31/2022. Plaintiffs Reply due by 09/14/2022. Plaintiffs Appendix Of The Relevant Administrative Record due by 09/20/2022. (mac) (Entered: 08/18/2022)	Send Runner to Court
144	08/15/2022	MOTION for Partial Summary Judgment by ALL PLAINTIFFS. (Attachments: # 1 Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment, # 2 Text of Proposed Order, # 3 Declaration of Ming Cheung) (Gelernt, Lee) (Entered: 08/15/2022)	View Add to request
	08/12/2022	Set/Reset Hearings: Status Conference set for 8/12/2022 at 1:30 PM in Telephonic/VTC before Judge Emmet G. Sullivan. (mac) (Entered: 08/12/2022)	Send Runner to Court
	08/12/2022	Minute Entry for proceedings held Via VTC before Judge Emmet G. Sullivan: Status Conference held on 8/12/2022. Parties Updated The Court In Regards To The Current Posture Of This Matter. Motion Hearing set for 10/11/2022 at 11:00 AM in Telephonic/VTC before Judge Emmet G. Sullivan. Order Forthcoming. (Court Reporter LISA BANKINS.) (mac) (Entered: 08/12/2022)	Send Runner to Court
	08/12/2022	MINUTE ORDER. In view of the discussion at the August 12, 2022 status conference and Plaintiffs' request to convert the 141 second motion for preliminary injunction to a motion for partial summary judgment, the Court shall consolidate the second motion for preliminary injunction with a determination on the merits with regard to the issue of whether the Title 42 policy is arbitrary and capricious under the Administrative Procedure Act. Accordingly, the second motion for preliminary injunction is hereby WITHDRAWN without prejudice. It is FURTHER ORDERED that the parties shall abide by the following schedule: (1) Plaintiffs shall file their motion	Send Runner to Court

		for partial summary judgment by no later than August 15, 2022; (2) Defendants shall file their response to Plaintiffs' motion by no later than August 31, 2022; (3) Plaintiffs shall file their reply by no later than September 14, 2022; and (4) Plaintiffs shall file the appendix of the relevant administrative record by no later than September 20, 2022 (or six days after the reply is filed, whichever is earlier). Defendants shall send record designations at least three days prior. It is FURTHER ORDERED that a motion hearing shall take place on October 11, 2022 at 11:00 a.m. via video teleconference. The parties shall contact Mr. Mark Coates, the Courtroom Deputy Clerk, for the dial-in information. It is FURTHER ORDERED that the August 1, 2022 Minute Order directing that the parties file a Joint Status Report by August 19, 2022 is VACATED. Signed by Judge Emmet G. Sullivan on 8/12/2022. (lcegs3) (Entered: 08/12/2022)	
143	08/11/2022	NOTICE of Appearance by Jean Lin on behalf of All Defendants (Lin, Jean) (Entered: 08/11/2022)	View Add to request
	08/11/2022	MINUTE ORDER. In view of 141 second motion for preliminary injunction, a status conference is hereby set for August 12, 2022 at 1:30 p.m. via video teleconference. The parties shall be prepared to discuss whether the Court should consolidate the second motion for preliminary injunction with a determination on the merits pursuant to Federal Rule of Civil Procedure 65(a)(2). See Fed. R. Civ. P. 65(a)(2) ("Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing."). The parties shall contact Mr. Mark Coates, the Courtroom Deputy Clerk, for the dial-in information. Signed by Judge Emmet G. Sullivan on 8/11/2022. (lcegs3) (Entered: 08/11/2022)	Send Runner to Court
142	08/10/2022	Joint MOTION for Briefing Schedule by XAVIER BECERRA, PETE FLORES, TAE D.	View Add to request

		JOHNSON, CHRIS MAGNUS, ALEJANDRO N. MAYORKAS, RAUL L. ORTIZ, ROCHELLE P. WALENSKY. (Attachments: # 1 Text of Proposed Order)(Tepe, Sean) (Entered: 08/10/2022)	
141	08/10/2022	Second MOTION for Preliminary Injunction by ALL PLAINTIFFS. (Attachments: # 1 Memorandum in Support, # 2 Declaration of Ming Cheung, # 3 Text of Proposed Order)(Gelernt, Lee) (Entered: 08/10/2022)	View Add to request
	08/02/2022	Set/Reset Deadlines: Joint Status Report due by 8/19/2022 (mac) (Entered: 08/02/2022)	Send Runner to Court
	08/01/2022	MINUTE ORDER. In view of 140 joint status report, the parties are directed to file another joint status report with a recommendation for further proceedings by no later than August 19, 2022. Signed by Judge Emmet G. Sullivan on 8/1/2022. (lcegs3) (Entered: 08/01/2022)	Send Runner to Court
140	07/29/2022	Joint STATUS REPORT by ALL PLAINTIFFS. (Gelernt, Lee) (Entered: 07/29/2022)	View Add to request
	07/12/2022	Set/Reset Deadlines: Joint Status Report due by 7/29/2022 (zmac) (Entered: 07/12/2022)	Send Runner to Court
	07/11/2022	MINUTE ORDER. In view of 139 joint status report, the parties are directed to file another joint status report with a recommendation for further proceedings by no later than July 29, 2022. Signed by Judge Emmet G. Sullivan on 7/11/2022. (lcegs3) (Entered: 07/11/2022)	Send Runner to Court
139	07/08/2022	Joint STATUS REPORT by ALL PLAINTIFFS. (Gelernt, Lee) (Entered: 07/08/2022)	View Add to request
138	06/17/2022	Joint STATUS REPORT by ALL PLAINTIFFS. (Gelernt, Lee) (Entered: 06/17/2022)	View Add to request
	06/17/2022	MINUTE ORDER. In view of 138 joint status report, the parties are directed to file another joint status report with a recommendation for further proceedings by no later than July 8, 2022. Signed by Judge Emmet G. Sullivan on 6/17/2022. (lcegs3) (Entered: 06/17/2022)	Send Runner to Court
	06/17/2022	Set/Reset Deadlines: Joint Status Report due by 7/8/2022. (zacr) (Entered: 06/17/2022)	Send Runner to Court
	06/01/2022	Set/Reset Deadlines: Joint Status Report due by 6/17/2022 (mac) (Entered: 06/01/2022)	Send Runner to Court

	05/31/2022	MINUTE ORDER. In view of 137 joint status report, the parties are directed to file another joint status report with a recommendation for further proceedings by no later than June 17, 2022. Signed by Judge Emmet G. Sullivan on 5/31/2022. (lcegs3) (Entered: 05/31/2022)	Send Runner to Court
137	05/27/2022	Joint STATUS REPORT by XAVIER BECERRA, PETE FLORES, TAE D. JOHNSON, CHRIS MAGNUS, ALEJANDRO J. MAYORKAS, RAUL L. ORTIZ, ROCHELLE P. WALENSKY. (Tepe, Sean) (Entered: 05/27/2022)	View Add to request
136	05/25/2022	MANDATE of USCA as to 124 Notice of Appeal to DC Circuit Court, filed by XAVIER BECERRA, ALEJANDRO J. MAYORKAS, RODNEY S. SCOTT, WILLIAM A. FERRARA, ROCHELLE P. WALENSKY, TAE D. JOHNSON, TROY MILLER ; USCA Case Number 21-5200. (Attachments: # 1 USCA Judgment)(zjf) (Entered: 05/25/2022)	View Add to request
	04/14/2022	Set/Reset Deadlines: Joint Status Report due by 5/27/2022. (zacr) (Entered: 04/14/2022)	Send Runner to Court
	04/13/2022	MINUTE ORDER. In view of 135 joint status report, the parties are directed to file a joint status report with a recommendation for further proceedings by no later than May 27, 2022. Signed by Judge Emmet G. Sullivan on 4/13/2022. (lcegs3) (Entered: 04/13/2022)	Send Runner to Court
135	04/07/2022	Joint STATUS REPORT by ALL PLAINTIFFS. (Gelernt, Lee) (Entered: 04/07/2022)	View Add to request

134	04/01/2022	NOTICE of CDC Public Health Determination and Order by XAVIER BECERRA, PETE FLORES, TAE D. JOHNSON, CHRIS MAGNUS, ALEJANDRO J. MAYORKAS, RAUL L. ORTIZ, ROCHELLE P. WALENSKY (Tepe, Sean) (Entered: 04/01/2022)	View Add to request
	03/30/2022	Set/Reset Deadlines: Joint Status Report due by 4/7/2022 (mac) (Entered: 03/30/2022)	Send Runner to Court
	03/29/2022	MINUTE ORDER. In view of 133 joint status report, the parties are directed to file another joint status report with a recommendation for further proceedings by no later than April 7, 2022. Signed by Judge Emmet G. Sullivan on 3/29/2022. (lcegs3) (Entered: 03/29/2022)	Send Runner to Court
133	03/25/2022	Joint STATUS REPORT by XAVIER BECERRA, PETE FLORES, TAE D. JOHNSON, CHRIS MAGNUS, ALEJANDRO J. MAYORKAS, RAUL L. ORTIZ, ROCHELLE P. WALENSKY. (Tepe, Sean) (Entered: 03/25/2022)	View Add to request
132	03/18/2022	NOTICE Notice of Filing Certified Index of Administrative Record by XAVIER BECERRA, PETE FLORES, TAE D. JOHNSON, CHRIS MAGNUS, ALEJANDRO J. MAYORKAS, RAUL L. ORTIZ, ROCHELLE P. WALENSKY (Tepe, Sean) (Entered: 03/18/2022)	View Add to request
	02/15/2022	Set/Reset Deadlines:, Defendants Administrative Record due by 3/18/2022. Joint Status Report due by 3/25/2022. (mac) (Entered: 02/15/2022)	Send Runner to Court
131	02/14/2022	SECOND AMENDED COMPLAINT against XAVIER BECERRA, TAE D. JOHNSON, ALEJANDRO J. MAYORKAS, ROCHELLE P. WALENSKY, CHRIS MAGNUS, PETE FLORES, RAUL L. ORTIZ filed by ALL PLAINTIFFS.(zjf) (Entered: 02/17/2022)	View Add to request
	02/14/2022	MINUTE ORDER granting 130 consent motion for leave to file second amended complaint. Plaintiffs' Second Amended Complaint is hereby deemed filed. Signed by Judge Emmet G. Sullivan on 2/14/2022. (lcegs3) (Entered: 02/14/2022)	Send Runner to Court
	02/14/2022	MINUTE ORDER. In view of 129 joint status report, Defendants	Send Runner to Court

		shall file on the docket an index of the Administrative Record and produce the Administrative Record to Plaintiffs by no later than March 18, 2022. It is FURTHER ORDERED that the parties shall file a joint status report with a recommendation for further proceedings by no later than March 25, 2022. Signed by Judge Emmet G. Sullivan on 2/14/2022. (lcegs3) (Entered: 02/14/2022)		
130	02/09/2022	Consent MOTION for Leave to File Amended Complaint filed by ALL PLAINTIFFS. (Attachments: # 1 Proposed Second Amended Complaint, # 2 Redline of Proposed Second Amended Complaint, # 3 Text of Proposed Order Proposed Order)(Gelernt, Lee) Modified on 2/10/2022 to correct docket event/ text (zjf). (Entered: 02/09/2022)	View	Add to request
129	02/09/2022	Joint STATUS REPORT by ALL PLAINTIFFS. (Gelernt, Lee) (Entered: 02/09/2022)	View	Add to request
128	02/09/2022	NOTICE of Appearance by Melissa E. Crow on behalf of All Plaintiffs (Crow, Melissa) (Entered: 02/09/2022)	View	Add to request
127	01/24/2022	NOTICE OF WITHDRAWAL OF APPEARANCE as to ALL PLAINTIFFS. Attorney Jamie L. Crook terminated. (Crook, Jamie) (Entered: 01/24/2022)	View	Add to request
126	10/08/2021	Joint STATUS REPORT by XAVIER BECERRA, WILLIAM A. FERRARA, TAE D. JOHNSON, ALEJANDRO J. MAYORKAS, TROY MILLER, RODNEY S. SCOTT, ROCHELLE P. WALENSKY. (Tepe, Sean) (Entered: 10/08/2021)	View	Add to request
125	09/17/2021	Transmission of the Notice of Appeal, Order Appealed (Memorandum Opinion), and Docket Sheet to US Court of Appeals. The Court of Appeals docketing fee was not paid because the appeal was filed by the government re 124 Notice of Appeal to DC Circuit Court. (zjf) (Entered: 09/17/2021)	View	Add to request
124	09/17/2021	NOTICE OF APPEAL TO DC CIRCUIT COURT as to 122 Order on Motion to Certify Class, Order on Motion for Preliminary Injunction, Order on Motion for Hearing, 123 Memorandum &	View	Add to request

		Opinion by TAE D. JOHNSON, TROY MILLER, ROCHELLE P. WALENSKY, ALEJANDRO J. MAYORKAS, XAVIER BECERRA, WILLIAM A. FERRARA, RODNEY S. SCOTT. Fee Status: No Fee Paid. Parties have been notified. (Attachments: # 1 Exhibit District Court Order, # 2 Exhibit District Court Memorandum Opinion)(Tepe, Sean) (Entered: 09/17/2021)	
	09/17/2021	USCA Case Number 21-5200 for 124 Notice of Appeal to DC Circuit Court, filed by XAVIER BECERRA, ALEJANDRO J. MAYORKAS, RODNEY S. SCOTT, WILLIAM A. FERRARA, ROCHELLE P. WALENSKY, TAE D. JOHNSON, TROY MILLER. (zjf) (Entered: 09/21/2021)	Send Runner to Court
123	09/16/2021	MEMORANDUM OPINION. Signed by Judge Emmet G. Sullivan on 9/16/2021. (lcegs3) (Entered: 09/16/2021)	View Add to request
122	09/16/2021	ORDER granting 23 Motion to Certify Class; granting 57 Motion for Preliminary Injunction; denying 117 Motion for Hearing. Signed by Judge Emmet G. Sullivan on 9/16/2021. (lcegs3) (Entered: 09/16/2021)	View Add to request
	09/13/2021	MINUTE ORDER granting 119 unopposed motion for leave to file reply declarations. Signed by Judge Emmet G. Sullivan on 9/13/2021. (lcegs3) (Entered: 09/13/2021)	Send Runner to Court
121	08/16/2021	NOTICE OF WITHDRAWAL OF APPEARANCE as to T. ALEXANDER ALEINIKOFF, DEBORAH ANKER, JAMES C. HATHTAWAY, GERALD L. NEUMAN. Attorney Paul R.Q. Wolfson terminated. (Wolfson, Paul) (Entered: 08/16/2021)	View Add to request
120	08/16/2021	NOTICE of Appearance by Daniel S. Volchok on behalf of T. ALEXANDER ALEINIKOFF, DEBORAH ANKER, JAMES C. HATHTAWAY, GERALD L. NEUMAN (Volchok, Daniel) (Entered: 08/16/2021)	View Add to request
119	08/11/2021	MOTION for Leave to File Reply Declarations by ALL PLAINTIFFS. (Attachments: # 1 Text of Proposed Order)(Gelernt, Lee) (Entered: 08/11/2021)	View Add to request

118	08/11/2021	REPLY to opposition to motion re 23 MOTION to Certify Class , 57 MOTION for Preliminary Injunction filed by ALL PLAINTIFFS. (Attachments: # 1 Text of Proposed Order, # 2 Exhibit Index of Exhibits, # 3 Declaration of Taylor Levy, # 4 Declaration of Julia Neusner, # 5 Declaration of Jennifer K. Harbury, # 6 Declaration of Erika Pinheiro, # 7 Declaration of Savitri Arvey, # 8 Declaration (Supplemental) of Former CDC Officials, # 9 Declaration of 32 Medical and Public Health Experts, # 10 Declaration (Second) of Ming Cheung, # 11 Declaration of Linda Rivas, # 12 Declaration of Marisa Limn Garza, # 13 Declaration of Astrid Dominguez, # 14 Declaration of Chelsea Sachau, # 15 Declaration of Mdecins Sans Frontires Medical Coordinator in Mexico, # 16 Declaration of Teresa Cavendish, # 17 Declaration of Kate Clark, # 18 Declaration of Aaron Reichlin-Melnick, # 19 Declaration of Alan E. Valdez Jurez, # 20 Declaration of Edgar Ramrez Lpez, # 21 Declaration of Samuel Thomas Bishop, # 22 Declaration of Luis Alberto Lizarraga Tolentino, # 23 Declaration of Cecilia Menjvar, Ph.D.)(Gelernt, Lee) (Entered: 08/11/2021)	View	Add to request
117	08/11/2021	MOTION for Oral Argument by XAVIER BECERRA, WILLIAM A. FERRARA, TAE D. JOHNSON, ALEJANDRO MAYORKAS, TROY MILLER, RODNEY S. SCOTT, ROCHELLE P. WALENSKY re 57 MOTION for Preliminary Injunction (Tepe, Sean) Modified on 8/12/2021 to correct docket event/ text (zjf). (Entered: 08/11/2021)	View	Add to request
116	08/06/2021	DECLARATION of David Shahoulian re Combined Opposition (ECF No. 76) to Plaintiffs Motion for Class Certification (ECF No. 23) and Motion for Classwide Preliminary Injunction (ECF No. 57). by XAVIER BECERRA, NORRIS COCHRAN, WILLIAM A. FERRARA, TAE D. JOHNSON, ALEJANDRO MAYORKAS, TROY MILLER, RODNEY S. SCOTT,	View	Add to request

		ROCHELLE P. WALENSKY. (zjf) (Entered: 08/06/2021)	
	08/06/2021	Set/Reset Deadlines: Defendants Supplemental Declaration In Support Of Their Combined Opposition To Plaintiffs' Motions For Class Certification And Classwide Preliminary Injunction due by 08/02/2021. Plaintiffs Reply In Support Of Those Motions due by 08/11/2021. (mac) (Entered: 08/06/2021)	Send Runner to Court
	08/05/2021	MINUTE ORDER granting nunc pro tunc 112 joint motion to reset briefing schedule on Plaintiffs' motions for class certification and classwide preliminary injunction. It is HEREBY ORDERED that Defendants shall file their supplemental declaration in support of their combined opposition to Plaintiffs' motions for class certification and classwide preliminary injunction by no later than August 2, 2021; and that Plaintiffs shall file their combined reply in support of those motions by no later than August 11, 2021. Signed by Judge Emmet G. Sullivan on 8/5/2021. (lcegs3) (Entered: 08/05/2021)	Send Runner to Court
	08/05/2021	MINUTE ORDER granting 113 motion for leave to file supplemental declaration. The Clerk of Court is directed to file the supplemental declaration, ECF No. 113-1, as a separate docket entry. Signed by Judge Emmet G. Sullivan on 8/5/2021. (lcegs3) (Entered: 08/05/2021)	Send Runner to Court
115	08/04/2021	RESPONSE TO ORDER OF THE COURT re Order,, Joint Response to Court's August 2, 2021 Order Concerning Further Mediation or Alternative Dispute Resolution filed by XAVIER BECERRA, WILLIAM A. FERRARA, TAE D. JOHNSON, ALEJANDRO MAYORKAS, TROY MILLER, RODNEY S. SCOTT, ROCHELLE P. WALENSKY. (Tepe, Sean) (Entered: 08/04/2021)	View Add to request
	08/03/2021	Set/Reset Deadlines: Joint Status Report due by 8/4/2021 (mac) (Entered: 08/03/2021)	Send Runner to Court
114	08/02/2021	NOTICE NOTICE OF CDC PUBLIC HEALTH ORDER by XAVIER BECERRA, WILLIAM A.	View Add to request

		FERRARA, TAE D. JOHNSON, ALEJANDRO MAYORKAS, TROY MILLER, RODNEY S. SCOTT, ROCHELLE P. WALENSKY (Tepe, Sean) (Entered: 08/02/2021)	
113	08/02/2021	MOTION for Leave to File Supplemental Declaration by XAVIER BECERRA, WILLIAM A. FERRARA, TAE D. JOHNSON, ALEJANDRO MAYORKAS, TROY MILLER, RODNEY S. SCOTT, ROCHELLE P. WALENSKY. (Attachments: # 1 Declaration of David Shahoulian)(Tepe, Sean) (Entered: 08/02/2021)	View Add to request
112	08/02/2021	Joint MOTION for Briefing Schedule on Plaintiffs' Motions for Class Certification and Classwide Preliminary Injunction by ALL PLAINTIFFS. (Gelernt, Lee) (Entered: 08/02/2021)	View Add to request
	08/02/2021	MINUTE ORDER. In view of 112 joint motion to reset briefing schedule, in which the parties indicated that efforts "to resolve or narrow the dispute in this case have reached an impasse," the parties are DIRECTED to file a joint status report by no later than August 4, 2021 informing the Court whether this case would benefit from referral to a magistrate judge, mediation, or any other form of alternative dispute resolution that can be tailored to the needs of their case. Signed by Judge Emmet G. Sullivan on 8/2/2021. (lcegs3) (Entered: 08/02/2021)	Send Runner to Court
	07/19/2021	MINUTE ORDER granting 111 Joint Motion to Continue Holding in Abeyance Plaintiffs' Motions for Class Certification and Preliminary Injunction. Plaintiffs shall file their reply brief in support of their motions for class certification and preliminary injunction by no later than August 2, 2021. Signed by Judge Emmet G. Sullivan on 7/19/2021. (lcegs1) (Entered: 07/19/2021)	Send Runner to Court
	07/19/2021	Set/Reset Deadlines: Plaintiffs Reply Brief In Support Of Their Motions For Class Certification And Preliminary Injunction due by 8/2/2021. (mac) (Entered: 07/19/2021)	Send Runner to Court
111	07/16/2021	Joint MOTION to Continue Holding in Abeyance Plaintiffs' Motions for	View Add to request

		Class Certification and Preliminary Injunction by XAVIER BECERRA, WILLIAM A. FERRARA, TAE D. JOHNSON, ALEJANDRO MAYORKAS, TROY MILLER, RODNEY S. SCOTT, ROCHELLE P. WALENSKY. (Tepe, Sean) Modified on 7/19/2021 to correct docket event/text (zjf). (Entered: 07/16/2021)	
	07/09/2021	MINUTE ORDER granting 110 Joint Motion to Continue Holding in Abeyance Plaintiffs' Motions for Class Certification and Preliminary Injunction. Plaintiffs shall file their reply brief in support of their motions for class certification and preliminary injunction by no later than July 16, 2021. Signed by Judge Emmet G. Sullivan on 7/9/2021. (lcegs3) (Entered: 07/09/2021)	Send Runner to Court
	07/09/2021	Set/Reset Deadlines: Plaintiffs Reply Brief In Support Of Their Motions For Class Certification And Preliminary Injunction due by 7/16/2021. (mac) (Entered: 07/09/2021)	Send Runner to Court
110	07/02/2021	Joint MOTION to Continue Holding in Abeyance Plaintiffs' Motions for Class Certification and Preliminary Injunction by WILLIAM A. FERRARA, TAE D. JOHNSON, ALEJANDRO MAYORKAS, TROY MILLER, RODNEY S. SCOTT, ROCHELLE P. WALENSKY, XAVIER BECERRA. (Tepe, Sean) Modified on 7/6/2021 to correct docket event/text (zjf). (Entered: 07/02/2021)	View Add to request
	06/22/2021	MINUTE ORDER granting 109 Joint Motion to Continue Holding in Abeyance Plaintiffs' Motions for Class Certification and Preliminary Injunction. Plaintiffs shall file their reply brief in support of their motions for class certification and preliminary injunction by no later than July 2, 2021. Signed by Judge Emmet G. Sullivan on 6/22/2021. (lcegs3) (Entered: 06/22/2021)	Send Runner to Court
	06/22/2021	Set/Reset Deadlines: Plaintiffs Reply Brief In Support Of Motions For Class Certification And Preliminary Injunction due by 7/2/2021. (mac) (Entered: 06/22/2021)	Send Runner to Court

109	06/18/2021	Joint MOTION to Continue in Abeyance Plaintiffs' Motions for Class Certification and Preliminary Injunction by NORRIS COCHRAN, WILLIAM A. FERRARA, TAE D. JOHNSON, ALEJANDRO MAYORKAS, TROY MILLER, RODNEY S. SCOTT, ROCHELLE P. WALENSKY. (Tepe, Sean) Modified on 6/21/2021 to correct docket event/text (zjf). (Entered: 06/18/2021)	View Add to request
	06/10/2021	Set/Reset Deadlines: Plaintiffs Reply Brief In Support Of Their Motions For Class Certification And Preliminary Injunction due by 6/18/2021. (mac) (Entered: 06/10/2021)	Send Runner to Court
	06/09/2021	MINUTE ORDER granting 108 Joint Motion to Continue Holding in Abeyance Plaintiffs' Motions for Class Certification and Preliminary Injunction. Plaintiffs shall file their reply brief in support of their motions for class certification and preliminary injunction by no later than June 18, 2021. Signed by Judge Emmet G. Sullivan on 6/9/2021. (lcegs3) (Entered: 06/09/2021)	Send Runner to Court
108	06/08/2021	Joint MOTION to Continue Holding in Abeyance Plaintiffs' Motions for Class Certification and Preliminary Injunction by NORRIS COCHRAN, WILLIAM A. FERRARA, TAE D. JOHNSON, ALEJANDRO MAYORKAS, TROY MILLER, RODNEY S. SCOTT, ROCHELLE P. WALENSKY. (Tepe, Sean) Modified on 6/9/2021 to correct docket event/text (zjf). (Entered: 06/08/2021)	View Add to request
	05/27/2021	MINUTE ORDER granting 107 joint motion to continue to hold in abeyance Plaintiffs' Motions for Class Certification and Classwide Permanent Injunction. Plaintiffs shall file their reply in support of their motions for class certification and preliminary injunction by no later than June 8, 2021. Signed by Judge Emmet G. Sullivan on 5/27/2021. (lcegs3) (Entered: 05/27/2021)	Send Runner to Court
	05/27/2021	Set/Reset Deadlines: Plaintiffs Reply In Support Of Their Motions For Class Certification And Preliminary Injunction due	Send Runner to Court

		by 6/8/2021. (mac) (Entered: 05/27/2021)	
107	05/25/2021	Joint MOTION to Continue Holding in Abeyance Plaintiffs' Motions for Class Certification and Preliminary Injunction by NORRIS COCHRAN, WILLIAM A. FERRARA, TAE D. JOHNSON, ALEJANDRO MAYORKAS, TROY MILLER, RODNEY S. SCOTT, ROCHELLE P. WALENSKY. (Tepe, Sean) Modified on 5/26/2021 to correct docket event/text (zjf). (Entered: 05/25/2021)	View Add to request
	05/18/2021	ENTERED IN ERROR....Set/ Reset Deadlines: Plaintiffs Reply In Support Of Their Motions For Class Certification And Preliminary Injunction due by 5/2/2021. (mac) (Entered: 05/18/2021)	Send Runner to Court
	05/18/2021	Set/Reset Deadlines: Plaintiffs Reply In Support Of Their Motions For Class Certification And Preliminary Injunction due by 5/2/2021 (mac) (Entered: 05/18/2021)	Send Runner to Court
	05/17/2021	MINUTE ORDER granting 106 joint motion to continue to hold in abeyance Plaintiffs' Motions for Class Certification and Classwide Permanent Injunction. Plaintiffs shall file their reply in support of their motions for class certification and preliminary injunction by no later than May 25, 2021. Signed by Judge Emmet G. Sullivan on 5/17/2021. (lcegs3) (Entered: 05/17/2021)	Send Runner to Court
106	05/13/2021	Joint MOTION to Continue Holding in Abeyance Plaintiffs' Motions for Class Certification and Preliminary Injunction by NORRIS COCHRAN, WILLIAM A. FERRARA, TAE D. JOHNSON, ALEJANDRO MAYORKAS, TROY MILLER, RODNEY S. SCOTT, ROCHELLE P. WALENSKY. (Tepe, Sean) Modified on 5/14/2021 to correct docket event/text (zjf). (Entered: 05/13/2021)	View Add to request
	05/05/2021	Set/Reset Deadlines: Plaintiffs Reply In Support Of Their Motions For Class Certification And Preliminary Injunction due by 5/13/2021. (mac) (Entered: 05/05/2021)	Send Runner to Court
	05/04/2021	MINUTE ORDER granting 105 joint motion to continue to hold in	Send Runner to Court

		abeyance Plaintiffs' Motions for Class Certification and Classwide Permanent Injunction. Plaintiffs shall file their reply in support of their motions for class certification and preliminary injunction by no later than May 13, 2021. Signed by Judge Emmet G. Sullivan on 5/4/2021. (lcegs3) (Entered: 05/04/2021)	
105	05/03/2021	Joint MOTION to Continue Holding in Abeyance Plaintiffs' Motions for Class Certification and Preliminary Injunction by NORRIS COCHRAN, WILLIAM A. FERRARA, TAE D. JOHNSON, ALEJANDRO MAYORKAS, TROY MILLER, RODNEY S. SCOTT, ROCHELLE P. WALENSKY. (Tepe, Sean) (Entered: 05/03/2021)	View Add to request
	04/26/2021	MINUTE ORDER granting 103 joint motion to continue to hold in abeyance Plaintiffs' Motions for Class Certification and Classwide Permanent Injunction until May 3, 2021. Plaintiffs shall file their reply in support of their motions for class certification and preliminary injunction on May 3, 2021. Signed by Judge Emmet G. Sullivan on 4/26/2021. (lcegs3) (Entered: 04/26/2021)	Send Runner to Court
	04/26/2021	Set/Reset Deadlines: Plaintiffs Reply In Support Of Their Motions For Class Certification And Preliminary Injunction due by 5/3/2021. (mac) (Entered: 04/26/2021)	Send Runner to Court
104	04/22/2021	NOTICE of Appearance by Tamara Goodlette on behalf of All Plaintiffs (Goodlette, Tamara) (Entered: 04/22/2021)	View Add to request
103	04/22/2021	Joint MOTION to Continue Holding in Abeyance Plaintiffs' Motions for Class Certification and Preliminary Injunction by NORRIS COCHRAN, WILLIAM A. FERRARA, TAE D. JOHNSON, ALEJANDRO MAYORKAS, TROY MILLER, RODNEY S. SCOTT, ROCHELLE P. WALENSKY. (Tepe, Sean) Modified on 4/23/2021 to correct event/text (zjf). (Entered: 04/22/2021)	View Add to request
	04/13/2021	Set/Reset Deadlines: Plaintiffs Reply In Support of Their Motions For Class Certification And Preliminary Injunction due by	Send Runner to Court

		4/22/2021. (mac) (Entered: 04/13/2021)	
	04/12/2021	MINUTE ORDER granting 102 joint motion to continue to hold in abeyance Plaintiffs' Motions for Class Certification and Classwide Permanent Injunction until April 22, 2021. It is FURTHER ORDERED that Plaintiffs shall file their reply in support of their motions for class certification and preliminary injunction by no later than April 22, 2021. Signed by Judge Emmet G. Sullivan on 4/12/2021. (lcegs3) (Entered: 04/12/2021)	Send Runner to Court
102	04/11/2021	Joint MOTION to Continue Holding in Abeyance Plaintiffs' Motions for Class Certification and Preliminary Injunction by NORRIS COCHRAN, WILLIAM A. FERRARA, TAE D. JOHNSON, ALEJANDRO MAYORKAS, TROY MILLER, RODNEY S. SCOTT, ROCHELLE P. WALENSKY. (Tepe, Sean) (Entered: 04/11/2021)	View Add to request
101	04/05/2021	NOTICE OF WITHDRAWAL OF APPEARANCE as to ALL PLAINTIFFS. Attorney Celso Perez terminated. (Gelernt, Lee) (Entered: 04/05/2021)	View Add to request
	04/03/2021	Set/Reset Deadlines: Plaintiffs Reply In Support Of Their Motions For Class Certification And Preliminary Injunction due by 4/12/2021. (mac) (Entered: 04/03/2021)	Send Runner to Court
	04/02/2021	MINUTE ORDER granting 100 joint motion to continue holding in abeyance Plaintiffs' motions for class certification and classwide preliminary injunction. It is FURTHER ORDERED that Plaintiffs shall file their reply in support of their motions for class certification and preliminary injunction by no later than April 12, 2021. Signed by Judge Emmet G. Sullivan on 4/2/2021. (lcegs3) (Entered: 04/02/2021)	Send Runner to Court
100	04/01/2021	Joint MOTION To Continue Holding in Abeyance Plaintiffs' Motions for Class Certification and Preliminary Injunction by NORRIS COCHRAN, WILLIAM A. FERRARA, TAE D. JOHNSON, ALEJANDRO MAYORKAS, TROY MILLER, RODNEY S. SCOTT, ROCHELLE P. WALENSKY.	View Add to request

		(Tepe, Sean) Modified on 4/2/2021 (zjf). (Entered: 04/01/2021)	
	03/23/2021	Set/Reset Deadlines: Plaintiff Reply due by 4/2/2021. (mac) (Entered: 03/23/2021)	Send Runner to Court
99	03/22/2021	Joint MOTION to Continue Holding in Abeyance Plaintiffs' Motions for Class Certification and Preliminary Injunction by NORRIS COCHRAN, WILLIAM A. FERRARA, TAE D. JOHNSON, ALEJANDRO MAYORKAS, TROY MILLER, RODNEY S. SCOTT, ROCHELLE P. WALENSKY. (Tepe, Sean) Modified on 3/22/2021 to correct docket event/text(zjf). (Entered: 03/22/2021)	View Add to request
	03/22/2021	MINUTE ORDER granting 97 joint motion for entry of a stipulated protective order. The terms presented in [97-1] Stipulated Protective Order are hereby incorporated by reference into this Order. Signed by Judge Emmet G. Sullivan on 3/22/2021. (lcegs3) (Entered: 03/22/2021)	Send Runner to Court
	03/22/2021	MINUTE ORDER granting 98 consent motion to vacate answer deadline and set joint status report deadline. It is hereby ORDERED that the March 22, 2021 deadline for Defendants to answer or otherwise respond to the Amended Complaint is VACATED. It is FURTHER ORDERED that the parties shall file a joint status report within fourteen days from the date of the Court's decisions on Plaintiffs' Motions for Class Certification and Classwide Preliminary Injunction. Signed by Judge Emmet G. Sullivan on 3/22/2021. (lcegs3) (Entered: 03/22/2021)	Send Runner to Court

	03/22/2021	MINUTE ORDER granting 99 joint motion to continue to hold in abeyance Plaintiffs' Motions for Class Certification and Classwide Permanent Injunction until April 2, 2021. Plaintiffs shall file their reply in support of their motions by no later than April 2, 2021. Signed by Judge Emmet G. Sullivan on 3/22/2021. (lcegs3) (Entered: 03/22/2021)	Send Runner to Court
98	03/16/2021	Consent MOTION to Vacate Answer Deadline and Set Joint Status Report Deadline by NORRIS COCHRAN, WILLIAM A. FERRARA, TAE D. JOHNSON, ALEJANDRO MAYORKAS, TROY MILLER, RODNEY S. SCOTT, ROCHELLE P. WALENSKY. (Tepe, Sean) (Entered: 03/16/2021)	View Add to request
97	03/16/2021	Joint MOTION for Protective Order by NORRIS COCHRAN, WILLIAM A. FERRARA, TAE D. JOHNSON, ALEJANDRO MAYORKAS, TROY MILLER, RODNEY S. SCOTT, ROCHELLE P. WALENSKY. (Attachments: # 1 Proposed Stipulated Protective Order)(Tepe, Sean) (Entered: 03/16/2021)	View Add to request
96	03/15/2021	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed as to the United States Attorney. Date of Service Upon United States Attorney on 1/21/2021. Answer due for ALL FEDERAL DEFENDANTS by 3/22/2021. (Cheung, Ming) (Entered: 03/15/2021)	View Add to request
95	03/15/2021	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed on United States Attorney General. Date of Service Upon United States Attorney General 01/19/2021. (Cheung, Ming) (Entered: 03/15/2021)	View Add to request
94	03/15/2021	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. ALEX M. AZAR, II served on 1/25/2021; JONATHAN FAHEY served on 1/19/2021; WILLIAM A. FERRARA served on 1/19/2021; PETER T. GAYNOR served on 1/19/2021; MARK A. MORGAN served on 1/19/2021; ROBERT R. REDFIELD served on 1/19/2021; RODNEY S. SCOTT served on 1/19/2021 (Cheung, Ming) (Entered: 03/15/2021)	View Add to request

93	03/15/2021	NOTICE of Appearance by Karla Vargas on behalf of All Plaintiffs (Vargas, Karla) (Entered: 03/15/2021)	View Add to request
92	02/26/2021	NOTICE of Appearance by Geroline A Castillo on behalf of INTERNATIONAL REFUGEE ASSISTANCE PROJECT (Castillo, Geroline) (Entered: 02/26/2021)	View Add to request
91	02/25/2021	ENTERED IN ERROR AS A DUPLICATE DE# 90 ..SEALED Declaration of Bebeto Pierrot filed by ALL PLAINTIFFS. (This document is SEALED and only available to authorized persons.) (zjf) Modified on 2/26/2021 (zjf). (Entered: 02/26/2021)	View Add to request
	02/24/2021	Set/Reset Deadlines: Plaintiffs Reply In Support Of Their Motions For Class Certification And Preliminary Injunction due by 3/23/2021. (mac) (Entered: 02/24/2021)	Send Runner to Court
87	02/23/2021	Joint MOTION to Stay Joint Motion to Hold in Abeyance Plaintiffs' Class Certification and Preliminary Injunction Motions by NORRIS COCHRAN, WILLIAM A. FERRARA, TAE D. JOHNSON, ALEJANDRO N. MAYORKAS, TROY MILLER, RODNEY S. SCOTT, ROCHELLE P. WALENSKY. (Tepe, Sean) (Entered: 02/23/2021)	View Add to request
	02/23/2021	MINUTE ORDER granting 87 joint motion to hold in abeyance Plaintiffs' motions for class certification and classwide preliminary injunction. It is FURTHER ORDERED that either party may request termination of the abeyance by filing a motion seeking such relief. It is FURTHER ORDERED that Plaintiffs shall file their reply in support of their motions for class certification and preliminary injunction by no later than March 23, 2021. Signed by Judge Emmet G. Sullivan on 2/23/2021. (lcegs3) (Entered: 02/23/2021)	Send Runner to Court
90	02/22/2021	SEALED DOCUMENT (Declaration of Bebeto Pierrot) filed by ALL PLAINTIFFS. (This document is SEALED and only available to authorized persons.)(znmw) (Entered: 02/26/2021)	View Add to request

	02/22/2021	MINUTE ORDER treating as opposed and granting over objection 85 Emergency Motion to Stay Removal. In view of the arguments presented by Plaintiffs in their motion, the Court's February 1, 2021 Minute Order, and for the reasons stated on the record at the January 12, 2021 Status Conference, it is hereby ORDERED that the removal of the following family is STAYED pending further order of this Court: Bebeto Pierrot, SID 369-772-300, Nadine Remilus, SID 369-772-363, and their minor child M.A.P., SID 369-868-214. This Order is subject to reconsideration for good cause shown by no later than February 22, 2021 at 3:00 PM. Signed by Judge Emmet G. Sullivan on 2/22/2021. (lcegs3) (Entered: 02/22/2021)	Send Runner to Court
	02/22/2021	MINUTE ORDER granting 86 Sealed Motion for Leave to File Document Under Seal. Signed by Judge Emmet G. Sullivan on 2/22/2021. (lcegs3) (Entered: 02/22/2021)	Send Runner to Court
	02/22/2021	Set/Reset Deadlines: Motion For Reconsideration due no later than 3:00PM on 2/22/2021. (mac) (Entered: 02/22/2021)	Send Runner to Court
86	02/19/2021	SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL filed by ALL PLAINTIFFS (This document is SEALED and only available to authorized persons.) (Attachments: # 1 Text of Proposed Order, # 2 Declaration of Bebeto Pierrot)(Russell, Morgan) (Entered: 02/19/2021)	View Add to request
85	02/19/2021	Emergency MOTION to Stay Removal of the Pierrot Family by ALL PLAINTIFFS. (Attachments: # 1 Text of Proposed Order)(Russell, Morgan) (Entered: 02/19/2021)	View Add to request
84	02/19/2021	SEALED Declaration of Francois filed by ALL PLAINTIFFS. (This document is SEALED and only available to authorized persons.) (zjf) (Entered: 02/19/2021)	View Add to request
83	02/19/2021	SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL filed by ALL PLAINTIFFS (This document is SEALED and only available to authorized persons.) (Attachments: # 1 Text of Proposed Order, # 2 Declaration of	View Add to request

		Francois)(Gelernt, Lee) (Entered: 02/19/2021)	
82	02/19/2021	Emergency MOTION to Stay Removal by ALL PLAINTIFFS. (Attachments: # 1 Text of Proposed Order)(Gelernt, Lee) (Entered: 02/19/2021)	View Add to request
	02/19/2021	Set/Reset Deadlines: Motion For Reconsideration due no later than 7:00PM on 2/18/2021. (mac) (Entered: 02/19/2021)	Send Runner to Court
	02/19/2021	MINUTE ORDER treating as opposed and granting over objection 82 Emergency Motion to Stay Removal. In view of the arguments presented by Plaintiffs in their motion, the Court's February 1, 2021 Minute Order, and for the reasons stated on the record at the January 12, 2021 Status Conference, it is hereby ORDERED that the removal of the following family is STAYED pending further order of this Court: Fredenel Francois (SID 369-772-515), Guyvlena Malvoisin, (SID 369-772-487), and their minor child, P.A.S.G.M. (SID 369-772-547). This Order is subject to reconsideration for good cause shown by no later than February 19, 2021 at 3:00 PM. Signed by Judge Emmet G. Sullivan on 2/19/2021. (lcegs3) (Entered: 02/19/2021)	Send Runner to Court
	02/19/2021	MINUTE ORDER granting 83 sealed motion for leave to file document under seal. Signed by Judge Emmet G. Sullivan on 2/19/2021. (lcegs3) (Entered: 02/19/2021)	Send Runner to Court
	02/19/2021	Set/Reset Deadlines: Motion For Reconsideration due no later than 3:00PM on 2/19/2021. (mac) (Entered: 02/19/2021)	Send Runner to Court
89	02/18/2021	SEALED Declaration of Torres-Rojas filed by ALL PLAINTIFFS. (This document is SEALED and only available to authorized persons.)(zjf) (Entered: 02/24/2021)	View Add to request
88	02/18/2021	SEALED Declaration of Bebeto Pierrot filed by ALL PLAINTIFFS. (This document is SEALED and only available to authorized persons.)(zjf) (Entered: 02/24/2021)	View Add to request
81	02/18/2021	SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL filed by ALL PLAINTIFFS (This	View Add to request

		document is SEALED and only available to authorized persons.) (Attachments: # 1 Text of Proposed Order, # 2 Declaration of Torres-Rojas)(Gelernt, Lee) (Entered: 02/18/2021)	
80	02/18/2021	Emergency MOTION to Stay Removal by ALL PLAINTIFFS. (Attachments: # 1 Text of Proposed Order)(Gelernt, Lee) (Entered: 02/18/2021)	View Add to request
	02/18/2021	MINUTE ORDER treating as opposed and granting over objection 80 Emergency Motion to Stay Removal. In view of the arguments presented by Plaintiffs in their motion, the Court's February 1, 2021 Minute Order, and for the reasons stated on the record at the January 12, 2021 Status Conference, it is hereby ORDERED that the removal of the following family is STAYED pending further order of this Court: Paola Trinidad Torres-Rojas (SID 369-842-359) and her minor child M.J.Z.T. (SID 369- 842-362). This Order is subject to reconsideration for good cause shown by no later than February 18, 2021 at 7:00 PM. Signed by Judge Emmet G. Sullivan on 2/18/2021. (lcegs3) (Entered: 02/18/2021)	Send Runner to Court
	02/18/2021	MINUTE ORDER granting 81 sealed motion for leave to file document under seal. Signed by Judge Emmet G. Sullivan on 2/18/2021. (lcegs3) (Entered: 02/18/2021)	Send Runner to Court
76	02/17/2021	Memorandum in opposition to re 23 MOTION to Certify Class , 57 MOTION for Preliminary Injunction filed by NORRIS COCHRAN, WILLIAM A. FERRARA, TAE D. JOHNSON, ALEJANDRO MAYORKAS, TROY MILLER, RODNEY S. SCOTT, ROCHELLE P. WALENSKY. (Attachments: # 1 Exhibits A-E, # 2 Declaration of Troy Miller, # 3 Declaration of Russell Hott)(Tepe, Sean) (Entered: 02/17/2021)	View Add to request
79	02/11/2021	AMICUS BRIEF by HISTORIANS. (znmw) (Entered: 02/18/2021)	View Add to request
78	02/11/2021	AMICUS BRIEF by INTERNATIONAL REFUGEE ASSISTANCE PROJECT. (znmw) (Entered: 02/18/2021)	View Add to request

77	02/11/2021	AMICUS BRIEF by T. ALEXANDER ALEINIKOFF, DEBORAH ANKER, JAMES C. HATHTAWAY, GERALD L. NEUMAN. (znmw) (Entered: 02/18/2021)	View Add to request
75	02/11/2021	NOTICE of Appearance by Noah A. Levine on behalf of T. ALEXANDER ALEINIKOFF, DEBORAH ANKER, JAMES C. HATHTAWAY, GERALD L. NEUMAN (Levine, Noah) (Entered: 02/11/2021)	View Add to request
	02/11/2021	MINUTE ORDER granting 51 motion for leave to appear pro hac vice. Noah A. Levine is hereby admitted pro hac vice in this action. Counsel should register for e-filing via PACER and file a notice of appearance pursuant to LCvR 83.6(a). Click for instructions. Signed by Judge Emmet G. Sullivan on 2/11/2021. (lcegs3) (Entered: 02/11/2021)	Send Runner to Court
	02/11/2021	MINUTE ORDER granting 62 motion for leave to appear pro hac vice. Tamara F. Goodlette is hereby admitted pro hac vice in this action. Counsel should register for e-filing via PACER and file a notice of appearance pursuant to LCvR 83.6(a). Click for instructions. Signed by Judge Emmet G. Sullivan on 2/11/2021. (lcegs3) (Entered: 02/11/2021)	Send Runner to Court
	02/11/2021	MINUTE ORDER granting 52 Unopposed MOTION for Leave to File a Brief for Scholars of Refugee and Immigration Law as Amici Curiae in Support of Plaintiffs' Motion for Class-wide Preliminary Injunction. The [52-1] amicus brief shall be deemed filed as of February 11, 2021. Signed by Judge Emmet G. Sullivan on 2/11/2021. (lcegs3) (Entered: 02/11/2021)	Send Runner to Court
	02/11/2021	MINUTE ORDER granting 54 MOTION for Leave to File Amicus Curiae Brief by INTERNATIONAL REFUGEE ASSISTANCE PROJECT. The [54-1] amicus brief shall be deemed filed as of February 11, 2021. Signed by Judge Emmet G. Sullivan on 2/11/2021. (lcegs3) (Entered: 02/11/2021)	Send Runner to Court
	02/11/2021	MINUTE ORDER granting 56 Unopposed MOTION for Leave to File Amicus Curiae Brief by	Send Runner to Court

		Historians. The [56-1] amicus brief shall be deemed filed as of February 11, 2021. Signed by Judge Emmet G. Sullivan on 2/11/2021. (lcegs3) (Entered: 02/11/2021)	
74	02/10/2021	NOTICE of Appearance by Omar C. Jadwat on behalf of All Plaintiffs (Jadwat, Omar) (Entered: 02/10/2021)	View Add to request
73	02/10/2021	NOTICE of Appearance by Morgan Russell on behalf of All Plaintiffs (Russell, Morgan) (Entered: 02/10/2021)	View Add to request
72	02/10/2021	NOTICE of Appearance by Ming Cheung on behalf of All Plaintiffs (Cheung, Ming) (Entered: 02/10/2021)	View Add to request
71	02/10/2021	NOTICE of Appearance by Daniel Antonio Galindo on behalf of All Plaintiffs (Galindo, Daniel) (Entered: 02/10/2021)	View Add to request
69	02/10/2021	NOTICE of Appearance by Cody H. Wofsy on behalf of All Plaintiffs (Wofsy, Cody) (Entered: 02/10/2021)	View Add to request
68	02/10/2021	NOTICE of Appearance by Stephen Bonggyun Kang on behalf of All Plaintiffs (Kang, Stephen) (Entered: 02/10/2021)	View Add to request
	02/10/2021	Set/Reset Deadlines: Motion For Reconsideration due no later than 12:00PM on 2/9/2021. (mac) (Entered: 02/10/2021)	Send Runner to Court
70	02/09/2021	SEALED Declaration of Clema Thomas,David Jean, Danie Lalune, Ketlene Emile filed by ALL PLAINTIFFS. (This document is SEALED and only available to authorized persons.)(zjf) (Entered: 02/10/2021)	View Add to request
62	02/09/2021	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Tamara F. Goodlette, Filing fee $ 100, receipt number ADCDC-8180349. Fee Status: Fee Paid. by BEDAPHECA ALCANTE, B.A.M.M., B.V.-A., FIDETTE BOUTE, D.J.T.-B., D.J.Z., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., J.A.Z., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA, T.J.T.-B., MARTHA LILIANA TADAY-ACOSTA, JULIEN THOMAS, ROMILUS VALCOURT.	View Add to request

		(Perez, Celso) (Entered: 02/09/2021)	
	02/09/2021	MINUTE ORDER treating as opposed and granting over objection 60 Emergency Motion to Stay Removal. In view of the arguments presented by Plaintiffs in their motion, the Court's February 1, 2021 Minute Order, and for the reasons stated on the record at the January 12, 2021 Status Conference, it is hereby ORDERED that the removal of the following families are STAYED pending further order of this Court: Ketlene Emile (SID# 369-736-280), Michel Riverson Cliff Salis Desenclos (SID# 369-736-194), and their minor child A.D.E. (SID# 369-736-308); David Jean (SID# 369-789-160), Edwidge Civil (SID# 369-789-185), and their minor child A.J. (SID# 369-789-192); Danie Lalune (SID# 369-782-922), Wesley Lalune (SID# 369-782-907), and their two minor children D.L. (SID# 369-782-935) and C.M.L. (SID# 369-782-949); Clema Thomas (SID# 369-781-406), Lyesse Sylen (SID# 369-783-314), and their minor children A.G.T.S. (SID# 369-781-423) and A.G.D. (SID# 369-783-326). This Order is subject to reconsideration for good cause shown by no later than February 9, 2021 at 12:00 PM. Signed by Judge Emmet G. Sullivan on 2/9/2021. (lcegs3) (Entered: 02/09/2021)	Send Runner to Court
	02/09/2021	MINUTE ORDER granting 61 Sealed Motion for Leave to File Document Under Seal. Signed by Judge Emmet G. Sullivan on 2/9/2021. (lcegs3) (Entered: 02/09/2021)	Send Runner to Court
61	02/08/2021	SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL filed by ALL PLAINTIFFS (This document is SEALED and only available to authorized persons.) (Attachments: # 1 Text of Proposed Order, # 2 Declaration of Clema Thomas, # 3 Declaration of David Jean, # 4 Declaration of Danie Lalune, # 5 Declaration of Ketlene Emile)(Crook, Jamie) (Entered: 02/08/2021)	View Add to request

60	02/08/2021	Emergency MOTION to Stay Removal of Desenclos/Emile, Jean, Lalune, and Thomas Families by ALL PLAINTIFFS. (Attachments: # 1 Text of Proposed Order)(Crook, Jamie) (Entered: 02/08/2021)	View Add to request
	02/08/2021	Set/Reset Deadlines: Motion For Reconsideration due no later than 8:00PM on 2/6/2021. (mac) (Entered: 02/08/2021)	Send Runner to Court
63	02/06/2021	SEALED Declaration of Gesnel Apollon re 58 Emergency MOTION to Stay Removal of Apollon Family filed by ALL PLAINTIFFS. (This document is SEALED and only available to authorized persons.) (zjf) (Entered: 02/09/2021)	View Add to request
	02/06/2021	MINUTE ORDER treating as opposed and granting over objection 58 Emergency Motion to Stay Removal. In view of the arguments presented by Plaintiffs in their motion, the Court's February 1, 2021 Minute Order, and for the reasons stated on the record at the January 12, 2021 Status Conference, it is hereby ORDERED that the removal of the following family is STAYED pending further order of this Court: Gesnel Apollon (SID 369-778-765), Elourdes Bergel (SID# 369-778-770), and their minor child, J.A., SID# 369-778-776. This Order is subject to reconsideration for good cause shown by no later than February 6, 2021 at 8:00 PM. Signed by Judge Emmet G. Sullivan on 2/6/2021. (lcegs3) (Entered: 02/06/2021)	Send Runner to Court
	02/06/2021	MINUTE ORDER granting 59 Sealed Motion for Leave to File Document Under Seal. Signed by Judge Emmet G. Sullivan on 2/6/2021. (lcegs3) (Entered: 02/06/2021)	Send Runner to Court
67	02/05/2021	SEALED Declaration of Fabiana Ferreira Da Costa filed by ALL PLAINTIFFS. (This document is SEALED and only available to authorized persons.)(zjf) (Entered: 02/09/2021)	View Add to request
59	02/05/2021	SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL filed by ALL PLAINTIFFS (This document is SEALED and only available to authorized persons.) (Attachments: # 1 Text of Proposed Order, # 2 Declaration of Gesnel	View Add to request

		Apollon)(Crook, Jamie) (Entered: 02/05/2021)	
58	02/05/2021	Emergency MOTION to Stay Removal of Apollon Family by ALL PLAINTIFFS. (Attachments: # 1 Text of Proposed Order)(Crook, Jamie) (Entered: 02/05/2021)	View Add to request
57	02/05/2021	MOTION for Preliminary Injunction by BEDAPHECA ALCANTE, ALL PLAINTIFFS, B.A.M.M., B.V.-A., FIDETTE BOUTE, D.J.T.-B., D.J.Z., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., J.A.Z., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA, T.J.T.-B., MARTHA LILIANA TADAY-ACOSTA, JULIEN THOMAS, ROMILUS VALCOURT. (Attachments: # 1 Memorandum in Support of Preliminary Injunction, # 2 Text of Proposed Order, # 3 Index of Exhibits, # 4 Declaration of Ming Cheung, # 5 Exhibit A-I, # 6 Declaration of Public Health Experts, # 7 Exhibit A-D, # 8 Declaration of Javier Hidalgo, # 9 Declaration of Allison Herre, # 10 Declaration of Linda Corchado, # 11 Declaration of Lisa Frydman, # 12 Declaration of Taylor Levy)(Gelernt, Lee) (Entered: 02/05/2021)	View Add to request
56	02/05/2021	Unopposed MOTION for Leave to File Amicus Curiae Brief by Historians. (Attachments: # 1 Exhibit Proposed Amicus Brief, # 2 Text of Proposed Order)(Tolentino, Raymond) (Entered: 02/05/2021)	View Add to request
55	02/05/2021	NOTICE of Appearance by Raymond P. Tolentino on behalf of Historians (Tolentino, Raymond) (Entered: 02/05/2021)	View Add to request
54	02/05/2021	MOTION for Leave to File Amicus Curiae Brief by INTERNATIONAL REFUGEE ASSISTANCE PROJECT. (Attachments: # 1 Exhibit Proposed Amicus Brief, # 2 Text of Proposed Order)(Austin, Kathryn) (Entered: 02/05/2021)	View Add to request
53	02/05/2021	NOTICE of Appearance by Lee Gelernt on behalf of All Plaintiffs (Gelernt, Lee) (Entered: 02/05/2021)	View Add to request
52	02/05/2021	Unopposed MOTION for Leave to File a Brief for Scholars of Refugee and Immigration Law as Amici Curiae in Support of	View Add to request

Plaintiffs' Motion for Classwide Preliminary Injunction by T. Alexander Aleinikoff, Deborah Anker, James C. Hathaway, Gerald L. Neuman. (Attachments: # 1 Proposed Amicus Brief, # 2 Text of Proposed Order)(Wolfson, Paul) (Entered: 02/05/2021)

51	02/05/2021	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Noah A. Levine, Filing fee $ 100, receipt number ADCDC-8169810. Fee Status: Fee Paid. by T. Alexander Aleinikoff, Deborah Anker, James C. Hathaway, Gerald L. Neuman. (Attachments: # 1 Declaration of Noah A. Levine, # 2 Text of Proposed Order)(Wolfson, Paul) (Entered: 02/05/2021)	View Add to request
50	02/05/2021	NOTICE of Appearance by Paul R.Q. Wolfson on behalf of T. Alexander Aleinikoff, Deborah Anker, James C. Hathaway, Gerald L. Neuman (Wolfson, Paul) (Entered: 02/05/2021)	View Add to request
	02/05/2021	Set/Reset Deadlines: Motion For Reconsideration due no later than 10:00PM on 2/4/2021. (mac) (Entered: 02/05/2021)	Send Runner to Court
	02/05/2021	MINUTE ORDER treating as opposed and granting over objection 48 Emergency Motion to Stay Removal. In view of the arguments presented by Plaintiffs in their motion, the Court's February 1, 2021 Minute Order, and for the reasons stated on the record at the January 12, 2021 Status Conference, it is hereby ORDERED that the removals of the following families are STAYED pending further order of this Court: Fabiana Ferreira Da Costa (SID 369-729-448), and her minor children M.A.L.F.C. (SID 369-729-454), K.R.F.D.C. (SID 369-729-457), and A.D.M.F.D.C. (SID 369-729-466). This Order is subject to reconsideration for good cause shown by no later than February 5, 2021 at 12:00 PM. Signed by Judge Emmet G. Sullivan on 2/5/2021. (lcegs3) (Entered: 02/05/2021)	Send Runner to Court
	02/05/2021	MINUTE ORDER granting 49 Sealed Motion for Leave to File Document Under Seal. Signed by Judge Emmet G. Sullivan on 2/5/2021. (lcegs3) (Entered: 02/05/2021)	Send Runner to Court
	02/05/2021	Set/Reset Deadlines: Motion For Reconsideration due no later than 12:00PM on 2/5/2021. (mac) (Entered: 02/05/2021)	Send Runner to Court
66	02/04/2021	SEALED Declarations of Jean Louissaint Fleury, Thechelet	View Add to request

		Dieudonne, Pouchon Bien-Aime and Elyse Louima filed by ALL PLAINTIFFS. (This document is SEALED and only available to authorized persons.)(zjf) (Entered: 02/09/2021)		
65	02/04/2021	SEALED Declaration of JONNY DIEUDONNE filed by ALL PLAINTIFFS. (This document is SEALED and only available to authorized persons.)(zjf) (Entered: 02/09/2021)	View	Add to request
64	02/04/2021	SEALED Declaration of DIANA QUILLI-MARCA filed by ALL PLAINTIFFS. (This document is SEALED and only available to authorized persons.)(zjf) (Entered: 02/09/2021)	View	Add to request
49	02/04/2021	SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL filed by BEDAPHECA ALCANTE, ALL PLAINTIFFS, B.A.M.M., B.V.-A., FIDETTE BOUTE, D.J.T.-B., D.J.Z., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., J.A.Z., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA, T.J.T.-B., MARTHA LILIANA TADAY-ACOSTA, JULIEN THOMAS, ROMILUS VALCOURT (This document is SEALED and only available to authorized persons.) (Attachments: # 1 Text of Proposed Order, # 2 Declaration of Fabiana Ferreira Da Costa)(Crook, Jamie) (Entered: 02/04/2021)	View	Add to request
48	02/04/2021	Emergency MOTION to Stay Removal by BEDAPHECA ALCANTE, ALL PLAINTIFFS, B.A.M.M., B.V.-A., FIDETTE BOUTE, D.J.T.-B., D.J.Z., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., J.A.Z., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA, T.J.T.-B., MARTHA LILIANA TADAY-ACOSTA, JULIEN THOMAS, ROMILUS VALCOURT. (Attachments: # 1 Text of Proposed Order)(Crook, Jamie) (Entered: 02/04/2021)	View	Add to request
47	02/04/2021	SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL filed by BEDAPHECA ALCANTE,	View	Add to request

		ALL PLAINTIFFS, B.A.M.M., B.V.-A., FIDETTE BOUTE, D.J.T.-B., D.J.Z., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., J.A.Z., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA, T.J.T.-B., MARTHA LILIANA TADAY-ACOSTA, JULIEN THOMAS, ROMILUS VALCOURT (This document is SEALED and only available to authorized persons.) (Attachments: # 1 Text of Proposed Order, # 2 Declaration of Jean Louissaint Fleury, # 3 Declaration of Thechelet Dieudonne, # 4 Declaration of Pouchon Bien-Aime, # 5 Declaration of Elyse Louima)(Crook, Jamie) (Entered: 02/04/2021)	
46	02/04/2021	Emergency MOTION to Stay Removal by BEDAPHECA ALCANTE, ALL PLAINTIFFS, B.A.M.M., B.V.-A., FIDETTE BOUTE, D.J.T.-B., D.J.Z., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., J.A.Z., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA, T.J.T.-B., MARTHA LILIANA TADAY-ACOSTA, JULIEN THOMAS, ROMILUS VALCOURT. (Attachments: # 1 Text of Proposed Order)(Crook, Jamie) (Entered: 02/04/2021)	View Add to request
45	02/04/2021	SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL filed by BEDAPHECA ALCANTE, ALL PLAINTIFFS, B.A.M.M., B.V.-A., FIDETTE BOUTE, D.J.T.-B., D.J.Z., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., J.A.Z., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA, T.J.T.-B., MARTHA LILIANA TADAY-ACOSTA, JULIEN THOMAS, ROMILUS VALCOURT (This document is SEALED and only available to authorized persons.) (Attachments: # 1 Text of Proposed Order, # 2 Declaration of	View Add to request

		Diana Quilli-Marca)(Crook, Jamie) (Entered: 02/04/2021)	
44	02/04/2021	Emergency MOTION to Stay Removal by BEDAPHECA ALCANTE, ALL PLAINTIFFS, B.A.M.M., B.V.-A., FIDETTE BOUTE, D.J.T.-B., D.J.Z., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., J.A.Z., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA, T.J.T.-B., MARTHA LILIANA TADAY-ACOSTA, JULIEN THOMAS, ROMILUS VALCOURT. (Attachments: # 1 Text of Proposed Order)(Crook, Jamie) (Entered: 02/04/2021)	View Add to request
43	02/04/2021	SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL filed by ALL PLAINTIFFS, B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA (This document is SEALED and only available to authorized persons.) (Attachments: # 1 Text of Proposed Order, # 2 Declaration of Jonny Dieudonne)(Crook, Jamie) (Entered: 02/04/2021)	View Add to request
42	02/04/2021	Emergency MOTION to Stay Removal by ALL PLAINTIFFS, B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA. (Attachments: # 1 Text of Proposed Order)(Crook, Jamie) (Entered: 02/04/2021)	View Add to request
	02/04/2021	Set/Reset Deadlines: Plaintiffs Motion For Classwide Preliminary Injunction due by 2/5/2021. Defendants Combined Opposition To Plaintiffs' Motion For Class Certification And Motion For Classwide Preliminary Injunction due by 2/17/2021. Plaintiffs Combined Reply In Support Of Both Motions due by 2/23/2021.(mac) (Entered: 02/04/2021)	Send Runner to Court
	02/04/2021	MINUTE ORDER treating as opposed and granting over	Send Runner to Court

	objection 42 Emergency Motion to Stay Removal. In view of the arguments presented by Plaintiffs in their motion, the Court's February 1, 2021 Minute Order, and for the reasons stated on the record at the January 12, 2021 Status Conference, it is hereby ORDERED that the removals of Jonny Dieudonne (SID 369-745-541), Nathalie Decilian (SID 369-745-608), and their minor child N.J.D.D. (SID 369-745-546) are STAYED pending further order of this Court. This Order is subject to reconsideration for good cause shown by no later than February 4, 2021 at 12:00 PM. Signed by Judge Emmet G. Sullivan on 2/4/2021. (lcegs3) (Entered: 02/04/2021)	
02/04/2021	MINUTE ORDER granting 43 SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL. Signed by Judge Emmet G. Sullivan on 2/4/2021. (lcegs3) (Entered: 02/04/2021)	Send Runner to Court
02/04/2021	Set/Reset Deadlines: Reconsideration, If Any, due no later than 12:00PM on 2/4/2021. (mac) (Entered: 02/04/2021)	Send Runner to Court
02/04/2021	MINUTE ORDER treating as opposed and granting over objection 44 Emergency Motion to Stay Removal. In view of the arguments presented by Plaintiffs in their motion, the Court's February 1, 2021 Minute Order, and for the reasons stated on the record at the January 12, 2021 Status Conference, it is hereby ORDERED that the removals of Diana Quilli-Marca (SID 369-752-319) and her minor child N.S.Q. (SID 369-752-531) are STAYED pending further order of this Court. This Order is subject to reconsideration for good cause shown by no later than February 4, 2021 at 10:00 PM. Signed by Judge Emmet G. Sullivan on 2/4/2021. (lcegs3) (Entered: 02/04/2021)	Send Runner to Court
02/04/2021	MINUTE ORDER granting 45 SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL. Signed by Judge Emmet G. Sullivan on 2/4/2021. (lcegs3) (Entered: 02/04/2021)	Send Runner to Court

02/04/2021	MINUTE ORDER treating as opposed and granting over objection 46 Emergency Motion to Stay Removal. In view of the arguments presented by Plaintiffs in their motion, the Court's February 1, 2021 Minute Order, and for the reasons stated on the record at the January 12, 2021 Status Conference, it is hereby ORDERED that the removals of the following families are STAYED pending further order of this Court: Thechelet Dieudonne (SID 369-745-511), Juna Delphin (SID 369-745-516), and their minor child T.D. (SID 369-745-519); Pouchon Bien-Aime, (SID 369-780-070), Annediana Desir, (SID 369-780-063), and their minor child P.R.B.A.D. (SID 369-780-078); Jean Louissaint Fleury, (SID 369-780-176), Barbara Fleury Previl, (SID 369-780-197), and their minor children D.L.F. (SID 369-780-189) and M.L. (SID 369-780-181); Elyse Louima (SID 369-739-119), Filande Adolphe (SID 369-739-126), and their minor child E.L.A. (SID 369-739-133). This Order is subject to reconsideration for good cause shown by no later than February 4, 2021 at 10:00 PM. Signed by Judge Emmet G. Sullivan on 2/4/2021. (lcegs3) (Entered: 02/04/2021)	Send Runner to Court
02/04/2021	MINUTE ORDER granting 47 Sealed Motion for Leave to File Document Under Seal. Signed by Judge Emmet G. Sullivan on 2/4/2021. (lcegs3) (Entered: 02/04/2021)	Send Runner to Court
02/03/2021	MINUTE ORDER granting 34 joint motion for scheduling order. The parties shall abide by the following briefing schedule: Plaintiffs shall file their motion for classwide preliminary injunction by no later than February 5, 2021; Defendants shall file their combined opposition to Plaintiffs' motion for class certification and motion for classwide preliminary injunction by no later than February 17, 2021; and Plaintiffs shall file their combined reply in support of both motions by no later than February 23, 2021. Signed by Judge Emmet	Send Runner to Court

	G. Sullivan on 2/3/2021. (lcegs3) (Entered: 02/03/2021)	
02/03/2021	MINUTE ORDER granting 35 motion for leave to appear pro hac vice. Stephen B. Kang is hereby admitted pro hac vice in this action. Counsel should register for e-filing via PACER and file a notice of appearance pursuant to LCvR 83.6(a). Click for instructions. Signed by Judge Emmet G. Sullivan on 2/3/2021. (lcegs3) (Entered: 02/03/2021)	Send Runner to Court
02/03/2021	MINUTE ORDER granting 36 motion for leave to appear pro hac vice. Ming Cheung is hereby admitted pro hac vice in this action. Counsel should register for e-filing via PACER and file a notice of appearance pursuant to LCvR 83.6(a). Click for instructions. Signed by Judge Emmet G. Sullivan on 2/3/2021. (lcegs3) (Entered: 02/03/2021)	Send Runner to Court
02/03/2021	MINUTE ORDER granting 37 motion for leave to appear pro hac vice. Cody Wofsy is hereby admitted pro hac vice in this action. Counsel should register for e-filing via PACER and file a notice of appearance pursuant to LCvR 83.6(a). Click for instructions. Signed by Judge Emmet G. Sullivan on 2/3/2021. (lcegs3) (Entered: 02/03/2021)	Send Runner to Court
02/03/2021	MINUTE ORDER granting 38 motion for leave to appear pro hac vice. Lee Gelernt is hereby admitted pro hac vice in this action. Counsel should register for e-filing via PACER and file a notice of appearance pursuant to LCvR 83.6(a). Click for instructions. Signed by Judge Emmet G. Sullivan on 2/3/2021. (lcegs3) (Entered: 02/03/2021)	Send Runner to Court
02/03/2021	MINUTE ORDER granting 39 motion for leave to appear pro hac vice. Morgan Russell is hereby admitted pro hac vice in this action. Counsel should register for e-filing via PACER and file a notice of appearance pursuant to LCvR 83.6(a). Click for instructions. Signed by Judge Emmet G. Sullivan on 2/3/2021. (lcegs3) (Entered: 02/03/2021)	Send Runner to Court

	02/03/2021	MINUTE ORDER granting 40 motion for leave to appear pro hac vice. Daniel Galindo is hereby admitted pro hac vice in this action. Counsel should register for e-filing via PACER and file a notice of appearance pursuant to LCvR 83.6(a). Click for instructions. Signed by Judge Emmet G. Sullivan on 2/3/2021. (lcegs3) (Entered: 02/03/2021)	Send Runner to Court
	02/03/2021	MINUTE ORDER granting 41 motion for leave to appear pro hac vice. Omar Jadwat is hereby admitted pro hac vice in this action. Counsel should register for e-filing via PACER and file a notice of appearance pursuant to LCvR 83.6(a). Click for instructions. Signed by Judge Emmet G. Sullivan on 2/3/2021. (lcegs3) (Entered: 02/03/2021)	Send Runner to Court
41	02/02/2021	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Omar Jadwat, Filing fee $ 100, receipt number ADCDC-8156091. Fee Status: Fee Paid. by B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA. (Perez, Celso) (Entered: 02/02/2021)	View Add to request
40	02/02/2021	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Daniel Galindo, Filing fee $ 100, receipt number ADCDC-8155744. Fee Status: Fee Paid. by B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA. (Perez, Celso) (Entered: 02/02/2021)	View Add to request
39	02/02/2021	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Morgan Russell, Filing fee $ 100, receipt number ADCDC-8155725. Fee Status: Fee Paid. by B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA. (Perez, Celso) (Entered: 02/02/2021)	View Add to request

38	02/02/2021	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Lee Gelernt, Filing fee $ 100, receipt number ADCDC-8155714. Fee Status: Fee Paid. by B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA. (Perez, Celso) (Entered: 02/02/2021)	View Add to request
37	02/02/2021	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Cody Wofsy, Filing fee $ 100, receipt number ADCDC-8155680. Fee Status: Fee Paid. by B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA. (Perez, Celso) (Entered: 02/02/2021)	View Add to request
36	02/02/2021	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Ming Cheung, Filing fee $ 100, receipt number ADCDC-8155543. Fee Status: Fee Paid. by B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA. (Perez, Celso) (Entered: 02/02/2021)	View Add to request
35	02/02/2021	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Stephen B. Kang, Filing fee $ 100, receipt number ADCDC-8155498. Fee Status: Fee Paid. by B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA. (Perez, Celso) (Entered: 02/02/2021)	View Add to request
34	02/02/2021	Joint MOTION for Scheduling Order by B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA. (Attachments: # 1 Text of Proposed Order)(Perez, Celso) (Entered: 02/02/2021)	View Add to request

33	02/01/2021	RESPONSE TO ORDER OF THE COURT re Order on Motion to Stay,,,,,, filed by ALEX M. AZAR, II, JONATHAN FAHEY, WILLIAM A. FERRARA, PETER T. GAYNOR, TROY MILLER, MARK A. MORGAN, DAVID PEKOSKE, ROBERT R. REDFIELD, RODNEY S. SCOTT. (Tepe, Sean) (Entered: 02/01/2021)	View Add to request
32	02/01/2021	SEALED Declarations of Fils Aime, Ladouceur, Louis, Myrtil, Sabino & Santos De Paula filed by ALL PLAINTIFFS. (This document is SEALED and only available to authorized persons.)(zjf) (Entered: 02/01/2021)	View Add to request
31	02/01/2021	REPLY to opposition to motion re 28 Emergency MOTION to Stay Removal filed by B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA. (Perez, Celso) (Entered: 02/01/2021)	View Add to request
30	02/01/2021	RESPONSE TO ORDER OF THE COURT re Order, Response to January 31, 2021 Minute Order filed by ALEX M. AZAR, II, JONATHAN FAHEY, WILLIAM A. FERRARA, PETER T. GAYNOR, TROY MILLER, MARK A. MORGAN, DAVID PEKOSKE, ROBERT R. REDFIELD, RODNEY S. SCOTT. (Tepe, Sean) (Entered: 02/01/2021)	View Add to request
	02/01/2021	Set/Reset Deadlines: Government Response due no later than 8:00AM on 2/1/2021. Plaintiffs Reply due no later than 12:00PM on2/1/2021. (mac) (Entered: 02/01/2021)	Send Runner to Court
	02/01/2021	MINUTE ORDER granting, over objection, 28 Emergency Motion to Stay Removal. Although the government notes in its 30 Response that, on January 31, 2021, the U.S. Court of Appeals for the District of Columbia ("D.C. Circuit") stayed the class-wide preliminary injunction in P.J.E.S. v. Wolf, No. 20-cv-2245 (D.D.C.), see Order, P.J.E.S. v. Pekoske, No. 20-5357 (D.C. Cir. Jan. 29, 2021), the government does not, and cannot, argue that the D.C. Circuit's order requires denial	Send Runner to Court

		of 28 Emergency Motion to Stay Removal because the D.C. Circuit's order is not published and was issued without opinion or reasoning. Accordingly, in view of the arguments presented by Plaintiffs, and for the reasons stated on the record at the January 12, 2021 Status Conference, it is hereby ORDERED that the removals of the following six families are STAYED pending further order of this Court: Evens Fils Aime (SID 369-703-977), Shnaidere Altenord (SID 369-703-992), and their minor child A.F.A.A. (SID 369-704-002); Rijkaard Ladouceur (SID 369-690-928), Miralia Fleurima (SID 369-690-930), and their minor children N.F. (SID 369-690-940) and B.R.L.F. (SID 369-690-944); Frenzy Joseph Louis (SID 369-627-368), Rose Maria Bien-Aime (SID 369-627-371), and their minor child H.G.L. (SID 369-627-374); Djimytoo Myrtil (SID 369-705-242), Lunda Odilus (SID 369-705-228), and their minor child M.Y.M.O. (SID 369-705-252); Eric Lenes Sabino (SID 369-694-161), Elisandra de Lima Borges (SID 369-694-170), and their minor children K.C.S.B. (SID 369-694-176) and K.V.S.B. (SID 369-694-183); Josimar Santos de Paula (SID 369-695-923), and his minor child K.V.S.D.P. (SID 369- 695-934). Signed by Judge Emmet G. Sullivan on 2/1/2021. (lcegs3) (Entered: 02/01/2021)	
	02/01/2021	MINUTE ORDER granting 29 SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL. Signed by Judge Emmet G. Sullivan on 2/1/2021. (lcegs3) (Entered: 02/01/2021)	Send Runner to Court
29	01/31/2021	SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL filed by B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA (This document is SEALED and only available to authorized persons.) (Attachments: # 1 Text of Proposed Order, # 2 Declaration	View Add to request

		of Fils Aime, # 3 Declaration of Ladouceur, # 4 Declaration of Louis, # 5 Declaration of Myrtil, # 6 Declaration of Sabino, # 7 Declaration of Santos De Paula)(Perez, Celso) (Entered: 01/31/2021)	
28	01/31/2021	Emergency MOTION to Stay Removal by B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA. (Attachments: # 1 Text of Proposed Order)(Perez, Celso) (Entered: 01/31/2021)	View Add to request
	01/31/2021	MINUTE ORDER. In view of 28 Emergency Motion to Stay Removal, the government is directed to file a response by no later than February 1, 2021 at 8:00 AM. Plaintiffs shall file a reply by no later than February 1, 2021 at 12:00 PM. Signed by Judge Emmet G. Sullivan on 1/31/2021. (lcegs3) (Entered: 01/31/2021)	Send Runner to Court
27	01/29/2021	SEALED Declarations of Casy, De Oliveira, Zami and Lataro filed by ALL PLAINTIFFS. (This document is SEALED and only available to authorized persons.) (zjf) (Main Document 27 replaced on 1/31/2021) (zjf). (Entered: 01/31/2021)	View Add to request
26	01/29/2021	SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL filed by B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA (This document is SEALED and only available to authorized persons.) (Attachments: # 1 Text of Proposed Order, # 2 Declaration of Casy, # 3 Declaration of De Oliveira, # 4 Declaration of Zami, # 5 Declaration of Lataro)(Perez, Celso) (Entered: 01/29/2021)	View Add to request
25	01/29/2021	Emergency MOTION to Stay Removal by B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA.	View Add to request

		(Attachments: # 1 Text of Proposed Order)(Perez, Celso) (Entered: 01/29/2021)	
	01/29/2021	MINUTE ORDER treating as opposed and granting over objection 25 emergency motion to stay removal. In view of the arguments presented by Plaintiffs in their motion and for the reasons stated on the record at the January 12, 2021 Status Conference, it is hereby ORDERED that the removal of Kaio Joseph Lataro (SID 369-651-122), Carine Nathielle Pereira Brocanelli (SID 369-651-127, and their minor child M.L.B.L. (SID 369-651- 134); Jude Mary Zami (SID 369-696-796), Santhianie Aris (SID 369-696-835), and their minor child C.E.J.Z.A. (SID 369-696-868); Gracia Junior Casy (SID 369-706-088), Farah Casy Bescien (SID 369-706-084), and their minor child T.C. (SID 369-706-096); and Jessica Fernandes de Oliveira (SID 369-676-509) and her minor child J.F.L. (SID 369-676-502) is STAYED pending further order of the Court. This Order is subject to reconsideration for good cause shown by no later than January 29, 2021 at 6:00 PM. Signed by Judge Emmet G. Sullivan on 1/29/2021. (lcegs3) (Entered: 01/29/2021)	Send Runner to Court
	01/29/2021	MINUTE ORDER granting 26 SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL. Signed by Judge Emmet G. Sullivan on 1/29/2021. (lcegs3) (Entered: 01/29/2021)	Send Runner to Court
	01/29/2021	Set/Reset Deadlines: Motion For Reconsideration due no later than 6:00PM on 1/29/2021. (mac) (Entered: 01/29/2021)	Send Runner to Court
23	01/28/2021	MOTION to Certify Class by B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA. (Attachments: # 1 Memorandum in Support of Motion to Certify Class, # 2 Declaration of Stephen B. Kang with Exhibits A and B, # 3 Text of Proposed Order)(Perez, Celso) (Entered: 01/28/2021)	View Add to request

22	01/28/2021	AMENDED COMPLAINT against All Defendants filed by B.A.M.M., H.N.D.S., H.T.D.S.D.S., I.M.C.H., JOSAINE PEREIRA-DE SOUZA, E.R.P.D.S., M.E.S.D.S., NANCY GIMENA HUISHA-HUISHA, VALERIA MACANCELA BERMEJO. (Attachments: # 1 Exhibit A. Redline Amended Complaint)(Perez, Celso) (Entered: 01/28/2021)	View Add to request
24	01/27/2021	SEALED DOCUMENT (Declaration) filed by B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA. (This document is SEALED and only available to authorized persons.)(znmw) (Entered: 01/29/2021)	View Add to request
	01/27/2021	MINUTE ORDER treating as opposed and granting over objection 20 emergency motion to stay removal. In view of the arguments presented by Plaintiffs in their motion and for the reasons stated on the record at the January 12, 2021 Status Conference, it is hereby ORDERED that the removal of Romilus Valcourt (SID 369-705-271), Bedapheca Alcante, (SID 369-705-293), and their minor child B.V.-A. (SID 369-705-304), is STAYED pending further order of the Court. This Order is subject to reconsideration for good cause shown by no later than January 27, 2021 at 5:00 PM. Signed by Judge Emmet G. Sullivan on 1/27/2021. (lcegs3) (Entered: 01/27/2021)	Send Runner to Court
	01/27/2021	MINUTE ORDER granting 21 SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL. Signed by Judge Emmet G. Sullivan on 1/27/2021. (lcegs3) (Entered: 01/27/2021)	Send Runner to Court
	01/27/2021	Set/Reset Deadlines: Minute Order Reconsideration For Good Cause Shown due no later than 5:00PM on 1/27/2021. (mac) (Entered: 01/27/2021)	Send Runner to Court
	01/27/2021	MINUTE ORDER granting 19 motion for leave to appear pro hac vice. Karla M. Vargas is hereby admitted pro hac vice in this action. Counsel should register for e-	Send Runner to Court

		filing via PACER and file a notice of appearance pursuant to LCvR 83.6(a). Click for instructions. Signed by Judge Emmet G. Sullivan on 1/27/2021. (lcegs3) (Entered: 01/27/2021)	
21	01/26/2021	SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL filed by B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA (This document is SEALED and only available to authorized persons.) (Attachments: # 1 Text of Proposed Order, # 2 Declaration of Valcourt)(Perez, Celso) (Entered: 01/26/2021)	View Add to request

20	01/26/2021	Emergency MOTION to Stay Removal by B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA. (Attachments: # 1 Text of Proposed Order)(Perez, Celso) (Entered: 01/26/2021)	View Add to request
19	01/26/2021	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Karla M. Vargas, Filing fee $ 100, receipt number ADCDC-8127067. Fee Status: Fee Paid. by B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA. (Perez, Celso) (Entered: 01/26/2021)	View Add to request
18	01/25/2021	STANDING ORDER: The parties are directed to read the attached Standing Order Governing Civil Cases Before Judge Emmet G. Sullivan in its entirety upon receipt. The parties are hereby ORDERED to comply with the directives in the attached Standing Order. Signed by Judge Emmet G. Sullivan on 1/25/21. (Attachment: # 1 Exhibit 1) (mac) (Entered: 01/25/2021)	View Add to request
	01/22/2021	Set/Reset Deadlines: Plaintiff Amended Complaint due by 1/28/2021. (mac) (Entered: 01/22/2021)	Send Runner to Court
16	01/21/2021	Joint STATUS REPORT by B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA. (Perez, Celso) (Entered: 01/21/2021)	View Add to request
	01/21/2021	Set/Reset Deadlines: Joint Status Report due no later than 12:00PM on 1/21/2021 (mac) (Entered: 01/21/2021)	Send Runner to Court
	01/21/2021	MINUTE ORDER. In view of 16 joint status report, Plaintiffs shall file their amended complaint by no later than January 28, 2021. Signed by Judge Emmet G. Sullivan on 1/21/2021. (lcegs3) (Entered: 01/21/2021)	Send Runner to Court

15	01/20/2021	REPLY re 2 Notice of Related Cases filed by B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA. (Perez, Celso) Modified on 1/20/2021 to correct docket link (zjf). (Entered: 01/20/2021)	View Add to request
17	01/19/2021	SEALED DECLARATIONS filed by ALL PLAINTIFFS. (This document is SEALED and only available to authorized persons.)(zjf) (Entered: 01/21/2021)	View Add to request
14	01/19/2021	RESPONSE re 2 Notice of Related Case filed by ALEX M. AZAR, II, JONATHAN FAHEY, WILLIAM A. FERRARA, PETER T. GAYNOR, MARK A. MORGAN, ROBERT R. REDFIELD, RODNEY S. SCOTT. (Tepe, Sean) (Entered: 01/19/2021)	View Add to request
13	01/19/2021	SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL filed by B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA (This document is SEALED and only available to authorized persons.) (Attachments: # 1 Text of Proposed Order, # 2 Declaration of Taday-Acosta, # 3 Declaration of Thomas)(Perez, Celso) (Entered: 01/19/2021)	View Add to request
12	01/19/2021	Emergency MOTION to Stay Removal by B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA. (Attachments: # 1 Text of Proposed Order)(Perez, Celso) (Entered: 01/19/2021)	View Add to request
	01/19/2021	Set/Reset Deadlines: Defendants Brief due 1/19/2021. Plaintiffs Brief due 1/21/2021. (mac) (Entered: 01/19/2021)	Send Runner to Court
	01/19/2021	MINUTE ORDER treating as opposed and granting over objection 12 emergency order to stay removal. In view of the arguments presented by Plaintiffs in their motion and for the reasons	Send Runner to Court

		stated on the record at the January 12, 2021 Status Conference, it is hereby ORDERED that the removal of Martha Liliana Taday-Acosta (SID 369-635-597) and her minor children D.J.Z. (SID 369-635-599) and J.A.Z. (SID 369-635-605); and of Julien Thomas (SID 369-648-244), Fidette Boute (SID 369-648-252), and their minor children D.J.T.-B. (SID 369- 648-250) and T.J.T.-B. (SID 369-648-247), is STAYED pending further order of the Court. It is FURTHER ORDERED that the parties shall file a joint status report with a recommendation for further proceedings by no later than January 21, 2021 at 12:00 PM. This Order is subject to reconsideration for good cause shown by no later than January 19, 2021 at 8:00 PM. Signed by Judge Emmet G. Sullivan on 1/19/2021. (lcegs3) (Entered: 01/19/2021)	
	01/19/2021	MINUTE ORDER granting 13 SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL. Signed by Judge Emmet G. Sullivan on 1/19/2021. (lcegs3) (Entered: 01/19/2021)	Send Runner to Court
11	01/15/2021	PROPOSED BRIEFING SCHEDULE Joint Proposed Briefing Schedule by ALEX M. AZAR, II, JONATHAN FAHEY, WILLIAM A. FERRARA, PETER T. GAYNOR, MARK A. MORGAN, ROBERT R. REDFIELD, RODNEY S. SCOTT. (Tepe, Sean) (Entered: 01/15/2021)	View Add to request
	01/15/2021	MINUTE ORDER. In view of Parties' 11 PROPOSED BRIEFING SCHEDULE concerning the specific issue of whether this case is related to Civil Action Number 20-2245, P.J.E.S. v. Wolf, the parties SHALL adhere to the following briefing schedule: Defendants shall file a brief with supporting points and authorities of no more than 10 pages in length by no later than January 19, 2021, and Plaintiffs shall file a brief with supporting points and authorities of no more than 10 pages in length by no later than January 21, 2021. Signed by Judge Emmet G. Sullivan on	Send Runner to Court

		1/15/2021. (lcegs2) (Entered: 01/15/2021)	
10	01/14/2021	NOTICE of Appearance by Jamie L. Crook on behalf of All Plaintiffs (Crook, Jamie) (Main Document 10 replaced on 1/14/2021) (zjf). (Entered: 01/14/2021)	View Add to request
9	01/13/2021	SEALED Declarations filed by B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA. (This document is SEALED and only available to authorized persons.)(zjf) (Entered: 01/13/2021)	View Add to request
	01/13/2021	Set/Reset Deadlines: Joint Status Report due by 1/15/2021 (mac) (Entered: 01/13/2021)	Send Runner to Court
	01/13/2021	SEALED MINUTE ORDER granting 4 SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL. Signed by Judge Emmet G. Sullivan on 1/13/21. (mac) (Entered: 01/13/2021)	Send Runner to Court
8	01/12/2021	NOTICE of Appearance by Arthur B. Spitzer on behalf of All Plaintiffs (Spitzer, Arthur) (Entered: 01/12/2021)	View Add to request
7	01/12/2021	NOTICE of Appearance by Scott Michelman on behalf of All Plaintiffs (Michelman, Scott) (Entered: 01/12/2021)	View Add to request
6	01/12/2021	NOTICE of Appearance by Sean Michael Tepe on behalf of All Defendants (Tepe, Sean) (Entered: 01/12/2021)	View Add to request
5	01/12/2021	Emergency MOTION to Stay Removal by B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA (Attachments: # 1 Memorandum in Support of Emergency Motion for Stay of Removal, # 2 Declaration of Andrea Meza, # 3 Text of Proposed Order)(Perez, Celso) (Entered: 01/12/2021)	View Add to request
4	01/12/2021	SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL filed by B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO,	View Add to request

		JOSAINE PEREIRA-DE SOUZA (This document is SEALED and only available to authorized persons.) (Attachments: # 1 Declaration of Huisha-Huisha, # 2 Declaration of Pereira-De Souza, # 3 Declaration of Macancela Bermejo, # 4 Text of Proposed Order)(Perez, Celso) (Entered: 01/12/2021)	
3	01/12/2021	SUMMONS (9) Issued Electronically as to ALEX M. AZAR, II, JONATHAN FAHEY, WILLIAM A. FERRARA, PETER T. GAYNOR, MARK A. MORGAN, ROBERT R. REDFIELD, RODNEY S. SCOTT, U.S. Attorney and U.S. Attorney General (Attachment: # 1 Notice and Consent)(adh,) (Entered: 01/12/2021)	View Add to request
2	01/12/2021	NOTICE OF RELATED CASE by B.A.M.M., E.R.P.D.S., H.N.D.S., H.T.D.S.D.S., NANCY GIMENA HUISHA-HUISHA, I.M.C.H., M.E.S.D.S., VALERIA MACANCELA BERMEJO, JOSAINE PEREIRA-DE SOUZA. Case related to Case No. 20cv2245. (adh,) (Entered: 01/12/2021)	View Add to request
1	01/12/2021	COMPLAINT against ALEX M. AZAR, II, JONATHAN FAHEY, WILLIAM A. FERRARA, PETER T. GAYNOR, MARK A. MORGAN, ROBERT R. REDFIELD, RODNEY S. SCOTT (Filing fee $ 402 receipt number ADCDC-8066168) filed by B.A.M.M., H.N.D.S., H.T.D.S.D.S., I.M.C.H., JOSAINE PEREIRA-DE SOUZA, E.R.P.D.S., M.E.S.D.S., NANCY GIMENA HUISHA-HUISHA, VALERIA MACANCELA BERMEJO. (Attachments: # 1 Civil Cover Sheet, # 2 Notice of Related Cases, # 3 Summons for all Defendants)(Perez, Celso) (Entered: 01/12/2021)	View Add to request
	01/12/2021	Case Assigned to Judge Emmet G. Sullivan. (adh,) (Entered: 01/12/2021)	Send Runner to Court
	01/12/2021	MINUTE ORDER. The Court, sua sponte, schedules a Status Conference for January 12, 2021 at 6:00 PM via Teleconference. The parties shall contact Mr. Mark Coates, the Courtroom Deputy Clerk, for the dial-in information. In view of Plaintiffs' 5 Emergency	Send Runner to Court

	MOTION to Stay Removal, plaintiffs are HEREBY DIRECTED to contact forthwith the United States Attorneys Office for the District of Columbia and/or the Department of Justice as appropriate to identify government counsel. Signed by Judge Emmet G. Sullivan on 1/12/2021. (lcegs2) (Entered: 01/12/2021)	
01/12/2021	Set/Reset Hearings: Status Conference set for 1/12/2021 at 6:00 PM in Telephonic/VTC before Judge Emmet G. Sullivan. (mac) (Entered: 01/12/2021)	Send Runner to Court
01/12/2021	Minute Entry for proceedings held before Judge Emmet G. Sullivan: Status Conference held via VTC on 1/12/2021. The Court Will Grant Motion Over Objection. Plaintiffs Not Involuntarily Moved Pending Further Order Of The Court. The Court Will Issue An Order. Parties Will Confer In Regard To Briefing Schedule. (Court Reporter LISA BANKINS.) (mac) (Entered: 01/12/2021)	Send Runner to Court
01/12/2021	MINUTE ORDER granting, over objection, Plaintiffs' 5 Emergency MOTION to Stay Removal. In view of the arguments presented by Plaintiffs in their motion, the representations made by the Government, and for the reasons stated on the record at the January 12, 2021 Status Conference, Plaintiffs shall not be involuntarily removed from the United States pending further order of the Court. Parties shall file a Joint Proposed Scheduling Order by no later than January 15, 2021. In the forthcoming briefing, in addition to other arguments, parties shall address whether this case is related to Civil Action Number 20-2245, P.J.E.S. v. Wolf Signed by Judge Emmet G. Sullivan on 1/12/2021. (lcegs2) (Entered: 01/12/2021)	Send Runner to Court

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INTRODUCTION

The States of Arizona, Louisiana, Alabama, Alaska, Kansas, Kentucky, Mississippi, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Virginia, West Virginia, and Wyoming (collectively, "the States"), hereby move pursuant to Federal Rule of Civil Procedure 24 to intervene in this action, both as of right and permissively.[1] The States successfully obtained a preliminary injunction against Defendants' attempts to rescind their Title 42 Orders. This Court entered an order with that same effect last week, Dkt. 165, and the Federal Defendants have made clear that they will not seek to stay that order beyond the few weeks they need to comply in an orderly fashion. Thus, despite defending this lawsuit since January of 2021, the Federal Defendants have shifted course and abandoned their defense of Title 42. In essence, Federal Defendants have circumvented APA notice-and-comment requirements by abandoning defense of Title 42 and instead agreeing with Plaintiffs on a December 21 end date.

Because invalidation of the Title 42 Orders will directly harm the States, they now seek to intervene to offer a defense of the Title 42 policy so that its validity can be resolved on the merits, rather than through strategic surrender. This motion is plainly timely because it comes within a week of the Federal Defendants' volte-face—which made plain that the States' interests are no longer adequately represented.

Plaintiffs and Defendants oppose this motion.

[1] Additional States contemplate joining this motion via a follow-on filing.

BACKGROUND

THE TITLE 42 ORDERS

COVID-19 is an infectious disease first detected in China in late-2019. It quickly spread into a global pandemic. The Secretary of the United States Department of Health and Human Services accordingly declared a public health emergency on January 31, 2020, under section 319 of the Public Health Service Act (42 U.S.C. 247(d)). That same day, the President sought to limit the spread of the spread of COVID-19 by suspending "[t]he entry into the United States, as immigrants or nonimmigrants, of all aliens who were physically present within the People's Republic of China … during the 14-day period preceding their entry or attempted entry into the United States." *Proclamation 9984, Suspension of Entry*, 85 Fed. Reg. 6709, 6710 (Feb. 5, 2020). The President then issued similar suspensions of entry from the Republic of Iran, *Proclamation 9992, Suspension of Entry*, 85 Fed. Reg. 12,855 (Mar. 4, 2020), and the Schengen Area of Europe, *Proclamation* 9993*, Suspension of Entry*, 85 Fed. Reg. 15,045 (Mar. 16, 2020).

In suspending entry from these areas, the President explained "the potential for widespread transmission of [the virus that causes COVID-19] by infected individuals seeking to enter the United States threatens the security of our transportation system and infrastructure and the national security." 85 Fed. Reg. at 12,855-56. He further explained that "the [Centers for Disease Control and Prevention], along with State and local health departments, has limited resources, and the public health system could be overwhelmed if sustained human-to-human transmission of the virus occurred in the United States" on a large scale. *Id.* "Sustained human-to-human transmission has the potential to have cascading public health, economic, national security, and societal consequences." *Id.*; *see also* 85 Fed. Reg. at 15,045. As COVID continued to spread, the President declared a national emergency. *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, 85 Fed. Reg. 15,337 (Mar. 18, 2020).

Consistent with the threat posed by COVID-19, federal agencies issued numerous additional travel restrictions, including restrictions on "non-essential travel between the United States and Mexico" because it "pose[d] a specific threat to human life or national interests." *Notification of Temporary Travel Restrictions*, 85 Fed. Reg. 16,547 (Mar. 24, 2020). Land crossings, for example, placed "the personnel staffing land ports of entry … as well as the individuals traveling through these ports of entry to increased risk of exposure to COVID-19." *Id.* at 16,547.

CDC acted, too. Pursuant to section 362 of the Public Health Service Act, 42 U.S.C § 265, CDC issued an Interim Final Rule providing that it may prohibit the "introduction into the United States of persons" from foreign countries. *Control of Communicable Diseases*, 85 Fed. Reg. 16,559, 16,563 (Mar. 24, 2020) (effective date Mar. 20, 2020). CDC then issued an order under Title 42 directing the "immediate suspension of the introduction" of certain persons, referred to as "covered aliens." *Notice of Order Under Sections 362 and 365 of the Public Health Service Act*, 85 Fed. Reb. 17,060, 17,067 (Mar. 26, 2020) (effective date March 20, 2020). "Covered Aliens" are those seeking to enter the United States through Canada or Mexico who "seek[] to enter . . . [ports of entry] who do not have proper travel documents, aliens whose entry is otherwise contrary to law, and aliens who are apprehended near the border seeking to unlawfully enter the United States between [ports of entry]." *Id.* at 17,060. The March 20 Order was extended on April 20, 2020, *Extension of Order*, 85 Fed. Reg. 22,424 (Apr. 22, 2020) (effective date April 20, 2020), and it was amended to cover both land and costal ports of entry and Border Patrol Stations on May 26, 2020, *Amendment and Extension of Order*, 85 Fed. Reg. 31,503 (May 26, 2020) (effective date May 21, 2020).

After receiving public comments in response to the Interim Final Rule, CDC issued a Final Rule pursuant to 42 U.S.C § 265 "establish[ing] final regulations under which the [CDC] Director may suspend the right to introduce and prohibit, in whole or in part, the introduction of persons into the United States." *Control of Communicable Diseases*, 85 Fed. Reg. 56,524 (Sept.11, 2020). CDC also extended its suspension of the introduction of Covered Aliens. 85 Fed. Reg. 65,806 (Oct. 16, 2020); 86 Fed. Reg. 38,717 (July 22, 2021); 86 Fed. Reg. 42,828 (Aug. 5, 2021); 87 Fed. Reg. 15,243 (Mar. 17, 2022).

THE HUISHA-HUISHA SUIT

On January 12, 2021, plaintiffs purportedly subject to expulsion under Title 42 filed this suit alleging the Title 42 orders violate various statutory provisions, including the Administrative Procedure Act. Dkt. 1. On September 16, 2021, this Court granted class certification and further granted a preliminary injunction prohibiting Defendants "from applying the Title 42 Process, including the CDC's August 2021 Order, to the Class Members." Dkt. 122 at 2. The basis of that preliminary injunction was this Court's determination that 42 U.S.C. § 265 does not permit expulsion or removal of aliens. Dkt. 123 at 34. Defendants appealed. Dkt. 124.

The D.C. Circuit stayed this Court's preliminary injunction, and it generally rejected this Court's statutory analysis, albeit while affirming a narrow part. *Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022). More specifically, the D.C. Circuit held "the Executive may expel the Plaintiffs, but only to places where they will not be persecuted or tortured," then remanded to this Court for further proceedings. Dkt. 136-1.

TEXAS ENJOINS AN UNEXPLAINED EXCEPTION TO TITLE 42

Yielding to the demands of his base, on February 2, 2021, President Biden ordered that "[t]he Secretary of HHS and the Director of CDC, in consultation with [DHS], shall promptly

review and determine whether termination, rescission, or modification of the [Title 42 orders] is necessary and appropriate." 86 Fed. Reg. 8,267 (Feb. 5, 2021). Citing President Biden's order, CDC created an exception to the Title 42 process for certain aliens. *Notice of Temporary Exception*, 86 Fed. Reg. 9,942 (Feb. 17, 2021). Texas brought suit attacking the essentially unexplained exception as, *inter alia*, arbitrary and capricious such that it violated the APA. *See* Compl. (Dkt. 1), *Texas v.* Biden, No. 4:21-cv-579 (N.D. Tex.). Texas then moved for a preliminary injunction. Ex. 1. The Northern District of Texas first held that Texas had standing. *Texas v. Biden*, 589 F. Supp. 3d 595, 610-13 (N.D. Tex. 2022). The court identified various financial injuries to Texas from increased expenditures traceable to the Title 42 exception. And the court noted CDC "tacitly confirmed" Texas's claim of injury: one of the Title 42 Orders acknowledges "'[s]igns of stress are already present in the southern regions of the United States,'" and "'the flow of migration directly impacts not only border communities and regions, but also destination communities and healthcare resources of both.'" *Id.* at 612 (quoting 86 Fed. Reg. at 42,835). On the merits, the court agreed with Texas, so it preliminarily enjoined the defendants from implementing the exception to the Title 42 process. *Id.* at 623-24.

TWENTY-FOUR STATES ENJOIN CDC'S ATTEMPT TO TERMINATE TITLE 42

In April 2022—fourteen months after President Biden instructed it to consider doing so—CDC issued an order terminating its previous Title 42 Orders outright. Dkt. 134. A coalition of States then filed suit alleging the Termination Order violated the APA because it was issued without notice and comment and was arbitrary and capricious. Compl. (Dkt. 1), *Louisiana v. Centers for Disease Control*, No. 6:22-885 (W.D. La.). The States noted the Termination Order was "plainly at war with other policies of the Biden Administration," such as refusing to lift the mask mandate on airline travelers, refusing to repeal vaccination mandates, and insisting on

discharging members of the military who sought religious exemptions from those mandates. *Id.* ¶ 13. And CDC utterly failed to consider the consequences of its order on the States, which even Biden Administration officials acknowledged would be an "influx" of aliens, inflicting a "surge on top of a surge" that would irreparably harm the Intervenor States. *Id.* ¶¶ 7, 30-31, 90. Ultimately, 24 States joined in the challenge and moved for a preliminary injunction. Exh. 3.

The Western District of Louisiana granted the States' motion. *Louisiana v. Centers for Disease Control & Prevention,* 2022 WL 1604901, at *23 (W.D. La. May 20, 2022). Like the Northern District of Texas, the court expressly rejected the contention that the States lacked standing do defend Title 42. *Id.* at *10, 15. In addition to the special solicitude due States, the court found "the States have come forward with evidence that the Termination Order is likely to result in a significant increase in border crossings, [and] that this increase will [adversely] impact" the States in a way fairly traceable to the termination of Title 42. *Id.* at *13, 14-15. On the merits, the court held CDC failed to demonstrate "good cause" for failing to engage in notice-and-comment before issuing the Termination Order. *Id.* at *20. And although the court declined to reach whether the Termination Order was arbitrary and capricious, it strongly suggested as much based on appellate precedent. *Id.* at *22. Defendants and activist intervenors appealed to the U.S. Court of Appeals for the Fifth Circuit. That court denied relief from the nationwide scope of the preliminary injunction. Ex. 5. Briefing on the merits is now complete. *See Louisiana v. CDC*, No. 22-30303 (5th Cir.).

THIS COURT VACATES THE TITLE 42 FINAL RULE AND ASSOCIATED ORDERS

Three months after the Western District of Louisiana entered its preliminary injunction against CDC's Termination Order, the plaintiffs in this case moved for partial summary judgment that "the regulation at 42 C.F.R. § 71.40 and all orders and decision memos issued by [CDC] or

the U.S. Department of Health and Human Services suspending the right to introduce certain persons into the United States—is arbitrary and capricious in violation of the Administrative Procedure Act." Dkt. 144.[2] When Plaintiffs first raised the issue of vacatur in their reply, the Federal Defendants filed a sur-reply emphasizing that "grants of partial summary judgment are generally considered interlocutory orders" and neither party had addressed the question of remedy in their briefing. Dkt. 160 at 1-2 (quoting *State of Alaska v. FERC*, 980 F.2d 761, 764 (D.C. Cir. 1992)). This Court nevertheless entered a judgment on November 15, 2022, giving Plaintiffs everything they asked for. It "vacate[d] and set[] aside the Title 42 policy-consisting of the regulation at 42 C.F.R. § 71.40 and all orders and decision memos issued by [CDC] or the U.S. Department of Health and Human Services suspending the right to introduce certain persons into the United States" as arbitrary and capricious in violation of the APA. Dkt. 164 at 1. The Court then stated "that any request to stay this Order pending appeal will be denied." *Id.* at 2.

THE FEDERAL DEFENDANTS ABANDON THEIR DEFENSE OF TITLE 42

Within hours of this Court's order, the Federal Defendants filed an Unopposed Emergency Motion for Temporary Stay. Dkt. 166. The Defendants made clear that "[t]he requested temporary stay … is not for the pendency of appeal but rather for only a temporary period." *Id.* ¶ 6. They elaborated:

> DHS requires a short period of time to prepare for the transition from Title 42 to Title 8 processing, given the need to resolve resource and logistical issues that it was unable to address in advance without knowing precisely when currently operative August 2021 Title 42 order would end. Cf. 87 Fed. Reg. at 19,954–56 (setting effective date of Termination Order for 52 days from date of issuance to, among other things, provide DHS with additional time to ready operational plans).

[2] An APA claim is almost necessarily based on the public record, and it appears no non-public documents were submitted in support of summary judgment. The summary judgment briefing is nevertheless inexplicably sealed. *See* Dkt. 144-1. This Court ordered Plaintiffs to file a redacted version of that document within five business days of a September 28, 2022, Minute Order, but it appears Plaintiffs failed to comply.

> During this period of time, DHS will need to move additional resources to the border and coordinate with stakeholders, including non-governmental organizations and state and local governments, to help prepare for the transition to Title 8 processing. This transition period is critical to ensuring that DHS can continue to carry out its mission to secure the Nation's borders and to conduct its border operations in an orderly fashion.

Id. ¶ 7. This Court granted that request "with great reluctance" and specified that its order will take effect at midnight on December 21, 2022.

The Defendants then informed the Western District of Louisiana that "[o]nce the five-week stay expires … CDC's Title 42 orders will be vacated, and there will thus be no legal authority for the government to continue to enforce the Title 42 policy." Ex. 6. Accordingly, notwithstanding the preliminary injunction, "on December 21, DHS will begin processing all noncitizens entering the United States pursuant to Title 8." *Id.* Defendants made a substantially similar filing with the U.S. Court of Appeals for the Fifth Circuit. Ex. 7.

LEGAL STANDARD

Intervention is governed by Federal Rule of Civil Procedure 24. "On timely motion, the court must permit anyone to intervene who … claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). Alternatively, "[o]n timely motion, the court may permit anyone to intervene who … has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1).

ARGUMENT

I. THIS COURT SHOULD GRANT THE STATES INTERVENTION AS OF RIGHT.

To intervene as of right, "prospective intervenors must satisfy the four requirements of Rule 24(a)(2)." *In re Brewer*, 863 F.3d 861, 872 (D.C. Cir. 2017). Those requirements are "(1)

the motion for intervention must be timely; (2) intervenors must have an interest in the subject of the action; (3) their interest must be impaired or impeded as a practical matter absent intervention; and (4) the would-be intervenor's interest must not be adequately represented by any other party." *Id.* The Intervenor States satisfy each of these requirements.

A. The States' Motion to Intervene Is Timely.

"[T]imeliness is to be judged in consideration of all the circumstances." *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001). The Supreme Court recently explained that "the most important circumstance relating to timeliness" is whether the litigant "sought to intervene as soon as it became clear that [its] interests would no longer be protected by the parties in the case." *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1012 (2022) (internal quotation marks omitted). And a post-judgment motion to intervene is timely if it is "filed soon after the movant learned that [a party purportedly representing the State's interests] would not appeal." *Id.* (discussing *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 396 (1977)); *accord United States House of Representatives v. Price*, No. 16-5202, 2017 WL 3271445, at *2 (D.C. Cir. Aug. 1, 2017) ("Where, as here, substantial doubts about the inadequacy of representation develop after the case has begun, timeliness is measured from when the potential inadequacy of representation develops.").

The D.C. Circuit has allowed intervention when a movant was "prompted by the post-judgment prospect that the Government might not appeal." *Smoke*, 252 F.3d at 471. The Court noted that "[p]rior to the entry of judgment . . . [the movant] had no reason to intervene; [its] interests were fully consonant with those of the Government, and those interests were adequately represented by the Government's litigation of the case." *Id.* In such circumstances, "a post-judgment motion to intervene in order to prosecute an appeal is timely (if filed within the time period for appeal) because 'the potential inadequacy of representation came into existence only at

the appellate stage.'" *Id.* (quoting *Dimond v. District of Columbia*, 792 F.2d 179, 193 (D.C. Cir. 1986)).

The States' intervention motion here is plainly timely. The Intervenor States made this motion within six days of learning the Federal Defendants would not defend the legality of the Title 42 policy by seeking an appeal. Thus, the Intervenor States have sought to intervene within a "reasonable time from when their doubts about adequate representation arose." *Price*, 2017 WL 3271445, at *2. And the time for appeal has not elapsed. *See* Fed. R. App. Pro. 4(1)(B) (allowing 60 days for an appeal if the United States or one of its agencies is a party).

Moreover, because the States filed this intervention motion quickly after the Federal Defendants indicated their intention not to appeal, there will be no prejudice to the other parties. *See Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994) (holding that the "requirement of timeliness is … a guard against prejudicing the original parties"); *McDonald*, 432 U.S. at 394. Intervention here ensures this case will be resolved on the merits, rather than through abdication. Denying the parties a potential opportunity to obtain their desired ends through the contrivance of surrender inflicts no cognizable prejudice on Plaintiffs. *See McDonald*, 432 U.S. at 394; *Price*, 2017 WL 3271445, at *2 (noting lack of prejudice because "intervention would not delay resolution of the merits." (internal quotation marks omitted)).

B. The States Have Significant Protectable Interests in the Subject of this Action That Will Be Impaired Absent Intervention.

The States also have a protectable interest in the continuing validity of the Title 42 implementing regulations and the related orders.. Two federal district courts independently held as much by finding the States have standing to oppose termination or restriction of the Title 42 Orders. *See Louisiana*, 2022 WL 1604901, at *10-15; *Texas*, 589 F. Supp. 3d at 610-13. Those holdings were undoubtedly correct.

In a July 28, 2022, deposition, Defendant Border Patrol Chief Raul Ortiz testified that migrant flows are responsive to changes in border operations, including processing time and likelihood of release. Ex. 8 at 62:21-64:9. Chief Ortiz further admitted that "unprecedented numbers of aliens are illegally entering the United States right now," "more aliens are going through the southern border than we have seen in the last 20 years," and "the southern border is currently in crisis." *Id.* at 40:18–41:17. Consistent with Chief Ortiz's testimony and public statements by federal officials, a May 19, 2022, guidance memorandum issued by Chief Ortiz explained the Border Patrol "is preparing for the anticipated increase in encounters of undocumented [aliens] following the anticipated lifting of [CDC's] Title 42 public health order. Ex. 9. The memorandum noted that "for most of Fiscal Year 2022 … USBP facilities [were] at, near, or over capacity." *Id.* Accordingly, Chief Ortiz's memorandum provided guidance for release of aliens into the interior of the United States, and specifically contemplated releases at "transportation hubs (i.e., airports, bus terminals)" as well as the likelihood that "local resources are [so] overtaxed" that "local releases without basic services could endanger the noncitizen" and USBP-provided "non-local transportation of noncitizens … may be necessary and appropriate." *Id.* The Termination Order is in accord. Dkt. 134 at *31 ("CDC recognizes that the Termination of the August Order will lead to an increase in the number of noncitizens being processed in DHS facilities …. Moreover, DHS projects … an increase in encounters in the coming months."). Indeed, CDC delayed implementation of the Termination Order due to its impact on migration and DHS's needing time to prepare for the resulting surge.

Chief Ortiz's testimony, his memorandum, and the Termination Order itself make clear that border states like Arizona and Texas will face increased migrant flows and increasd releases of aliens if the Title 42 process is terminated. Those aliens will flow to other States, too. For

example, Stephen Manning of the immigration activist organization Innovation Law Lab explained in a 2019 declaration:

> [T]he clients served by Law Lab's programs do not [*sic*] complete their immigration case in a single jurisdiction. It is possible that a client would move seamlessly between our program sites—and thus between different judicial circuits—as their case progresses. A person fleeing persecution might receive a legal orientation and services at a workshop supported by Law Lab in Tijuana, Mexico; obtain release on bond or parole from a detention center in Texas with assistance from our BorderX project; and complete their asylum application at a Law Lab-run legal workshop in Atlanta, Georgia. Many persons served by Law Lab programs move between jurisdictions throughout the lifetime of their asylum case as well. In my experience, such movement between jurisdictions is common for asylum seekers.

Ex. 10 ¶ 16. "[A]sylum seekers that Law Lab has provided guidance to in Tijuana [Mexico] … end up in detention centers in Louisiana and Mississippi, despite the fact that they entered the US to request asylum in the Ninth Circuit." *Id.* ¶ 12. Accordingly, Law Lab maintains offices throughout the United States, including in Portland, Oregon; Atlanta, Georgia; San Diego, California; Kansas City, Missouri and San Antonio and El Paso, Texas. *Id.* ¶ 4.

Wherever those aliens end up, they will impose financial burdens on the States involuntarily hosting them. CDC acknowledges as much: "[T]he flow of migration directly impacts not only border communities and regions, but also destination communities and healthcare resources of both," 86 Fed. Reg. at 42,835, especially if those aliens have COVID, *cf. Del. Dep't of Nat. Res. v. EPA*, 785 F.3d 1, 10 (D.C. Cir. 2015). The record and findings in the *Texas* action exemplify the financial harm:

> Texas proffers specific, uncontroverted evidence that it will experience increased financial hardship—most directly through healthcare spending. [Ex. 1 at 21 (citing 1 TEX. ADMIN. CODE §§ 366.903, 355.8201-8202, 355.8212-8215.] Included in Texas's appendix is a declaration from Lisa Kalakanis, the Data Dissemination and Reporting Director with the Texas Health and Human Services Commission's Office of Data Analytics and Performance. [Ex. 2 at App'x p.81.] Kalakanis testifies that Texas HHSC provides three principal categories of services and benefits to undocumented aliens in Texas: (1) Texas Emergency Medicaid; (2) the

> Texas Family Violence Program; and (3) Texas Children's Health Insurance Program Perinatal Coverage. *Id.* at 82. Taking just one of those programs—Texas Emergency Medicaid—Kalakanis testifies that "[t]he total estimated cost to [Texas] for the provision of Emergency Medicaid services to undocumented immigrants residing in Texas was approximately $80 million in SFY 2007, $62 million in SFY 2009, $71 million in SFY 2011, $90 million in SFY 2013, and $73 million in SFY 2015." *Id.* at 83. She estimates the cost in SFY 2019 at $80 million. *Id.* Kalakanis testifies that based on her knowledge and expertise of the benefits and services provided to undocumented migrants by the Texas HHSC, "the total costs to the State of providing such services and benefits to undocumented immigrants will continue to reflect trends to the extent that the number of undocumented immigrants residing in Texas increases or decreases each year." *Id.* at 84.
>
> Texas further establishes specific financial injuries through the costs of issuing of driver's licenses to illegal aliens (*Id.* at 96–107), providing education to UAC (*Id.* at 88–95), and incarcerating aliens convicted of crimes committed when they are not legally present in the United States (*Id.* at 108–10).

Texas, 589 F. Supp. 3d at 611-12. Likewise, evidence from Arizona and Missouri in the *Louisiana* action:

> According to Mark Napier, Chief of Staff for the Cochise County Sheriff's Office in Cochise County, Arizona, for the period from July 2020 to January 2021, only 27.6% of undocumented persons crossing the southern border were apprehended by DHS personnel. [Ex. 3 at WDLA-PI-161.] Further, from "January through September 2020 there were 181 sets of human remains recovered in the border region of Arizona's desert. Each of these recoveries results in the tremendous expenditure of law enforcement resources." [*Id.*] Mr. Napier further indicated that "[m]igrants abandoned by transnational criminal organizations trafficking in humans on the north side of the border frequently call local law enforcement in distress.... These often led to significant expenditures of county and Border Patrol resources to affect rescue in the hope of preventing additional migrant deaths." [*Id.*]
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> Mark Dannels, the Sheriff of Cochise County, Arizona, submitted a declaration stating that "[i]ndividuals illegally crossing through [the border] cut trails, trample plant life, and leave behind litter and potentially hazardous waste including soiled clothing and excrement." [Ex. 3 at WDLA-PI-171.]
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> * * * * *
>
> According to Robert J. Trenschel, President and CEO of Yuma Regional Medical Center ("YRMC"), "[f]rom January through June 2019, ... an estimated 1,293 adult patients were brought to YRMC while in ICE custody" and that "[t]he estimated cost of [their] care in that six-month period was $810,433," but that only $264,383

> was reimbursed, "leaving a $546,050 unreimbursed gap for that six-month period alone." [Ex. 3 at WDLA-PI-188.] "These cost estimates also do not include the substantial care expenses for the multiple mothers who delivered babies at YRMC while under ICE custody during that timeframe." [*Id.*]
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> * * * * *
>
> According to Maddie Green, Assistant Attorney General for Missouri, "Missouri spent an average of $10,654 per student in school year 2019-2020 regardless of immigration status," and further that "[a] 2018 study shows that an estimated 3,000 illegal alien school-aged children were enrolled in Missouri schools." [Ex. 3 at WDLA-PI-627.] "Missouri. expended $361,702 in emergency medical care costs for treatment of ineligible aliens during Fiscal Year 2020." [*Id.* at WDLA-PI-628.] In addition, "Missouri's Department of Revenue ("DOR") uses the Systemic Alien Verification of Entitlements ("SAVE") system to verify unlawful individuals' lawful immigration status at a cost of $0.80 for the initial inquiry and $0.50 for any additional inquiries. [*Id.*] In state fiscal year 2020, DOR paid $30,114.11 for SAVE inquiries." "Statistically, for every 1,000 aliens who remain unlawfully in the United States, 56 end up residing in Missouri." [*Id.*]

Louisiana, 2022 WL 1604901, at *6-7. "The Fifth Circuit has found these types of specific injuries sufficient to establish injury when a federal action would have enabled '500,000 illegal aliens in Texas' to receive such benefits." *Texas*, 589 F. Supp. 3d at 612 (quoting *Texas v. United States*, 809 F.3d 134, 155-56 (5th Cir. 2015), *aff'd by an equally divided court*, 579 U.S. 547 (2016)).[3]

The States' standing is further bolstered in other ways. The States are entitled to special solicitude in the standing analysis because the States have sovereign and quasi-sovereign interests in controlling their borders, limiting the persons present within those borders, excluding persons carrying communicable diseases, and the enforcement of immigration law. *See Massachusetts v.*

[3] MOUs that DHS executed with Arizona and Louisiana are in accord. In those MOUs, DHS admitted, among other things, that "a decrease or pause on returns or removals of removable or inadmissible aliens," "relaxation of the standards for granting return or removal," "an increase in releases from detention," "changes to immigration benefits or eligibility," or "rules, policies, procedures, and decisions that could result in significant increases to the number of people residing in a community" "result in direct and concrete injuries to [the signatory State], including increasing the rate of crime, consumption of public benefits and services, strain upon the healthcare system, and harm to the environment." *See* Ex. 3 at WDLA-PI-662-63, WDLA-PI-588-590.

EPA, 549 U.S. 497, 519-520 (2007); *see also, e.g.*, *Texas v. United States*, 50 F. 4th 498, 516 (5th Cir. 2022) ("The importance of immigration policy and its consequences to Texas, coupled with the restraints on Texas' power to make it, create a quasi-sovereign interest."). That interest applies not only to the Title 42 Orders, but even more so to the Final Rule. That rule is not limited to COVID, "but also future public health threats." 85 Fed. Reg. at 56,449. It accordingly "implement[s] a permanent procedure which the [CDC] Director may use to issue an order suspending the right to introduce persons into the United States when[ever] there is a serious danger of the introduction of a quarantinable communicable disease into the United States." *Id.* The States have limited power to themselves exclude aliens. *See, e.g.*, *Arizona v. United States*, 567 U.S. 387, 409-410 (2012). They have a quasi-sovereign interest in ensuring CDC is able to rapidly react to emerging public health threats and exclude aliens to the maximum extent permitted by Congress, *i.e.*, precisely what the Final Rule implements. And the Final Rule itself backhandedly recognizes the States' interest by providing that CDC may "consult" with them. 42 C.F.R. 71.40. Regardless, as *Louisiana* and *Texas* actions illustrate, the States have a procedural right under the APA to notice and comment regarding any changes to CDC's Title 42 implementing regulation and the associated Title 42 Orders. The States seek intervention in this case to avoid the federal Defendants' circumventing that procedural right via a friendly surrender. Special solicitude applies.

C. The States' Interests Are Not Adequately Represented.

A prospective intervenor need only make a "minimal" showing that its interests are not adequately protected by any parties in the litigation. *Price*, 2017 WL 3271445, at *2 (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)); *see United States v. All Assets Held at Credit Suisse (Guernsey) Ltd.*, 45 F.4th 426, 432 (D.C. Cir. 2022) ("A would-be intervenor is adequately represented when she 'offer[s] *no* argument not also pressed by' an

existing party." (emphasis added)). This light burden can be satisfied by merely by showing that the government has "equivocat[ed] about whether" it will "appeal the adverse ruling of the district court" or will otherwise protect an intervenors' interests. *Id.* (quoting *Smoke*, 252 F.3d at 471); *see Utah Ass'n of Cntys. v. Clinton*, 255 F.3d 1246, 1256 (10th Cir. 2001) (federal government's "silence on any intent to defend the [intervenors'] special interests is deafening") (citation omitted); *Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992) (same). Moreover, the government does not adequately represent an intervenor's interests after the government changes its position such that it "no longer share[s] the views of Intervenors" on essential questions of law in the litigation. *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1146 (D.C. Cir. 2009).

The States here have "raised sufficient doubt concerning the adequacy" of the Federal Defendants' representation of their interests. The Federal Defendants' stay motion certainly did not assure the Court that they would "continue to prosecute the appeal." *Price*, 2017 WL 3271445, at *2. On the contrary, they assured the Court the opposite was true. And Federal Defendants' representation to the Western District of Louisiana clearly stated that they intend to "begin processing all noncitizens entering the United States pursuant to Title 8" after this Court's stay has elapsed.

Federal Defendants have essentially abandoned their defense of Title 42, and it is doubtful that they will make any further arguments in support of it, let alone make all arguments that the States would press. *Guernsey*, 45 F.4th at 432. Thus, the Federal Defendants fail to adequately represent the State's interests in the continued validity of Title 42.

II. PERMISSIVE INTERVENTION IS WARRANTED.

Even if the Court declines to grant the States' motion to intervene as of right, this is precisely the type of case where permissive intervention is warranted. An applicant for permissive intervention should present the Court with "(1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998).

First, the States have standing to protect their unique interests in this litigation, and there is subject-matter jurisdiction because this case presents a federal question. *See* 7C Charles Alan Wright et al., Federal Practice and Procedure § 1916 (3d ed. 2007) ("[T]he need for independent jurisdictional grounds is almost entirely a problem of diversity litigation. In federal-question cases there should be no problem of jurisdiction with regard to an intervening defendant.").

Second, as discussed, the States' motion to intervene is timely. It became clear only this week that Federal Defendants do not seek to challenge this Court's ruling on appeal.

Third, the States' position that the Title 42 policy validly authorizes Federal Defendants to expel aliens has perfect overlap with the issues presented in this case and so easily satisfies the requirement to show a "common question of law or fact" with the main action. *National Children's Ctr.*, 146 F.3d at 1046.

At bottom, the important issues in this case should be decided on the merits, rather than through surrender. A central issue in this case is the costs imposed on the States. Allowing intervention will ensure those interests are represented. A favorable exercise of discretion is therefore warranted.

CONCLUSION

For the foregoing reasons, the States' motion to intervene should be granted.[4]

Respectfully submitted,

Dated: November 21, 2022

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[4] The States also respectfully seek leave from the requirement of Rule 24(c) to attach a responsive pleading. Such an omission without seeking leave "is a purely technical defect which does not result in the disregard of any substantial right." *Westchester Fire Ins. v. Mendez*, 585 F.3d 1183, 1188 (9th Cir. 2009) (quotation marks omitted). "Courts ... have approved intervention motions without a pleading where the court was otherwise apprised of the grounds for the motion." *Beckman Indus. Inc., v. Int'l Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992).

A responsive pleading—which would overwhelmingly consist of *pro forma* denials—would not serve any meaningful purpose at this time. But to the extent that this might be otherwise, the States will adopt by reference the answer of Federal Defendants.

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

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

DECLARATION OF JAMES K. ROGERS

I, James K. Rogers, declare as follows:

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

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

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

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

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

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

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

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

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

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

Exhibit A

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Central American migrants surrender to Border Patrol in Texas

Exhibit B

CORONAVIRUS

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

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

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

SAVE

Dec. 9, 2022, 4:30 AM MST

By Julia Ainsley

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

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

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

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

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

Mexican authorities evict Venezuelan migrants from border camps

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

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

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

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

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

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

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

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

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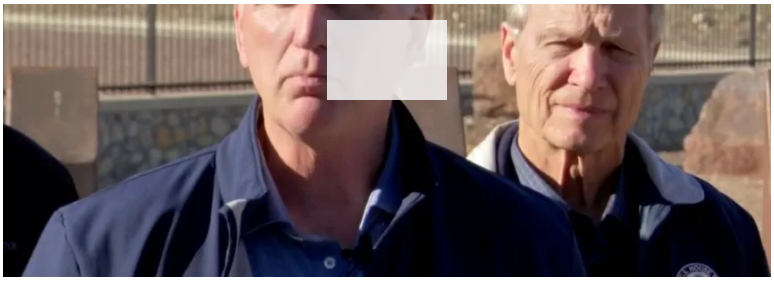
They could also end up being released onto the street in border cities or bused by Republican governors to cities inside the U.S.

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



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

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

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

DHS did not respond to a request for comment.

Julia Ainsley

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

Exhibit C

TITLE 42

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

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

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

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

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

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Washington Examiner MIDTERMS ★ 2022 ★

Opinion

tightening of immigration policies with Democrats.

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

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

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

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

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

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

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

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

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

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

CLICK HERE TO READ MORE FROM THE WASHINGTON EXAMINER

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

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The Debrief: David Mark on

Reporter's Notebook: The future of

Newsletters

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

Exhibit D

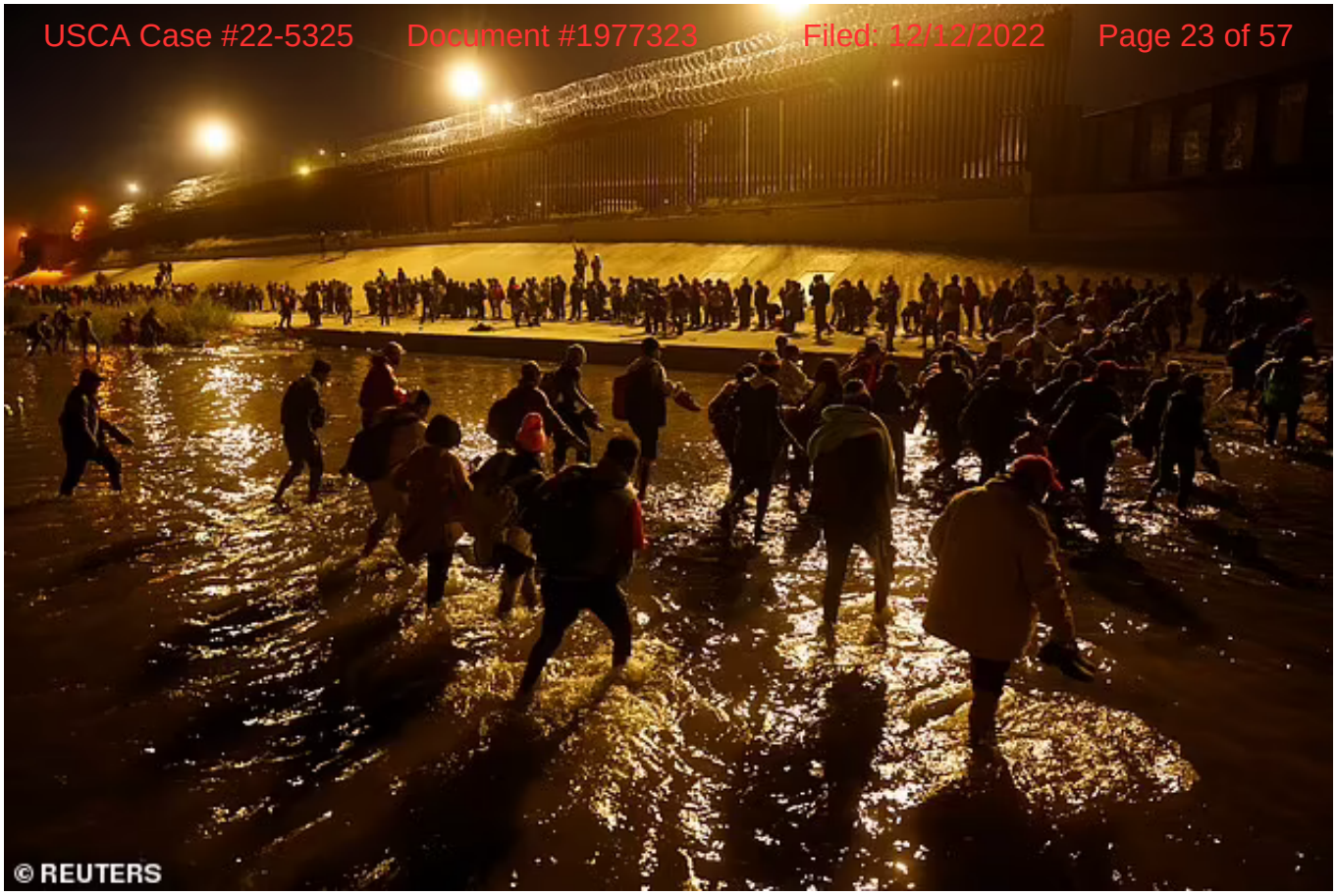
Around 1,000 migrants line the Rio Grande waiting to cross into US as Title 42 is set to lapse

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

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

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

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



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

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

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

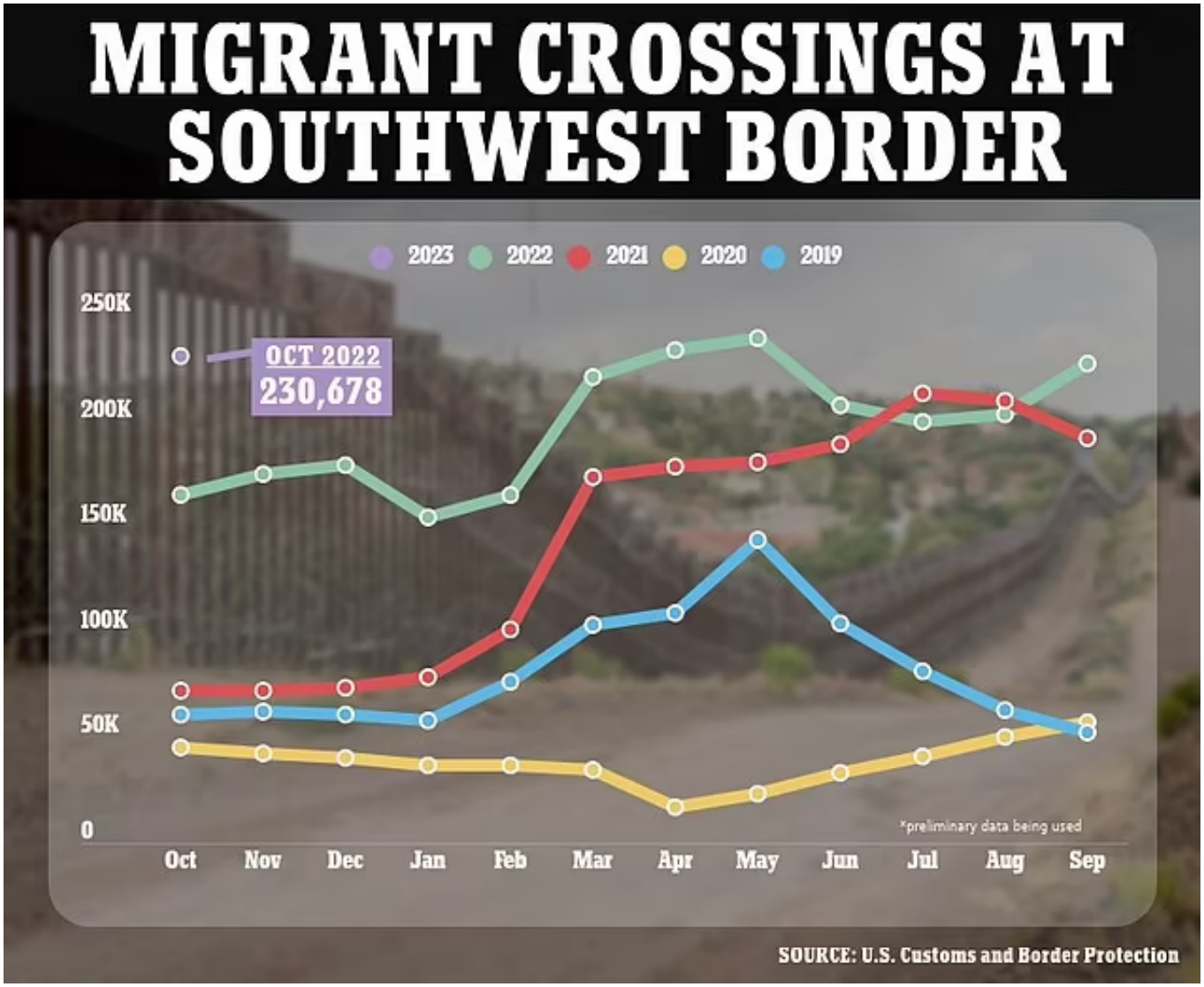
The latest caravan had been stopped in Jimenez on Thursday by Chihuahua state officials who warned them Juarez was already at breaking point.

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

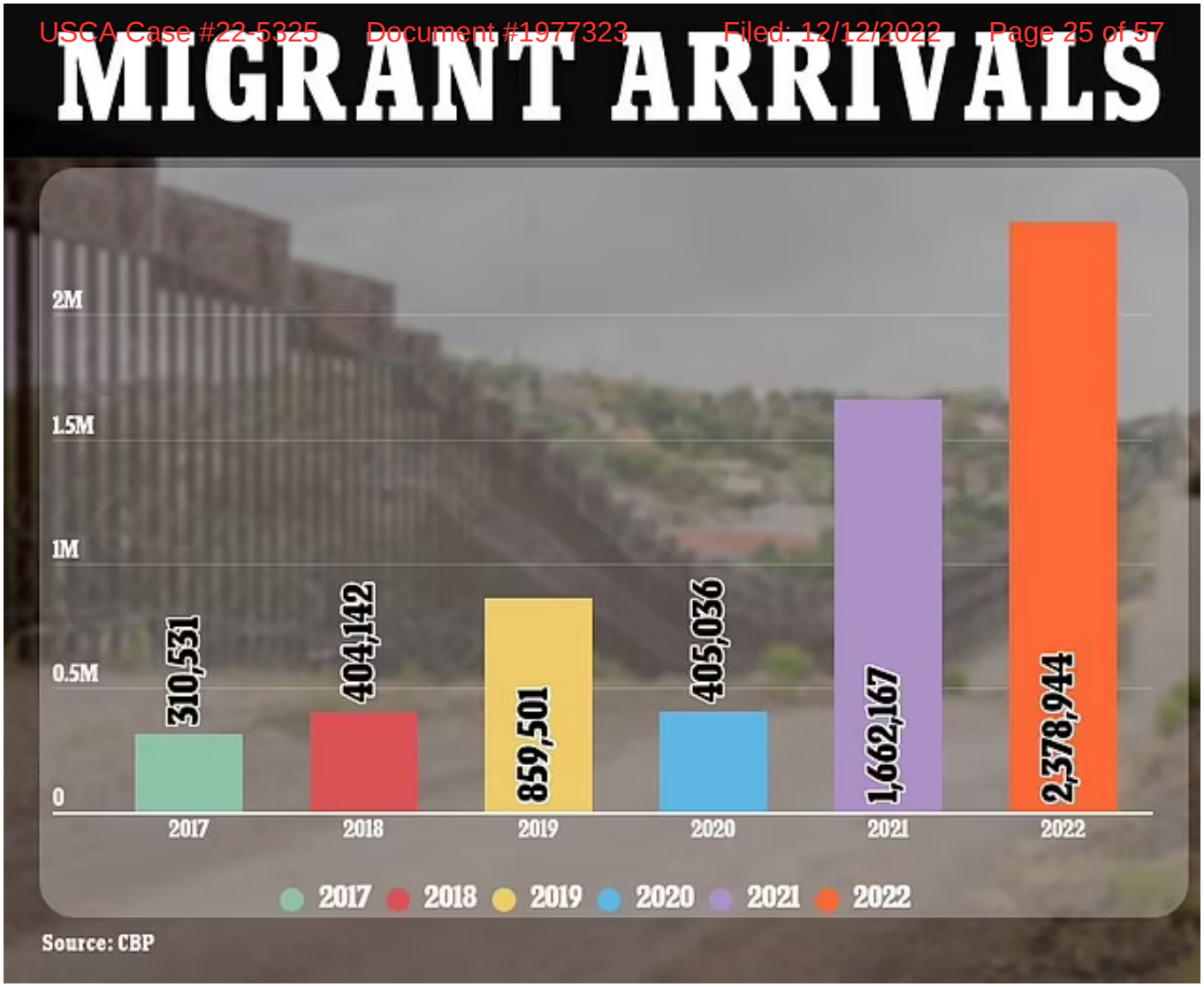
Marjorie and her six-year-old son were among those forming the line across the El Paso side of the Rio Grande, according to El Paso Matters.

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

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



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



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

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

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

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

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

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

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

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

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

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

They were eventually rescued by the

What is Title 42 and why was it introduced?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

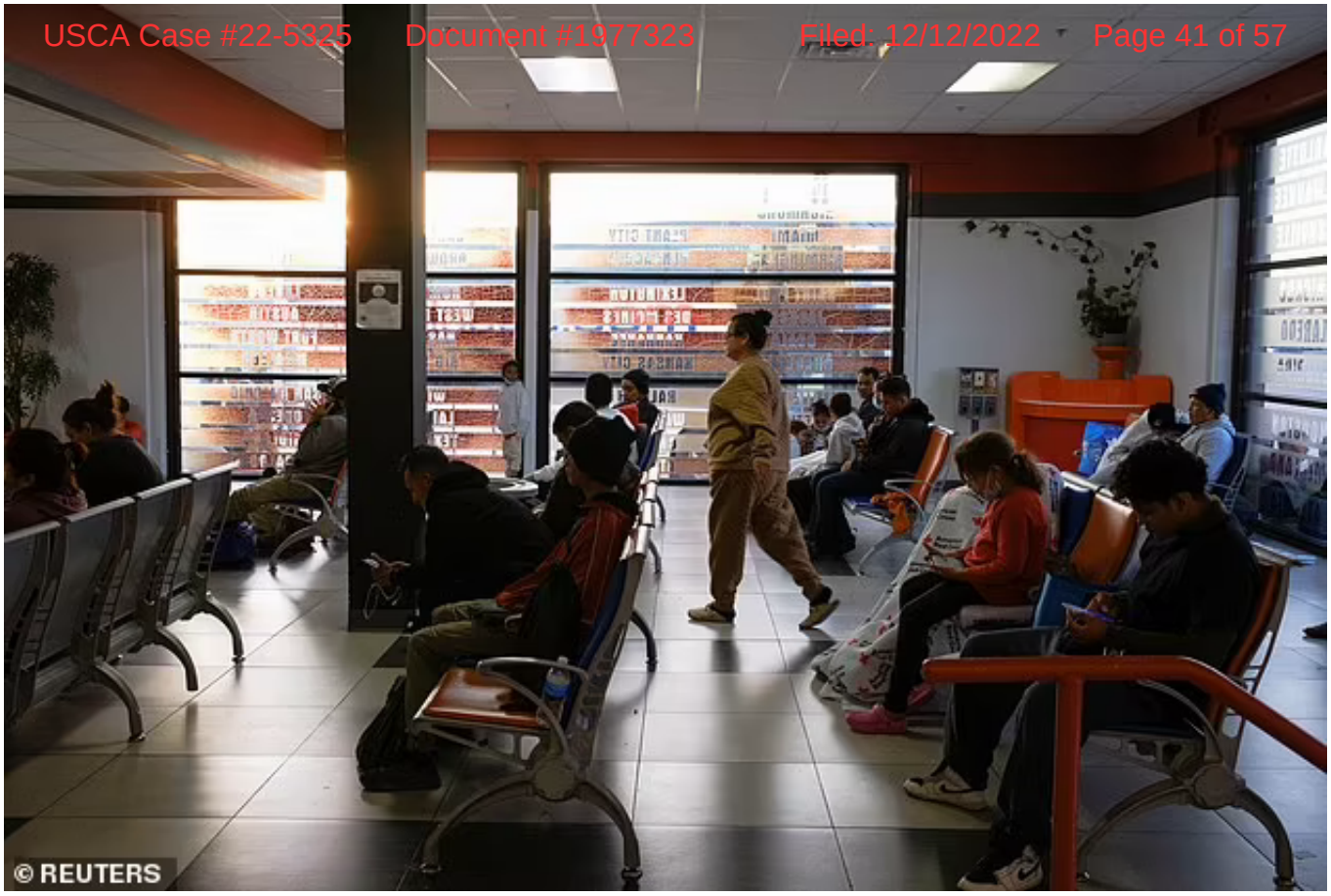
It's thought many of those who were brought back into Mexico simply repeated the journey in crossing the Rio Grande river, which separates the two cities

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

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

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

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



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

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

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

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

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

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

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

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

Migrants sleep on streets after eviction from Rio Bravo camp

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

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

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

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

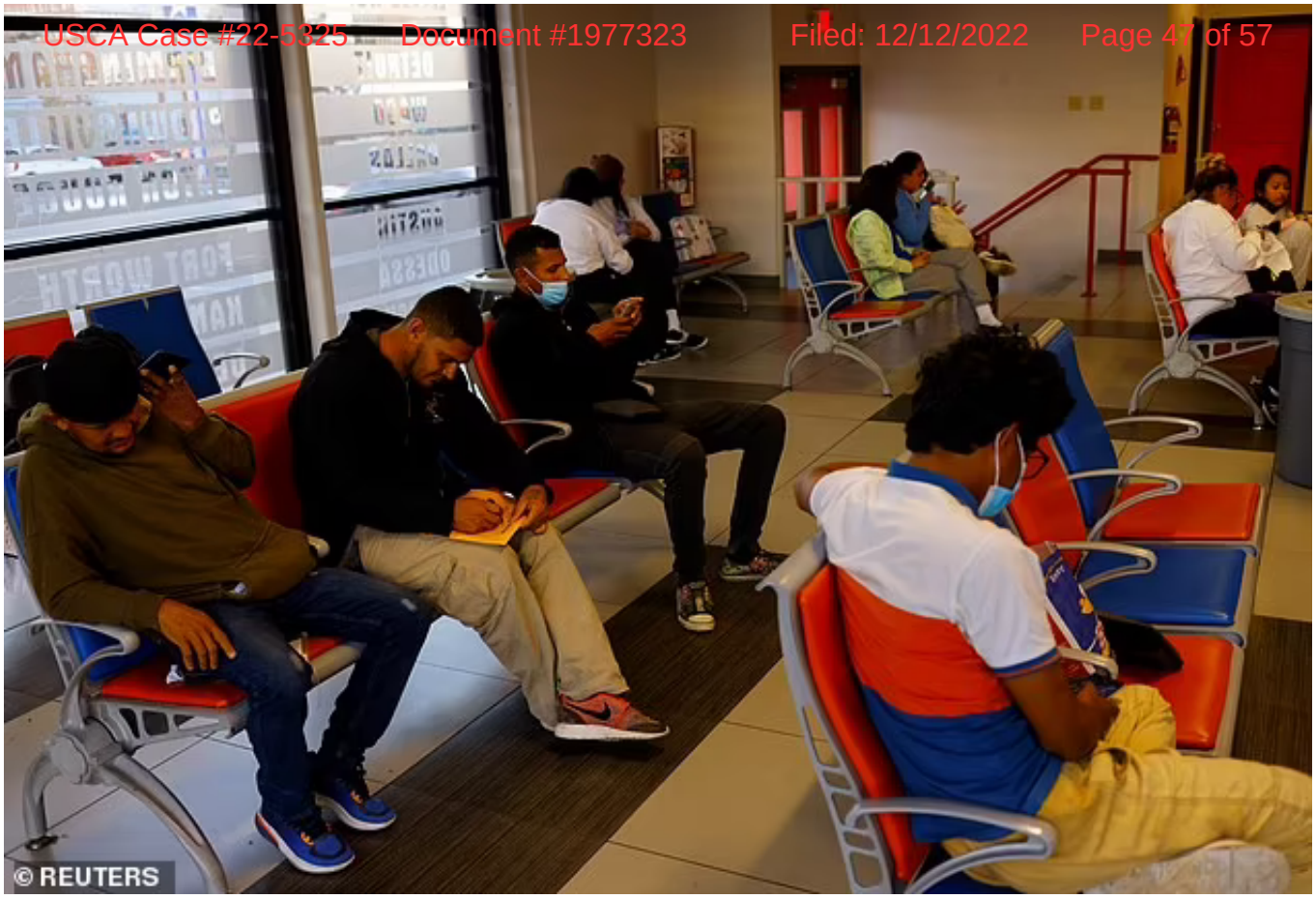
D'Agostino said after talking with FEMA last week it became more clear how dire the situation could be when Title 42, the Covid-era CDC health restriction that allows for immediate expulsion, ends in ten days.

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

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

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

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



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

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

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

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

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

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

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

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

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

Exhibit E

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

By Adam Shaw, Bill Melugin, Griff Jenkins

Published December 10, 2022

Fox News

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

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

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

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

FOX NEWS CREW WITNESSES DRAMATIC HUMAN SMUGGLING BUSTS BY TEXAS AUTHORITIES

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

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

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

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

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

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

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

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

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

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

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

Exhibit F

NEWS

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

By Mark Moore

November 29, 2022 | 10:18am | Updated

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US BORDER

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Letters to the Editor — Dec. 12, 2022

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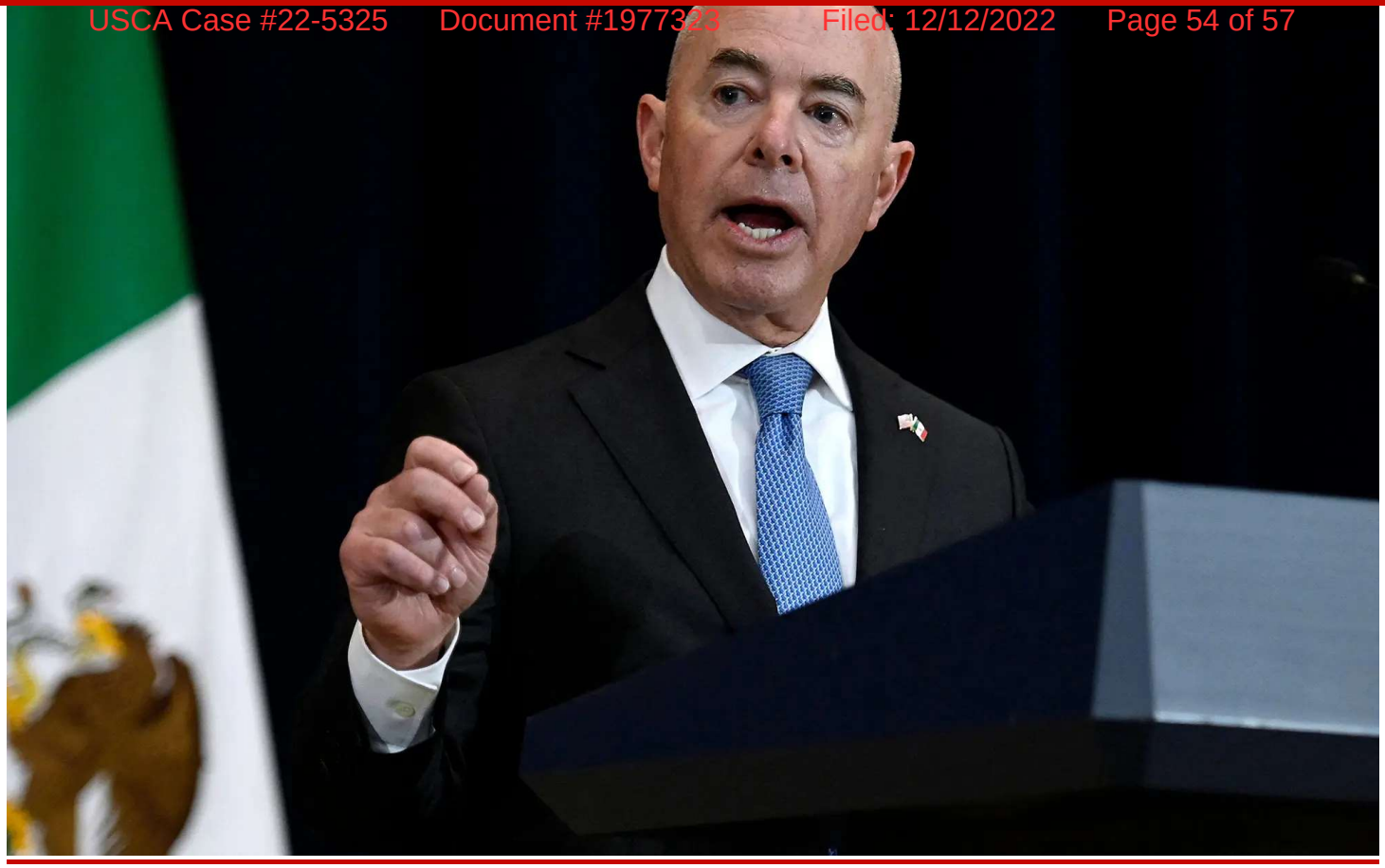
NY Post reporter: The Biden administration barred me from doing a border ride-along

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

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

The policy will expire on Dec. 21.

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



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

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

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

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

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

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

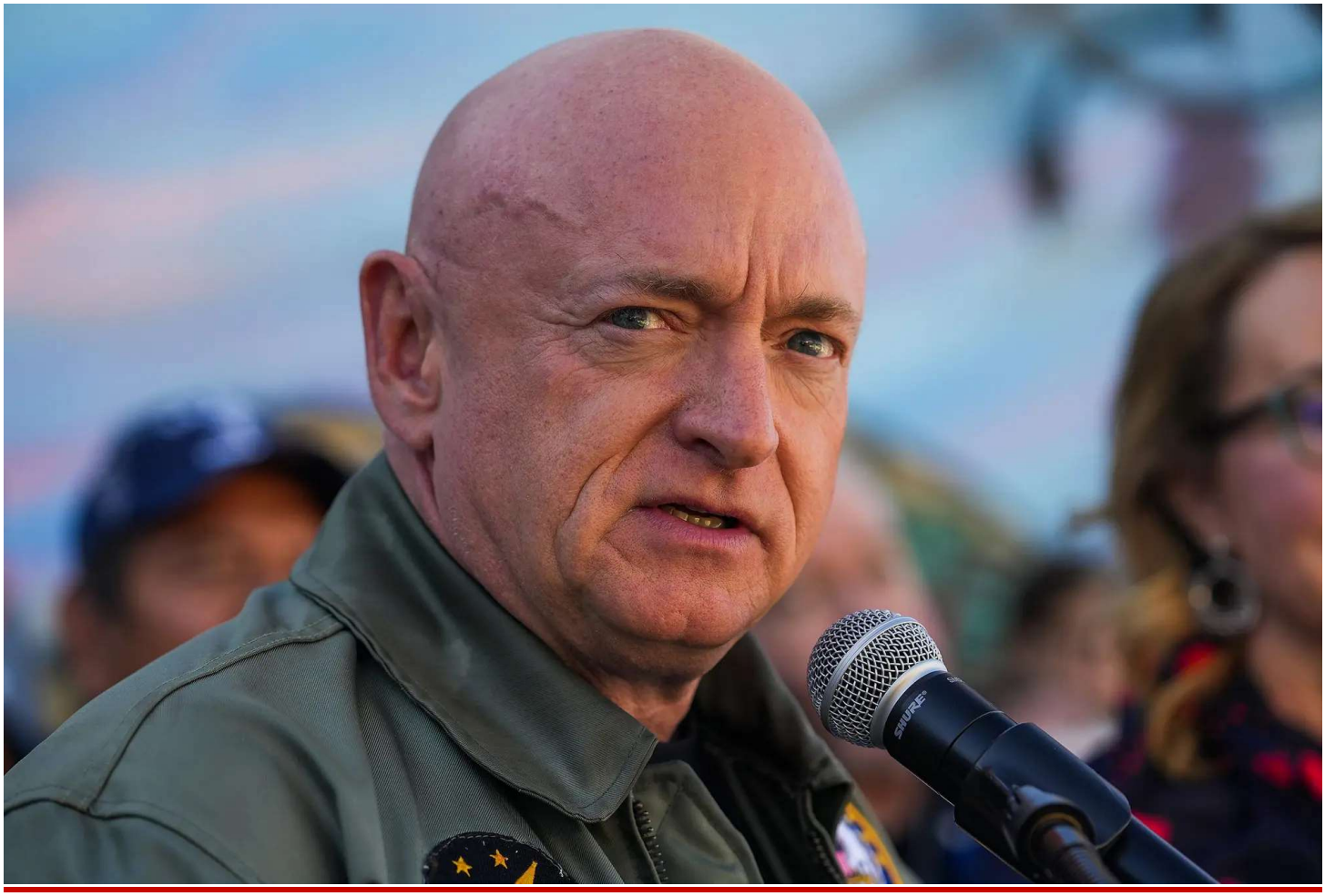
AP

Sen. Jon Tester represents Montana.

Getty Images

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

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



Sen. Mark Kelly represents Arizona.

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

Sen. Maggie Hassan represents New Hampshire.
Getty Images

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

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

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

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

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

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