IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NANCY GIMENA HUISHA-HUISHA, *et al.,* *Plaintiffs*, v. ALEJANDRO MAYORKAS, Secretary of Homeland Security, in his official capacity, *et al.,* *Defendants*.	No. 1:21-cv-00100-EGS

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Plaintiffs hereby move the Court for summary judgment on their claim that 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—is arbitrary and capricious in violation of the Administrative Procedure Act for the reasons set forth in the accompanying memorandum of points and authorities.

In support of this Motion, Plaintiffs rely upon the attached memorandum of points and authorities, the accompanying declarations, the relevant portions of the administrative record, and the filings in this case. Plaintiffs are entitled to prevail on the claims at issue in this motion, and are entitled to relief as a matter of law. A proposed order is attached.

Defendants oppose this Motion.

Dated: August 15, 2022

Respectfully submitted,

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Defendants continue to use the Title 42 policy to expel thousands of vulnerable families, including young children, each month. This Court and the D.C. Circuit previously considered certain arguments addressing the government's purported statutory authority for the policy, and the Circuit held that expulsions could proceed subject to certain safeguards against persecution and torture. The Circuit remanded the case for further proceedings, however, pointedly noting "Plaintiffs' claim that the § 265 Order is arbitrary and capricious" in violation of the Administrative Procedure Act ("APA"), which had not yet been addressed by this Court because the administrative record had not been produced at that point. *Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 735 (D.C. Cir. 2022); *see also id.* (noting that the policy appears not to serve "any purpose"). Although the Centers for Disease Control and Prevention ("CDC") has since decided to terminate the Title 42 policy in its entirety for lack of a public health necessity, that termination decision has been enjoined by another court on notice-and-comment grounds, keeping the policy in place indefinitely. That court did *not* address whether the policy was arbitrary and capricious.

Plaintiffs therefore respectfully move the Court to grant them summary judgment on their arbitrary-and-capricious claim. Second Amended Complaint, Dkt. 131 at 21–22.[1]

The Title 42 policy is arbitrary and capricious for several independent reasons. First, CDC's settled practice is to adopt the least restrictive means necessary to protect public health, but the agency departed from that standard *sub silentio* when authorizing the Title 42 policy. Second, the Title 42 policy bears no rational connection to the stated goal of preventing the

[1] Plaintiffs at this time are not moving on their remaining claims, including that the Title 42 policy was enacted for pretextual reasons based on political pressure.

introduction of COVID-19 into the country. That is particularly so in light of more effective and less burdensome alternatives that are now readily available, such as vaccinations and testing. Third, CDC failed to consider the human impact the Title 42 policy would have on vulnerable migrants. The Court should declare the Title 42 policy unlawful and vacate it as arbitrary and capricious.

In addition to vacatur and declaratory relief, the Court should also enter a permanent injunction. The equitable considerations now favor Plaintiffs even more decisively than when this Court granted the preliminary injunction. Since then, CDC has echoed the findings of this Court and the D.C. Circuit, and indeed, has concluded that the Title 42 policy is *unnecessary* as a public health measure. Defendants have now also admitted that Plaintiffs suffer horrific harms as a result of Title 42 expulsions. In short, the Title 42 policy unnecessarily and unlawfully endangers lives, and it must be immediately enjoined to prevent further harm.

BACKGROUND

The Court is familiar with the history of the Title 42 policy and this litigation. *See Huisha-Huisha v. Mayorkas*, 560 F. Supp. 3d 146, 156–60 (D.D.C. 2021). In short, CDC first instituted the Title 42 policy in March 2020; the original regulatory framework was replaced by a final rule issued in September 2020; and CDC issued the last of several orders keeping the policy in effect in August 2021 (the "August 2021 Order"). *Id*. at 156–58. Throughout that time, the policy has directed the expulsion of noncitizens under the purported authority of a public health statute, 42 U.S.C. § 265. The justification for these expulsions has been COVID-19, even as the public health landscape has changed dramatically since early 2020. *See infra*; *Huisha-Huisha*, 27 F.4th at 734 ("The CDC's § 265 order looks in certain respects like a relic from an era with no vaccines, scarce testing, few therapeutics, and little certainty.").

Plaintiffs—a certified class of families—moved for a preliminary injunction on three statutory grounds: that § 265 regulates only transportation carriers and not individual travelers, that it does not authorize expulsions even if it does regulate individual travelers, and that it cannot authorize expulsions in violation of the humanitarian protections designed to protect migrants fleeing danger. *Huisha-Huisha*, 560 F. Supp. 3d at 171 n.6. This Court granted the motion, holding that § 265 likely did not authorize expulsions. *Id*. at 166–71. The D.C. Circuit affirmed that Order in part. *Huisha-Huisha*, 27 F.4th at 735. It held that § 265 likely did authorize expulsions of families in general, but "only to places where they will not be persecuted or tortured." *Id*.

Less than a month after the D.C. Circuit's opinion, CDC issued an order terminating Title 42 entirely as unnecessary and concluding "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." *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, 19955 (Apr. 6, 2022) (the "April 2022 Order"). The termination was to be implemented on May 23, 2022. *Id*. at 19955. However, the termination order was preliminarily enjoined on May 20 in separate litigation brought by Louisiana and other states, on the ground that CDC was required to undertake notice-and-comment rulemaking in order to rescind Title 42. *Louisiana v. CDC*, ___ F. Supp. 3d. ___, No. 6:22-CV-00885, 2022 WL 1604901, at *22–23 (W.D. La. May 20, 2022). That ruling is on appeal, and the federal government has not sought a stay. *See* No. 22-30303 (5th Cir.). As a result, the August 2021 CDC Order continuing the Tile 42 policy remains in effect, subject to the limitations imposed by the D.C. Circuit's ruling. In June 2022, the first full month following issuance of the D.C.

Circuit's mandate, over 14,000 Class Members were expelled—the highest monthly total since September 2021. CBP, *Southwest Land Border Encounters*.[2]

ARGUMENT

In an APA action, "summary judgment . . . 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." *Grace v. Whitaker*, 344 F. Supp. 3d 96, 145 (D.D.C. 2018) (cleaned up). The Court should grant summary judgment to Plaintiffs on their claim that the Title 42 policy is arbitrary and capricious. That claim was not before this Court or the D.C. Circuit earlier in this litigation, but the Circuit pointedly instructed that the claim be considered on remand. *See Huisha-Huisha*, 27 F.4th at 735 (remanding "for further proceedings and ultimate resolution of the merits, including the Plaintiffs' claim that the § 265 Order is arbitrary and capricious."); *see also* Second Amended Complaint, Dkt. 131 at 21–22. The Court should also enter a permanent injunction, as the equities strongly favor Plaintiffs. *See Grace*, 344 F. Supp. at 145 (recounting permanent injunction standard). The Title 42 policy is set to remain in place indefinitely despite CDC's judgment that it is unnecessary, and Class Members face devastating impacts on a daily basis.

I. THE TITLE 42 POLICY IS ARBITRARY AND CAPRICIOUS.

Plaintiffs are entitled to summary judgment on their claim that the Title 42 policy is arbitrary and capricious, for several independently dispositive reasons. First, it is bedrock APA law that an agency may not deviate from its prior practice without sufficient explanation, yet here CDC never even mentioned, much less explained, why it failed to apply the agency's

[2] https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters (last updated July 15, 2022) (drop-down filters: select "FMUA"—i.e., "family unit aliens"—for Demographic and "Title 42" for Title of Authority).

established "least restrictive means" standard when authorizing the drastic step of expulsions. Notably, when CDC's now-retired second in command testified before the House, she specifically noted the agency's longstanding least restrictive means standard, its failure to apply that standard, and the political pressure placed on the agency. *See* Section A, *infra*.

Second, as both the D.C. Circuit and this Court have stressed in this case, the Title 42 policy does not appear to serve "any purpose," especially in light of the widespread availability of vaccines and other alternative measures. *Huisha-Huisha*, 27 F.4th at 734 (calling the policy "a relic"); *Huisha-Huisha*, 560 F. Supp. 3d at 171 (granting injunction "in view of the wide availability of testing, vaccines, and other minimization measures"). Moreover, as Dr. Anthony Fauci and other experts have long pointed out, immigrants are not a significant source of COVID-19 in the United States, and Class Members are dwarfed by millions of other travelers who are permitted to cross the U.S.-Mexico border, including many who are not tested or vaccinated for COVID-19. CDC's orders authorizing the Title 42 policy failed to address those obvious disconnects between its chosen policy and public health. *See* Section B, *infra*.

Third, CDC failed to take account of the harm the Title 42 policy would inflict on vulnerable migrants. But the countervailing harm to affected individuals must be factored into an agency's analysis, not only under CDC's least restrictive standard but also as a matter of well-established APA principles. *See* Section C, *infra*.

A. CDC Disregarded Its Established Policy Regarding Responses to Communicable Diseases By Failing To Use the Established Least Restrictive Means Standard.

It is settled law that an agency may not "depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). An agency must "acknowledge and explain its departure from past practice." *Grace*

v. Barr, 965 F.3d 883, 903 (D.C. Cir. 2020). It may not "gloss over or swerve from prior precedents without discussion." *Id.* at 900 (cleaned up). "Failing to supply such analysis renders the agency's action arbitrary and capricious." *Lone Mountain Processing, Inc. v. Sec'y of Lab.*, 709 F.3d 1161, 1164 (D.C. Cir. 2013); *see Grace*, 965 F.3d at 903 (affirming injunction in relevant part "on that basis alone").

Prior to instituting the Title 42 policy, CDC's settled practice was to impose only the "least restrictive means necessary to prevent spread of disease" in "all situations," including the spread of communicable diseases from abroad. *Control of Communicable Diseases*, 82 Fed. Reg. 6890, 6912 (Jan. 19, 2017).[3] This rigorous least restrictive means standard requires CDC to consider and seek to minimize the burdens of any proposed public health measure on individuals. *See id.* at 6896. For example, in responding to the 2014–2016 Ebola outbreak, CDC applied "principles of least restrictive means" in determining that "measures to ban travel . . . were unnecessary," in part because those measures "would have had dramatic negative implications for travelers." *Id.*; *see also* CDC, *Notes on the Interim U.S. Guidance for Monitoring and Movement of Persons with Potential Ebola Virus Exposure* (stating that CDC's 2014 Ebola response sought to "apply[] the least-restrictive measures necessary to protect communities and travelers").[4] CDC has also applied that principle to combat tuberculosis and even COVID-19

[3] This 2017 CDC final rule notice amended regulations in 42 C.F.R. Parts 70 and 71 setting forth the agency's authority to respond to communicable diseases, in part to "clarify the agency's standard operating procedures and policies." 82 Fed. Reg. at 6931, 6935, 6962. The subsequently-issued regulation governing the Title 42 policy, 42 C.F.R. 71.40, is located in 42 C.F.R. Part 71.

[4] https://www.cdc.gov/vhf/ebola/exposure/monitoring-and-movement-of-persons-with-exposure.html (last updated Dec. 27, 2017).

outside of the Title 42 context.[5] Indeed, least restrictive means—sometimes referred to as "least restrictive infringement" or "least infringement"—is a foundational principle that CDC has taught in its "Public Health Law 101" course. *See* CDC, *Public Health Law 101: A CDC Foundational Course for Public Health Practitioners*, at 24 (Jan. 16, 2009).[6]

CDC disregarded its established least restrictive means standard when adopting and maintaining the Title 42 policy, and failed to even acknowledge that it was doing so. From March 2020 on, none of CDC's rules or orders authorizing the Title 42 policy even referenced the least restrictive means standard, much less explained why it was jettisoning that standard. *E.g.*, 85 Fed. Reg. 56424 (Final Rule); 86 Fed. Reg. 42828 (August 2021 Order); *compare* 82 Fed. Reg. at 6896 (CDC discussing agency's Ebola policy: "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."); *Control of Communicable Diseases; Importation of Human Remains*, 85 Fed. Reg. 42732, 42733–35 (July 15, 2020) (CDC considering "less burdensome alternative[s]" when regulating importation of human remains pursuant to its Title 42 authority). The agency thus failed even to "display awareness that it [was] changing position," *Fox*, 556

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[5] *E.g.*, CDC, *Menu of Suggested Provisions For State Tuberculosis Prevention and Control Laws* (Sept. 1, 2012), https://www.cdc.gov/tb/programs/laws/menu/ appendixa.htm ("Public health officials generally employ a step-wise approach to implementing TB control measures, beginning with the least restrictive measure necessary . . . ."); CDC, *Developing a Framework for Assessing and Managing Individual-Level Risk of Coronavirus Disease 2019 (COVID-19) Exposure in Mobile Populations* ("CDC COVID-19 Framework") (CDC recommendations regarding COVID-19 based on risk level and relative restrictiveness of policy options for arriving travelers) (last updated Oct. 29, 2021), https://www.cdc.gov/immigrantrefugeehealth/exposure-mobile-populations.html.

[6] https://www.cdc.gov/phlp/docs/phl101/PHL101-Unit-2-16Jan09-Secure.pdf.

U.S. at 515, thereby "fail[ing] the APA's requirement of reasoned decisionmaking," *Grace*, 965 F.3d at 901.

Congressional testimony further confirms that the Title 42 policy was an unjustified deviation from CDC's prior practice. According to interview excerpts released by the House of Representatives, Dr. Anne Schuchat, who was second-in-command at CDC when the Title 42 policy was adopted in March 2020, testified that CDC's "typical" practice was to seek the "least restrictive means possible to protect public health" when considering quarantine and other public health measures. *House Subcommittee Interview* at 28, Cheung Decl., Ex. A. She revealed that the Title 42 policy was *not* subjected to that usual analysis. In fact, Dr. Schuchat reported that the Title 42 policy "wasn't based on a public health assessment," that "the decision wasn't being made based on criteria for quarantine," and that the policy "may have been initiated for other purposes." *Id.* at 27–28.

Dr. Schuchat further explained that the Title 42 policy was not necessary to prevent the spread of COVID-19 in the United States and that "the bulk of the evidence . . . did not support th[e] policy" because other mitigation measures were available to reduce the risk of infection in border facilities and during transit. *Id.* at 28. She also suggested that in general then-CDC Director Dr. Robert Redfield's decisionmaking was subjected to political pressure on many occasions. *See id.* According to Dr. Schuchat, Dr. Martin Cetron, who at all relevant times has headed the CDC division responsible for exercising the agency's authority under 42 U.S.C.

§ 265,[7] likewise concluded that "the facts on the ground didn't call for this [policy] from a public health reason, and that the decision wasn't being made based on [the relevant] criteria."[8] *Id.*

Notably, when the CDC finally terminated the Title 42 policy, first as to unaccompanied minors and then more generally, it did so because the continuation of Title 42 could not satisfy the "least restrictive means" standard. Specifically, CDC's March 2022 order terminating the program as to unaccompanied children stated that "CDC is committed to using the least restrictive means necessary and avoiding the imposition of unnecessary burdens in exercising its communicable disease authorities." 87 Fed. Reg. 15243, 15252 (Mar. 17, 2022) ("[L]ess restrictive means are available to avert the public health risks associated with the introduction, transmission, and spread of COVID-19 into the United States."). Likewise, its April 2022 Order terminating the Title 42 policy in its entirety stated that "CDC . . . has 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 due to the entry of covered noncitizens." 87 Fed. Reg. at 19955 ("CDC is committed to avoiding the imposition of unnecessary burdens in exercising its communicable disease authorities."). In doing so, CDC

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[7] According to CDC's 2017 rulemaking, "[t]he authority for carrying out these regulations [at 42 C.F.R. Parts 70 and 71] has been delegated from the HHS Secretary to the CDC Director, who in turn delegated these authorities to HHS/CDC's Division of Global Migration & Quarantine (DGMQ)," which has been led by Dr. Cetron at all relevant times. 82 Fed. Reg. at 6898; *see* AR 23485 (identifying Dr. Cetron as the Director of DGMQ).

[8] Dr. Cetron has previously concluded that "least restrictive means" must be considered when setting public health policy, including during a pandemic. Specifically, he agreed that pandemic responses "should be proportional, necessary, relevant, equitably applied, and done by least restrictive means." Martin Cetron et al., *Public Health and Ethical Considerations in Planning for Quarantine*, 78 Yale Journal of Biology and Medicine 325, 329 (Oct. 2005), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2259156/pdf/17132339.pdf; *see also id.* at 325 (identifying Dr. Cetron's affiliation as the "Division of Global Migration and Quarantine, Centers for Disease Control").

belatedly acknowledged that expulsions are "among the most restrictive measures CDC has undertaken." *Id.* at 19952; *see also id.* at 19944 ("[T]he extraordinary measure of an order under 42 U.S.C. 265 is no longer necessary, particularly in light of less burdensome measures that are now available to mitigate the introduction, transmission, and spread of COVID–19.").

Yet, as noted, the agency never once cited, much less applied, the least restrictive means standard when it chose to enact and *continue* the policy, presumably because it recognized from the beginning it could not satisfy that demanding standard. The failure to reference and apply the least restrictive means standard, or justify deviating from that standard, violates the APA's reasoned decisionmaking requirement and renders the policy arbitrary and capricious. *See Grace*, 965 F.3d at 901. Indeed, even were Defendants now to (implausibly) claim in litigation that it could have satisfied that standard, CDC's "failure to acknowledge and explain its departure from past practice" is enough, standing "alone," to render the Title 42 policy unlawful. *Id*. at 903 (rejecting agency "lawyers' post-hoc rationalizations").

B. The Title 42 Policy Does Not Rationally Serve its Stated Purpose Especially Given the Alternatives.

An agency action is also arbitrary and capricious if it lacks a reasonable "connection to the goals" it purports to advance or "the rational operation" of the laws it purports to implement. *Judulang v. Holder*, 565 U.S. 42, 58 (2011).

Here, the D.C. Circuit correctly observed that "from a public-health perspective," it is "far from clear that [the Title 42 policy] serves *any* purpose." *Huisha-Huisha*, 27 F.4th at 735 (emphasis added). And as this Court held nearly a year ago, Defendants had numerous options available to them even at that time, given "the wide availability of testing, vaccines, and other minimization measures." *Huisha-Huisha*, 560 F. Supp. 3d at 176. Defendants' failure to account for fundamental changes in the pandemic response and other serious defects from the

outset demonstrate the inherent irrationality of the Title 42 policy and render it arbitrary and capricious.

1. CDC failed to adequately consider alternatives to the drastic Title 42 policy.

Even absent an established agency practice like CDC's least restrictive means principle, "[a]n agency is required to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives." *Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 997 F.3d 1247, 1255 (D.C. Cir. 2021) (citation omitted). At minimum, agencies must consider "obvious and less drastic alternative[s]." *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 (D.C. Cir. 1986). "[T]he failure of an agency to consider obvious alternatives has led uniformly to reversal." *Spirit Airlines*, 997 F.3d at 1255 (cleaned up); *see also DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (failure to consider less sweeping alternative was arbitrary and capricious). Here, CDC consistently failed to consider public health measures less drastic than indefinitely authorizing summary expulsions.

a. First, Defendants could have instituted testing, vaccination, and quarantine protocols, rather than continuing to authorize expulsions. An agency must "reexamine its approach if a significant factual predicate of a prior decision has been removed." *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) (cleaned up). In March 2020, the Title 42 policy was purportedly justified as an emergency measure at a time when there was "no vaccine," "no rapid test," and no "approved therapeutics." 85 Fed. Reg. 17060, 17062 (Mar. 26, 2020) (original Title 42 order). By the time CDC issued its operative Order in August 2021, each of these core factual underpinnings for the policy had changed entirely. Highly effective vaccines and on-site rapid antigen tests were available. 86 Fed. Reg. at 42833 (August 2021 Order); *see also* AR 2517 (CDC July 2021 report: "COVID-19 vaccination remains the most effective means to achieve

control of the pandemic"). Two-thirds of people in the United States over age 12 had received at least one vaccine dose. 86 Fed. Reg. at 42834. All American adults had been vaccine-eligible for more than three months, AR 2585, and CBP "frontline personnel" had been prioritized for vaccination for months longer. CBP, *January 2021 Operational Update* (Feb. 10, 2021).[9] Effective new treatments including "monoclonal antibodies were available in August 2021," 87 Fed. Reg. at 19950 (April 2022 Order), and these therapeutics greatly reduced hospitalizations resulting from infection, AR 6846. Notably, the August 2021 Order failed to even mention these advances in therapeutics, violating the APA's requirement that an "agency cannot ignore evidence contradicting its position." *See Butte Cnty., Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010).

Yet, for unexplained reasons, CBP still was not testing or vaccinating the migrants who came into its custody. Nor does the record indicate that Defendants had taken measures to build out quarantine and processing capacity—anticipated to take approximately "90 days" in the initial March 2020 Order. *See* 85 Fed. Reg. at 17067 n.66. The August 2021 Order was issued nearly a year and a half later, and the government had evidently done virtually nothing to institute these basic public health measures at the border. *See* 86 Fed. Reg. at 42837 (continuing to cite lack of testing and quarantine space in existing facilities); *id.* at 42840 ("encourag[ing]" but declining to require vaccination programs for noncitizens subject to the policy).

That year and a half was more than enough time to institute alternatives to expulsion. Indeed, DHS has demonstrated a capacity to move expeditiously when it so chooses. In March 2022, for example, CBP rapidly instituted an exception to the Title 42 policy for thousands of

[9] https://www.cbp.gov/newsroom/national-media-release/cbp-announces-january-2021-operational-update.

Ukrainian citizens arriving at U.S. borders. *See* Mem. from Matthew S. Davies, Executive Director of Admissibility and Passenger Programs, CBP, *Title 42 Exceptions for Ukrainian Nationals* (Mar. 11, 2022).[10] And in April 2022, when CDC finally set an "implementation timeline" for the end of the Title 42 policy, it concluded that a comparatively short period of seven weeks would be sufficient to expand a vaccination program for migrants and deploy other additional COVID-19 protocols at border facilities. 87 Fed. Reg. at 19955–56 (April 2022 Order). A few weeks later, DHS agreed that CDC's timeframe was adequate to implement migrant testing and vaccination protocols at 24 CBP sites and improve its logistics and processing capacity, "including the deployment of soft-sided facilities and virtual processing." Mem. from Alejandro N. Mayorkas, Sec'y of Homeland Sec., *DHS Plan for Southwest Border Security and Preparedness*, Apr. 26, 2022, at 2, 9.[11]

Yet from March 2020 to August 2021 (and after), Defendants seemingly did nothing to obviate the asserted need for the Title 42 policy. Indeed, an internal CDC memo from November 2021 expressed frustration that "DHS continue[d] to delay implementing . . . public health interventions" for families and single adults, even though similar measures had already been successfully implemented at other DHS facilities and for unaccompanied children and Afghan evacuees. AR 23494; *see also Huisha-Huisha*, 560 F. Supp. 3d at 176 (pointing out in September 2020 that "the government has successfully implemented mitigation measures with

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[10] https://tinyurl.com/59fjhrbx. From March through May 2022, CBP encountered 23,767 Ukrainians at the southern border and subjected only 148 of those individuals to the Title 42 policy. *See* CBP, *Nationwide Encounters* (last modified July 15, 2022), https://www.cbp.gov/newsroom/stats/nationwide-encounters (drop-down filters: "Southwest Land Border" for Region, "Ukraine" for Citizenship, and "Title 8" or "Title 42" for Title of Authority).

[11] https://www.dhs.gov/sites/default/files/2022-04/22_0426_dhs-plan-southwest-border-security-preparedness.pdf.

regard to processing unaccompanied minors"). In fact, DHS had not even "developed a *plan* for the resumption of normal border operations." AR 23494 (emphasis added).

Thus, as the D.C. Circuit rightly recognized, the Title 42 policy is "a relic from an era with no vaccines, scarce testing, few therapeutics, and little certainty." *Huisha-Huisha*, 27 F.4th at 734. All the public health tools needed to institute these alternative testing, vaccination, and quarantine protocols were already available by August 2021. *See Huisha-Huisha*, 560 F. Supp. 3d at 176. Despite their acknowledged efficacy, Defendants failed to institute these less drastic measures or "to give a reasoned explanation for its rejection of such alternatives." *See Spirit Airlines*, 997 F.3d at 1255 (citation omitted). That failure constitutes arbitrary and capricious agency action. *Id.*

b. Second, even apart from increased testing and the development of vaccines and therapeutics, CDC failed to adequately consider other "alternative way[s] of achieving [its] objectives" that were raised by commenters and were available from the very beginning—namely self-quarantine and outdoor processing. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983).

At the outset, CDC failed to adequately consider an obvious solution to the purported risks of processing noncitizens in congregate settings. In its August 2021 Order, CDC indicated that Title 42 processing poses a lower risk of COVID-19 transmission because it "generally happens outdoors." *See* 86 Fed. Reg. at 42841. But nothing in the record indicates that Title 8 processing must occur indoors. CDC's failure to consider whether processing under Title 8 could also happen outside of a facility, as one commenter suggested, AR 6, overlooks an obvious and less drastic alternative to expulsions. *See also* Mem. from Alejandro N. Mayorkas, *supra*

note 11, at 9 (stating that DHS has capacity to deploy "soft-sided facilities" and utilize "virtual processing").

Many commenters also explained that CDC could order noncitizens to self-quarantine or self-isolate instead of authorizing their expulsion. *E.g.*, AR 173, 238, 282, 301. CDC rejected this proposal, asserting "that covered noncitizens [likely] do not have homes in the United States" where they could self-quarantine or -isolate. *See*, *e.g.*, 86 Fed. Reg. at 42841 (August 2021 Order). But the administrative record belies that claim. In fact, the record shows that the vast majority (approximately 92%) of migrants have family or friends already in the United States who could provide shelter for self-quarantine. *E.g.*, AR 30 (citing study conducted by U.S. Immigration Policy Center), 97, 173, 238, 274, 301. CDC posited that any homes available to noncitizens might not be suitable for self-quarantine, but again nothing in the record supports that rank speculation. *See* 85 Fed. Reg. at 56453 (Final Rule). And the agency failed entirely to address the availability of shelters as a backstop, *id*., even though the record demonstrates that community and faith-based organizations responsible for receiving migrants were available to provide shelter and quarantine to those who may lack a place to quarantine. AR 30. Finally, CDC acknowledged that Europe and Canada had successfully implemented self-quarantine systems for arriving travelers but failed to explain why Defendants could not do the same. 85 Fed. Reg. at 56434–37.

The APA's requirement to consider alternatives demands more than rejection based on speculation contradicted by the record before the agency. An "agency cannot ignore evidence contradicting its position." *Butte Cnty*, 613 F.3d at 194. Faced with data undermining its assumption that noncitizens are unable to self-quarantine, CDC was obligated "to deal with newly acquired evidence in some reasonable fashion or to reexamine [its] approach[]." *See*

Portland Cement Ass'n v. EPA, 665 F.3d 177, 187 (D.C. Cir. 2011) (citations omitted). CDC's failure to meaningfully address the alternatives of requiring testing, vaccination, self-quarantine, self-isolation, and outdoor processing is arbitrary and capricious.

2. Apart from alternatives, the Title 42 policy did not further its stated objectives given COVID-19's already-widespread existence in the United States.

An agency action is arbitrary and capricious if it lacks a reasonable "connection to the goals" it purports to advance or "the rational operation" of the laws it purports to implement. *Judulang*, 565 U.S. at 58. The record here does not reflect that the Title 42 policy has had or could have any remotely meaningful impact on the spread of COVID-19 within the United States. Indeed, as Dr. Anthony Fauci has stated, immigrants are "absolutely not" a "major reason why COVID-19 is spreading in the US," and "expelling [immigrants] is not the solution." CNN, *Fauci: Expelling immigrants 'not the solution' to stopping Covid-19 spread* (Oct. 3, 2021)[12]; NY Post, *Fauci says US travel bans don't 'make any sense' now given rapid spread of Omicron* (Dec. 20, 2021) ("[W]hen you get to the point when there's enough of a virus in your own country, it doesn't really make any sense of trying to keep it out . . . [I]nput from countries that might even have less infection than we have doesn't give any added value.").[13]

First, by August 2021 COVID-19 was indisputably widespread *within* the United States. By the time the CDC issued its August 2021 Order, there had already been "over 34 million" confirmed COVID-19 cases in the United States. 86 Fed. Reg. at 42830–31 (August 2021 Order). And CDC failed to cite any evidence that noncitizens subject to the order would meaningfully contribute to the existing spread—in fact, during the first seven months of the Title 42 policy, CBP encountered on average just one migrant per day who tested positive for COVID-

12 https://tinyurl.com/5ua5m4bm (2:13 to 4:05 of video).
13 https://tinyurl.com/2ksp2nyk.

19. AR 27108 (CBP memo). Indeed, the August 2021 Order reported that COVID-19 was more widespread in the United States than in Canada and Mexico: 137.9 daily cases per 100,000 people in the United States, compared to 68.6 in Mexico and 8.0 in Canada. 86 Fed. Reg. at 42831. As Defendants have concluded in the past, travel restrictions are unlikely to be effective, particularly when a disease is already widespread, and are likely to be counterproductive. 82 Fed. Reg. at 6895 (CDC concluding in 2017 that travel restrictions are presumptively "detrimental to efforts to combat the spread of communicable disease"); Dep't of Health and Human Services ("HHS"), *HHS Pandemic Influenza Plan* (November 2005) at 369 ("[T]ravel restrictions . . . are likely to be much less effective once the pandemic is widespread.").[14]

Second, even just considering cross-border traffic, the Title 42 policy's limited scope meant that it could not affect the vast majority of travel and thus the travel-related spread. Indeed, the record bears out Judge Walker's observations during the D.C. Circuit argument that because "the [CDC's] order only covers about .1 percent of people who cross the Canadian or Mexican border," nothing "suggest[s] that those .1 percent of border crossers are more likely to have COVID than the other 99.9 percent." Oral Argument Tr. at 5, Cheung Decl., Ex. B. CDC had reasoned that the risk that travelers could spread infection increased when they traveled in "congregate settings" such as "trains[] and road vehicles." 85 Fed. Reg. at 16560–61 (Interim Final Rule). But tens of millions of people continued to be permitted to cross the southern border, even if they traveled in such "congregate settings." CBP's own data shows that in July 2021 alone, over 11 million people entered from Mexico by land, including over 8.4 million

[14] https://www.cdc.gov/flu/pdf/professionals/hhspandemicinfluenzaplan.pdf.

people in cars, buses, and trains.[15] According to HHS's pandemic plan, even a near-complete ban on travel has only a marginal effect on the introduction of disease. *See HHS Pandemic Influenza Plan* at 307 ("[T]ravel restrictions would need to be about 99% effective to delay introduction into a country by one to two months."). A travel restriction that ignores 99% of travelers cannot possibly be effective, and CDC fails to explain otherwise.

Third, the record indicates that, if anything, Title 42 expulsions likely *exacerbate* rather than reduce COVID-19 transmission on both sides of the U.S.-Mexico border by increasing the number of times migrants are encountered by CBP—a dynamic that CDC again failed even to acknowledge. The evidence continues to bear out this Court's previous finding that "under the Title 42 regime, individuals seeking an asylum hearing have attempted to cross the border multiple times, sometimes 10 times or more." *Huisha-Huisha*, 560 F. Supp. 3d at 176. Noncitizens expelled back to Mexico are forced to "attempt to cross [the border] again and again." AR 439; *see also* CBP, *January 2021 Operational Update* (Feb. 10, 2021) ("[T]he Border Patrol estimates that between March 20, 2020 and February 4, 2021, 38 percent of all encounters involved recidivism, or individuals who have been apprehended more than once.");[16] Gov't Accountability Off., *CBP's COVID-19 Response* (June 2021) ("CBP COVID-19 Response"), at 40–41 ("[T]he recidivism rate along the Mexican border increased from 7 percent in fiscal year 2019 to . . . 34 percent for the first quarter of fiscal year 2021.").[17]

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[15] U.S. Bur. of Transp. Stats., Border Crossing Entry Data, https://explore.dot.gov/views/BorderCrossingData/Monthly?%3Aembed=y&%3AisGuestRedirectFromVizportal=y (select July 2021 and "US-Mexico Border"); *see also* U.S. Bur. of Transp. Stats., Border Crossing/Entry Data, https://www.bts.gov/browse-statistical-products-and-data/border-crossing-data/border-crossingentry-data ("Border crossing data are collected at ports of entry by [CBP]").

[16] https://www.cbp.gov/newsroom/national-media-release/cbp-announces-january-2021-operational-update.

[17] https://www.gao.gov/assets/gao-21-431.pdf.

Similarly, the Title 42 policy requires noncitizens who otherwise could be processed and released from CBP custody to spend additional time in congregate detention and transportation awaiting expulsion. As CDC has acknowledged, many noncitizens subject to the order cannot be immediately expelled by land, because Mexico will only accept the return of certain nationalities. 86 Fed. Reg. at 42836 (August 2021 Order). To expel noncitizens that Mexico will not accept, Defendants detain them pending an international flight. AR 275. This has "resulted in prolonged contact between agents and detainees" and thus "sent a conflicting message to agents on health and safety." CBP COVID-19 Response at 41.

As this Court previously found, the Title 42 policy thus results in placing noncitizens on "on crowded planes and buses" and does so "without first testing the individuals and isolating those who test positive, and transporting them to other locations [on the border], before expelling them or releasing them into the United States." *Huisha-Huisha*, 560 F. Supp. 3d at 175; *see also* AR 275 (noting that migrants are placed on flights with only temperature screen). Indeed, in the lead-up to the August 2021 Order, DHS had "increased lateral flights of migrants" up and down the border prior to expulsion. *See* DHS, *Sec'y Mayorkas Delivers Remarks in Brownsville, Texas* (Aug. 12, 2021).[18]

All this needless additional transportation necessarily increases close-quarters exposure between noncitizens and DHS personnel. As commenters from Columbia University's medical school explained, expelling noncitizens therefore contributes to "the spread of diseases on both sides of the border." AR 96. Indeed, CDC itself has advised other countries *not* to deny entry to any individual as a means of combatting COVID-19 if doing so may "put others at risk," such as

[18] https://www.dhs.gov/news/2021/08/12/secretary-mayorkas-delivers-remarks-brownsville-texas.

by "requiring the individual to depart the country by plane." *See* CDC, *Developing a Framework for Assessing and Managing Individual-Level Risk of Coronavirus Disease 2019 (COVID-19) Exposure in Mobile Populations*, *supra* note 5. These numerous, obviously counterproductive consequences of the Title 42 policy underscore its disconnect from "the rational operation" of the public health laws. *Judulang*, 565 U.S. at 58.

The purpose of the Title 42 policy was purportedly to protect against the spread of COVID-19. But each of these defects demonstrates that the Title 42 policy lacks a rational "connection to the goals" that purportedly justify it, and the policy is therefore arbitrary and capricious. *See Judulang*, 565 U.S. at 58.

C. The Agency Failed to Consider the Countervailing Harms to Vulnerable Migrants Subject to Summary Expulsion Under Title 42.

From the beginning in March 2020, CDC's orders continuously failed to consider the harm to migrants. Consideration of harm was required by CDC's least restrictive means standard. It was also required under the APA's general reasoned decision-making mandate, which compels agencies "to consider [and] to adequately analyze the . . . consequences of" their actions on affected individuals. *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 931–32 (D.C. Cir. 2017); *see also Regents of the Univ. of Cal.*, 140 S. Ct. at 1914 (invalidating agency action and explaining that agency was required to consider impact that rescinding DACA program would have on affected noncitizens). An agency may not ignore the negative effects of its actions even as it pursues otherwise desirable ends. *See Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1105–06 (D.C. Cir. 2019) (invalidating action because agency failed to consider that its actions would cause low-income consumers to lose access to affordable services). As the D.C. Circuit explained in *Grace*, an agency's "failure to acknowledge the change in policy is

especially egregious" where it poses grave "potential consequences for asylum seekers." *Grace*, 965 F.3d at 901.

In this case, the D.C. Circuit observed that there is ample "stomach-churning evidence of death, torture, and rape" and other "horrific circumstances" that the Title 42 policy causes to migrants. *Huisha-Huisha*, 27 F.4th at 735–36. Even if Defendants were somehow unaware of these dire consequences on their own, they were put on notice by numerous public comments on the Title 42 policy rulemaking. *See generally* AR 1–807 (public comments). One commenter explained that migrants are expelled to border regions in Mexico that are "controlled by dangerous cartels" and where migrants face a "high probability" of persecution, torture, violent assaults, or rape. AR 90 (citing more than 1,000 publicly reported attacks on migrants in Mexico within a one-year period). Another commenter noted that many migrants are also returned under Title 42 to countries such as Guatemala, Haiti, Honduras, and El Salvador with "fragile healthcare systems, deepening poverty, severe food insecurity, repressive policing of public health measures, and restrictions on public transportation," which hinder migrants' ability to find shelter after they are expelled. AR 276–77. Expulsions to Haiti are particularly egregious, in light of DHS's own determination that the country is too destabilized and dangerous to receive deportations. *See Designation of Haiti for Temporary Protected Status*, 86 Fed. Reg. 41863, 41864 (Aug. 3, 2021) (citing "a deteriorating political crisis, violence, and a staggering increase in human rights abuses").

Among other groups, noncitizens subject to summary expulsion under Title 42 include: "survivors of domestic violence and their children," who "have endured years of abuse," AR 705; "survivors of sexual assault and rape," who are at risk of being stalked, attacked, or murdered by their persecutors in Mexico or elsewhere, *id.*; and LGBTQ+ individuals from

countries where their gender identity or sexual orientation is criminalized, AR 620, or for whom expulsion to Mexico or elsewhere makes them prime targets for persecution, AR 73–74 (citing State Department report indicating that more than half of LGBTQ+ individuals have experienced hate speech and physical aggression in Mexico within past year).

CDC never addressed any of these harms. It did not do so in its rulemaking. *See generally* 85 Fed. Reg. 16559 (Mar. 24, 2020) (Interim Final Rule); 85 Fed. Reg. 56424 (Final Rule). And it did not so in any of its orders, including the operative August 2021 Order. *See generally, e.g.*, 85 Fed. Reg. 17060 (original Title 42 order); 86 Fed. Reg. 42828 (August 2021 Order).

Faced with uncontroverted evidence that migrant families would be brutalized as a result of its policy, the agency impermissibly "averted its eyes altogether." *See Am. Wild Horse Pres. Campaign*, 873 F.3d at 931. CDC's failure to consider the Title 42 policy's consequences independently renders the policy arbitrary and capricious. *See Grace*, 965 F.3d at 901; *Nat'l Lifeline Ass'n*, 921 F.3d at 1113 (invalidating FCC action because agency's "decision [did] not indicate that it considered the effect of eliminating" a government subsidy on consumers who would lose access to the subsidized service).

* * *

In sum, there are three independently sufficient grounds on which to find that the Title 42 policy is arbitrary and capricious in violation of the INA: the agency (1) did not justify its departure from its established "least restrictive means" standard; (2) did not provide a sufficient factual basis to show that the policy furthered its stated objectives, especially in light of available alternatives, and (3) did not consider the countervailing harm to noncitizens who are subject to the Title 42 policy.

II. FAMILIES CONTINUE TO SUFFER IRREPARABLE HARM.

There is no question that the Title 42 policy inflicts irreparable injury on Class Members. As this Court previously held, "Plaintiffs have provided ample unrebutted evidence" that "they face real threats of violence and persecution if they were to be removed from the United States." *Huisha-Huisha*, 560 F. Supp. 3d at 173 ("Plaintiffs' alleged injuries would likely be 'beyond remediation.'"). The D.C. Circuit agreed that "the record is replete with stomach-churning evidence of death, torture, and rape." *Huisha-Huisha*, 27 F.4th at 733. And Defendants themselves, at oral argument, acknowledged "the quite horrific circumstances that non-citizens" face as a result of the Title 42 policy. *Id.*

Similarly, in an October 2021 memorandum explaining his decision to terminate the so-called Migrant Protection Protocols—a policy that also involves the forced return of noncitizens across the border to Mexico—the DHS Secretary determined that "[s]ignificant evidence indicates that individuals were subject to extreme violence and insecurity at the hands of transnational criminal organizations that profited from putting migrants in harms' way" once returned to Mexico. Mem. from Alejandro N. Mayorkas, Sec'y of Homeland Security, *Explanation of the Decision to Terminate the Migrant Protection Protocols* (Oct. 29, 2021); *accord id.* at 12–14[19]; *see also Huisha-Huisha*, 27 F.4th at 734 ("In defending its repeal of the 'Remain in Mexico' policy, the Executive recently said that sending similarly situated aliens to dangerous places 'exposes migrants to unacceptable risks' of 'extreme violence.'" (citation omitted)).

[19] https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-justification-memo.pdf.

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. *See Huisha-Huisha*, 560 F. Supp. 3d at 175. Now, the rate of expulsions is nearly twice as high, reaching 27%. *See* CBP, *supra* note 2. In June 2022—the first full month following issuance of the D.C. Circuit's mandate—14,028 individual members of families were expelled. *Id.* Documented cases of kidnapping, rapes, and other violence against noncitizens subject to Title 42 have also risen dramatically since last year: In Mexico alone, recorded incidents spiked from 3,250 cases in June 2021 to over 10,318 in June 2022. *See* Dkt. 118-4 ¶ 8; 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).[20] Title 42 expulsions must be immediately enjoined to prevent further irreparable harm to Class Members.

III. THE REMAINING EQUITABLE FACTORS ALSO FAVOR PLAINTIFFS.

Title 42 policy is wholly unnecessary as a public health measure—the balance of the equities and the public interest therefore weigh decisively in favor of an injunction. Nearly a year ago, this Court ruled that COVID-19 risks can be adequately mitigated "in view of the wide availability of testing, vaccines, and other minimization measures." *Huisha-Huisha*, 560 F. Supp. 3d at 176. The D.C. Circuit affirmed, concluding that the Title 42 policy appears to lack a public health purpose in an era of effective vaccinations and testing and greater certainty about the disease. *Huisha-Huisha*, 27 F.4th at 734–35. In April 2022, CDC finally echoed those findings and decided to terminate the Title 42 policy. 87 Fed. Reg. at 19944 (April 2022 Order).

In its termination order, CDC "determined that the extraordinary measure of an order under 42 U.S.C. 265 is no longer necessary, particularly in light of less burdensome measures

[20] https://www.humanrightsfirst.org/sites/default/files/NightmareContinues.pdf.

that are now available." 87 Fed Reg. at 19944; *id.* at 19949–50 (discussing "widespread deployment of COVID-19 tests, vaccines, and therapeutics"; the availability of rapid tests that are "particularly helpful in congregate settings"; and the increase in vaccination rates around the world); *id.* at 19951 (citing other measures such as "incorporating mask use, improving ventilation, [and] enhancing cleaning and disinfection procedures" that further reduce risk in congregate settings); *id.* (explaining that 86% of CBP personnel already received a COVID-19 vaccination and that, by May 23, 2022, DHS would be providing up to 6,000 vaccinations a day to noncitizens at the U.S.-Mexico border); *id.* (noting DHS's coordination with nonprofit and other entities to test and quarantine individuals released from CBP custody). In light of those alternative measures that do not expose noncitizens to the extraordinary harms of expulsion, the Title 42 policy plainly imposes "unnecessary burdens" on persons seeking to enter the United States. *Id.* at 19955.

Critically, CDC itself recognizes that its factual determination that the Title 42 policy is "unnecessary" deprives the agency of the *statutory* authority to maintain the policy. *Id.* ("[A]voiding the imposition of unnecessary burdens . . . aligns with the underlying legal authority in 42 U.S.C. 265, which makes clear that this 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."). As this Court has previously held, "there is generally no public interest in the perpetuation of unlawful agency action." *See Huisha-Huisha*, 560 F. Supp. 3d at 174 (quoting *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016)). Meanwhile, "the public has an interest in ensuring that we do not deliver aliens into the hands of their persecutors and preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm." *Id.* (citations omitted).

The equities here could not be clearer: the agency policy is admittedly unnecessary and unlawful, yet it continues to remain in effect, subjecting parents and children to horrific but preventable violence. Injunctive relief is warranted to prevent further harm.

CONCLUSION

The Court should grant Plaintiffs' motion, vacate the Title 42 policy, and declare the policy unlawful and issue a permanent injunction prohibiting Defendants from applying the policy with respect to Class Members.

Dated: August 15, 2022

Respectfully submitted,

/s/ Lee Gelernt

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NANCY GIMENA HUISHA-HUISHA, *et al.,* *Plaintiffs*, v. ALEJANDRO MAYORKAS, Secretary of Homeland Security, in his official capacity, *et al.,* *Defendants*.	No. 1:21-cv-00100-EGS

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Upon consideration of Plaintiffs' Motion for Partial Summary Judgment, along with all exhibits thereto and relevant portions of the administrative record, this Court finds that Plaintiffs have shown good cause for relief. Accordingly, the Court hereby GRANTS Plaintiffs' Motion for Partial Summary Judgment. This 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.

SO ORDERED.

DATE:

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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NANCY GIMENA HUISHA-HUISHA, *et al.,* *Plaintiffs*, v. ALEJANDRO MAYORKAS, Secretary of Homeland Security, in his official capacity, *et al.,* *Defendants*.	No. 1:21-cv-00100-EGS

DECLARATION OF MING CHEUNG IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I, Ming Cheung, Esq., declare as follows:

1. I submit this declaration in support of Plaintiffs' Motion for Partial Summary Judgment. I have personal knowledge of the facts set forth herein, and, if called as a witness, I could and would testify competently as follows:

2. On Friday, November 12, 2021, I downloaded a document from the website of the House Select Subcommittee on the Coronavirus Crisis. The document contained excerpts of the Subcommittee's transcribed interviews of certain Centers for Disease Control and Prevention officials, including Dr. Anne Schuchat. Attached as Exhibit A is a true and correct copy of the excerpts of Dr. Schuchat's transcribed interview as released by the Subcommittee.

3. On Monday, February 2, 2022, I received a copy of the transcript of the oral argument which occurred on January 19, 2022, before the U.S. Court of Appeals for the D.C. Circuit in *Huisha-Huisha v. Mayorkas*, No. 21-5200. The document was transmitted to me by Deposition Services, Inc., which is the entity designated by the Circuit as the exclusive transcriber of oral arguments in that court. Attached as Exhibit B is a true and correct copy of that document.

I, Ming Cheung, declare under penalty of perjury of the laws of the State of New Jersey and the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

Executed on August 12, 2022, in Jersey City, New Jersey.

MING CHEUNG, ESQ.

EXHIBIT A

Excerpts from Transcribed Interview of Dr. Anne Schuchat

White House Efforts to Block CDC Briefings and Media Appearances

Q: On February 26th, 2020, Dr. Nancy Messonnier gave a telebriefing update on COVID 19. During this briefing, she warned about the risk of community spread saying, "We will see community spread in this country. It's not so much a question of if it will happen anymore, but rather more a question of exactly when." Are you familiar with this particular briefing?

A: I think it was the February 25th, but, yes, I'm familiar with that briefing when she spoke and used those words, yes.

…

Q: … Do you believe that Dr. Messonnier's remarks were accurate at the time based on the best known information?

A: Yes, I do.

Q: It's been recorded that the President was angered by Dr. Messonnier's remarks at the briefing, I think it has been widely reported publicly. I'm wondering if at that time you were aware of any feedback CDC received from HHS or the White House?

A: What I can say is that on February 25th, I was in Washington, DC doing some briefings and so forth. And I was not following what CDC had done a briefing on, but I was asked to adjust my schedule so that I could join the Secretary in a media briefing that afternoon on COVID. So my familiarity was there had been a briefing in the morning and then there was another briefing that afternoon that I was asked to be part of. And I didn't know why, I was just asked to attend.

Q: Did you later find out that there were other reasons for the later briefing?

A: **The impression that I was given was that the reaction to the morning briefing was quite volatile, and having another briefing – you know, later I think I got the impression that having another briefing might get – you know, there was nothing new to report, but get additional voices out there talking about that situation.**

…

Q: So I think following that particular briefing, CDC conducted, I think, four more public briefings in the next few weeks. I'm going to assume they actually happened the day before they are listed here, so February 27th, March 1st, March 2nd, and then March 9th. **I think that my understanding is that on March 9th, Dr. Messonnier also took over the briefing and gave similar warnings. After that point, CDC stopped providing public briefings until about June 11th or 12th, 2020; is that correct?**

A: **That sounds right.**

Q: **Do you know why CDC stopped providing public briefings during that period?**

A: **I think there were two factors. One was a request. We would submit a request to the others to do a briefing and it was declined, and then – or we didn't get approval to be able to do one.** And then at some point during that period the White House task force began doing briefings that were not really – I would say they didn't get carried out exactly the way we would have done them in terms of the content or Q&A or availability. But as a whole of government response, the communication center moved to the task force.

Q: You mentioned having requests denied. Who communicated that denial to you?

A: In general – let me speak generally. When the media would request for me to speak, you know, in a one on one or some sort of – you know, if there was an ask for me personally, I had the CDC media contact a public affairs support person who would submit a request through our office of communication to HHS for the ASPA to let us know. **And so my contact – there were several requests for me personally, and basically she said we didn't get approval or we haven't heard back or it's too late. They either said no or they didn't say anything.**

For telebriefings, it would be a different story that our office of communication would be directly communicating with ASPA. And I wouldn't have seen the back and forth on that. So I'm only familiar with when somebody asked for me, and it got to the point where I was surprised when there was approval. I was, like, are you sure? Did they really say I could do that interview? Let's make sure before I do it. So there were not too many interviews after the February time period.

Q: So just to make sure I understand, in the sense a media outlet, say, requested you for an interview, that request process would run its way up through ASPA. And before this time period, were those requests generally approved and then after they started being denied?

A: That's right.

Q: And were you ever given any explanation of the reasons for the denials?

A: Only one time where I pushed and said, you know, do we know why not? You know, I got the email trail on that one, and it was from the White House communications had said, no, we won't have time to prep her. We've made lots of announcements this week and we can't get her ready by the morning show.

…

Q: Do you recall any specific telebriefing requests being denied?

A: **I do recall the agency asking to do briefings, but I don't recall when and which ones. I know there was a point where they stopped asking because they kept saying no. So**

I knew where there were some we asked, you know, there was enough going on or we had important content coming out.

The typical rhythm was if we had a lot of new science coming out, we wanted to push it rather than just respond or not respond at all and let others be trying to interpret it. And in that March April period, there was a lot of – in the U.S. in terms of the field investigations we were doing and the emerging understanding of the situation both here and around the world.

And so rather than – you know, if we had two or three MMWRs coming out, the ability to explain them as a narrow focus rather than as a policy kind of thing could have helped disseminate that fast moving case of understanding that was going on. **So, basically, we didn't get approval for most of those, so far as I know.**

…

Q: You mentioned one of the reasons that you were given or that you understood for the CDC not doing the briefings during this period is that the White House task force had taken over that role. **In your opinion, were the White House task force briefings that occurred an adequate substitute for the CDC briefings or other information that CDC would have disseminated through the media?**

A: I should qualify this by saying after a certain point, I didn't watch them anymore. **But my sense of the ones that I saw were that they were not, in general, an adequate way to – you know, there were parts of them that were probably fine, but that the – you know, the intrusion of conflicting points of view from the speakers were – you know, I used the example of the briefing where the policies to recommend masks for the general public, which I think was a critical, essential tool in our toolkit early on in this accelerating epidemic, were at the very same briefing where the scientists were describing these new policies, a politician said that he was not going to use that. That, to me, was a poor way to announce the new policy that had been reviewed and bought into and agreed upo**n. So I think the idea of conflicting messaging, even in the same press briefing, let alone insufficient time for media to really ask their questions.

Q: I think you might be referring to the President's comment on April 3rd, he said, "The mask is going to be really a voluntary thing. If you do it, you don't have to do it. I'm choosing not to do it, but some people may want to do it, and that's okay." Is that what you're referring to generally?

A: Yes.

Q: I believe – and we will talk about this a little bit more – I believe the CDC had put out guidance on face coverings that same day.

A: That's right. And the way that guidance was announced was in that press conference, because we didn't do a press briefing ourselves. It was through the task force essentially.

Q: So is it your opinion that comments like that at those briefings undermine the government's response to the pandemic?

A: I think that that was potentially confusing to the public and may have reduced use of a preventable tool that we had before we had vaccines or many other means to reduce spread. And particularly at a time where a number of – where a lot of thought was going into how some settings could reopen or could partially open, the masks were a key tool in that toolbox. And so that mixed messaging or contradiction of the message was unfortunate.

…

Q: I'm guessing your colleague has spoken to the media often, not by name, but there are some quotes that they have made about CDC's authority to communicate to the public during this period of time**. I think one quote reported in CNN in May 2020 said that CDC officials say they've been, "muzzled and that their agency's efforts to mount a coordinated response to the COVID 19 pandemic were hamstrung by a White House whose decisions are driven by politics rather than science." Do you agree with that assessment?**

A: **That is the feeling that we had, many of us had.**

Q: **Do you think that allowing CDC to speak publicly – or perhaps a better way to say it is, is having clear, consistent, and accurate messaging, regardless of the speaker, particularly in that early stage of the pandemic, could or would have resulted in fewer infections and deaths in the U.S.?**

A: **Yes, I do…**

Trump Officials' Interference with CDC Public Health Guidance

Q: … On March 20th, 2020, there was an order under Title 42 suspending the introduction of certain persons from countries where a communicable disease exists. In other words, there was an order to close borders and to support unaccompanied children in asylum.

There's been public reporting about the way in which this order was instituted. Do you have any knowledge about how it came to be instituted at this time?

A: I don't have knowledge about the final decision. I'm familiar with the CDC's presentation of data about the relative risks of disease in different sides of the border. And at that time, there was a lot more disease in the U.S. than south of the border. But the decisionmaking process that led to that I wasn't familiar with, but that case wasn't based on a public health assessment at the time.

Q: Do you believe that that order was necessary to prevent the spread of coronavirus in the U.S. at that time, at this specific time, March 20, 2020?

A: No.

Q: Why not?

A: The focus on reducing spread on our side of the border was critically needed. And, again, the – that's what I would say.

Q: It's been reported that Mr. Cetron refused to sign it. Did you ever discuss that with him?

A: … I did have some discussions with Dr. Cetron about the issue, yes. Is that the question?

Q: That was actually the question. I'm just wondering if he told you the reasons why he wouldn't sign it.

A: Dr. Cetron takes the regulatory authority for quarantine very seriously and weighs – you know, the typical issue is, the least restrictive means possible to protect public health is when you exert a quarantine order versus other measures. **And the bulk of the evidence at that time did not support this policy proposal**; that there was focus on trying to improve the conditions in the facility during – where individuals were housed to reduce the risk. There were CDC recommendations to ICE and to ACF and everything about how to make the transit of individuals less problematic.

But his view was that the facts on the ground didn't call for this from a public health reason, and that the decision wasn't being made based on criteria for quarantine. It may have been initiated for other purposes. So I don't think he was comfortable using his authority to do that because it didn't meet his careful review of what the criteria are.

…

Q: Do you know why Dr. Redfield made the decision he decided not to render his opinion?

A: No. **I imagine that Dr. Redfield was put in many impossible situations over the course of his position.**

Q: **By impossible situations, you mean the pressure from a political perspective?**

A: **I would agree with that.**

…

Q: So the next three exhibits, in that case, might be documents that you have less familiarity with, but I still want to make sure because they were widely reported. It is Exhibits 15, 16, and 17, and they are each titled Overview of Testing for SARS-CoV-2, COVID 19.

Exhibit 15 is dated July 17, 2020, Exhibit 16 is dated August 24, 2020, and then Exhibit 17 is dated October – hold on, I'm sorry – September 18th, 2020.

The version that was updated on August 24th changed a statement in earlier guidance which recommended such change for close contact of persons with concerned coronavirus infections. It says, "You do not necessarily need a test unless you are a vulnerable individual or your healthcare provider or local health officials recommend you take one."

First of all, I just talked a lot, but are you familiar with these changes that took place at the time?

A: When the August 24th document was posted and released, I was contacted by a partner, an expert who was concerned about the guidance and wondered, what was the rationale? What were we thinking? And I wasn't familiar with this before it came out, and so I looked into it and spoke with the leadership of the response to understand what happened? That doesn't seem to follow.

…

Q: Who did you then go to obtain the information about what had happened?

A: I went to our incident manager.

Q: Who?

A: **So Dr. Henry Walke was the incident manager for the longest period. Really I think from July 1st until this past week. So I went to him to say, do you have a sense of what happened here? And he shared with me kind of this point by point review of the evolution.**

You know, this was an important work. Admiral Brett Giroir, who was the testing czar, was convening the big picture of testing, because so much had been learned, so many tools were available. There was a need for a big picture, everything you need to know about testing in one place.

So this document was developed over several weeks at least with several of the HHS entities contributing, reviewing, and revising. And then this last version that went out, I don't think either – in media reports, Admiral Giroir distanced himself from the final piece.

Dr. Fauci, he commented on the earlier draft. He was having surgery when the thing was finalized, and, of course, it was updated later without that change.

So this wasn't – sorry, I don't even remember the question.

Q: No, I think the question was who you went to find out

A: Yeah. I went to Dr. Giroir to ask his brief summary, and he shared with me a written one.

Q: At the time, he was familiar with the advice having been changed to advice about testing asymptomatic close contact?

A: He was familiar with what had happened and shared the version evolution with me. So he was aware, and also he knew that this was the final that had gone out and that that was how – and our team just tried to document what are the inaccuracies so that if we did get a chance to update it, we could fix those.

Q: Did he tell you who had instituted these changes that were inaccurate?

A: I believe it was just the White House. I don't know who.

Trump Administration Officials' Efforts to Alter MMWRs

Q: Let's turn to some other specific MMWRs, ones that you did not draft, but I think were part of the approval team for. We have one marked here as Exhibit 28…. This is titled SARS-CoV-2 Transmission and Infection Among Attendees of an Overnight Camp, in June 2020. Do you remember the circumstances surrounding the publication of this MMWR?

A: Yes. Yes.

Q: I believe this was published on August 7th…. This is an email chain dated – the date at the top of the chain is July 27, 2020, and at the very end of the chain it includes a summary of this MMWR scheduled for early release.

A: Mm hmm.

Q: Your next email in the chain after the summary from Dr. Kent is a long list of items of questions and some feedback from Dr. Alexander about the MMWRs. He explains his reaction asking them both questions. And then he goes on to explain he thought the MMWR contradicted CDC's guidance on schools. Do you remember seeing this before?

A: Yeah. Okay, I do remember Mr. Alexander sending a lot of comments about this and several other MMWRs, yes. Charlotte would share with the senior leaders both in the science chain about when she had questions about how to handle some of the inputs.

Q: **You referenced that this is something that Dr. Alexander had, I guess, started a practice of doing, you might say – is that fair to say – providing feedback?**

A: **Yes, that's right. He was in the public affairs office, and typically our MMWRs are they're scientific products and they don't go through our communication office or ASPA for review or clearance.** You know, they are developed, reviewed, and cleared if

they're a single agency or with State through our science chain. So he was not sending comments on the actual MMWRs, he was sending comments on title or brief drafts, you know, summaries of the general content. But I don't think he understood that what he was sending comments on was not in the actual article.

…

Q: So further up on this email chain where you are no longer copied, this is on the first page, Michael Beach says to Charlotte Kent -- and Henry Walke is copied here – "Folks on the HHS Secretary's call want to see this MMWR – do we normally do this, how do we do this? Here, they're asking for – people from the Secretary's office are asking to see the original summary?

A: Yeah. My interpretation is they want to see both what we would call the proof and then the full report with its tables and figures. You know, it may not be the absolute final, but it would have not just the abstract or the summary.

Q: Ms. Kent responds at 10:05 a.m. "We do not normally share. Done once before after discussion with Dr. Schuchat. Only comfortable if she approves." First of all, why would Charlotte Kent say that they don't normally share?

A: **There's a longstanding practice that the MMWRs are scientific products of CDC, and that there's a firewall between the editorial production and political levels**. So a proof might be – you know, the authors might include FDA or there might be a state health department that would be reviewing the proofs. **But the proofs don't usually go outside of the author and the agency, so we wouldn't be sharing the full content outside. And that's longstanding for every administration that I'm aware of**. I can't say that's never been breached, but that's the practice that the agency's had.

…

Q: I want to refer back to your comments a moment ago about why CDC wouldn't normally share these reports. You talked, I think, about the MMWR being scientifically independent. **So I just want to ask, when you saw that these political issues with Mr. Caputo, Dr. Alexander in the communications department at HHS were starting to be included in the summaries, did it give you pause or cause you any concerns?**

A: **Yes. Yes, it gave me many concerns.**

Q: What concerns did it raise?

A: It seemed important for us to double our efforts to protect the scientific independence and integrity of the MMWR. One of the roles that the senior leaders who review it and clearance take is to assure that we're not making new policies, so we really are independent and we need to clear and confer. But on scientific results, there's an extensive internal review process like a competitive peer reviewed process on other journals that is meant to assure the scientific integrity and quality of the articles. And it

didn't seem appropriate for political appointees in communication to be involved in that effort from any administration.

…

Q: I want to actually skip up to the 11:22 p.m., now on August 26. This is on the first page, the second one down. Dr. Kent writes to you and Michael Iademarco saying that she received the communication from Dr. Alexander and she doesn't know how to respond. She's looking for guidance. Do you remember what you said, if anything?

A: Yes, I do remember this well. When I received Charlotte's email, I believe I called Dr. Iademarco or perhaps Dr. Iademarco called me. But we had a conversation; and I recommended that Charlotte not send this email, that Dr. Iademarco speak with Dr. Redfield and have Dr. Redfield follow up with HHS. I didn't think it was appropriate for Charlotte to offer this very polite draft response and didn't think we should wordsmith her polite response. **I thought this was an inappropriate offer on his part and that we should have Dr. Redfield follow up**.

…

Q: I just want to ask one more clarifying question about some of what we talked earlier about Charlotte Kent, and the requests, I guess, you could say she was receiving from Dr. Alexander. I think your testimony was, in summary, and her testimony was as well, was that she feels, and you said that she was able to protect the scientific integrity of CDC's work ultimately; is that right?

A: Yes. My understanding is that her – you know, that she was able to. And I would say that senior leadership did our part to try to help protect that integrity and always improve the quality, we can always improve, but to try to not let our work be compromised. And so the MMWR, we had more control over, I guess, than some of the others.

Q: **Now, just because you were successful in your efforts doesn't mean that there weren't attempts by others – particularly Dr. Alexander, perhaps under the direction of Mr. Caputo – to compromise the scientific integrity of CDC's work.** Those are two – I just want to clarify that those are two distinctive things, that attempts happened without the work ultimately being compromised; is that fair?

A: **I would say that's absolutely true, and that it took great effort to protect that integrity. It took active effort on the part of Dr. Kent and others to make sure that the attempts were not successful.**

***

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NANCY GIMENA HUISA-HUISA, and her minor child, et al., Appellees,	:	
v.	:	No. 21-5200
ALEJANDRO N. MAYORKAS, Secretary of Homeland Security, in his official capacity, et al., Appellants.	:	

Wednesday, January 19, 2022

Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CHIEF JUDGE SRINIVASAN, AND CIRCUIT JUDGES WILKINS AND WALKER

APPEARANCES:

ON BEHALF OF THE APPELLANTS:

SHARON SWINGLE, ESQ.

ON BEHALF OF THE APPELLEES:

LEE GELERNT, ESQ.

C O N T E N T S

P R O C E E D I N G S

THE CLERK: Case No. 21-5200, Nancy Gimena Huisha-Huisha, and her minor child, et al. v. Alejandro N. Mayorkas, Secretary of Homeland Security, in his official capacity, et al., Appellants. Ms. Swingle for the Appellants, Mr. Gelernt for the Appellees.

JUDGE SRINIVASAN: Good morning, counsel. Ms. Swingle, please begin when you're ready.

MS. SWINGLE: Thank you, Your Honor.

ORAL ARGUMENT OF SHARON SWINGLE, ESQ.

ON BEHALF OF THE APPELLANTS

MS. SWINGLE: Sharon Swingle for the Department of Justice representing the defendants/appellants in this case. In issuing the Title 42 rule and order, CDC applied its scientific expertise to address a once in a century, highly dynamic public health emergency involving emergent variants of COVID-19, rising transmission rates, and strained healthcare resources, in particular, at remote areas near the southwest border. The challenged CDC order response to the serious danger of the transmission of COVID-19 that arises for non-citizens who enter the United States without valid travel documents, and as a result would normally be held in congregate settings pending their processing under the Immigration laws.

Under the Title 42 order, those non-citizens can

be rapidly screened and then quickly expelled, substantially reducing the risk of transmission. If those non-citizens were required to be processed under Title 8, they would have to be transported to Border Patrol stations or held at ports of entry, facilities that are not designed or equipped to quarantine, isolate or treat COVID positive individuals, and they would be held for lengthy periods in these crowded and over-capacity facilities, posing a substantial risk of the spread of COVID-19 to other non-citizens, CBP officials and the public at large.

Two different panels of this Court have already concluded in granting stays of preliminary injunctions in this case and PJES that the Government is likely to succeed on the merits and we similarly ask this Court to vacate the district court's preliminary injunction which was premised on an erroneously cramped view of the CDC's authority under Section 265.

JUDGE WALKER: Ms., Ms. Swingle, you started out by mentioning, or leading with the CDC's expertise, health expertise, and as you know, the plaintiffs have to a somewhat small degree in their briefing suggested that this decision was not really made based on any health concerns. Now the arbitrary and capricious challenge that the plaintiffs brought to this order was not briefed on this appeal, but it was raised in their complaint; and so, I, I,

I'd be grateful if you could, if you could address some concerns I have about whether this order was arbitrary and capricious as the plaintiffs allege in their complaint, and some factors that seem to inform my concern, that do inform my concern are as follows.

One is that the statute refers to introducing a disease, but COVID is, unfortunately, quite introduced into the United States by this point in time. In particular, with regard to Mexico and Canada, which the order applies to, I don't know of anything in the record suggesting that COVID is more prevalent in Mexico or Canada than it is in the United States. In addition to that, the order only covers about .1 percent of people who cross the Canadian or Mexican border; and I don't know of anything in the record suggesting that those .1 percent of border crossers are more likely to have COVID than the other 99.9 percent.

In addition, the order applies only to Mexico and Canada. I don't know of anything in the record suggesting that those two countries have especially high prevalence of COVID relative to other countries that are not covered by the CDC'S order.

And then I guess I would add to that sort of, perhaps less specific, but a general concern, maybe concern is the wrong word, but factor in the arbitrary and capricious analysis, that the plaintiffs have alleged and

cited to some reports that there are no experts in the CDC who actually think any health concerns justify this order; that the order was forced on the CDC's director over the objections of those career CDC people who refused to sign the order. And I would suggest maybe if the order was justified, was not arbitrary and capricious, in March of 2020 when there was so much uncertainty. It's now January of 2022 and we've heard from Dr. Fauci, who in many ways, in many instances, this Administration has pointed to as, as an expert deserving of trust, and he has said directly that expelling immigrants is not a solution to COVID-19.

Now I'm not suggesting that we should defer to Dr. Fauci, but it seems that the Administration has sometimes suggested that his, his guidance is worthy of deference. So, with all of those things in mind, can you explain to me why the plaintiffs were not correct when they said that this policy is arbitrary and capricious?

MS. SWINGLE: So, there's a lot there to unpack and I hope you'll give me a chance to address it with all due steps. First, I just, as Your Honor's question, I think, made clear, the arbitrary and capricious claim that was brought by the plaintiffs was not the basis for the district court's preliminary injunction; and they have not argued that that should be a basis for this Court to affirm that injunction as not being abusive discretion on wholly

alternative grounds. So, I think it's not appropriately before the Court.

But I want to be also clear that the CDC has and continues to apply its public health expertise, and as recently as the August 2021 new order has again concluded that the order remains necessary as applied to members of family units and single adults who cross the border without valid travel documents. And the reason for that really goes to the circumstances in which those individuals would be held under normal immigration processing, which is to say if they cross outside of ports of entry, they would be held in Border Patrol stations that are often rather small facilities; often, you know, largely over capacity even in normal times, much less in these COVID times with restricted capacity in an effort to mitigate the spread of COVID. And those conditions are highly conducive to the spread of COVID-19 to non-citizens, to CBP officials and the public at large.

Now to get to some of your specific questions, if I can start sort of where you ended with Dr. Fauci? I would encourage the Court to listen to the specific Dr. Fauci interview that the plaintiffs cite multiple times in their brief seconds after the quote that they rely on, he was specifically asked if there was a medical necessity for the CDC's Title 42 order and he said that he was not

sufficiently aware of the circumstances to express a comment on that issue. So, I think that it in no way undermines the CDC's judgment; and it's a judgment that has been made repeatedly across two political administrations, and as recently as the most recent re-review of the order at the end of November of this year, last year, that the order remains necessary to protect the public health.

I think the fact that there is a higher prevalence in Mexico or Canada, or a lower prevalence was not the basis for the order. I think the basis for the order is the spiking incidents. The continuing basis for the order is the spiking incidents of COVID, most recently in August of the new delta variant and I, obviously, I'm not telling the Court anything it doesn't know; but now the Omicron variant has also had an impact on the need for the order.

Going to your question about, but I would add that the CDC did note that the non-citizens who were coming to the United States across the border were coming from countries that at that time had lower vaccination rates than within the United States. You mentioned the very small percentage of the individuals who crossed the order who are subject to the order. That, again, is not surprising because those are the individuals who would be held in congregate settings at CBP, border stations or ports of entry. Now for individuals who cross with valid travel

documents, the process of entering is very quick. It does not involve any kind of confinement or holding in a closed setting that poses the kind of risks of transmission that are really designed to be responded to by the CDC's order.

And then, finally, going to your first question about how the CDC's expertise is implicated by its interpretation of introduction. The CDC determined, and I think reasonably so, that introduction can occur when somebody moves into the country in such a manner as to pose a risk of transmission of a communicable disease; and here, an individual who crosses the border and, you know, walks five miles into the interior of the country who would then come into contact with other persons in a way that would risk transmission of COVID-19 is reasonably understood to be in the process of introduction; and I think that reflects CDC's application of its expertise about the way in which communicable diseases spread and the circumstances that give rise to the public health emergency that justified the order here.

JUDGE SRINIVASAN: As I understand the basis of the order, though, the fact that somebody comes in and then might encounter other people, let's say sometime afterwards, that can't be the basis for the order because that's true of all kinds of people who come over, who immigrate into the country. The entire rationale for the order, I think, has

to be because otherwise it would be substantially under-inclusive. It has to be bound up in the congregate settings, right? It's all about the congregate settings because any other explanation that deals with COVID at large just can't substantiate this order, I think you would agree with, and that's why the order is framed as it is. It has to do with the congregate settings and the congregate settings are a product of the way that the Government chooses to structure its affairs. Now I'm not saying that there's practical alternatives. I don't mean to suggest that there's something that's, you know, just obviously there that should be done. I'm just saying that it's a consequence of the way that the Government structures its handling of persons who come to the order without documentation and seek these forms of relief under Title 8.

MS. SWINGLE: And, yes, I don't mean to suggest otherwise, Judge Srinivasan. I would just add that to the extent that those congregate settings and, and the normal mechanism by which non-citizens would be processed when they are in the United States, or enter the United States without valid travel documents poses the risk attains both as to individuals who can be turned away at the border and individuals who manage to evade the prohibition on entry by entering outside of ports of entry.

JUDGE WILKINS: When, when does introduction end?

MS. SWINGLE: So, I think that's an interesting question and I think it's one that is addressed in part in one of the final rules, the September 2020 final rule which reflects that somebody who has been in the United States for longer than the incubation period, and doesn't have symptoms or hasn't tested positive may have finished introducing himself into the United States, that's at 85 F. Reg. 56445; but I, I don't think, you know, the, the challenged order applies to individuals who are apprehended or encountered at or near the border after either entering, presenting themselves at a port of entry, or entering, you know, outside of a port of entry; and I think the plaintiffs here have not brought any challenge that somehow it's being applied to people who have been apprehended far enough away from the border, or a long enough period of time that they are no longer still in the process of being introduced.

JUDGE WILKINS: Thank you.

JUDGE SRINIVASAN: Can I ask a question about the inter-relationship between 265 and the Title 8 provisions that provide for a particular process, or at least an entitlement vis-à-vis asylum, the withholding of removal and the Convention Against Torture?

MS. SWINGLE: Certainly.

JUDGE SRINIVASAN: So, the context against which we think about the inter-relationship between those, because

I think both sides treat with the inter-relationship, and what you say is, well, 265 takes control because it, it deals with the specific context of the kind of emergency we're dealing with here and so it tends, it supersedes, overrides or carves out from what otherwise would be the case under Title 8. Then the other side says, no, that's got it backwards; actually, the specific provisions are the ones under Title 8 and they carve out from what otherwise might be authority under 265; and so, I'm trying to figure out how do we, how do we assess which side has it right in terms of which statutory regime governs over the other one to the extent that there's an inter-relationship between the two and a need to harmonize them or figure out how they work together in this, in this situation? And so, the context against which we assess that question is informed by the fact that the Title 8 already accounts for inadmissibility for individuals who have communicable diseases and says that if you have a communicable disease, that's a ground for inadmissibility and so you don't otherwise qualify for admission into the United States; but it specifically, Congress specifically said even as to that ground of inadmissibility for somebody who actually has a communicable disease and it's a communicable disease of public interest, I can't remember the precise wording, but I think you know the language, of public significance maybe is what it says;

that the Title 8 entitlement still govern and so notwithstanding that somebody has a communicable disease of public significance, they still have the entitlement to see through the processes under Title 8 to seek asylum relief under withholding or Convention Against Torture. So, if that's the balance that Congress has already struck with respect to somebody who has a communicable disease and is inadmissible to the United States by virtue of that, then that seems to me to, to have some salience as we're trying to figure out how 265 interrelates with the Title 8 authorities.

MS. SWINGLE: Absolutely, Your Honor. I would first point out that, of course, the district court did not ground its preliminary injunction on that, that argument. It didn't reach it.

JUDGE SRINIVASAN: Yes.

MS. SWINGLE: Didn't rule on it. So, it would be, in the Government's view --

JUDGE SRINIVASAN: It's, it's definitely an alternate ground and I take, and I appreciate your, your noting that; but it's also one that's at least before us, I think, because both parties have briefed it as an alternate ground and you've engaged on it. That's not necessarily to say we would do it without sending it back, but it's at least to say that it's a possibility.

MS. SWINGLE: Agreed, Your Honor. I would first point out that even at the time that the predecessor statute to Section 265 was first enacted in 1893, communicable diseases were already at that point a ground of inadmissibility under the immigration laws; but Congress clearly meant to displace that general rule and to grant a broader authority to, at that time, the president to suspend introduction of persons in the face of a significant public health emergency of the sort that is the basis for invoking Section 265. So, I think you can see in that, that Congress understood, even at the time, that Section 265's predecessor would be focused on a very specific, rare set of circumstances; and I think under normal principles of the specific governing the general that reflects a Congressional intent for this different rule to apply in the unique circumstances that we are facing in this --

JUDGE SRINIVASAN: If I can just stop you there for a second? That's true, but at that point in time, you didn't have the Title 8 humanitarian provisions that you have now; and you didn't have Congress having struck the balance in favor of those, in, as against somebody who presents with a communicable disease.

MS. SWINGLE: So, I, I agree that the Congress in enacting the Convention Against Torture and the refugee protocol did set out generally applicable rules for

immigrants generally. I think our view is that Section 265, nevertheless, constitutes the more specific rule of decision; and I think to the extent that there is conflict, you can look to the text of Section 265 and its context, and drafting history, you know? It was originally entitled the suspension of immigration, that the, the specific provisions of the statute envision that the, initially the President, now the CDC, will have the authority to suspend the right to introduce. That right was one that was understood to be applicable, in our view, under the immigration laws; and the suspension of immigration necessarily encompasses the authority to suspend what would otherwise be the operation of the immigration laws in the face of this kind of unique public health emergency.

JUDGE WILKINS: Is there also, and, and I guess an argument that Section 265 says basically Congress is giving the Surgeon General the authority where there is serious danger of the introduction of such disease into the United States, is that, I guess, fodder for your argument that this is the specific trumping the general because nowhere in those other immigration statutes is there kind of a, an, I guess an acknowledgement that there is a serious danger introducing the communicable disease into the United States?

MS. SWINGLE: Yes, Your Honor. That is our view. To the extent there is anything in the immigration laws

relating to transmission of communicable diseases, it's in the grounds of ineligibility that were in place already at the time that Section 265 was enacted and was clearly intended to supplant. And to the extent we're looking at sort of generally applicable entitlements to apply for asylum or relief under the Convention Against Torture, those have no reference to the kind of significant public health emergency at issue here.

I do want to be clear, however, that in its application of the Title 42 order, the CBP officials are providing an opportunity for some humanitarian relief for non-citizens who express fear of torture upon return to the country that is the country of destination. They are being referred to USCIS for further screening.

JUDGE SRINIVASAN: But you're not taking the view that that complies with Title 8, right? You're just saying that that (indiscernible)?

MS. SWINGLE: That's correct.

JUDGE SRINIVASAN: Otherwise, we wouldn't even have this dispute if it actually --

MS. SWINGLE: Exactly, Your Honor.

JUDGE SRINIVASAN: Can I ask you, does the Government on, on this set of issues, I didn't read anywhere in the brief that the Government draws any distinction as among the three forms of Title 8 relief that we're talking

about, i.e., asylum, withholding of removal and Convention Against Torture, that they stand or fall together? Either there's, either if plaintiffs are right in their alternate, alternative argument, there's an entitlement to pursue that Title 8 process notwithstanding 265 as to all three, or your right that that entitlement that otherwise would, would, otherwise would exist is non-existent in the face of an assertion of 265 authority?

MS. SWINGLE: That's correct, Your Honor. We have not distinguished between the, the three forms of relief. We think in these circumstances where Section 265 has been invoked, all of them are displaced.

JUDGE SRINIVASAN: Can I ask you one other, one other question? It's, it's on a little bit of a different axis. So, getting back to the point that the focal point of the order is the circumstances in congregate settings, and that's really the basis against which the order was promulgated and then renewed, what's the status of unaccompanied minors vis-à-vis congregate settings because I know that unaccompanied minors aren't covered by the order; and the question I have in my mind is in terms of the rationale for not including, are they meaningfully differently situated vis-à-vis congregate settings? I, it's not my understanding that they avoid congregate settings altogether. It may be the case that there, as a rough

average, they're there for a lesser amount of time. I don't know for sure, but I'm just curious to get your explanation as to why unaccompanied minors are carved out vis-à-vis the concerns about congregate settings that underly the order?

MS. SWINGLE: Your Honor, so I think unaccompanied minors are different in a number of pretty critical ways. Obviously, for an initial period of time upon their encounter, they are going to be held in a congregate setting pending transfer. They would be held, as with other distinct demographics, separately from other members or family units, for example, or single adults. There are a much smaller number of unaccompanied minors who are encountered than members of family units or single adults in particular. So, the risk of overcrowding is in some respects lessened as to that population; but I think most importantly they can be transferred to the Office of Refugee Resettlement has robust capacity for holding those minors, and they can be transferred quickly into those facilities which have testing available; they have quarantine and isolation available; they can provide vaccination for the minors; and then they can ensure that during that period in which they need to be quarantined or isolated, they are actually complying with mitigation protocols. For members of family units, there is not the comparable ability to do that kind of monitored quarantining or isolation testing

treatment in a way that exists for the unaccompanied minors.

JUDGE SRINIVASAN: But if I'm understanding it correctly, that happens after leaving the initial congregate setting because if you, if the order was based on what happens outside of the congregate setting, then there's lots of people who are coming over every day who raise the, exactly the same kinds of concerns but aren't covered by the order. So, the order has to be justified by what happens in the initial congregate setting, and so the distinction between unaccompanied minors and members of family units would need to be grounded in a different, vis-à-vis that initial placement, in a congregate setting before the unaccompanied minors go to an RR facility and have the kinds of benefits that you've, you've listed.

MS. SWINGLE: Principally, Your Honor, but I, I want to respond in a couple of ways. First, in addition to the risk of congregate settings, there is this question about the strain on local regional healthcare resources. You know, in the CBP facilities, in the ports of entry, there are limited or no medical resources available and so for individuals who are sick, who need treatment, who need to be tested, particularly PCR testing, they need to be transported to local healthcare facilities for that treatment and testing; and so that itself both risks spread of COVID but, in particular, in areas where there are

limited resources that can be a real strain on the resources of the healthcare institutions at a time when they are already strained because of rising COVID rates in the local communities. So, I think that's one distinction that we see.

The second, you know, yes, absolutely one critical risk is of the spread in the congregate settings; but one of the concerns about spread in congregate settings is about the, then the potential spread into a local community. And for members of family units because of the Flores settlement, there are limits on how long members of family units can be held in detention. And so what's happening is that if they are being processed under Title 8 after being held in this congregate setting which is posing this risk of spread of COVID, they are then released on discretionary parole into the community; and the concern is that people who either were previously infected upon entering the country, or who have then become infected in that congregate setting are then being released into the community where there is limited ability to quarantine, isolate, monitor the compliance. And I think --

JUDGE SRINIVASAN: But that, but that's true, but is that, that's just true of all kinds of people who come across the border every minute of every hour of every day. They are released into a community. So, there has to be

some --

MS. SWINGLE: I would respectfully disagree, Your Honor, because what I'm saying is that the risk is caused by the release after the holding in the congregate setting, right?

JUDGE SRINIVASAN: Right. So, then it's the congregate setting that creates the problem. So, everything comes back to the basis of the order which is bound up by the congregate, initial congregate setting.

MS. SWINGLE: Yes, although I, I think the risk is not limited sort of temporally to that period.

JUDGE SRINIVASAN: Oh, I --

MS. SWINGLE: Yeah, exactly.

JUDGE SRINIVASAN: -- I take that point. There's subsequent risks that emerge from the initial congregate setting but the differentiator is the congregate setting, at least that's the entire gravamen of the order as I understand it.

MS. SWINGLE: That's correct, Your Honor. And I, I, I want to be clear for the Court, you know, the goal for the Government is to eventually work back to orderly, normal immigration processing; and notwithstanding the very real resource constraints that DHS and ICE have been faced with in light of limited Congressional expropriations, they have taken significant steps in recent months, recent years, to

increase capacity and improve processing. DHS has stood up numerous emergency facilities and retrofitted existing ones and, in part, that has allowed for greater capacity to process unaccompanied children and now family members. ICE has transitioned existing facilities and DHS is sometimes using private contractors to build out facilities; and they, of course, have previously set up programs for special exceptions for non-citizens which have allowed collectively some 29,000 people to come in as exceptions to the order. The goal is to, to return to a world in which everyone is processed under Title 8 but we are just not there yet.

JUDGE SRINIVASAN: On, on the, on that point, you, you had also mentioned that for unaccompanied minors, the numbers are less than the numbers for family units --

MS. SWINGLE: Much, much less, yes.

JUDGE SRINIVASAN: And I'm just wondering, how, how much less is it if we only talk about the number of individuals in family, family units who are, in fact, processed under Title 42 rather than Title 8 because as I understand the record, at least for one relevant period, 86 percent of individuals in family units were, in fact, given the Title 8 process because of the refusal of other countries to accept people who hadn't gone through the Title 8 processing. So, I'm wondering what the comparison is between unaccompanied minors and then the number of people

in family units who actually went, go through the Title 42 process, or the limited --

MS. SWINGLE: Certainly, Your Honor. You know, the, the latest numbers are not in the record before the Court, but they are available online. DHS does keep those. And I would just note that although at the time the opening brief was filed, the most recent month had been a, sort of a unique low in the percentage of family unit members who were being expelled under Title 42. That number has been significantly higher in subsequent months and has varied between over 11,000 individuals in November 2022 and over 17,000 individuals in August and September of 2022, and up to a high of 30 percent, 31 percent of members of family units in October 2021. So, the 14 percent is not a number that has remained static.

I don't have the numbers for unaccompanied minors directly in front of me, but my understanding is that they are a much smaller number compared to the number of family member units who have been expelled. And, of course, I would just add, if I might, you know, that the District Court's reasoning here, although it was applied in a class action brought only by members of family units would be wholly applicable to any category of non-citizens expelled under the order and I would just mention that the numbers for single adults have remained staggeringly high and the

idea that the Government would be able to process, you know, what now is like probably close to 100,000 non-citizens monthly and hold those individuals in congregate settings is, obviously, an alarming specter from the public health perspective.

JUDGE SRINIVASAN: There's, looking in the record of, of prior CDC regulations in 2017 related to Ebola and other communicable diseases, do any of those prior regulations purport to give the CDC the authority to suspend immigration laws and expel persons either, either explicitly, or did it happen?

MS. SWINGLE: So, I don't believe so, Your Honor. I would note that those regulations were not issued under Section 265. I believe the only time Section 265 has previously been invoked to suspend introduction of persons was in response to the epidemic coming from China and the Philippines in 1929; and it, which did not by its plain terms provide for expulsion; but, of course, in the Government's view, suspending the introduction of persons from a country sort of necessarily encompasses the authority to expel somebody who comes in contravention of that prohibition.

In the same way, you know, Federal law prohibits, for example, the unauthorized entry onto the White House grounds; and, surely, the fact that that also provides for

criminal punishment, a fine or imprisonment of somebody who violates that prohibition doesn't disable the Secret Service from, you know, apprehending somebody who has managed to hop the fence and turning them around again.

JUDGE WILKINS: But it doesn't mean that they have the authority to, for example, you know, shoot and kill them on sight, right? I mean there's, there's, there's, because they can stop the introduction doesn't mean that they can stop the instruction any way they so please?

MS. SWINGLE: Agreed, Your Honor. Our point is only that the power to suspend introduction or prohibit introduction is most normally understood to include the power to expel somebody, push out somebody who has entered notwithstanding that prohibition.

JUDGE WILKINS: What are we to do with, I mean I'd be, I'm inclined to be very sympathetic to your position, but we have Supreme Court authority that says that when, you know, an agency is, is taking, you know, unprecedented, you know, action or, or exercising some unprecedented power, that we are to look askance at that; and, and so, so what are we to do with that authority?

MS. SWINGLE: With all due respect, Your Honor, we think that line of authority is simply not applicable here. This is not a circumstance in which, you know, the Government has exercised an authority that has long been

understood to be, or has long been applied in a more circumscribed kind of way. This is a very rarely used authority which is coming to bear in an extraordinary public health emergency of a sort, you know, never seen in our lifetimes and I think, with all due respect, this is akin to, for example, the application of the Medicare, Medicaid rules to require vaccination that the Supreme Court has just recently opined on and that was the subject of our 28(j) response letter last evening.

You know, this is a unique and extraordinary circumstance, and it is hardly surprising that the Government would invoke a quite extraordinary power that was intended to be a quite extraordinary power to bring, has brought that to bear to respond to try and protect the public health.

JUDGE WILKINS: Well, of course, your friends on the other side say it's more akin to the OSHA rule that the Court struck down, right?

MS. SWINGLE: And we think that's just simply not correct. This is not a circumstance in which we are claiming the power to regulate some vast array of economic activity. This is not a restriction that applies even to U.S. persons and it is carefully circumscribed, and I think, you know, really tailored to the precise risk that happens when non-citizens are being held in these congregate

settings in a, in a manner that poses really a substantial risk of the spread of this terrible disease.

JUDGE SRINIVASAN: This is also a category of persons as to whom, just to get back to Title 8, the record materials indicate, and I think just what the Title 8 provisions are about, are some harrowing conditions that are faced by people who are turned away; and I think you, you would, you would acknowledge that aspect of this such that the 265 authority when it's asserted in this context will mean that individuals who otherwise couldn't be sent back to a particular country because they will be tortured there, will be.

MS. SWINGLE: Certainly, Your Honor. We are aware of and deplore the quite horrific circumstances that non-citizens are in in some of the countries that are at issue here. I would take issue with the fact that somebody who expresses a fear of torture certainly is being referred appropriately to USCIS for a possible exception; and, you know, we are, we do have humanitarian exceptions to the Title 42 order. We have previously used that to try and bring in particularly vulnerable people and I would just note that the August 2021 order, again, contains a new exception for programs if they can be developed to safely bring people to ports of entry consistent with public health needs to try and apply for the kind of relief Your Honor is

seeking.

JUDGE WILKINS: How would you want the Court to, to use that information, I guess, in your favor? Is it just information that we use in, in thinking about irreparable harm or, or balance of equities, or does it go to likelihood of success on the merits?

MS. SWINGLE: So, I, I don't think it goes to likelihood of success on the merits as to the statutory authority question that was the basis for the District Court's preliminary injunction; and I also don't think it goes to likelihood of success on the merits at this stage of the litigation where neither the plaintiffs, nor the defendants, have briefed that as an alternate basis for affirming the preliminary injunction. I do think it is relevant at the balancing of equities stage.

Of course, in the Government's view, because a likelihood of success on the merits is a necessary factor to be established to be a basis for preliminary injunction, in the Government's view, that court doesn't actually need to reach the balancing of evidence.

JUDGE WALKER: But if we disagree with you about likelihood of success on the merits and we have to reach the balance of equities, I wonder if we should consider the sort of self-contradiction between your, the Department of Justice's briefing in this case and the Department of

Justice's current cert petition with regard to remain in Mexico where the cert petition says alien sent to Mexico faced persecution, abuse and other harms. The cert petition says there's, quote, "Extreme violence perpetrated by criminal organizations." The cert petition says sending asylum seekers to Mexico doesn't, quote, "Align with the Administration's values." And as you know, and as I think you don't contest, the plaintiffs in this case describe how the plaintiffs will be pushed across bridges at predicable times, locations where cartels lie in wait. They tell the story of a mother who was expelled and then armed men grabbed her and raped her multiple times while she begged them not to harm her daughter; and they say that's just one example, an example out of 3,000 or so kidnappings and other attacks. So, what are we supposed to do with this, what I would describe as self-contradiction between the cert petition you filed on remain in Mexico and your argument with regard to the bounds of equities in this case?

MS. SWINGLE: So, Your Honor, I don't believe there is contradiction there. We have not contested that migrants are, have been subject to extremely harrowing conditions in Mexico or elsewhere; and, certainly, we deplore the horrific treatment of those individuals by gangsters, and criminals, and violent persons.

JUDGE WALKER: I, I understand why. I, I

appreciate that and I, I know that you, you're not, you're not denying it. You're conceding that, that, that's the reality they face, but you seem in this case to be downplaying it relative to what you describe as the risk from COVID, which as I mentioned, covers only .1 percent of people who cross the border. I understand that there have been congregate settings, but this isn't March 2020. We have widespread, available, effective vaccines. We also have a whole host of testing that wasn't as widely available and treatments as well. So, I'm not asking whether you, whether, whether you agree that these terrible risks exist for these migrants. I know you agree that they exist. I'm asking you to sort of square how much you emphasize them relative to other values and concerns in the remain in Mexico litigation and how much you seem to devalue them with regard to COVID concerns in this litigation.

MS. SWINGLE: So, with all due respect, Your Honor, I simply don't agree. Obviously, the Government's goal is to get back to a state of orderly immigration processing for everyone; but currently, in CDC's view, the public health realities don't permit that. And just to respond to a couple of specific points in your question, for example, yes, vaccines are more available; but vaccinating somebody upon encounter does nothing to reduce the risk that that person may spread COVID in a congregate setting in the

days after vaccination when the vaccine has not yet become effective. Testing is, you know, certainly more widespread now and I don't want to downplay its efficacy. It is one of the mitigation measures that --

JUDGE WALKER: Ms., Ms. Swingle, if I may interrupt. I didn't mean that it would be effective to vaccinate the migrants. I meant that the American citizens, those who wish to be protected through vaccination have had that option for almost a year now and the administration has said that those who are vaccinated will have a good, a good year, something like a good summer, a good year ahead. The Administration has said that the unvaccinated are at great risk and that, you know, it's, it's sort of criticized them for making that choice; but I'm, I'm saying in a country where everyone who wants to be vaccinated has been vaccinated, and in an era where the vaccines are as effective as they are, how is it that you, you devalue these risks to migrants that you seem to emphasize so much in your remain in Mexico litigation?

MS. SWINGLE: So, if I may, Your Honor, I think, yes, many CBP officials are now vaccinated who were not vaccinated in March 2020. We certainly are extremely happy that there is a vaccination available and widespread, more widespread through the United States than it was at the outset of these challenged rules and orders. On the other

hand, you know, we have new variants even as of August 2021. The delta variant was a game changer and can lead to breakthrough vaccinations even in vaccinated, breakthrough infections even in vaccinated people. That doesn't mean that non-citizens are vaccinated. You know, there is a change in the calculus of risk and I think the CDC has responded, you know, effectively and timely to changed risk by, for example, accepting unaccompanied children as the facts on the ground have changed; but in the CDC's judgment, the need for this order remains in place notwithstanding the changes that have happened. And I think --

JUDGE WALKER: Is there any, is there any affidavit in the record from an expert at CDC attesting to what you just said? Maybe there is. I, but I'm asking.

MS. SWINGLE: No, Your Honor, but I would also just point out that, you know, no record has been put forward yet. This was all decided at the preliminary injunction stage. I would just add, you know, I think this all highlights the need why the CDC should be making the public health determinations in the first instance. I don't need to tell the Court that this is an extremely dynamic set of circumstances. You know, at the time of the August 2021 order, we had the delta variant, which, you know, was a very significant game changer in terms of sort of anticipated plans for federal reopening and other things. You know,

just in the past few weeks we have the Omicron variant. These all emphasize why the CDC rather than, you know, a judge issuing a preliminary injunction should be making decisions about what the public health requires.

JUDGE SRINIVASAN: There Is something called -- go ahead, Judge Walker.

JUDGE WALKER: Now, please, I was going to go back to the likelihood of success on the merits. So, please, Chief Judge.

JUDGE SRINIVASAN: I'm on likelihood of success on the merits, too, so --

JUDGE WALKER: Right. Go ahead.

JUDGE SRINIVASAN: Okay. So, there is something, there is something interesting about and anomalous about this exercise of authority by the CDC because even if as a general matter, I certainly don't take issue with the proposition that the CDC director would be acting in the interest of public health and is doing so, and is intending to do so here for sure; and that would be true in the normal instance in which 265 would apply to an across-the-board kind of mechanism.

What makes this case something different in terms of its architecture is that it only applies in the context of border crossings and the order draws the kind of distinctions that just make immigration policy because it

carves out certain categories; it carves in certain categories; and it just, it can't help but be, it invokes the assistance, totally understandably and necessarily, of DHS and CBP; but it can't help but be a document that ends up being an immigration policy resolution that is being done under the auspices of the CDC.

MS. SWINGLE: And with all due respect, Judge Srinivasan, I think that is precisely what Congress intended in enacting this statute. You know, in 1893, in the fact of a Cholera epidemic, and I might add a Cholera epidemic that had already started in the United States, that had already been introduced to the United States; that, you know, the prior year the Government had taken action to try and stop; Congress specifically intended to, to confer this authority to suspend all immigration, as well as all non-immigrant travel, or some subset of those people precisely in order to stop this kind of increased transmission of a disease, increased risk of a transmission of a disease.

JUDGE SRINIVASAN: Right, no, but I think all non-immigrant travel, true, factors into this because something that would apply to everybody coming here, of course, it's going to overlap with immigration. I, I completely take that point. It's necessarily bound up in it. But when the document deals specifically with the population of undocumented immigrants and draws distinctions among

undocumented immigrants, it starts to sound like exactly the type of immigration debates that have been vexing immigration policy makers for a long time.

MS. SWINGLE: Well, you know, Your Honor, I think it's really quite instructive to look at the legislative history and, in particular, the drafting history of what became Section 7 of the 1893 Act because in that debate over the statute and in the various iterations of the bill that were considered and rejected in favor of this one, there was widespread understanding about precisely what Your Honor is discussing, which is that the authority conveyed by this statute would allow the President to choose subsets of individuals crossing the border to suspend the introduction of, prohibit the introduction of precisely, in order to reflect, you know, judgments about the difference in consequence and impact of bringing, for example, immigrants versus travelers who came for tourism or pleasure purposes, immigrants versus U.S. citizens or U.S. persons. So, I think it envisioned, you know, I, I appreciate that immigration policy gets kind of caught up in this, but I think that is by virtue of the sort of basic set of circumstances that this statute is intended to address which is the fear of significant danger of transmission of a disease over the border coming from people crossing the border.

JUDGE SRINIVASAN: I have, I have one last question along these lines, but I, and then I want to make sure my colleagues don't have additional questions for you, which is you're not going to buy this, this premise, but I'm just going to ask you to buy it just for purposes of understanding the architecture of the case; and that is that among the various grounds that he plaintiffs have asserted, before us, not at large in the case, but before us, am I right in understanding that the one that would be the narrowest limitation on the scope of the CDC's authority under Section 265 would be the Title 8 ground as opposed to either the ground on which the District Court rested, which is that there, the power to stop introduction just doesn't encompass expulsions at all; or the notion that the statute was directed at the common carriers or third parties, and you can glean that from the use of the, the introduction, that Title 8-1 is narrower in scope, not narrower in scope in a way that you would accept, but narrower in scope than those other two grounds?

MS. SWINGLE: I do think in, in that sense it's probably technically narrower in scope because, of course, there are other arguments would leave Section 265 essentially insignificant or really a nullity. I would say that as a practical matter, the ramifications of that would be substantial because it would require offering processes,

procedures for any individual subject, potentially subject to the order to invoke rights or protections under the asylum laws or the CAT beyond what is being done now in a way that effectively would, I think, eviscerate the authority of the Government to apply the order in the way that it's actually protective of public health.

JUDGE SRINIVASAN: Yes, certainly with respect to the order, I, I, I completely take that point. As, with respect to the scope of 265 at large?

MS. SWINGLE: Yes, I, I agree, Your Honor. Certainly, the other arguments that this is only intended to be a regulation of common carriers or that, I think, the most extreme version of the argument that the Government can issue a prohibition on entry, but has no ability to enforce that except through criminal prosecution and fines, those would, obviously, be much more sweeping.

JUDGE WALKER: If I could, if I could ask a question or two on the, on the merits and likelihood of success? I think I'm with you on both, on this statute not just applying to transportation, third-party providers; and I'm also, I think I'm with you on the statute didn't need to expressly give the executive the authority to expel an order for the executive to be able to expel under this statute.

And even on some of the Title 8 questions, I, I think I might be with you. It seems odd to give an asylum

process to someone who 265, to, who under a 265 order is guaranteed to not be able to get asylum, someone whose, whose very presence is rendered illegal under 265. And then on the Convention Against Torture, as you mentioned, that, there may be some accommodations for that under the order as it exists.

So, what, what do I do if I think only on the right to withholding of removal is this order inconsistent with the statutory right to withholding of removal? What do I do then?

MS. SWINGLE: So, again, Your Honor, I, I think we would urge because those were not issues the District Court ruled on, if the Court thought that that were a significant question, we think it ought to be sent back to the District Court. I do think withholding of removal is somewhat different from the right to apply for asylum in the sense that it is a defense to removal which is a process, a term of art under the immigration laws; and, of course, the individuals here are not being removed within the meaning of that term of art. They are simply being expelled. And I want to be clear, this is, this is not actually an adverse immigration act. It has no adverse consequences under the immigration laws, unlike removal, which has some legal consequences for non-citizens. This is simply not that process. It's a wholly different thing.

JUDGE WALKER: Can you, can you spell that out a little bit for me because I mean I think that may be the solution to this case from my perspective. The, the difference between expelling, as you're doing under this order, and removing in the sense that the statutory right to withholding of removal to a, to a place where you'll be persecuted uses the term removal.

MS. SWINGLE: Yes. So, and, again, this has not been briefed and so I'm, I'm winging it a little bit here and I, I want to not be inaccurate for the Court; and, certainly, if this is something Your Honor would like supplemental briefing on, we would be happy to provide it. Withholding of removal is a defense to removal for somebody who would otherwise be subject to removal, either expedited removal or normal removal under Title 8; and what is happening in the, the, the implementation of this order at ports of entry or outside of ports of entry is that individuals who are encountered, who are subject to Title 42 are, the Government obtains some basic biographic information on them just to check to make sure that they are not criminal aliens who would be subject to prosecution under the criminal laws; but to the extent that they are not, they are then simply transported to a port of entry and walked across the border; or if it's not possible to expel them to Mexico, flown to another country; but there is no

adjudication made that would have any adverse consequences for them. The way it's documented in the Government's systems is, is not something that has any negative legal ramifications for a non-citizen who subsequently attempts to enter the country or apply for relief, or some type of right under the immigration laws. It's, it's of no consequence. Unlike removal, which may affect a statutory bar, for example, to a subsequent effort to enter the United States.

JUDGE WALKER: And I'm, I'm in some ways because it wasn't briefed, you know, it wasn't the basis of the District Court decision, I'm, I'm flying a bit blind myself. So, don't take this as a, as a hostile question but, you know, the right, the right to removal to a country where you'll be persecuted seems to, to kind of make real a value that we have as a nation that, you know, if, if there were a genocide in another country, we wouldn't put somebody who is currently on American soil back into that, that country if their, if their group is the target of the genocide. And I'm not saying it's a way, applies to genocide, but that's, that would be like the most drastic example.

So, imagine that there was a genocide against a certain religion in Mexico and someone of that religion crosses the border and encounters Border Patrol 10 minutes later. Are you saying that the statutory right to withholding of removal would not prevent the United States

from taking that person from American soil and putting them back in Mexico where in my hypothetical there's a genocide and they, their group is the target of the genocide?

MS. SWINGLE: So, two things, Your Honor. First, to the extent that that person expresses a fear of mistreatment, a fear of torture upon expulsion, that person is going to be referred to USCIS for relief. So, I, the order contemplates application of humanitarian exceptions to expulsion; but, you know, in our view, the order is not removal. It is sort of operating apart and entirely separate from the operation of the immigration laws; and so, no, statutory defenses to removal being effectuated under Title 8 do not apply.

JUDGE SRINIVASAN: All right. So, I mean as a matter --

JUDGE WALKER: And if I --

JUDGE SRINIVASAN: Go, please, please, please finish.

JUDGE WALKER: I, I was, I was just going to correct something I said earlier. I misspoke when I said every American can be vaccinated. It's, it would be every American over, over five and, at least unless they have health conditions that, that prevent it. I just wanted to correct my misstatement, Chief.

JUDGE SRINIVASAN: So, as I understand your

response, as a matter of legal authority, the hypothetical that was presented by Judge Walker, the answer would be, yes, the 265 authority would allow for sending that person back in the face of the circumstances that he outlines. There may be some minimal process that even you acknowledge, I think you have to, is not the normal Title 8 process for someone who is seeking withholding or relief, or protection under the Convention Against Torture. That, that may exist as a matter of grace under the order; but as a matter, the Government's understanding of the 265 authority, it does completely supersede the withholding of removal protection that otherwise would exist.

MS. SWINGLE: That is correct, Your Honor. Although, as I understand the withholding of removal, you know, that is a statutory defense to removal under Title 8, which is, obviously, not in our view what's happening here.

JUDGE SRINIVASAN: And did you see a distinction between withholding of removal and Convention Against Torture? I'm not aware that there's any distinction between those other than I know that the order carves out this non-Title 8 compliant minimalist process by which somebody can affirmatively exclaim that they have, that they would be subjected to torture if they were sent back. I understand that, that that's a possibility, and it's happened in a handful of instances; but in terms of the relationship

between Convention Against Torture and withholding of removal, I didn't understand there to be a distinction between those two, but maybe there is.

MS. SWINGLE: We have not drawn a distinction for purposes of this humanitarian exception under 265, you're correct, Your Honor. In our view, the 265 expulsion authority is independent from Title 8 and supplants what would otherwise apply under Title 8, including any Title 8 defenses to removal.

JUDGE SRINIVASAN: Okay.

MS. SWINGLE: If I could just add --

JUDGE WALKER: I think I would just anticipate, let me just anticipate something that the plaintiffs are going to say. They're going to say we shouldn't ask for supplemental briefing, or they're going to say we shouldn't send this back to the District Court on this Title 8 question. If, if that's what the Court would be inclined, if the Court is inclined to disagree with the District Court on what it did but wants to not decide the Title 8 question, they're going to say, don't send it back to the District Court because that would just put these plaintiffs through months and months more of delay. What, what's your response to that?

MS. SWINGLE: So, we don't disagree that the Court can reach that question. We do think it's, it's somewhat

anomalous to say the District Court didn't abuse its discretion because it could have, but didn't rely on wholly independent grounds; but, you know, it's certainly within the Court's authority to reach that. We just think that they're wrong on the Title 8 question.

And if I can be precise about one thing, Judge Walker, in offering supplement briefing, we're certainly happy to offer supplemental briefing on Title 8 at large, but I think the precise issue I was suggesting hadn't been briefed really at all is whether if one were to look at Title 8 defenses to removal or particular rights available under Title 8, whether the defense against, the defense for withholding of removal might be differently situated, for example, than the right to apply for asylum which is not a defense to removal but is, you know, a free-standing Title 8 provision.

JUDGE WALKER: Okay.

JUDGE SRINIVASAN: Thank you, Ms. Swingle. If my colleagues have no further questions for you at this time, we'll give you some time for rebuttal; but we'll hear from the plaintiffs now, Mr. Gelernt?

ORAL ARGUMENT OF LEE GELERNT, ESQ.

ON BEHALF OF THE APPELLEES

MR. GELERNT: Good morning, Your Honors. May it please the Court, Lee Gelernt from the ACLU for

plaintiffs/appellees. I want to just jump into the conversation you've just been having about reconciling Title 8 with 265. Just to clear up a few points. Withholding applies regardless of whether you're in the immigration system because I gather that's what my friend's argument is, that that's clear-cut. The refugee convention says, to quote, "It is expel or return (indiscernible) in any manner whatsoever." Our domestic law makes it clear you can apply -- and the reason is sort of common sense, and this is laid out in the UNHCR brief and the IRAP amicus brief, because otherwise a sovereign nation could just relabel their laws and then send anybody back where they want to to persecution. So, it can't be that it's limited to the immigration laws. That still leaves reconciling with 265, but I just wanted to clear up that very specific point.

And on asylum, of course, you have a statutory right to apply. You have no statutory right ultimately to be granted it. Withholding and CAT are mandatory but, ultimately, the Government is not raising a distinction. I think that's because they need to provide these -- putting aside 265, they do need to provide these protections. And just one other note about CAT. As Judge Srinivasan has said, it doesn't, it's not a legal answer for the Government because even if they were providing it for CAT relief, CAT screenings at least, they would under Title 8 have to

provide for asylum and withholding screenings; and in any event, I think we've pointed out, and some of the amicus briefs have pointed out, it's a fairly illusory CAT screening, but I want to turn to the larger issue about reconciling 265 with these Title 8 protections.

I think the key is that the later statute applies, but you, if there's a conflict; but you don't need to get to that conflict, as Your Honors have been pointing out, because it can be harmonized; and I just want to raise one nuance point about, what may be a nuance about the harmonization. We think that the first step in harmonizing as the Brown and Williams case lays out, and as the much more recent case in Epoch lays out is you try and construe the two statutes not to have a conflict. If that doesn't work, you then go to specific versus general CAT. So, I want to start with trying to harmonize the laws.

I think what's clear is that Congress, in enacting the asylum laws, does not have a carveout for communicable diseases. Congress has repeatedly amended the asylum laws; repeatedly created additional exemptions every few years, but has never put in an exception for communicable diseases or pandemics; and that's consistent with the refugee convention which we're bound by and as, again, laid out by UNHCR. There is no exception in the Refugee Convention for pandemics or communicable diseases and that's because what

the nations of the world decided was you can deal with those with mitigation, but you're not to send someone back to danger because of a communicable disease; and so, I, I think that what we have are settled asylum laws, and so to the extent you can harmonize the two laws not to conflict, the law that's not settled in its interpretation, that's never been interpreted is 265.

In 265, we have multiple reasons why we don't believe 265 conflicts because we don't believe it allows for expulsions because we don't believe it applies to only transportation providers, but ultimately, I think you would have to read a lot into 265 to override the balance Congress has struck with these protective statutes. So --

JUDGE SRINIVASAN: Can I just, just to --

MR. GELERNT: Yes.

JUDGE SRINIVASAN: -- make sure I'm understanding this part of your argument. So, let's suppose, and I know you're going to disagree with the premise, but let's just suppose to get down to the nub of it on this axis of the argument, that we disagree with you on expulsion and we disagree with you on third-party/transportation. So, we're only talking about the inter-relationship between 265 and the Title 8 entitlements.

And as to that, I'm not understanding how it's a harmonization to say that the Title 8 provisions should be

given effect in the face of 265 any more than I understand why it's a harmonization to say the opposite. It just seems like at the end of the day, one of them is going to be viewed as a carveout to the other. Under your argument, it's that Title 8 is a carveout to what otherwise exists under 265. Under the Government's argument, it's that 265 is a carve out from what otherwise exists under Title 8. So, it's not a harmonization; it's just a decision that one of the statutory regimes is going to govern in the face of the otherwise applicable other one.

MR. GELERNT: Sure, Your Honor. So, I think, ultimately, if you got to the point where there's a, sorry, irreconcilable conflict, that ultimately you would apply the later enacted statutes. That's sort of black letter law. But as to the harmonization point, I think what you would be saying is 265, on the assumption it applies to individuals, not just transportation providers, it allows for expulsion, still should be understood in light of the later statutes to have Congress' policy decision to not send people back to danger; and I think that's what Brown and Williamson teaches as you had an earlier statute construed in light of later statutes and policy directives from Congress in later statutes, and so the Supreme Court went back and construed the earlier statute in light of those later enactments. I think that's what we're saying here. On your, on the

premise of your question, it applies to individuals and allows exclusion, but it doesn't mean it needs to be interpreted inconsistently with later enactments from Congress in the asylum laws because I think it's very clear that Congress did not want people sent back because of communicable diseases; and the Charming Betsy canon, obviously, comes in here where you have the international laws being very clear and UNHCR rarely submits an amicus brief, much less takes a position on a very specific policy in one country, but they have here to point out that the Refugee Convention does not allow for communicable disease exception. And I would just note just as a practical matter, with the exception of Hungary, every European Union country now has the exception allowing people to apply for asylum. There's been, you know, some differences in how they do it, but ultimately only Hungary is not allowing people to apply for asylum. And on the Government's --

JUDGE SRINIVASAN: Can I, can I ask a question about the, whether these can be harmonized? Section 265 discusses communicable diseases, but it has the additional language that there is a serious danger of the introduction of such disease into the United States. Is it true that that clause, there is serious danger of the introduction of such disease into the United States does not appear in any of the Title 8 provisions?

MR. GELERNT: In, in the asylum provisions, it does not, Your Honor. What the asylum laws and the withholding laws set out are various exceptions. A good many of them have to do with criminal convictions. In asylum, it has to do with when you apply. There's various exceptions that Congress has repeatedly enacted different exemptions, but they have never put in a communicable disease exception and I think that's because --

JUDGE SRINIVASAN: But what I'm, I guess my question then is, is can you, if our duty is to try to harmonize these, then isn't that the answer as to how, how you can harmonize 265 with the Title 8? Is that Title 8, Congress meant, well, you're not going to deny asylum to people with communicable diseases so long as there is no serious danger of them introducing such disease into the United States; but if the surgeon general makes that finding under 265, then the person with the communicable disease will be treated differently. Isn't that the answer as to how you harmonize these?

MR. GELERNT: Sure, Your Honor. I, I don't think that's the way we would view it, obviously, because we think that Congress in refusing to make an exception for communicable diseases, even if you actually had a communicable disease, would have put something in. And I think the reason they didn't is because they're following

international law. And if you were to reconcile the two statutes that way, you would then be creating an inconsistency between domestic law and international law. And as the Charming Betsy cannon suggests, that is something that the Court should try and avoid; and so, I think what you have are the domestic laws specifically based on our treaty obligations and those treaty obligations are very clear that there is no exception even for a pandemic and that once you have that, the domestic laws should be construed consistent; and I think there's nothing in 265 that's clear enough to say, yes, this overrides the later statutes. I think to the extent you can harmonize it, you have a statute that's never been interpreted. And to go to your earlier point, Judge Wilkins, it's absolutely unprecedented to be used against individuals. And contrary to my friend's explanation of the 1929, that was only against ships. I think you can look at the historian, public health historian's brief to see that it was only against ships. So, this is the first time in more than a hundred years of its enactment, since 1893, that it's ever been used. So, you have a statute that's never been used this way, has no definitive interpretation, does not have language making it clear that you should override Congress' policy judgments later on. And so, you have those policy judgments that are very clear, codified in the statute based

on our treaty obligations. Congress very easily could have put in --

JUDGE WILKINS: But are you telling me that it would violate international law if there were a disease with, with 90 percent or more lethality, like some of the Ebola strains, that was very communicable as a virus, you know, airborne and there were no cure, no vaccine, no effective treatment for it, that it would violate international law for the United States or any other country to bar persons from entering them and, and expel them even if they had a valid asylum claim if that country made a determination in its technical, scientific, medical judgment that there was no safe way to kind of quarantine that person, that it would violate international law to expel that person?

MR. GELERNT: Your Honor, so certainly your hypothetical puts this into sharp relief, but it is the position of UNHCR that there can be no exception. Now I want to, I want to make clear, and this is, this also is a takeaway, maybe the biggest takeaway from the Supreme Court's decisions that you referenced earlier is ultimately Congress could decide to change the law and pull us out of a treaty, or make a reservation about that aspect of the treaty; but right now, under an international law, there is no exception and I think, you know, you look at the European

Union countries, they've all managed to do this. I think, you know, your hypothetical does put this position to test for UNHCR, but I think this is the position that international law has taken because their commitment to asylum is so solemn and, you know, for the U.S. after World War II, it has been so solid.

I think in this, in, you know, this case going to the equities, I think there's no reason why you would need to expel asylum seekers. And, I just want to say a couple of points. One, to, I'm sorry, Judge Wilkins --

JUDGE WALKER: No, go ahead.

MR. GELERNT: Did you want to -- I think two points, one raised by Chief Judge Srinivasan, and the other by Judge Walker, Judge Srinivasan's point about really it's all about Congress settings and you see, I want to address that; and I also want to come to Judge Walker's point about what is going on here with CDC, and I think they're, they're related.

We are not contesting, and I think this is critical, we are not contesting CDC's expert judgment. I think it is absolutely clear from CDC's August 2nd order what they are doing, the line they are, the needle they're threading, and our experts also pointing this out. What CDC is saying is, look, the whole country is open. Unaccompanied minors are processed in the exact same

Congress setting and sometimes, and even longer. It varies how long they spend and sometimes the numbers are exactly the same going to your earlier questions you, Judge, in November, for example, of this year, the numbers were the same between how many expulsions of families there were and how many UC's had to be, unaccompanied minors, sorry, had to be processed; and, you know, again, as Judge Walker pointed out, there has not been affidavit by CDC. There's no administrative record but, of course, CDC was free to put in an affidavit. Everybody under the sun for the Government put in an affidavit except CDC; and you also, this is mentioned in the amicus briefs because it was post our briefs, but second in command at CDC, Anne Schuchat, recently came out and testified before the House that there's never been a public health justification for this. She's since resigned.

And I want to get to the point about UC's because I think that's critical. It's all about congregate settings. The whole country is open, even a basketball arena, one-third of NBA arenas do not require testing or vaccines. CDC has not said you shouldn't ride Amtrak, airlines, domestic, all different sorts of congregate settings are open. The Government says, well, this congregate setting is different. Unaccompanied minors are processed in the exact same place.

In the July order with unaccompanied minors, it mentions that unaccompanied minors were spending 131 hours, still they signed off, CDC signed off on the exemption for them. So, there's -- and there's really no difference. Once you get out of, I'm not saying that it's for all the reasons Chief Judge Srinivasan pointed out and Judge Walker, then they're just, those people are just the same as anybody else and they represent, they represented .1 of the traffic over Mexico; .1, .01 percent of the traffic for Mexico, and that was even before they've opened the country up to non-essential traffic over Mexico.

JUDGE WILKINS: That hasn't been in all part of an arbitrary and capricious argument that's not before us?

MR. GELERNT: Well, Your Honor, sure. I think it, it is most central to the arbitrary and capricious argument that Judge Solomon could look at on remand; but I think it does also go to the equities because I think the theme here is that the Government's brief is essentially applying a different standard to family asylum seekers than they are to anybody else. And I think that's most clear if you look at the Government's brief, opening brief at 50 and 51, and the reply brief at 25. Every time we point out the mitigation steps that CDC has suggested, they say, well, that would not, quote, unquote, "Fully eliminate the risk, or eliminate the risk." But, of course, that can't be the standard that

CDC has pointed out. It's not the standard for unaccompanied minors. It's whether it's acceptable risk or there's a significant risk, a serious risk, and I think that's really what's happening here is that this is getting caught up in a debate about immigration, but it can't be that these asylum seekers are presenting more of a risk; and I think that's why Dr. Fauci came out and said, well, look, I'm not responsible for Title 42. I don't know anything about it.

JUDGE WILKINS: But, but still on likelihood of success on the merits, counsel, I mean just common sense introduced has to include expel. I mean if, if, if a parent tells children living in the house, you're not allowed to introduce drugs into this house, and they, you know, search the kids' bedroom and find drugs, you're not going to tell me with a straight face that the parent couldn't throw the drugs away. That the parent somehow has to quarantine the drugs because introduce doesn't mean expel, right?

MR. GELERNT: So, Your Honor, as a parent, I'm going to definitely agree with you, that I could throw the drugs away; but I think it's different here for, for a few reasons and I, but I didn't want to spend too much time -- I want to answer your question as directly as I can but, ultimately, agree that the narrowest way to do this is to reconcile with the asylum laws. But on your expulsion

point, I think a few things. When someone's liberty is at stake, there's never been a statute that allows someone's body to be taken and moved from the country without a clear statement, whether that's Immigration. It breaks tradition.

The other point I would make is that the Government concedes, and I think everyone concedes, that this applies to U.S. citizens. So, what you would be having is Congress implicitly, implicitly saying we can summarily expel U.S. citizens. That would have been a big thing for Congress to do in --

JUDGE WILKINS: But, but, but that's not before us. All that's before us is this order. This order doesn't say anything about U.S. citizens. It explicitly excludes U.S. citizens.

MR. GELERNT: Well, I think, Your Honor, you would have to, you would have to bring that into bear for the reasons that the Supreme Court has laid out in the Zadvydas case and the Clark case. In interpreting a statute, whether the litigants who raised the constitutional problem were actually before you, you ought to take that into account in interpreting the statute.

I think the other thing that Supreme Court has said is where it's so unprecedented, you ought to bring a skeptical eye to this; but, ultimately, Your Honor, I recognize that the Court may be not, not ready to go to that

argument on the merits; and so, on the asylum question, that's a much more narrow issue.

JUDGE SRINIVASAN: Before we go to asylum for, let me just ask one follow-up question on the theory that's most squarely before us, which is the one that District Court adopted and that you're defending. What is the implication of that theory for whether the plaintiffs have committed a crime because as I understand it, that theory would mean that there's been an introduction and under, the way you see the case, and I think your brief spells this out, there's an alternate avenue of enforcement that's available to the Government which is criminal prosecution under 371? So, 271 rather, sorry. So, does that mean that for this part of the case, that the plaintiffs' class is subject to criminal punishment?

MR. GELERNT: They are, Your Honor, and I think that's one of the reasons why there are, enforced mechanisms are heavy civil penalties; there are criminal penalties; there's quarantine; and, ultimately, they can be removed under the immigration laws. And this, I think, scopes over all our arguments are --

JUDGE SRINIVASAN: And does the commission of a crime not affect the entitlement to any of the relief under Title 8?

MR. GELERNT: It does not, your Honor. It has to

be a more serious penalty. I would also note that even without 265, it is illegal to cross between ports of entry. That's 8 U.S.C. 1325. It's a misdemeanor. But the one thing Congress made clear is whether or not you cross between a port of entry, you can still apply for asylum. So, for the Government to suggest, well, they have no right to be here, therefore, it's absolutely not true. That's 8 U.S.C. 1158. The Supreme, the Ninth Circuit in the East Bay case said it doesn't matter that people cross between ports illegally. They have a right to apply for asylum. That was Judge Bibey's decision that ultimately the Government asked the Supreme Court to stay and the Supreme Court refused to.

So, what I think there are, are there are a lot of deterrents. There are penalties. It's not as if you can't do anything, and you ultimately can expel them. There are the immigration laws, and I want to be clear about how quick that is because I think the Government is suggesting a huge gulf in the time period. The expedited removal statute was enacted in 1996. What Congress thought was, we need a swift way to remove people right at the border, people who are covered by the CDC order in effect. And so, Congress said, we're going to allow expedited removal. If you're not applying for asylum, that can be a matter of minutes, some, but he just has to, a supervisor just has to sign off; they have to ask if you want to apply for asylum; if no, the

supervisor signs off, you're gone right over, out of the country. If you want to apply for asylum, you can, but it's a very quick timetable that under the regulations can last about a week. And on that, Congress, again, was very clear, you still have to be allowed to apply for asylum even if this expedited removal process is going to be applied to you; and, again, but no exceptions for communicable diseases. So, I think it's, it's much quicker -- and so I, I take Judge Wilkins' hypothetical and it's, it's a fair one, but I think there are ways to deal with it. Ultimately, Congress can change it, but I think international law takes the idea that people running for their lives have to be allowed to apply; there have to be mitigation steps taken. If we ever get to a disease where there are literally no way to handle it, I ensure Congress will react to that and, perhaps, (indiscernible).

JUDGE SRINIVASAN: So, I guess, I guess the question is, I guess the question is whether 265 already did that and, and forecast that possibility and left it up to the CDC direct, at that time the Surgeon General, I guess, but the CDC director as to whether we're in that situation now. And as to that, I, I take the point that under the existing laws under Title 8, Congress has already made, struck a balance between somebody who has a communicable disease and whether they're nonetheless entitled to apply

for asylum. That balance has been struck. And I also take the point that because having a communicable disease is a ground for inadmissibility, then we're already talking about people who at least pose some danger to the United States because otherwise why make it a ground of inadmissibility if they're not going to pose a danger to the United States in the first place? That's the reason the communicable disease is a problem because it could be introduced.

But as Judge Wilkins points out, 265 talks about a serious danger and the argument that the Government makes is that it's only a narrow emergency situation in which you have the serious danger, and Congress hasn't yet struck that balance. That's -- 265 does that. 265 says in the narrow necessarily, historically, almost unprecedented circumstances in which this kind of authority can be asserted, Congress did strike the balance and say that 265 governs even if in non-emergency situations the entitlement to asylum would overcome somebody who has a communicable disease.

MR. GELERNT: Sure, Your Honor. So, I think what we have then is a statute in 1893 that not specific to asylum and no, and protection of what it might overcome. So, there's no sort of clear statement in the statute and I, and I think that's sort of like Brown and Williamson. You have a statute that's not been definitively interpreted, and

you then have yet later statutes where Congress is making clear what they think about the very specific issue; and I think that's the asylum laws. So, I don't think you're foreclosed from interpreting 265 to say, well, there's going to be an exception because I don't think 265 directly addressed it. And I want to take a step back because even, even if it goes more to our first two arguments that there's no expulsion, only transportation providers, I do think some of the historical context is worth emphasizing.

It may seem implausible in today's day that Congress would have only regulated transportation providers or not put in an expulsion for individuals. The reason is because two things were markedly different back in 1893. The first was the immigration landscape. As the legislative history points out, 95 percent of immigrants came just to the New York harbor, and that doesn't include Boston and San Francisco harbor; so, virtually all immigrants came by ship to the harbor. So, there was very little land migration.

Secondly, the Federal Government really wasn't involved in the public health sphere. They were just tipping their, dipping their toe in in 1893, but they were relying on the states and the historian's brief lays this out. The states could criminalize. They even expelled people. And the Federal Government couldn't practically actually enforce the border. They did not have agents along

the border, the states did that. So, for the Congress looking at this, they would have said, well, there's very few people coming at land; we don't have the agents along the border; we're going to leave that to the states.

So, I think what's happening is the Government is suggesting, well, it couldn't be that they wouldn't regulate individuals back in 1893, but the fact is, again, as the historian's brief lays out, that's what they were doing because that was the landscape. But even if you don't accept either of those two arguments, I think there's nothing in that statute that says you can't reconcile it with very clear pronouncements by Congress later on. And --

JUDGE SRINIVASAN: What about the language that says suspension of the right to introduce because if, if we're past the transportation part, I, I take it, I know that you have the response that what that was about was licenses; but for purposes of this part of the argument, we're already past that. Then the suspension of the right to introduce, it could be that the right to introduce is the sort of thing that asylum covers and what 265 contemplates is suspension of that kind of right.

MR. GELERNT: Sure, Your Honor, that, that is the Government's argument. I think what we believe is that that's not sufficiently clear language and if it was in a dependent clause, and I think as Your Honor just pointed

out, it's most naturally read to suspend the license of a shipping company. And I, I think what it goes to is the larger point of is there anything in 265 that is so clear that it's going to allow the CDC director to wipe away all our asylum laws, withholding laws, CAT laws, that really is an enormous change to the landscape; but I know the major questions issue that's raised in the CATO brief has been used with economic, with economic questions; but I think to wipe away all of the U.S.'s protection statutes in violation of international law would be an enormous step and I think there's nothing that suggests you cannot reconcile 265. And it would be very different, I think, I don't that the legal question would be different, but I think we might be in a different conversation if there was really no way to mitigate.

And one thing I want to mention about what my friend said, and my friend said, well, we really want to do this; we're working at it. And I think that was a fine response first month, second month, third month, but we're two years into this and we're six months from CDC saying you can do this, here's the road map, you've done it for unaccompanied minors release, HHS has done it for unaccompanied minors, but up 14 new emergency shelters in only two months, 20,000 new beds. Here's the road map for you to do it.

And so, I think what Judge Sullivan, just bringing a common sense approach to it said is, look, at some point, this is just a matter of allocating resources. CDC is giving you a road map how to do this. It's been a long time. It seems like DHS needs a little bit of a push. There's something going on here that can't be strictly about public health because as Judge Walker pointed out, when you start, and, and Chief Judge Srinivasan pointed out, when you start comparing the various groups, it's clear that these asylum seekers don't prevent such a different risk.

So, we are not taking issue with CDC. We are just simply saying at some point DHS needs to comply with CDC, and it's been a long, long time now; and we, as Your Honors know, we put this case on hold --

JUDGE WILKINS: But how are we, so how are we supposed to look at that? I mean either the statute, we, we're to decide whether the statute gives the Government the authority to do this or not, whether it's wise for them to be doing it or not. I don't think it's for us to assess whether they could avoid doing this if they allocated their resources differently, or more efficiently, or more wisely is not for us to assess. We're assessing whether the statute gives them this authority. So, what, what are we supposed to do with, with, with, with that argument that you're making?

MR. GELERNT: Sure, Your Honor. I, and I, I apologize if I was conflating two different parts of our case, but I was simply going to the, I moved without much of a transition, I apologize for that, moving to the equities arguments. Simply saying I think that they can reconcile that the asylum, withholding and CAT statutes, and I don't think it raises the specter, going to the balance of harms, it raises the specter that Your Honor's hypothetical presented because I do think -- and, you know, if anything like that ever came about, it may be that they don't have the power to do it but the injunction wouldn't be proper. You can deal with that at the equities but, ultimately, I think if something catastrophic like that ever did happen where there were literally no vaccines, mitigation steps, I think that's probably where Congress steps in and says we're bowing out of the treaty, or maybe even the international community says we need to adjust. I was simply going to the equities and I think there's absolutely no question that the theme here is that the Government's brief is treating asylum seekers very differently. All the mitigation steps that have been recommended by everyone are not enough according to the Government because they don't fully eliminate and, again, CDC has repeatedly said it cannot be a zero risk. They're letting people go to basketball games, fly on planes, Amtrak, unaccompanied minors.

The other thing I would make as a point of comparison is in litigation over ICE facilities where people are being detained long-term, the Government has repeatedly said in every brief, we don't have to eliminate all risk, just have to make it acceptable and mitigation steps are sufficient like testing and various things. So, I think even there the Government has made it clear there is absolutely no way there could be zero risk and so they're applying a different standard. I think that's not dissimilar to the contradictions that Judge Walker pointed out with the MPP briefing about individual harms.

And, you know, I haven't, I want to just turn for one second to the individuals' harms. I don't need to dwell on it. I think Judge Walker laid them out carefully, but it's literally like the families are walking the plank and the U.S. Government knows it. The U.S. Government is pushing them over the bridge, walked, as they walk over the bridge. The cartels are sitting there waiting for them. Mothers and fathers are holding their little kids' hands knowing that the cartels are at the other end. In some regions, between 20 and 40 percent of the families are being targeted and then, for kidnapping; and then after the kidnapping, the most brutal treatment, sexual assault, mothers being assaulted in front of their kids; and so, for the, for the Government to say, look, transmission risks for

this one group outweigh all those harms, I, I don't think it's plausible and I think Judge Sullivan was right to find that the balance of equities favors us; but, again --

JUDGE SRINIVASAN: Well, what's, what's your response to the Government's argument that, that this case is not really like the OSHA reg, that it's really more like the Medicaid?

MR. GELERNT: Yeah, I, I think, Your Honor, that what the Supreme Court said in the Medicare is the law was very specific that they had done all of these types of things, protect from infection could, and answered questions, argument that, sorry, that the, the companies' arguments at, at oral argument, that they could do various measures, make them wear gloves. So, it was just a matter of degree, I think; and the, the statute was much clearer. I think this is closer to OSHA where it was unprecedented, this type; and this is really night and day from regulating ships.

In 1893, we have gone through a number of pandemics, including the Spanish flu and meningitis. They have never used it to expel people. And so, the other thing I would, with all due respect to my friend on the other side, the Government's letter said, well, this is only non-citizens, a certain group of non-citizens being expelled. It's not economic impact on Americans. I would submit that

I'm not, I don't want to minimize any of the economic impact, but I would submit that the harm here is deeply great.

And what the Supreme Court, to the extent there's a takeaway in all the Supreme Court cases, and I think there is, it's you can't factor in the dangers of COVID in interpreting a statute. You need to find that very specific statutory authority and you want to be very skeptical if it's never been used before. This statute goes way back, obviously, before the OSHA statute. This statute goes back to 1893. And, and, again, I would urge the Court to look at the historian's brief because the example the Government gave of it being used in 1929, which is already almost a hundred years, is simply wrong. That was only for transportation entities. So, it's never been used for expulsions and, certainly, not after Congress said we have to have these asylum laws. We are never going to allow what happened after World War II to happen again.

JUDGE WILKINS: And that balance of equities, I can imagine two very different responses, different from each other, but that would be responses to, to your, to your argument on the equities. One is an argument, and I'm neither endorsing or criticizing either of these arguments. One is an argument that we've heard that you'll ultimately have a better humanitarian situation with fewer people

taking great risk to cross the border if the Government makes it extremely painful on them when they are apprehended. So, that's one, I'd like you to respond to that and the other, the other one as well. It's very different.

We heard in the vaccine oral argument, Justice Breyer asked on multiple occasions the question along these lines. He would say to the challengers, I'll assume your argument is reasonable. I'll assume the Government's argument is reasonable. Rather than exactly trying to figure out, you know, which is better there have been, he kept mentioning the statistic of 750,000 new COVID cases yesterday he said. He said I mean there were three quarters of a million new cases yesterday, new cases, nearly three-quarters, seven and some odd thousand, okay? And you said the hospitals are today, yesterday, full, almost to the point of the maximum that ever see in this disease, okay? And he said, are you telling me that when I consider the stay factors, or when this Court considers preliminary injunction factors, that that really shouldn't just be the end of the case? There, COVID is, COVID is prevalent. The Government is trying to protect people from COVID and we ought to just, when we balance equities, you know, just do whatever the Government and the CDC say.

MR. GELERNT: Sure, Your Honor. I maybe take

those in the order you gave them to me. One is on the deterrence and I think that goes to a point that Chief Judge Srinivasan asked, which is, isn't really what's going on here in light of the lack of CDC affidavit and other indications that this is being used as an immigration statute? People can debate whether the border policies work and the asylum policies work but, ultimately, this can't be used as an immigration provision to deter people; and I think that relates to your second point of people are coming over.

One point I neglected to mention is that at one point the Government was safely doing 70,000 families, processing 70,000 families. They're only doing 30,000 families now. So, it's absolutely clear they can do more; but as to Judge, Justice Breyer's point, I mean, obviously, he was in dissent in one of the cases; but, but putting that aside, I think it goes to there they were simply asking can we force mitigation steps? Here we're saying even with mitigation steps, we want to actually expel you. And so, all we're saying is that the mitigation steps are sufficient to make family asylum seekers the same as all the other groups who are being allowed to do stuff. I, I think CDC is saying, yes, go to a basketball game, 15,000 people, as long as, you know, you, we urge you to vaccinate; we urge you to wear a mask; but the arenas are not requiring that in many,

many college arenas and in one-third of the NBA. The CDC is not saying don't ride Amtrak; don't go on planes; and so, I think, ultimately, that's what's going on here is that we can't have a zero risk; we're never going to have a zero risk; and asylum seekers can't be singled out for worse treatment, have a zero risk applied to them, especially not where the harm is so great. Whatever --

JUDGE WILKINS: But people have a choice to whether to go to the basketball game, to get on the Amtrak, to get on an airplane, you know? Border Patrol officer who is working, you know, they have to do their job and to the extent that they are exposed to increased risk from congregate settings from these people, they're not, they're not similarly situated to those other circumstances. They're, they're basically kind of forced into this. Isn't that part of what the, this order is trying to prevent?

MR. GELERNT: So, a --

JUDGE WILKINS: (Indiscernible.)

MR. GELERNT: Sorry, Your Honor. A few responses. One is I think that the Government had been making that argument much more forcefully and CDC had been pointing it out much more forcefully in the very beginning. Now that there are vaccines and there's a mandate for Federal employees and most CBP officers are now vaccinated, I don't think that's an argument that can be made that's, that CD,

that the Border Patrol is any different than other people who come into contact.

The other point is that they're already coming into contact with unaccompanied minors. The CDC has said that's fine. So, I think, ultimately, they're not that much different. The people who work in the arenas, the people who work on the planes, I think once you get out of that Congress setting, then it no longer, the order can no longer be justified; and within the Congress setting, I think that's why the Government and CDC have pulled back from that argument, because of the vaccinations, because they're saying it's okay for unaccompanied minors to, to be exempted.

And so, we, we, I want to be clear, Judge Wilkins, we are not being cavalier. We hope we are not coming off as cavalier about COVID, but I do think the country now has moved; and I think it, more importantly, CDC has said we'd move to a place where mitigation steps are the solution; and, notably, not only has CDC not put an affidavit in, it made that clear in its August 2nd order that mitigation steps are the way to go, but I am not aware of any real public health support from the CDC order. We've put in affidavits from former CDC officials and other public health experts saying that mitigation steps are the way to go. What's really happening is DHS is refusing to take those

steps and I know that they've said that they're trying in their, they want to do it; but now it's been two years and it's been six months even since the August 2nd order. At an absolute, absolute minimum, one thing this Court can do is send it back to Judge Sullivan and say, does DHS have a plan for putting these mitigation steps in place because right now DHS is refusing to even say how the mitigation steps are coming along; and you, you see in their affidavits, for example, the Shehulian (phonetic sp.) affidavit, where he says these, these Congress settings were not designed for this. Well, that's all well and good if they weren't designed; but now it's been two years to change them. I mean it can't be that hard to build outdoor processing; and yet, they haven't done that, or not sufficiently.

The NGOs are saying we have more capacity, we'll help you; and, ultimately, the Government, this is not asking the Government to reverse gravity. They know how to do this because they've done it and safely processed at the time of the order 86 percent of the families. We're talking about another 8,000 families that represents the 14 percent. That's 267 a day. That's half a plane load coming from the entire southern border. If we had ever said to TSA, could you process 267 people from a plane load in the entire U.S. and they said, well, we can't do it, we've, it's been two years, that would be inconceivable, right?

Right now, they're processing 30,000 people. They absolutely can do this and I; and, again, I just, you know, stressing what Judge Sullivan, I think looking at it from a common sense standpoint said, if there's a likelihood of success on the merits, which, yes, Judge Walker, we absolutely have to show that; but if there is, ultimately, there is extraordinary harm to these families, maybe out of sight, out of mind to most of the American public, but just really gruesome harm; and DHS can do this, they're doing it for unaccompanied minors, they're doing it around the country. So, ultimately, I think that's where the case comes down to; and I would urge the Court to at least take the narrowest ground and reconcile with, as Brown and Williamson did with the later statutes. The Congress has specifically looked at this issue.

JUDGE SRINIVASAN: I'll make sure my colleges don't have additional questions for you, Mr. Gelernt. Thank you

MR. GELERNT: Thank you, Your Honors.

JUDGE SRINIVASAN: Ms. Swingle, we'll give you three minutes for rebuttal.

MS. SWINGLE: Thank you, Your Honor.

REBUTTAL ARGUMENT OF SHARON SWINGLE, ESQ.

ON BEHALF OF THE APPELLANTS

MS. SWINGLE: I'd like to just turn to this

question Mr. Gelernt left off and which was a focus of the Courts' questioning earlier, which is how to best harmonize what seems to be his primary argument today, how to harmonize Section 265 and international treaties providing a right to apply for asylum or for relief under the Convention Against Torture.

So, this, perhaps, seems self-evidence, but I would, I would note that those conventions, the Convention Against Torture and the refugee protocol, which is the only one that the United States is a party to, are non-self-executing treaties. They are non-self-executing treaties that Congress then implemented into domestic law. And so, I think it is extremely odd to invoke the Charming Betsy principle to try and harmonize the statutes. I think the question is, what did Congress intend? And so, the best evidence, I think, of what Congress intended is to put those statutes side-by-side; and when we look at Section 265, I think there are multiple indicia that Congress intended for it to displace and be the more specific rule of decision in, in contradiction to the immigration laws.

First, I think as Judge Wilkins pointed out, it applies only where there is a determination of a serious danger of the introduction of a communicable disease from a foreign country into the United States. We know from the title of the section when it was originally enacted, it was

entitled, "Suspension of Immigration During Existence of Contagious Diseases." We can look to see that the President was originally given the authority to invoke authority under this section. It was considered so significant a power to be invoked that unlike the other provisions of the 1893 Act which were invoked at the authority of the Secretary of Treasury or of various health officials, this was the President alone who had the power; and it's notable that even in the current version of 265, the Surgeon General, now the CDC, has to act in accordance with regulations approved by the President, which I think is reflective of sort of the significant nature of the decision being made under this provision.

And then I think we can look to, as we've noted, that the determination is that a suspension of the right to introduce persons is necessary to protect the public health; and that was intended to infer, confer the authority to suspend immigration, which I think necessarily envisions suspension of what would be the otherwise applicable immigration laws. And even today, the section is entitled, "Suspension of Entries from Designated Places." And so, I think together that all manifests pretty clear congressional intent that this statute should take precedence in the extraordinary circumstances in which it is necessary to invoke this authority.

And I just want to, one final point, it is true that the only time that the President has previously invoked Section 265 to suspend entry, it related to entry from foreign countries; but I think that tells you very little about what the outer scope of the authority is. Obviously, in 1929, when you're talking about passengers coming from China and the Philippines to the United States, it would not be surprising that they would be traveling by vessel; but I would also note that the actual suspension order was not by its terms so limited, and it referred to introduction directly, or indirectly, and by trans-shipment or otherwise.

JUDGE SRINIVASAN: Thank you, counsel. If my colleagues don't have additional questions for you, thank you to you. Thank you to both counsel for your arguments this morning. We will take this case under submission.

(Whereupon, the proceedings were concluded.)

DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

Tracy Hahn

January 28, 2022
Date

DEPOSITION SERVICES, INC.