

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF LOUISIANA  
LAFAYETTE DIVISION**

THE STATE OF ARIZONA, By and through  
its Attorney General, MARK BRNOVICH;

THE STATE OF LOUISIANA,  
By and through its Attorney General, JEFF  
LANDRY;

THE STATE OF MISSOURI,  
By and through its Attorney General, ERIC S.  
SCHMITT;

PLAINTIFFS,

v.

CIVIL ACTION No. \_\_\_\_\_

CENTERS FOR DISEASE CONTROL &  
PREVENTION;

ROCHELLE WALENSKY , in her official  
capacity as Director of the Centers for  
Disease Control & Prevention;

U.S. DEPARTMENT OF HEALTH & HU-  
MAN SERVICES;

XAVIER BECERRA , in his official capacity as  
Secretary of Health and Human Services;

the UNITED STATES DEPARTMENT OF  
HOMELAND SECURITY;

ALEJANDRO MAYORKAS in his official ca-  
pacity as Secretary of Homeland Security;

U.S CUSTOMS AND BORDER PROTEC-  
TION;

CHRISTOPHER MAGNUS in his official ca-  
pacity Commissioner of U.S. Customs and Bor-  
der Protection;

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT;

TAE JOHNSON in his official capacity as Senior Official Performing the Duties of Director of U.S. Immigration and Customs Enforcement;

U.S. CITIZENSHIP AND IMMIGRATION SERVICES;

UR M. JADDOU in her official capacity as Director of U.S. Citizenship and Immigration Services;

U.S. BORDER PATROL;

RAUL ORTIZ in his official capacity as Chief of the U.S. Border Patrol;

The UNITED STATES DEPARTMENT OF JUSTICE;

MERRICK GARLAND in his official capacity as Attorney General of the United States of America;

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW;

DAVID NEAL in his official capacity as Director of the Executive Office for Immigration Review;

JOSEPH R. BIDEN, J R., in his official capacity as President of the United States; and

the UNITED STATES OF AMERICA;

DEFENDANTS.

## **COMPLAINT**

The States of Arizona, Louisiana, and Missouri bring this civil action against the above-listed Defendants for declaratory and injunctive relief and allege as follows:

## INTRODUCTION

1. This suit challenges an imminent, man-made, self-inflicted calamity: the abrupt elimination of the *only* safety valve preventing this Administration’s disastrous border policies from devolving into an unmitigated chaos and catastrophe. Specifically, this action challenges the Biden Administration’s revocation of Title 42 border control measures, which will, absent judicial relief, become effective May 23, 2022.

2. This is not merely the opinion of the Plaintiff States, but also that of some of the Administration’s ardent supporters. For example, one Democratic Senator observed: “This is the wrong decision.... [I]t’s clear that this administration’s lack of a plan to deal with this crisis will further strain our border communities.”

3. Similarly, another Democratic Senator explained that the “decision to announce an end to Title 42 despite not yet having a comprehensive plan ready shows a lack of understanding about the crisis at our border.”

4. Eight days prior, these two Democratic Senators wrote a letter to President Biden telling him: “To date, we have not yet seen evidence that DHS has developed and implemented a sufficient plan to maintain a humane and orderly process in the event of an end to Title 42.”

5. A third Democratic Senator, Joe Manchin, described the Title 42 revocation as an outright “*frightening* decision.”<sup>1</sup> He further explained that “[w]e are *nowhere near prepared to deal with that influx*. Until we have comprehensive, bipartisan immigration reform that commits to securing our borders and providing a pathway to citizenship for qualified immigrants, *Title 42 must stay in place*.”<sup>2</sup> In addition, “Title 42 has been an essential tool in combatting the spread of COVID-19 and control-

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<sup>1</sup> Joe Manchin, *Title 42 Must Stay In Place Until We Have Major Immigration Reforms* (April 1, 2022) <https://bit.ly/37azEI0> (emphasis added).

<sup>2</sup> *Id.* (emphasis added).

ling the influx of migrants at our southern border,” said Senator Manchin.<sup>3</sup> “We are already facing an unprecedented increase in migrants this year, and that will only get worse if the Administration ends the Title 42 policy.”<sup>4</sup>

6. And a fourth Democratic Senator, Maggie Hassan, similarly declared that: “Ending Title 42 prematurely will likely lead to a migrant surge that the administration does not appear to be ready for.”<sup>5</sup>

7. And these are just the opinions of Senators of President Biden’s *own party*—hardly disinterested, neutral observers. To be fair, these views appear to be widely shared—though in more-circumspect/less-candid statements—by many members of the Biden Administration itself, even at the highest levels. For example, the White House’s own Communications Director, Kate Bedingfield, outright admitted that the Administration “ha[s] every expectation that when the CDC ultimately decides it’s appropriate to lift Title 42, *there will be an influx* of people to the border.”<sup>6</sup>

8. Senator Bill Cassidy of Louisiana similarly criticized the Biden Administration’s plans, stating “Removing Title 42 is a mistake that will encourage another wave of illegal migration and drug trafficking to overwhelm the Southern border. There is no justification for this.” See Press Release, Cassidy Reacts to Rescinding Trump-Era Policy to Stop Mass Migration, [www.cassidy.senate.gov](http://www.cassidy.senate.gov).

9. The National Border Patrol Council President, Brandon Judd, similarly declared: “We know this is going to *cause chaos of epic proportions*.”<sup>7</sup> He also noted the obvious incongruity of

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> <https://twitter.com/SenatorHassan/status/1509936999267983364>

<sup>6</sup> Catherine E. Shoichet, *We're expecting a big increase in migrants at the US-Mexico border. But this time is different*, CNN, (April 1, 2022) (emphasis added), <https://cnn.it/3LrtLoC>.

<sup>7</sup> Adam Shaw, *Border Patrol agents bracing for new migrant wave if Title 42 lifts: 'We are expecting to get wrecked'*, Fox News, (Mar, 31, 2022), <https://fxn.ws/3uKEx2B>

Administration policy: “We can’t even fly on airplanes without masks, but we’re going to end Title 42 which is going to cause the single largest [in]flux of illegal immigration in our history?”<sup>8</sup> “It’s impossible for me to overstate how demoralized the average agent is,” Judd said. “They’re asking themselves, ‘Why am I putting on this uniform?’ every day. This administration is responsible for the single largest crisis on the border and they’re about to make it worse.”<sup>9</sup>

10. Similarly, DHS put out an official “fact sheet” in anticipation of the Title 42 revocation declaring that “There is broad agreement that our immigration system is *fundamentally broken*.”<sup>10</sup> But the Administration’s “answer” to that problem is to break it further.

11. Other DHS officials, shielded by anonymity, have been even more candid, explaining that “ending Title 42 would lead to what one DHS agent described as a ‘surge on top of a surge.’”<sup>11</sup>

12. One anonymous agent succinctly explained the sentiment at the Border Patrol: “We are expecting to get wrecked.”<sup>12</sup>

13. The Center for Disease Control’s (“CDC’s”) April 1, 2022 order revoking its prior Title 42 policy is also plainly at war with other policies of the Biden Administration. The Title 42 Termination is expressly premised on the “rapid[] decrease” of COVID-19 cases following the recent wave of the Omicron variant of the virus. Ex. A at 12. But the Administration has not seen fit elsewhere to act upon these improvements by, for example, lifting the mask mandate on airline trav-

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<sup>8</sup> *Id.*

<sup>9</sup> Callie Patteson and MaryAnn Martinez, *Immigration authority Title 42 to be terminated on May 23, CDC says*, NY Post (Apr. 1, 2022), <https://nypost.com/2022/04/01/title-42-to-be-terminated-on-may-23-cdc-says/>.

<sup>10</sup> DHS, *Fact Sheet: DHS Preparations for a Potential Increase in Migration* (Mar. 30, 2022), <https://bit.ly/3j3LEgR>.

<sup>11</sup> Adam Shaw and Peter Hasson, *Border Patrol agents bracing for new migrant wave if Title 42 lifts: “We are expecting to get wrecked”*, Fox News (Mar. 31, 2022), <https://fxn.ws/3IZjApt>.

<sup>12</sup> *Id.*

el,<sup>13</sup> or loosening or repealing its vaccination mandates,<sup>14</sup> or ending its relentless campaign to discharge members of our military who have applied for religious exemptions for vaccination requirements—which have been almost uniformly denied.<sup>15</sup> The Title 42 Revocation thus stands as a radical outlier—seemingly the only COVID-19-based restriction the Administration sees fit to end.

14. But the CDC’s Termination Order is not merely unfathomably bad public policy. It is also profoundly illegal. That is principally so for two reasons: (1) Defendants unlawfully flouted the notice-and-comment requirements for rulemaking under the Administrative Procedure Act (“APA”) and (2) Defendants’ Termination Order is arbitrary and capricious, thus violating the APA, because it has numerous omissions that each independently render it illegal.

15. First, the notice-and-comment violation: Defendants do not deny that the Termination Order would ordinarily be subject to the requirement of providing notice of a proposed rule, taking comment upon it, and responding to those comments. They seek to excuse their flouting of that requirement for two reasons: they invoke the “good cause” and “foreign affairs” exceptions of 5 U.S.C. §553(a)(1) and (b)(3)(B). But neither applies.

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<sup>13</sup> Jonathan Franklin, *U.S. airline CEOs call on President Biden to end the federal mask mandate on planes*, NPR (Mar. 24, 2022), <https://www.npr.org/2022/03/24/1088669929/airlines-federal-travel-mask-mandate> (noting request from airline CEOs to the Biden Administration that the air travel mask mandate be lifted, and noting that “the White House has not yet commented on the group's request”).

<sup>14</sup> *E.g.*, *Georgia v. Biden*, --- F.Supp.3d ---, 2021 WL 5779939 (S.D. Ga. Dec. 7, 2021) (granting nationwide preliminary injunction of federal contractor vaccine mandate); *Georgia v. Biden*, 21-cv-00163, ECF No. 96 (S.D. Ga. Dec 9, 2021) (federal government’s notice of appeal of nationwide injunction of federal contractor vaccine mandate); *Feds for Med. Freedom v. Biden*, --- F.Supp.3d ---, 2022 WL 188329, at \*8 (S.D. Tex. Jan. 21, 2022) (granting nationwide preliminary injunction of federal employee vaccine mandate); *Feds for Med. Freedom v. Biden*, 21-cv-00356, ECF No. 37 (S.D. Tex. Jan. 21, 2022) (federal government’s notice of appeal of nationwide injunction of federal employee vaccine mandate).

<sup>15</sup> *E.g.*, *U.S. Navy SEALs 1-26 v. Biden*, --- F.Supp.3d ---, 2022 WL 34443, at \*1, \*13, and \*14 (N.D. Tex. Jan. 3, 2022) (“[t]he Navy has not granted a religious exemption to any vaccine in recent memory”; noting punitive measures taken against Navy SEALs who refused to take vaccine, including threat of discharge from military; and enjoining military vaccine mandate); *U.S. Navy SEALs 1-26 v. Biden*, 21-cv-01236, ECF No. 82 (N.D. Tex. Jan. 21, 2022) (federal government’s notice of appeal). .

16. As to the good cause exception, CDC argues that “it would be impracticable and contrary to the public interest” to take public comments on the Title 42 Revocation, and that DHS “need[s] time to implement an orderly and safe termination of the order.” Order at 29. These skeletal assertions fail to satisfy the good cause exception for four reasons.

17. *First*, CDC had *ample* time to take public comment on revoking Title 42 and lacks any pressing need or minimally persuasive excuse for failing to do so. President Biden issued an executive order on February 2, 2021, directing CDC and DHS to *consider* rescinding Title 42. Defendants thus had one day short of *fourteen months* to take public comment on potentially rescinding Title 42. They simply refused to do so. That willful failure to take public comments in that time is not “good cause” under the APA.

18. *Second*, Defendants ignore that while the initial promulgation of Title 42 invoked the good cause exception—because its issuance was during the rapidly unfolding beginning of the Covid-19 pandemic—the same is not true here. This Order arises two full years into the pandemic, where it is waning in some areas while a new variant threatens others. The exigency of the initial order simply does not exist here. There is no “pandemic exception” to notice-and-comment requirements, particularly two years into that pandemic.

19. *Third*, the CDC ignores that it *did take* public comment on the initial Title 42 Order under the Trump Administration, from March 24 to April 24, 2022, and then issued a final rule less than five months after the comment period closed. 85 Fed. Reg. 56424, 56488 (Sept. 11, 2020). There is no reason that the CDC could not have taken the same approach again here—and the CDC certainly does not supply any. The CDC is thus simply wrong in contending that the “extraordinary nature” of Title 42 orders necessarily eliminates the APA’s requirement for taking public comment, as its own actions demonstrate.

20. *Fourth*, the CDC’s rationale is self-refuting: if Defendants “need time” to implement

the Title 42 revocation, which the Order effectively concedes will be extraordinarily challenging, that is a reason to *take* comments so the agency can have the benefit of public input and can use the needed time to obtain it. Moreover, the disaster that the Administration correctly predicts could easily be less calamitous if they take suggestions from the public and states and incorporate those suggestions. But the CDC's arrogant assertion that there is *no value to be had* from public commenting does not constitute "good cause."

21. As to the foreign affairs exception, the CDC offers only a single unspecific sentence contending that "this Order concerns ongoing discussions with Canada, Mexico, and other countries regarding immigration and how best to control COVID-19 transmission over shared borders." Order at 29. That is patently insufficient.

22. The "foreign affairs exception applies in the immigration context only when ordinary application of the public rulemaking provisions [*i.e.*, taking public comment] *will provoke definitely undesirable international consequences*." *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 775–76 (9th Cir. 2018) (cleaned up) (emphasis added). But the CDC does not identify *any* potential "undesirable international consequences," let alone establish with certainty that such consequences will occur. Instead, the CDC's order merely alludes to the fact that the Administration is engaged in unspecified talks with Canada and Mexico about Covid-19. That is woefully insufficient. The Administration cannot evade notice-and-comment requirements by the expedient of simply talking with its neighboring countries about the same subject in lieu of seeking comment from its own citizens. But that is all Defendants offer here.

23. For these reasons, neither the good cause nor foreign affairs exceptions apply here. The CDC's refusal to take public comment thus violates the APA and alone requires invalidation of the Termination Order.

24. That conclusion is perhaps unsurprising. The Biden Administration's violation of no-



tice-and-comment requirements in the immigration context is by now notorious with federal courts. See, e.g., *Arizona v. Biden*, \_\_ F. Supp. 3d \_\_\_, 2022 WL 839672, at \*36 (S.D. Ohio Mar. 22, 2022) (holding that Plaintiffs states had established “strong likelihood the States prevail on their notice-and-comment claim” against DHS Permanent Guidance severely restricting immigration enforcement); *Texas v. United States*, \_\_ F. Supp. 3d \_\_\_, 2021 WL 3683913, at \*51-58 (S.D. Tex. Aug. 19, 2021) (holding that DHS’s issuance of Interim Guidance, which similarly and severely reduced removals of aliens with criminal convictions, violated notice-and-comment requirements); *Texas v. United States*, 524 F. Supp. 3d 598, 656-62 (S.D. Tex. 2021) (holding same for 100-day moratorium on immigration removals). Indeed, at oral argument Justice Kagan recently observed another potential violation by DHS, explaining that “[t]he real issue to me is [DHS’s] evasion of notice-and-comment.”<sup>16</sup>

25. The Termination Order also violates the APA as arbitrary and capricious decision-making. “[A]gency action is lawful only if it rests on a consideration of the relevant factors” and considers all “important aspects of the problem.” *Michigan v. EPA*, 576 U.S. 743, 750-52 (2015) (requiring “reasoned decisionmaking”). This means agencies must “examine all relevant factors and record evidence.” *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017).

26. The CDC’s Order is arbitrary and capricious most obviously because it expressly refuses to analyze the impacts it will have upon the States. That is, after all, an “important aspect of the problem.” *Michigan*, 576 U.S. at 752. Indeed, the Supreme Court has repeatedly recognized “the importance of immigration policy to the States,” particularly as the States “bear[] many of the consequences of unlawful immigration. *Arizona v. United States*, 567 U.S. 387, 397 (2012)

27. The CDC does not even attempt to deny that its Title 42 Termination Order will

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<sup>16</sup> Transcript at 47-48, *Arizona v. San Francisco*, No. 20-1775 (Feb. 23, 2022) available at <https://bit.ly/3itwfq7>

impose enormous costs upon the States. Nor did it make *any* attempt to analyze those substantial harms—even though it was legally required to do so under the APA. *See, e.g., Arizona v. Biden*, 2022 WL 839672, at \*30 (holding that DHS violated APA by providing “no explanation of how its policy—that relaxes mandatory detention standards set by Congress—might increase state criminal justice expenses”); *Texas v. United States*, 2021 WL 3683913, at \*49 (explicitly rejecting “the Government’s argument that it need not consider the States’ costs and expenses stemming from the new [immigration] guidelines” under the APA). Defendants thus violated the APA by failing to consider the impacts of their Order on the States, which is manifestly an “important aspect of the problem.” *Michigan*, 576 U.S. at 752.

28. Rather than attempting to analyze the costs that its Order will impose on the States *whatsoever*, CDC denies that it has any obligation to consider those harms *at all*. Instead, it reasons that “no state or local government could be said to have legitimately relied on the CDC [Title 42] Orders ... because those orders are, by their very nature, short-term orders, authorized only when specified statutory criteria are met, and subject to change at any time in response to an evolving public health crisis.” Order at 23.

29. The CDC’s argument fails for two reasons. *First*, regardless of the purported illegitimacy of the State’s reliance on the CDC’s Title 42 Orders, the CDC still had an obligation to consider the harms to the States since that is an “important aspect of the problem.” *Michigan*, 576 U.S. at 752. The CDC has no license to inflict wanton harms on the States without at least first considering what the magnitude of those harms might be and whether they could be mitigated if the agency considered alternatives with those harms in mind. *See, e.g., id.* at 759 (explain that agencies “must consider cost ... before deciding whether regulation is appropriate and necessary”). Here the CDC failed to do so—and indeed *expressly refused* to consider those harms. Defendants’ APA violation is thus *explicit and admitted*.

30. *Second*, even if the CDC were correct that the “short-term” nature of the Title 42 Orders—which have been in place for two entire years and counting—meant that the States could rely on the Orders being in place *permanently*, the States still could reasonably rely on the CDC not to revoke the Orders abruptly at a truly terrible time to do so. The Order’s timing will greatly exacerbate an already extant meltdown of operational control at the southern border—which even the Administration and its *supporters* fully expect. *Supra* ¶¶2-7, 10. Simply put, the States could reasonably rely on the CDC not suddenly revoking its Title 42 Orders now, thereby stacking crisis upon crisis—or in the words of DHS officer, inflicting a “surge on top of a surge.”

31. A second principal deficiency of the Termination Order is that it fails to analyze meaningfully the entirely predictable—and *actually predicted*—surge of illegal migration that it will cause. Indeed, the Administration has internally predicted that the Termination Order could triple the daily number of illegal aliens attempting to cross the border. *See infra* ¶¶ 90. But the Termination Order never meaningfully analyzes these impacts or considers ways in which they might be mitigated.

32. These are only the most flagrant of the defects of the Order. It is also arbitrary and capricious because it, for example, (1) failed to consider alternative effective dates, (2) failed to consider DHS’s inability to cope with the resulting surge and failure to plan adequately for it, (3) failed to consider the impacts of the fact that there are *huge* numbers of aliens waiting at the southern border to cross the moment that Title 42 is rescinded, and (4) failed to consider the cumulative effects of the rescission of the Title 42 rescission with the Administration’s attempted termination of the Migrant Protection Protocol, *see Texas v. Biden*, 20 F.4th 928, 990 (5th Cir. 2021) *cert. granted*, 142 S. Ct. 1098 (2022), whose impacts will snowball upon each other.

33. For all of these reasons, the CDC’s Title 42 Termination Order violates the APA many times over. This Court should accordingly “hold unlawful and set aside” that Order. 5 U.S.C.

§ 706(2).

## **PARTIES**

34. Plaintiff State of Arizona is a sovereign state of the United States of America. Arizona sues to vindicate its sovereign, quasi-sovereign, and proprietary interests. Arizona brings this suit through its Attorney General, Mark Brnovich. He is the chief legal officer of the State of Arizona and has the authority to represent the State in federal court. His offices are located at 2005 North Central Avenue, Phoenix, Arizona 85004.

35. Plaintiff State of Louisiana is a sovereign State of the United States of America. Louisiana sues to vindicate its sovereign, quasi-sovereign, and proprietary interests. Louisiana brings this suit through its Attorney General, Jeff Landry. He is authorized by Louisiana law to sue on the State's behalf. His offices are located at 1885 North Third Street, Baton Rouge, Louisiana 70802.

36. Plaintiff State of Missouri is a sovereign State of the United States of America. Missouri sues to vindicate its sovereign, quasi-sovereign, and proprietary interests. Missouri brings this suit through its Attorney General, Eric S. Schmitt. He is authorized by Missouri law to sue on the State's behalf. His address is P.O. Box 899, Jefferson City, Missouri 65102

37. Defendants are officials of the United States government and United States governmental agencies responsible for promulgating or implementing the Rule.

38. Defendant Centers for Disease Control and Prevention is constituent agency of the U.S. Department of Health and Human Services ("HHS"). It conducts specified functions under the Public Health Service Act, including exercising authority delegated by HHS.

39. Defendant Rochelle Walensky is the Director of the CDC. She is sued in her official capacity.

40. Defendant U.S. Department of Health and Human Services is an executive department of the United States Government.

41. Defendant Xavier Becerra is the Secretary of HHS. He is sued in his official capacity.

42. Defendant United States Department of Homeland Security (“DHS”) is an executive department of the United States Government.

43. Defendant Alejandro Mayorkas is the Secretary of Homeland Security and therefore the “head” of DHS with “direction, authority, and control over it.” 6 U.S.C. § 112(a)(2). Defendant Mayorkas is sued in his official capacity.

44. Defendant U.S. Customs and Border Protection (“USBP”) is an agency within DHS that is headquartered in Washington, D.C.

45. Defendant Christopher Magnus serves as Commissioner of USBP. Defendant Magnus is sued in his official capacity.

46. Defendant U.S. Immigration and Customs Enforcement (“ICE”) is an agency within DHS that is headquartered in Washington, D.C.

47. Defendant Tae Johnson serves as Acting Director of ICE. Defendant Johnson is sued in his official capacity.

48. Defendant U.S. Citizenship and Immigration Services (“USCIS”) is an agency within DHS that is headquartered in Camp Springs, Maryland.

49. Defendant Ur Jaddou serves as the Director for USCIS. Defendant Jaddou is sued in her official capacity.

50. Defendant U.S. Border Patrol is an agency within DHS that is headquartered in Washington, D.C.

51. Raul Ortiz serves as the Chief of the U.S. Border Patrol.

52. Defendant Department of Justice (“DOJ”) is an executive department of the United States Government.

53. Defendant Merrick Garland is the Attorney General of the United States of America. He is sued in his official capacity.

54. Defendant Executive Office for Immigration Review (“EOIR”) is an agency within DOJ that is headquartered in Bailey's Crossroads, Virginia.

55. Defendant David Neal is Director of EOIR. He is sued in his official capacity.

56. Defendant Joseph R. Biden, Jr., is the President of the United States. He is sued in his official capacity.

57. Defendant the United States of America is sued under 5 U.S.C. §§ 702–703 and 28 U.S.C. § 1346 and includes the departments and agencies thereof.

### **JURISDICTION AND VENUE**

58. This Court has subject-matter jurisdiction over this case because it arises under the Constitution and laws of the United States. *See* 28 U.S.C. §§1331, 1346, 1361; 5 U.S.C. §§701-06.

59. An actual controversy exists between the parties within the meaning of 28 U.S.C. §§2201(a), and this Court may grant declaratory relief, injunctive relief, and other relief under 28 U.S.C. §§2201-02, 5 U.S.C. §§705-06, 28 U.S.C. § 1361, and its inherent equitable powers.

60. Venue is proper in this Court under 28 U.S.C. §1391(e)(1) because (1) Defendants are United States agencies or officers sued in their official capacities, (2) the State of Louisiana is a resident of this judicial district, (3) no real property is involved, and (4) a substantial part of the events or omissions giving rise to the Complaint occur within this judicial district. *See Atlanta & F.R. Co. v. W. Ry. Co. of Ala.*, 50 F. 790, 791 (5th Cir. 1982); *Ass’n of Cmty. Cancer Centers v. Azar*, 509 F. Supp. 3d 482 (D. Md. 2020).

### **FACTUAL AND LEGAL BACKGROUND**

#### ***The INA’s Requirements***

61. The Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135, and the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, charge DHS with enforcing the United States' immigration laws. Under the immigration laws, “several classes of aliens are ‘inadmissible’ and therefore ‘removable.’” *Dept. of Homeland Sec. v. Thuraissigiam*, 140 S.Ct. 1959, 1964 (2020), citing 8 U.S.C. §§ 1182, 1229a(e)(2)(A). Among these classes are aliens who lack a valid entry document when they apply for admission. 8 U.S.C. § 1182(a)(7)(A)(i)(I). This includes aliens who arrive in the United States and aliens who are present in the United States without having been lawfully admitted, who are deemed to have applied for admission. 8 U.S.C. § 1225(a)(1).

62. An inadmissible alien may be removed; the usual process involves an evidentiary hearing before an immigration judge at which the alien may present evidence and argue against removal. *Thuraissigiam*, 140 S.Ct. at 1964. However, this process is slow, and while “removal is being litigated, the alien will either be detained, at considerable expense, or allowed to reside in this country, with the attendant risk that he or she may not later be found.” *Id.*

63. To address these problems, Congress created more expedited procedures that apply to aliens who are “present in the United States who [have] not been admitted” and to aliens “who arrive[] in the United States (whether or not at a designated port of arrival ...)[.]” 8 U.S.C. § 1225(a)(1).

64. These aliens are subject to expedited removal if they (1) are inadmissible because they lack a valid entry document; (2) have not “been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility”; and (3) are among those whom the Secretary of Homeland Security has designated for expedited removal. *Id.* § 1225(b)(1)(A). Once an immigration officer determines that such an alien is inadmissible, the alien must be ordered “removed from the United States without further hearing or review.” *Id.* § 1225(b)(1)(A)(i).

65. Whether subject to the standard removal process or the expedited process, aliens who intend to claim asylum or who claim a credible fear of persecution are not deportable while that claim is being investigated. *See* 8 U.S.C. §§ 1158, 1225(b)(1). But those aliens must be detained until their entitlement to asylum is determined. *Id.* § 1225(b)(2).

66. It has been generally accepted that DHS has the discretion as to whether to place aliens, other than unaccompanied children, into the standard removal process or into expedited removal. *See, e.g., Matter of M-S-*, 27 I&N Dec. 509, 510 (A.G. 2019); *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520, 524 (BIA 2011); 8 U.S.C. § 1232(a)(5)(D) (exception). Whichever path DHS chooses, aliens placed in removal proceedings must be detained until DHS has finished considering the asylum application or the removal proceedings. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 844–45 (2018), (citing 8 U.S.C. § 1225(b)(1), (2)). DHS may “for urgent humanitarian reasons or significant public benefit” temporarily parole these aliens, but it may do so “only on a case-by-case basis.” 8 U.S.C. § 1182(d)(5)(A).

67. Another class of inadmissible aliens is those who have a “communicable disease of public health significance[.]” 8 U.S.C. § 1182(a)(1)(A)(i). The INA defines a “communicable disease of public health significance” by referring to “regulations prescribed by the Secretary of Health and Human Services.” *Id.*

68. There are two circumstances under which aliens must be detained to determine whether they are inadmissible for public-health reasons. First, they must be detained if DHS has reason to believe they are “afflicted with” such a disease. 8 U.S.C. § 1222(a). Second, they must be detained if DHS “has received information showing that any aliens are coming from a country or have embarked at a place” where such a disease is “prevalent or epidemic[.]” This detention must enable “immigration officers and medical officers” to conduct “observation and an examination sufficient to determine whether” the aliens are inadmissible. *Id.*



***Covid-19 And The Requirements of the PHSA***

69. In the words of the CDC itself, Covid-19 “is a quarantinable communicable disease caused by the SARS-CoV-2 virus.” Order Suspending the Right to Introduce Certain Persons, 86 Fed. Reg. 42,828, 42,830 (Aug. 5, 2021). Since it emerged in late 2019, “SARS–CoV–2, the virus that causes COVID–19, has spread throughout the world, resulting in a pandemic.” *Id.*

70. Since COVID-19 was first declared a public-health emergency in January 2020, “the U.S. government and CDC have implemented a number of COVID–19 mitigation and response measures.

71. The first Title 42 Order was issued on March 24 as an interim final rule. 85 Fed. Reg. 16,559 (Mar. 24, 2020). At the same time, the CDC expressly invited “comment on all aspects of this interim final rule, including its likely costs and benefits and the impacts that it is likely to have on the public health, as compared to the current requirements under 42 CFR part 71.” *Id.* at 16,559.

72. After receiving 218 comments during the 30-day comment window that closed April 24, 2020, the CDC published a final rule September 11, 2020; that rule “establishe[d] final regulations under which the Director [of the CDC] may suspend the right to introduce and prohibit, in whole or in part, the introduction of persons into the United States for such period of time as the Director may deem necessary to avert the serious danger of the introduction of a quarantinable communicable disease into the United States.” 85 Fed. Reg. 56,424, 56,424, 56, 448 (Sep. 11, 2020) (codified at 42 C.F.R. § 71.40). This Final Rule, issued under the authority granted by the PHSA, 42 U.S.C. § 265, became effective October 13, 2020. On October 13, 2020, the day the Final Order became effective, the CDC issued its Order Suspending the Right to Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists. 85 Fed. Reg. 65,806–12 (Oct. 13, 2020). Collectively, the Final Rule and this October Order work together in a process generally known as “Title 42” or “Title 42 Order(s).”

73. Though issued under the Final Rule, the October Order was the latest in a series of orders issued under the original March 24, 2020 interim final rule. As had the earlier orders, the October Order suspended introducing covered aliens into the United States, a suspension lasting until CDC determined that “the danger of further introduction of COVID-19 into the United States has ceased to be a serious danger to the public health[.]” 85 Fed. Reg. at 65,810. The suspension was based on findings that:

- COVID-19 is a communicable disease that poses a danger to the public health;
- COVID-19 is present in numerous foreign countries, including Canada and Mexico;
- Because COVID-19 is so globally widespread, there is a serious danger that it will be carried into the land points of entry and Border Patrol stations at or near the United States’ borders with Canada and Mexico, and from there into the interior of the country;
- If their entry were not suspended, covered aliens would be go through immigration processing at the land points of entry and Border Patrol stations that would require many of them (typically aliens who lack valid travel documents and are therefore inadmissible) to be held in the congregate areas of the facilities, in close proximity to one another, for hours or days;
- Holding them in such settings would increase the already serious danger to the public health of the United States; and
- This increased danger rose to the level that it required a temporary suspension of the introduction of covered aliens into the United States.

*Id.*

74. Customs and Coast Guard officers have the duty to “aid in the enforcement of quarantine rules and regulations,” PHSA, 42 U.S.C. § 268, and the Order noted that the CDC had requested “that DHS aid in the enforcement [of] this Order because CDC does not have the capabil-

ity, resources, or personnel needed to do so.” *Id.* at 65,812. The CDC needed this assistance because of its own public health tools not being “viable mechanisms given CDC resource and personnel constraints, the large numbers of covered aliens involved, and the likelihood that covered aliens do not have homes in the United States.” *Id.*

75. The October Order applied to all covered aliens, defined as aliens “seeking to enter the United States ... who lack proper travel documents,” “whose entry is otherwise contrary to law,” or “who are apprehended at or near the border seeking to unlawfully enter the United States.” *Id.* at 65,807.

76. The October Order noted that expulsions under CDC’s prior orders had “reduced the risk of COVID-19 transmission in [points of entry] and Border Patrol Stations, and thereby reduced risks to DHS personnel and the U.S. health care system.” *Id.* It further noted that “[t]he public health risks to the DHS workforce—and the erosion of DHS operational capacity—would have been greater” without the initial suspension order. Further, the suspension orders “significantly reduced the population of covered aliens in congregate settings in [points of entry] and Border Patrol stations, thereby reducing the risk of COVID-19 transmission for DHS personnel and others within these facilities.” *Id.*

77. DHS began using its Title 42 authority to expel aliens in March 2020, and the population of aliens processed under Title 8 (the ordinarily applicable immigration rules) plummeted. Out of more than 253,000 total southwest border encounters under Title 8 in Fiscal Year 2020, fewer than 25,000 occurred in the last six months of the year.<sup>17</sup> During that same six-month period, nearly 200,000 aliens were rapidly expelled under Title 42.

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<sup>17</sup> The CBP statistics cited in this Complaint are available at *Sw. Border Land Encounters*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> (last visited Aug. 23, 2021).

78. On July 19, 2021, the CDC issued a new order excepting unaccompanied children from the October Order. Public Health Determination Regarding an Exception for Unaccompanied Noncitizen Children, 86 Fed. Reg. 38,717 (July 22, 2021) (signed July 19, 2021)

79. On August 3, 2021, Defendants issued an order superseding the October Order and incorporating by reference the July Order excepting unaccompanied children. Public Health Reassessment and Order Suspending the Right to Introduce Certain Persons, 86 Fed. Reg. 48,828 (Aug. 5, 2021) (“August Order”).

80. The August Order summarized the current state of emergency and nature of the pandemic:

- “Congregate settings, particularly detention facilities with limited ability to provide adequate physical distancing and cohorting, have a heightened risk of COVID-19 outbreaks.” *Id.* at 42,833. CBP facilities themselves have “[s]pace constraints [that] preclude implementation of cohorting and consequence management such as quarantine and isolation.” *Id.* at 42,837.
- “Countries of origin for the majority of incoming covered [aliens] have markedly lower vaccination rates.” Of the top five originating countries, El Salvador, at 22%, had the highest rate of vaccinated persons; Guatemala and Honduras, the two lowest, had 1.6% and 1.8%, respectively. *Id.* at 42,834 & n.57.

81. The August Order concedes that “the flow of migration directly impacts not only border communities and regions, but also destination communities and healthcare resources of both.” 86 Fed. Reg. at 42,835. It came only days after the Defendants released more than 1,500 COVID-positive unauthorized immigrants into the city of McAllen, Texas.<sup>18</sup>

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<sup>18</sup> Adam Shaw & Bill Melugin, “Texas border city says more than 7,000 COVID-positive migrants released since February, 1,500 in last week,” FOX NEWS (Aug. 4, 2021),

82. On March 11, 2022, CDC Director Walensky issued a new order (the “March Order”) superseding the August Order. 87 Fed. Reg. 15243. The March Order apparently was issued in response to litigation in Texas<sup>19</sup> challenging Defendants’ practice of not applying Title 42 to unaccompanied alien children (“UAC”). The March Order found that suspending entry of UACs was “not necessary to protect U.S. citizens,” and that the August Order’s provisions were terminated as to UACs, but not as to “individuals in family units (FMU) or single adults (SA).” 87 Fed. Reg. 15243, 15245.

***Termination of the August and March Orders***

83. On April 1, 2022, CDC Director Walensky issued an order terminating the Title 42 policy (the “Termination Order”) effective May 23, 2022. Exhibit A, Public Health Determination And Order Regarding The Right To Introduce Certain Persons From Countries Where A Quarantinable Communicable Disease Exists, CDC (Apr. 1, 2022), available at <https://www.cdc.gov/coronavirus/2019-ncov/cdcresponse/Final-CDC-Order-Prohibiting-Introduction-of-Persons.pdf>.

84. The Termination Order claimed that it was “not a rule subject to notice and comment under the Administrative Procedure Act.” Ex. A at 29. It did so on two putative bases. First it asserted the good cause exception applied because “it would be impracticable and contrary to the public interest.” Second, it asserted that the APA’s foreign affairs exception by claiming without offering any detail or explanation that “this Order concerns ongoing discussions with Canada, Mexico, and other countries regarding immigration and how best to control COVID-19 transmission over shared borders.” *Id.*

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<https://www.foxnews.com/politics/texas-border-city-covid-positive-migrants-released-february-last-week>.

<sup>19</sup> *Texas v. Biden*, 21-cv-00579 (N.D. Tex.)

85. Even members of President Biden’s own party have criticized the Termination Order. Senator Joe Manchin warned in a letter to President Biden that, “[w]ith encounters along our southern border surging and the highly transmissible Omicron BA.2 subvariant emerging as the dominate strain in the United States, now is not the time to throw caution to the wind” and cancel the Title 42 policy.<sup>20</sup>

***Harms to Plaintiffs***

86. States “bear[] many of the consequences of unlawful immigration.” *Arizona v. United States*, 567 U.S. 387, 397 (2012). They are, however, limited in their ability to “engage in” their own immigration “enforcement activities.” *Id.* at 410. The States thus rely significantly on the federal government to fulfill its duties under the immigration laws, particularly when Congress has created mandatory obligations or otherwise limited the federal government’s discretion.

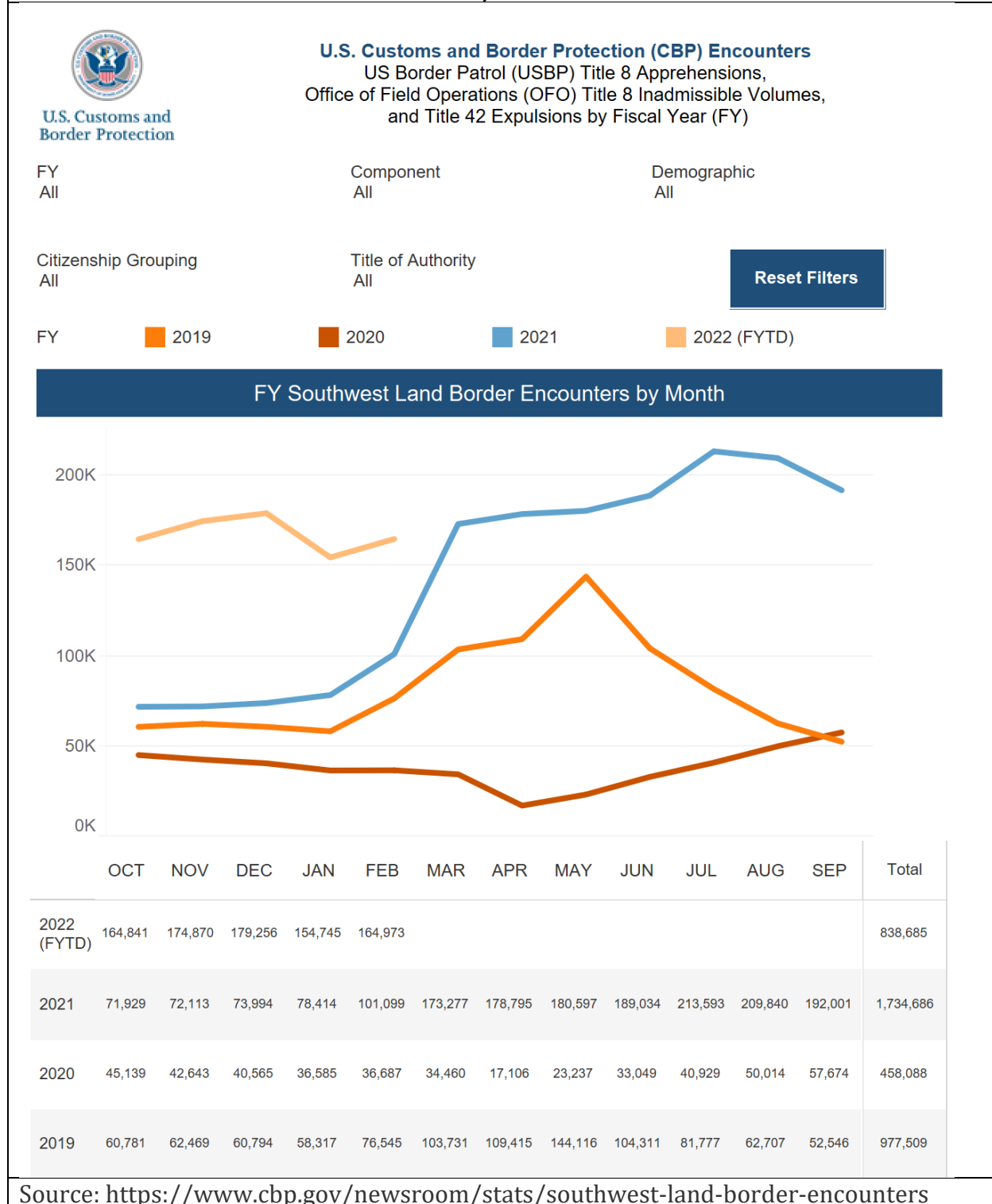
87. As a result, there is little the States can do about the thousands of aliens entering the United States. Record numbers of aliens are already attempting to cross the border illegally.

88. DHS’s own statistics show the dramatic increases in the number of crossings into the United States—even with Title 42 in place. Indeed, current levels of illegal crosses are at their highest levels in at least two decades, and perhaps ever. The following is DHS’s own chart graphically showing these enormous increases in crossings:

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<sup>20</sup> Joe Manchin, Ltr. to President Biden, (Mar. 29, 2022), <https://bit.ly/3J4e2dF>.

Table 1: DHS Southwest Border Encounters By Month



89. DHS sources have indicated that “there have been more than 300,000 known ‘gotaways’ —migrants who were not apprehended or turned themselves in and who got past agents -- since fiscal year 2022 began on October 1st.”<sup>21</sup> In addition, “former Border Patrol Chief Rodney Scott said there had been approximately 400,000 gotaways in the entirety of FY 2021.”<sup>22</sup>

90. Defendants’ unlawful termination of the Title 42 policy will induce a significant increase of illegal immigration into the United States, with many migrants asserting non-meritorious asylum claims. Indeed, press reports state that Defendants themselves predict that the Termination Order will create an unprecedented surge at the border that will overwhelm Defendants’ capacity to enforce immigration laws at the border—they predict that the daily number of aliens unlawfully trying to enter the United States will nearly *triple*.<sup>23</sup> White House Communications Director Kate Bedingfield admitted on the record that the Termination Order will cause “an influx of people to the border.”<sup>24</sup> This predicted influx will injure the Plaintiff States in multiple ways, including through increased expenditures on health care, education, and law enforcement, as well as through increased numbers of crimes.

91. Another district court in this Circuit has found that reducing the likelihood that an alien will be released into the United States reduces the number of aliens who attempt to enter the United States illegally. *Texas v. Biden*, No. 2:21-cv-67, 2021 WL 3603341, at \*6, \*18–19 (N.D. Tex. Aug. 13, 2021); cf. *Zadvydas v. Davis*, 533 U.S. 678, 713 (2001) (Kennedy, J., dissenting). (“An alien ...

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<sup>21</sup> Melugin, BillFox News, *62,000+ illegal immigrants got past Border Patrol agents in March: sources* (April 1, 2022), <https://fxn.ws/37fqLNq>.

<sup>22</sup> *Id.*

<sup>23</sup> Nick Miroff and Maria Sacchetti, “Biden officials bracing for unprecedented strains at Mexico border if pandemic restrictions lifted,” *The Washington Post*, Mar. 29, 2022, <https://www.washingtonpost.com/national-security/2022/03/29/border-pandemic-title-42-immigration/>.

<sup>24</sup> Maria Sacchetti and Nick Miroff, “Biden administration to lift pandemic border restrictions,” *The Washington Post*, Mar. 30, 2022, <https://www.washingtonpost.com/national-security/2022/03/30/title-42-border-restrictions-no-longer-needed-public-health-cdc-says/>.



has less incentive to cooperate or to facilitate expeditious removal when he has been released, even on a supervised basis, than does an alien held at an [ICE] detention facility.”)

92. Defendants’ unlawful termination of the Title 42 policy creates incentives to cross the border illegally by reducing the cost of being apprehended. Just as with the Migrant Protection Protocols, by removing the carrot of admission into the United States, reduced the number of false asylum claimants by requiring potential asylees to remain in Mexico, *Texas*, 2021 WL 3603341, at \*6, \*18–19, the Defendants, by removing the stick of mandatory detention, increase the number of illegal entries into the United States by erasing the possibility that an apprehension will result in anything other than the freedom to remain in the United State

93. Since 1982, the Supreme Court has mandated that States provide public education to school-age aliens not lawfully in the United States. *Plyler v. Doe*, 457 U.S. 202, 230 (1982). As a direct result of the influx of migrants that the Termination Order will cause, some of whom will be minors, the Plaintiff States will be compelled to spend additional moneys on education for these additional immigrants. The Termination Order is thus a direct, but-for cause of these imminent injuries.

94. The presence of these aliens in each State violates each State’s quasi-sovereign interest in its territory and the welfare of their citizens.

95. The Termination Order will cost Plaintiffs millions, as explained in further detail below.

### **Arizona**

96. As a border state, Arizona is acutely affected by modifications in federal policy regarding immigration.

97. Defendant DHS has previously recognized that Arizona “is directly and concretely affected by changes to DHS rules and policies that have the effect of easing, relaxing, or limiting immigration enforcement. Such changes can negatively impact [Arizona’s] law enforcement needs

and budgets, as well as its other important health, safety, and pecuniary interests of the State of Arizona.” Exhibit B, Memorandum of Understanding Between DHS and the State of Arizona at 2. DHS has also recognized that “rules, policies, procedures, and decisions that could result in significant increases to the number of people residing in a community” will “result in direct and concrete injuries to [Arizona], including increasing the rate of crime, consumption of public benefits and services, strain upon the healthcare system, and harm to the environment, as well as increased economic competition with the State of Arizona 's current residents for, among other things, employment, housing, goods and services.” *Id.* at 3.

98. Arizona is required to expend its scarce resources when DHS acts unlawfully to induce increased illegal immigration. This includes resources expended by Arizona’s law enforcement community.

99. Arizona bears substantial costs of incarcerating unauthorized aliens, which amounts to tens of millions of dollars each year, as reflected by Arizona’s State Criminal Assistance Program (SCAAP) requests, the great majority of which are not reimbursed by the federal government.

100. Arizona has approximately 275,000 to 365,000 immigrants living in the State that are not lawfully in the United States; more than 50% of them do not have health insurance.<sup>25</sup>

101. Drug cartels use human trafficking routes to also traffic illegal drugs into the United States. Increased illegal immigration means increased quantities of illegal drugs. For example, drug

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<sup>25</sup> The number of unauthorized aliens is notoriously difficult to calculate. Several studies, however, estimate the number of unauthorized aliens in Arizona to be in this approximate range. *See, e.g.*, Unauthorized Immigrant Population Profiles, Migration Policy Institute, <https://www.migrationpolicy.org/programs/us-immigration-policy-program-data-hub/unauthorized-immigrant-population-profiles#AZ> (273,000, 54% uninsured); U.S. unauthorized immigrant population estimates by state, Pew Research Center (2016), <https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/> (275,000); The Fiscal Burden of Illegal Immigration, Federation for American Immigration Reform (2017), <http://fairus.org/sites/default/files/2017-09/Fiscal-Burden-of-Illegal-Immigration-2017.pdf> (365,000).

cartels coordinate surges of unauthorized immigrants who cross the border in large groups and then make non-meritorious asylum claims. This serves as a distraction to Border Patrol personnel. While all available Border Patrol personnel are busy processing these aliens' asylum claims, they are unable to patrol the border, which allows drug mules to enter the United States unimpeded. Individuals believed to be cartel drug smugglers are regularly caught on camera crossing the border, dressed in camouflage and carrying weapons to protect their drug loads.<sup>26</sup> Cartel scouts appear to even brazenly “occupy strategically-selected hilltops for dozens of miles inside Arizona,” establishing a presence on American territory to track Border Patrol movements and coordinate surges of aliens entering the United States.<sup>27</sup> Even the drugs themselves are becoming more dangerous, as smugglers are trading large bags of marijuana for smaller packs of more potent “cocaine, fentanyl, heroin, [and] meth.”<sup>28</sup> In December 2021, police in Scottsdale, Arizona seized 1.7 million fentanyl pills that were worth \$9 million; they also seized ten kilograms of powdered fentanyl and one pound of methamphetamine.<sup>29</sup> The seized drugs were from the Sinaloa Cartel.<sup>30</sup> According to the DEA, “[t]he Sinaloa Cartel pri-

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<sup>26</sup> Brian Brennan, *People don't need to die': Border rancher deals with constant flow of migrants, drug packers*, KGUN 9 (May 20, 2019), <https://www.kgun9.com/border-watch/people-dont-need-to-die-border-rancher-deals-with-constant-flow-of-migrants-drug-packers>

<sup>27</sup> U.S. House of Representatives, Committee on Homeland Security, *Testimony of Jim Chilton on “Examining the Effect of Border Wall on Private and Tribal Landowners”*, (February 27, 2020), <https://homeland.house.gov/imo/media/doc/Testimony%20-%20Chilton1.pdf>

<sup>28</sup> Natasha Yee, *As marijuana profits fade, cartels increasingly smuggle fentanyl across the border*, (October 18, 2021), <https://gilaherald.com/as-marijuana-profits-fade-cartels-increasingly-smuggle-fentanyl-across-the-border/>

<sup>29</sup> Steven Hernandez, *Scottsdale police, DEA seize record 1.7 million fentanyl pills in Arizona*, Arizona Republic, (Dec. 16, 2021), <https://www.azcentral.com/story/news/local/phoenix-breaking/2021/12/16/authorities-arizona-seize-9-million-fentanyl-pills-narcotics/8929613002/>

<sup>30</sup> *Id.*

marily uses trafficking routes that go through Arizona,”<sup>31</sup> and the Phoenix area is a major cartel drug trans-shipment hub.<sup>32</sup>

### Louisiana

102. Plaintiff Louisiana is also gravely injured by the Termination Order. Louisiana is required to stretch its scarce resources even further when DHS fails to carry out its statutory duties to enforce immigration law. The Rule will create increased crime and drug trafficking in Louisiana’s communities, requiring additional expenditure by law enforcement. In addition, by incentivizing further illegal immigration, the Rule will force Louisiana to expend limited resources on education, healthcare, public assistance, and general government services.

103. Defendant DHS has previously recognized that Louisiana “is directly and concretely affected by changes to DHS rules and policies that have the effect of easing, relaxing, or limiting immigration enforcement. Such changes can negatively impact [Louisiana’s] law enforcement needs and budgets, as well as its other important health, safety, and pecuniary interests of the State of Arizona.” Exhibit C, Memorandum of Understanding Between DHS and the Louisiana Department of Justice at 2. DHS has also recognized that “rules, policies, procedures, and decisions that could result in significant increases to the number of people residing in a community” will “result in direct and concrete injuries to [Louisiana], including increasing the rate of crime, consumption of public benefits and services, strain upon the healthcare system, and harm to the environment, as well as increased economic competition with the State of Louisiana's current residents for, among other things, employment, housing, goods and services.” *Id.* at 3.

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<sup>31</sup> *Id.*

<sup>32</sup> Alex Gallagher, *Record fentanyl seizure by Scottsdale cops, DEA*, Scottsdale Progress, (Dec. 19, 2021), [https://www.scottsdale.org/news/record-fentanyl-seizure-by-scottsdale-cops-dea/article\\_fbf7c02e-6074-11ec-91ab-b35932ed58da.html](https://www.scottsdale.org/news/record-fentanyl-seizure-by-scottsdale-cops-dea/article_fbf7c02e-6074-11ec-91ab-b35932ed58da.html)

104. Louisiana has approximately 70,000 to 78,000 aliens living in the State that are not lawfully in the United States; more than 70% of them do not have health insurance.<sup>33</sup>

105. DHS operates multiple alien detention facilities in the Western District of Louisiana, including the Pine Prairie ICE Processing Center in Pine Prairie, Louisiana, and others in Oberlin, Plain Dealing, Jonseboro, Jena, Natchitoches, Monroe, Ferriday, Basile, and Winnfield, Louisiana. DHS releases illegal aliens from those detention facilities to Louisiana cities throughout the Western District, including Lafayette, Monroe and Shreveport. Releases in Lafayette are so common that a California business advertises “immigration bail bonds in Lafayette” and urges illegal immigrants and their families to “contact our Lafayette bail bondsmen” “if you have a family member who finds him or herself in custody of [DHS].” Upon information and belief, DHS “paroles” many illegal immigrants into Louisiana cities without even the minimal security of a bond. The Termination Order will increase the use of DHS detention facilities and lead to the increased release of aliens into the Western District and throughout the State.

### **Missouri**

106. Missouri is directly and adversely affected by increases in illegal immigration at the southern border. Based on recent statistics, approximately 56 out of every 1,000 unlawful aliens who enter the United States end up residing in Missouri. These unlawful aliens impose pocketbook injuries on Missouri in the form of education, healthcare, and criminal-justice costs. These pocketbook injuries are irreparable because Missouri has no plausible recourse to recoup them.

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<sup>33</sup> See, e.g., Unauthorized Immigrant Population Profiles, Migration Policy Institute, <https://www.migrationpolicy.org/programs/us-immigration-policy-program-data-hub/unauthorized-immigrant-population-profiles#LA> (70,000, 73% uninsured); U.S. unauthorized immigrant population estimates by state, Pew Research Center (2016), <https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/> (70,000); The Fiscal Burden of Illegal Immigration, Federation for American Immigration Reform (2017), <http://fairus.org/sites/default/files/2017-09/Fiscal-Burden-of-Illegal-Immigration-2017.pdf> (78,820).

107. “Missouri likewise faces a cost of verifying lawful immigration status for each additional customer seeking a Missouri driver’s license.” *Texas*, 2021 WL 3603341, at \*10. The total costs to ... Missouri ... of providing public education for illegal alien children will rise in the future as the number of illegal alien children present in the State increases.” *Id.*

108. “Some aliens who ... are being released or paroled into the United States and will use state-funded healthcare services or benefits in ... Missouri.” *Id.* “The total costs to the State will increase as the number of aliens within the state increases.” *Id.*

109. Missouri is also a destination state and hub for human-trafficking crimes within the United States, due to its situation at the confluence of several major interstate highways. Such crimes disproportionately afflict illegal aliens, and these crimes (and other crimes committed by illegal aliens) impose irreparable law-enforcement and criminal-justice costs on Missouri. As another district court recently found, “[s]ome aliens who ... are being released or paroled into the United States and will commit crimes in ... Missouri,” and “Missouri is ... a destination and transit State for human trafficking of migrants from Central America who have crossed the border illegally.” *Id.* Both crimes committed by unlawful aliens, and human-trafficking crimes committed by and against unlawful aliens, inflict irreparable costs on Missouri, both in law-enforcement costs and providing resources for victims. “Human trafficking” arising from and involving increases in unlawful immigration “causes fiscal harm to ... Missouri.” *Id.*

110. An increased influx of illegal aliens also affect the labor market and reduce job opportunities for U.S. citizens and lawfully present aliens in Missouri, as illegal aliens frequently compete for jobs at lower wages than workers who are lawfully present. Missouri is a State with large agricultural sector. The presence of large numbers of unlawful aliens distorts Missouri’s job markets and inflicts irreparable injury on both the State and its citizens.

**All Plaintiffs**

111. The CDC's Termination Order will result in the entry of tens or hundreds of thousands of aliens unlawfully entering the United States, who would not be able to gain entry into the United States. This, in turn, will cause Plaintiff States to spend money on healthcare, detention, education, and other services for aliens that would otherwise not have to be spent. For example, Arizona, Louisiana, and Missouri are required to spend state monies on Emergency Medicaid, including for unauthorized aliens. 42 C.F.R. § 440.255(c).

112. By ignoring the requirements of the INA and PHSA, and thus facilitating the entry of unauthorized aliens into the United States, the Termination Order encourages a greater influx of unauthorized aliens into Plaintiff States, further increasing law enforcement costs in Plaintiff States, including costs related to coordinated activity between federal and state law enforcement agencies in the pursuit of suspected unauthorized aliens.

113. Federal law also requires that emergency medical services be provided to unlawfully present aliens. 42 C.F.R. § 440.255(c).

114. Plaintiff States' emergency medical providers deliver millions of dollars in medical services to unauthorized aliens each year. These costs are not fully reimbursed by the federal government or the aliens themselves.

115. While these costs are impactful in typical years, the COVID-19 pandemic makes the potential for harm to Plaintiff States through additional emergency healthcare costs to unauthorized aliens exceptionally high.

116. The Termination Order necessarily increases the number of aliens in Arizona, Louisiana, and Missouri who are subject to receiving such medical care at the expense of Plaintiff States' healthcare institutions.

117. The Termination Order will allow a far greater number of aliens with meritless asylum claims to enter the United States. Such aliens rarely leave the United States of their own accord, and Defendants rarely remove such aliens, even after their asylum claims have been denied. The Termination Order will therefore increase Plaintiff States' costs of providing emergency medical care to these individuals who would otherwise never have been allowed into the United States. Additionally, the Termination Order encourages a greater influx of unauthorized aliens into Plaintiff States, further increasing the population of unauthorized aliens for whom Plaintiff States must bear the cost of emergency medical care, education, and other social services.

## CLAIMS FOR RELIEF

### COUNT I

#### Administrative Procedure Act, 5 U.S.C. § 706(2)(D) Lack of Notice and Comment

118. Plaintiff States repeat and incorporate by reference each of the Complaint's allegations stated above.

119. The APA provides that courts must "hold unlawful and set aside agency action" that is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

120. The APA requires agencies to publish notice of all "proposed rule making" in the Federal Register, *id.* § 553(b), and to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," *id.* § 553(c). The Termination Order, therefore, only can be issued, if at all, pursuant to notice-and-comment rulemaking under the APA. 5 U.S.C. § 553.

121. Such requirements "are not mere formalities" but rather "are basic to our system of administrative law." *NRDC v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 115 (2d Cir. 2018). "Section 553 was enacted to give the public an opportunity to participate in the rule-making process. It also enables the agency promulgating the rule to educate itself before establishing rules and pro-



cedures which have a substantial impact on those who are regulated.” *U.S. Dep’t of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1153 n.17 (5th Cir. 1984); *see also NRDC*, 894 F.3d at 115 (notice and comment serves “the public interest by providing a forum for the robust debate of competing and frequently complicated policy considerations having far-reaching implications and, in so doing, foster reasoned decisionmaking”); *Spring Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (notice and comment “ensures fairness to affected parties[] and provides a well-developed record that enhances the quality of judicial review”).

122. The Defendants did not conduct the statutorily required notice-and-comment process for the Termination Order.

123. The Termination Order is not an interpretive rule, general statement of policy, nor is it a rule of agency organization, procedure, or practice otherwise exempt from notice-and-comment rulemaking. Rather, the Termination Order is a substantive rule for APA purposes because it binds agency discretion. 5 U.S.C. § 551(4)–(5). Further, it is a final order because it represents the culmination of the agency’s consideration and affects the rights and obligations of those to whom they apply. Indeed, the title of the Termination Order the “right” affected by the rule, specifically “the right to introduce certain persons from countries where a quarantinable communicable disease exists.” Ex. A at 1.

124. The CDC offered two bases for excusing notice-and-comment requirements: the good cause exception and the foreign affairs exception. Ex. A at 29. In assessing whether good cause exists, this Court “must rely only on the ‘basis articulated by the agency itself’ at the time of the rulemaking. ‘Post hoc explanations’” do not suffice. *United States v. Johnson*, 632 F.3d 912, 928 (5th Cir. 2011) (cleaned up).

125. The good-cause exception to the APA’s notice-and-comment requirement does not apply here, and Defendants’ rationale for invoking that exception is insufficient as a matter of law. *See supra* ¶¶15-20.

126. Defendants’ attempt to invoke the good cause exception ignores that there is a difference between putting in place emergency measures against the backdrop of a rapidly *escalating* pandemic of epic proportions versus taking action in the context of a slowly *dissipating* pandemic—it may be an emergency at the start of the pandemic, when quick action is needed, but not when it is tapering off slowly at a predictable pace. For example, there was ample time for Defendants to notify the public of its intention to revoke and to gather and consider comments on that proposal. On February 2, 2021, President Biden signed Executive Order 14010, in which he ordered that “[t]he Secretary of HHS and the Director of CDC, in consultation with the Secretary of Homeland Security, shall promptly review and determine whether termination, rescission, or modification of the [Title 42 orders] is necessary and appropriate.” 86 Fed. Reg. 8267. Defendants have therefore been considering the ending Title 42 for over 14 months. Defendants have had ample time to put potential termination up for notice-and-comment. And Defendants’ preparations for the Termination Order has apparently been continuous up until the moment of its issuance. On March 17, 2022, in response to a question about the possible termination of the Title 42 policy, White House spokesperson Vedant Patel affirmed that “the Administration is doing our due diligence to prepare for potential changes at the border.”<sup>34</sup> Apparently, however, that diligence did not include fulfilling the Administration’s legal obligation under the APA to subject their planned policy change to notice and comment.

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<sup>34</sup> Jonathan Swan and Stef W. Kight, “Scoop: Biden officials fear “mass migration event” if COVID policies end,” Axios, Mar. 17, 2022, <https://www.axios.com/biden-border-mexico-migrants-title-42-a91b6441-2197-463f-ab1f-2435824a9566.html>.

127. Nor does the foreign affairs exception to the APA’s notice-and-comment requirement apply. “[T]he foreign affairs exception requires the Government to do more than merely recite that the Rule ‘implicates’ foreign affairs.” *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 775 (9th Cir. 2018). A mere “reference in [a] Rule ... to our ‘southern border with Mexico’ is not sufficient.” *Id.* Thus, “the foreign affairs exception applies in the immigration context only when ordinary application of the public rulemaking provisions will provoke definitely undesirable international consequences.... [I]t would be problematic if incidental foreign affairs effects eliminated public participation in this entire area of administrative law.” *Id.* at 776 (cleaned up) (citations and quotation marks omitted).

128. In the immigration context, the foreign affairs exception only applies if “the public rulemaking provisions [w]ould provoke definitely undesirable international consequences”; otherwise, “the foreign affairs exception would become distended.” *Zhang v. Slattery*, 55 F.3d 732, 744 (2d Cir. 1995) (citation omitted), superseded by statute on other grounds, by 8 U.S.C. § 1101(a)(42). In the Termination Order, Defendants never even claim at all that the Title 42 policy—either its continuance or termination—implicates any “undesirable international consequences.” Instead, Defendants attempt to invoke the foreign affairs exception merely by making the obvious and unexceptional disclosure that the Title 42 policy “concerns ongoing discussions with Canada, Mexico, and other countries regarding immigration.” Ex. A at 29. This weak attempt to invoke the foreign affairs exception is insufficient. That the United States is engaged in “ongoing discussions with Canada, Mexico, and other countries” *id.* at 29, does not entitle the Defendants to except the Termination Order from the APA’s procedures. There is no evidence that complying with the APA’s rulemaking procedures would cause a diplomatic incident.

129. Under these circumstances, Defendants’ failure to comply with the APA’s notice and comment provisions is fatal to the Rule. *Id.* at 928-29 (“Without good cause, we must enforce Congress’s choice in favor of the traditional, deliberative rulemaking process.”).

**COUNT II**  
**Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C)**  
**Arbitrary and Capricious Agency Action**  
**Contrary to 8 U.S.C. §§ 103(g)**

130. Plaintiff States repeat and incorporate by reference each of the Complaint’s allegations stated above.

131. Under the APA, a court must “hold unlawful and set aside agency action” that is arbitrary or capricious or otherwise not in accordance with law or contrary to the Constitution. 5 U.S.C. §706(2)(A).

132. “[A]gency action is lawful only if it rests on a consideration of the relevant factors” and “important aspects of the problem.” *Michigan v. EPA*, 576 U.S. 743, 750-52 (2015) (requiring “reasoned decisionmaking”). This means agencies must “examine all relevant factors and record evidence.” *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017).

133. For starters, an agency cannot “entirely fail[] to consider an important aspect of the problem.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Gresham v. Azar*, 363 F. Supp. 3d 165, 177 (D.D.C. 2019) (“The bottom line: the Secretary did no more than acknowledge—in a conclusory manner, no less—that commenters forecast a loss in Medicaid coverage.”).

134. Further, agencies must actually analyze the relevant factors. “Stating that a factor was considered ... is not a substitute for considering it.” *Texas v. Biden*, 10 F.4th 538, 556 (5th Cir. 2021) The agency must instead provide more than “conclusory statements” to prove it considered the relevant statutory factors. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016).

135. The Termination Order is arbitrary and capricious for several independently sufficient reasons.

136. *First*, Defendants failed to estimate or account for the costs to the States of the Termination Order, such as the increased health care costs for aliens infected with COVID-19 and the cost of increased illegal immigration caused by the Termination Order, and the presence of much greater numbers of paroled aliens with non-meritorious asylum claims who were induced to enter the United States because of the Termination Order.

137. Federal policy as it relates to immigration “has more than just an incidental effect on the States” because “the States engage in an immigration cost-sharing partnership” with the federal government. *Arizona*, 2022 WL 839672, at \*24. Defendants, therefore “cannot so easily dismiss how [their] administration of the immigration laws impacts the States.” *Id.* “Immigration ‘ha[s] a discernable impact on traditional state concerns,’ considering that ‘unchecked unlawful migration might impair the State’s economy generally, or the State’s ability to provide some important service.’” *Id.* at \*30 (quoting *Plyler*, 457 U.S. at 228 n.23) (alteration in original).

138. Thus, when DHS “only considered whether its enforcement policies generally influence state expenditures” and “gave no explanation of how its policy ... might increase state criminal justice expenses,” the Southern District of Ohio recently found that DHS had “‘entirely failed to consider’ an important consequence of its policy,” and its rule was therefore arbitrary and capricious. *Id.* (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The CDC has committed the same APA violation here by disclaiming any responsibility for analyzing negative impacts on the States from its Termination Order.

139. *Second* and relatedly, the Termination Order is arbitrary and capricious because the Defendants did not consider Plaintiffs States’ reliance interests in the continuation of the Title 42 policy. In particular, the Defendants did not consider whether States relied on continuation of the

Title 42 policy when Plaintiffs determined how they would marshal and distribute their resources to address the public-health, safety, and economic effects of the COVID-19 pandemic, as well as their decisions about resource allocations to deal with the number of unauthorized aliens entering their states.

140. Defendants' cursory dismissal of the existence of any reliance interests in the Title 42 policy misses the mark. Ex. A at 23-24. Their analysis is entirely legal in nature and fails to undertake any kind of policy analysis of the actual real-world effects of the Title 42 policy and how States might have legitimately relied on it. The Termination Order even acknowledges that "state or local government[s]" may have "reliance interest[s]" in the Title 42 policy, but characterizes such interests as "misplaced" and claims that delaying the effective date of Termination Order until May 23 would be enough time for states "to adjust their planning in anticipation of the full resumption of Title 8 border processing." *Id.* at 29. The Termination Order offers no explanation, however, of how 53 days might be enough time for states to "adjust their planning," when the Title 42 policy has been in place for more than two years and when Defendants have in the meantime abdicated most of their other border enforcement obligations, thus leaving Title 42 as the only remaining bulwark against the rising flood of migrants pouring across the border illegally. The Termination Order is arbitrary and capricious because it utterly ignores Plaintiffs' reliance interests, and it must therefore be set aside. *See DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913-14 (2020).

141. *Third*, Defendants also failed to consider the immigration consequences of the Termination Order. Indeed, this failure is particularly brazen, as press reports state that Defendants have made internal assessments of the immigration effects, and are predicting unprecedented waves of new illegal immigration. *See supra* ¶¶7, 90. Indeed, the Termination Order itself acknowledges the likelihood of these public health and immigration consequences, as it delays the effective date of Termination Order until May 23, 2022 "to give DHS time to implement additional COVID-19 miti-

gation measures” and “to provide DHS time to implement operational plans for fully resuming Title 8 processing.” Ex. A at 26, 28. By delaying the effective date until May 23, Defendants thus recognize the Termination Order will have consequences and that they have the authority and capacity to delay the Termination Order to account for immigration-related consequences. But they failed to analyze whether they should exercise that authority in a different manner given the enormous immigration consequences that even they predict will occur.

142. *Fourth*, Defendants failed to consider or arbitrarily rejected obvious alternatives to Termination Order, such as continuing the Title 42 policy, rigorous enforcement of immigration laws to deter illegal immigration, or implementing in good faith the Migrant Protection Protocols (“MPP”) and withdrawing their challenge to the Fifth Circuit’s invalidation of it.

143. *Fifth*, Defendants failed to consider obvious and relevant consequences of the Termination Order, such as the public health and public policy consequences of the emergence of new variants of the COVID-19 virus.

144. *Sixth*, Defendants failed to justify their deviation from prior practice of continuing the Title 42 policy.

145. *Seventh*, Defendants have failed to analyze and consider how their own failure to maintain alien detention capacity affects the purported need to parole aliens into the United States. For example, at the same time Defendants claim that their detention facilities are at overcapacity, Defendants have submitted budget requests to Congress requesting for a *decrease* in funding for detention and detention facilities.<sup>35</sup> Moreover, Defendants have affirmatively degraded their own de-

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<sup>35</sup> Eileen Sullivan, “Biden to Ask Congress for 9,000 Fewer Immigration Detention Beds,” New York Times, Mar. 25, 2022, <https://www.nytimes.com/2022/03/25/us/politics/biden-immigration-detention-beds.html>.

tention capacity by cancelling contracts with private detention facilities and by closing detention facilities.<sup>36</sup>

146. *Eighth*, Defendants failed to failure to consider alternative timing of the Termination so that the Termination would not coincide with the current unprecedented, continuing surge of migrants unlawfully crossing the border.

147. *Ninth*, Defendants failed to consider accumulated groups of aliens (*e.g.* Haitians) waiting on the Mexican side of the border who are waiting to cross the moment Title 42 is rescinded.<sup>37</sup> “Department of Homeland Security intelligence estimates that perhaps 25,000 migrants already are waiting in Mexican shelters just south of the border for Title 42 to end.”<sup>38</sup> A federal law enforcement official told CNN that the number of aliens in northern Mexico waiting to cross illegally into the United States is “[b]etween 30,000 to 60,000.”<sup>39</sup>

148. *Tenth*, Defendants failed adequately to consider the spread of infection in DHS facilities resulting from Title 42 termination, because the INA requires that aliens awaiting removal proceedings must be detained.

149. *Eleventh*, Defendants failed to consider the interaction of the Termination with termination of MPP.

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<sup>36</sup> *Id.*; Priscilla Alvarez, “Biden administration to close two immigration detention centers that came under scrutiny,” CNN, May 20, 2021, <https://www.cnn.com/2021/05/20/politics/ice-detention-center/index.html>.

<sup>37</sup> Maria Sacchetti and Nick Miroff, “Biden administration to lift pandemic border restrictions,” The Washington Post, Mar. 30, 2022, <https://www.washingtonpost.com/national-security/2022/03/30/title-42-border-restrictions-no-longer-needed-public-health-cdc-says/> (“Thousands [of] Haitian migrants are believed to be waiting in Mexico in anticipation of the end of Title 42, according to DHS officials familiar with the government’s planning and preparations.”).

<sup>38</sup> Jonathan Swan and Stef W. Kight, “Scoop: Biden officials fear ‘mass migration event’ if COVID policies end,” Axios, Mar 17., 2022, <https://www.axios.com/biden-border-mexico-migrants-title-42-a91b6441-2197-463f-ab1f-2435824a9566.html>.

<sup>39</sup> Catherine E. Shoichet, “We’re expecting a big increase in migrants at the US-Mexico border. But this time is different.” CNN, Apr. 1, 2022, <https://www.cnn.com/2022/03/31/politics/border-title-42-whats-next-ccc/index.html>.



150. This list is not exclusive but merely illustrative of the Termination Order's obvious deficiencies. For each of these independently sufficient reasons and others, the Rule is arbitrary and capricious.

#### **PRAYER FOR RELIEF**

**NOW, THEREFORE,** Plaintiffs request an order and judgment:

1. Declaring, under 28 U.S.C. §2201, that the Termination violates the APA because it was promulgated without notice and comment;
2. Declaring, under 28 U.S.C. § 2201, that the Termination Order is arbitrary and capricious and unlawful under the APA;
3. Vacating the Termination Order;
4. Preliminarily and permanently enjoining, without bond, Defendants from applying the Termination Order;
5. Awarding Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees, pursuant to 28 U.S.C. § 2412; and
6. Granting any and all other such relief as the Court finds appropriate.

Dated: April 3, 2022

Respectfully submitted,

By: /s/ Elizabeth B. Murrill

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# EXHIBIT A

**U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES  
CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC)**

**ORDER UNDER SECTIONS 362 & 365 OF THE PUBLIC HEALTH SERVICE ACT  
(42 U.S.C. §§ 265, 268) and 42 C.F.R. § 71.40**

**PUBLIC HEALTH DETERMINATION  
AND  
ORDER REGARDING THE RIGHT TO INTRODUCE CERTAIN PERSONS FROM  
COUNTRIES WHERE A QUARANTINABLE COMMUNICABLE DISEASE EXISTS**

**Executive Summary**

The Centers for Disease Control and Prevention (CDC), a component of the U.S. Department of Health and Human Services (HHS), is hereby issuing this Public Health Determination and Order Regarding Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists (Public Health Determination and Termination). This Public Health Determination and Termination terminates the Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, issued on August 2, 2021 (August Order),<sup>1</sup> and all related prior orders issued pursuant to the authorities in sections 362 and 365 of the Public Health Service (PHS) Act (42 U.S.C. §§ 265, 268) and the implementing regulation at 42 C.F.R. § 71.40 (CDC Orders);<sup>2</sup> this Termination will be implemented on May 23, 2022. The August Order continued a suspension of the right to introduce “covered noncitizens,” as defined in the Order,<sup>3</sup> into the United States along the U.S. land and adjacent coastal borders.<sup>4</sup> The August Order states that CDC will reassess at least every 60 days whether the Order remains necessary to protect the public health. Based on the public health landscape, the current status of the COVID-19 pandemic, and the procedures in place for the processing of covered noncitizens, taking into account the inherent risks of transmission of SARS-CoV-2 in congregate settings, CDC has determined that a suspension of the right to introduce such covered noncitizens is no longer necessary to protect U.S. citizens, U.S. nationals, lawful permanent residents, personnel and noncitizens at the ports of entry (POE) and U.S. Border Patrol stations, and destination communities in the United States. This Termination will be implemented on May 23, 2022, to enable the Department of Homeland Security (DHS) to implement appropriate COVID-19 mitigation protocols, such as scaling up a program to provide COVID-19 vaccinations to

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<sup>1</sup> Available at [https://www.cdc.gov/coronavirus/2019-ncov/downloads/CDC-Order-Suspending-Right-to-Introduce-Final\\_8-2-21.pdf](https://www.cdc.gov/coronavirus/2019-ncov/downloads/CDC-Order-Suspending-Right-to-Introduce-Final_8-2-21.pdf) (last visited Mar. 7, 2022); *see also* 86 Fed. Reg. 42828 (Aug. 5, 2021).

<sup>2</sup> “CDC Orders” issued under these legal authorities are found at 85 Fed. Reg. 17060 (Mar. 26, 2020), 85 Fed. Reg. 22424 (Apr. 22, 2020), 85 Fed. Reg. 31503 (May 26, 2020), 85 Fed. Reg. 65806 (Oct. 16, 2020), and 86 Fed. Reg. 42828 (Aug. 5, 2021) (fully incorporating by reference 86 Fed. Reg. 38717 (July 22, 2021), *see* 86 Fed. Reg. 42828, 42829 at note 3).

<sup>3</sup> *See infra* I.

<sup>4</sup> The August Order specifically excepted unaccompanied noncitizen children (UC) and incorporated an exception for UC issued by CDC on July 16, 2021 (July Exception). Public Health Determination Regarding an Exception for Unaccompanied Noncitizen Children from Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/more/pdf/NoticeUnaccompaniedChildren.pdf> (July 16, 2021); 86 Fed. Reg. 38717 (July 22, 2021); *see* 86 Fed. Reg. 42828, 42829 at note 1 (Aug. 5, 2021) (which fully incorporated by reference the July Exception relating to UC). On March 11, 2022, CDC fully terminated the August Order and all prior orders issued under the same authorities with respect to UC. *See* <https://www.cdc.gov/coronavirus/2019-ncov/more/pdf/NoticeUnaccompaniedChildren-update.pdf>.

migrants, and prepare for full resumption of regular migration processing under Title 8 authorities. Until that date, it is CDC's expectation that DHS will continue to apply exceptions outlined in the August Order to covered noncitizens as appropriate, including the exception based on the totality of an individual's circumstances on a case-by-case basis.

## **Outline of Determination and Order**

### **I. Background**

#### **A. Evolution of the COVID-19 Pandemic and the U.S. Government Response**

1. First Wave – January to June 2020
2. Second Wave – June to August 2020
3. Third Wave – Alpha Variant – September 2020 to May 2021
4. Fourth Wave – Delta Variant – June to October 2021
5. Fifth Wave – Omicron Variant – November 2021 to March 2022

#### **B. Current Status of the COVID-19 Pandemic**

1. Community Levels
2. Healthcare Systems and Resources
3. Mitigation Measures
  - a. Test Availability
  - b. Vaccines and Boosters
  - c. Treatments
4. Congregate Settings
5. DHS Mitigation Measures

### **II. Public Health Determination**

### **III. Legal Considerations**

#### **A. Temporary Nature of Orders under 42 U.S.C. § 265 and Absence of Reliance Interests**

#### **B. Basis for Termination under 42 U.S.C. §§ 265, 268 and 42 C.F.R. § 71.40**

### **IV. Issuance and Implementation**

#### **A. Implementation of this Termination**

#### **B. APA Review**

## I. Background

Coronavirus disease 2019 (COVID-19) is a quarantinable communicable disease<sup>5</sup> caused by the SARS-CoV-2 virus. As part of U.S. government efforts to mitigate the introduction, transmission, and spread of COVID-19, CDC issued the August Order,<sup>6</sup> replacing a prior order issued on October 13, 2020 (October Order) which continued a series of orders issued pursuant to 42 U.S.C. §§ 265, 268 and the implementing regulation at 42 C.F.R. § 71.40,<sup>7</sup> suspending the right to introduce<sup>8</sup> certain persons into the United States from countries or places where the quarantinable communicable disease exists in order to protect the public health from an increased risk of the introduction of COVID-19.<sup>9</sup> The August Order applied specifically to “covered noncitizens,” defined as “persons traveling from Canada or Mexico (regardless of their country of origin) who would otherwise be introduced into a congregate setting in a POE or U.S. Border Patrol station<sup>10</sup> at or near the U.S. land and adjacent coastal borders subject to certain exceptions detailed below; this includes noncitizens who do not have proper travel documents, noncitizens whose entry is otherwise contrary to law, and noncitizens who are apprehended at or near the border seeking to unlawfully enter the United States between POE.”<sup>11</sup>

Three groups typically make up covered noncitizens—single adults (SA),<sup>12</sup> individuals in family units (FMU),<sup>13</sup> and unaccompanied noncitizen children (UC).<sup>14</sup> UC were specifically excepted from the

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<sup>5</sup> Quarantinable communicable diseases are any of the communicable diseases listed in Executive Order 13295, as provided under § 361 of the Public Health Service Act (42 U.S.C. § 264), 42 C.F.R. § 71.1. The list of quarantinable communicable diseases currently includes cholera, diphtheria, infectious tuberculosis, plague, smallpox, yellow fever, viral hemorrhagic fevers (Lassa, Marburg, Ebola, Crimean-Congo, South American, and others not yet isolated or named), severe acute respiratory syndromes (including Middle East Respiratory Syndrome and COVID-19), influenza caused by novel or reemerging influenza viruses that are causing, or have the potential to cause, a pandemic, and measles. *See* Exec. Order 13295, 68 Fed. Reg. 17255 (Apr. 4, 2003), as amended by Exec. Order 13375, 70 Fed. Reg. 17299 (Apr. 1, 2005) and Exec. Order 13674, 79 Fed. Reg. 45671 (July 31, 2014), 86 Fed. Reg. 52591 (Sep. 22, 2021).

<sup>6</sup> *See supra* note 1.

<sup>7</sup> Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 85 Fed. Reg. 65806 (Oct. 16, 2020). The October Order replaced the Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, issued on March 20, 2020 (March Order), which was subsequently extended and amended. Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060 (Mar. 26, 2020); Extension of Order Under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 22424 (Apr. 22, 2020); Amendment and Extension of Order Under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 31503 (May 26, 2020).

<sup>8</sup> *Suspension of the right to introduce* means to cause the temporary cessation of the effect of any law, rule, decree, or order pursuant to which a person might otherwise have the right to be introduced or seek introduction into the United States. 42 C.F.R. § 71.40(b)(5).

<sup>9</sup> *See supra* note 2.

<sup>10</sup> POE and U.S. Border Patrol stations are operated by U.S. Customs and Border Protection (CBP), an agency within Department of Homeland Security (DHS).

<sup>11</sup> 86 Fed. Reg. 42828, 42841.

<sup>12</sup> A single adult (SA) is any noncitizen adult 18 years or older who is not an individual in a “family unit.” 86 Fed. Reg. 42828, 42830 at note 13.

<sup>13</sup> An individual in a family unit (FMU) includes any individual in a group of two or more noncitizens consisting of a minor or minors accompanied by their adult parent(s) or legal guardian(s). *Id.* at note 14.

<sup>14</sup> CDC understands UC to be a class of individuals similar to or the same as those individuals who would be considered “unaccompanied alien children” (*see* 6 U.S.C. § 279) for purposes of HHS Office of Refugee Resettlement custody, were DHS to make the necessary immigration determinations under Title 8 of the U.S. Code. 86 Fed. Reg. 38717, 38718 at note 4.

August Order<sup>15</sup> based on its explicit incorporation by reference of CDC's July Exception of UC.<sup>16</sup> On March 11, 2022, CDC fully terminated the August Order and all previous orders issued under 42 U.S.C. §§ 265, 268 and 42 C.F.R. § 71.40 with respect to UC. This termination with respect to UC was based on a thorough determination of the current status of the COVID-19 pandemic as well as an analysis of the specific care available to UC<sup>17</sup> and the absence of legitimate countervailing reliance interests, and was prioritized ahead of CDC's reassessment for SA and FMU in light of the entry of a preliminary injunction by the U.S. District Court for the Northern District of Texas that was to go into effect on March 11, 2022, enjoining CDC from excepting UC from the August Order based solely on their status as UC.<sup>18</sup>

The CDC Orders issued under 42 U.S.C. §§ 265, 268 and 42 C.F.R. § 71.40 were intended to reduce the risk of COVID-19 introduction, transmission, and spread at POE and U.S. Border Patrol stations by significantly reducing the number and density of covered noncitizens held in these congregate settings, thereby reducing risks to U.S. citizens, U.S. nationals, lawful permanent residents, DHS and U.S. Customs and Border Protection (CBP) personnel and noncitizens at the facilities, and local healthcare systems. The measures included in the CDC Orders were deemed necessary for the protection of public health.

In the August Order, CDC committed to reassessing the public health circumstances necessitating the Order at least every 60 days by reviewing the latest information regarding the status of the COVID-19 public health emergency and associated public health risks, including migration patterns, sanitation concerns, and any improvement or deterioration of conditions at the U.S. borders.<sup>19</sup> CDC conducted its most recent reassessment on January 28, 2022; in addition, a reassessment specific to UC was completed on March 11, 2022. The instant Public Health Determination and Termination considers the current status of the pandemic, including the receding numbers of COVID-19 cases, hospitalizations, and deaths most recently related to the Omicron variant, and constitutes the reassessment concluding on March 30, 2022. This Determination and Termination also reflects the recent issuance of CDC's COVID-19 Community Levels framework.<sup>20</sup> Additionally, the National COVID-19 Preparedness Plan was recently updated to provide a roadmap to help the nation continue fighting COVID-19, while also allowing resumption of more normal routines.<sup>21</sup>

Based on the analysis below, the CDC Director finds that, pursuant to 42 U.S.C. § 265 and 42 C.F.R. § 71.40, there is no longer a serious danger that the entry of covered noncitizens, as defined by

<sup>15</sup> 86 Fed. Reg. 42828, 42829 at note 3.

<sup>16</sup> See *supra* note 4.

<sup>17</sup> While SA, FMU, and UC are all processed by U.S. Customs and Border Protection (CBP), a component of DHS, following that initial intake, UC are referred to HHS' Office of Refugee Resettlement (ORR) for care. See 86 Fed. Reg. 42828, 42835-37 (describing the processing of noncitizen SA and FMU by DHS components, CBP and Immigration and Customs Enforcement (ICE), under both regular Title 8 immigration and under an order pursuant to 42 U.S.C. § 265). At both the CBP and ORR stages, UC receive special attention. This care and the distinct immigration processing available to UC compared to SA and FMU provided the basis for the exception of UC in the July Exception and the August Order. See 86 Fed. Reg. 42828, 42835-37 (describing the processing of noncitizen SA and FMU by DHS components, CBP and ICE, under both regular Title 8 immigration and under an order pursuant to 42 U.S.C. § 265); see also 87 Fed. Reg. 15243, 15246-47 (Mar. 17, 2022) (describing the different COVID-19 mitigation measures applied where UC are processed).

<sup>18</sup> *Texas v. Biden*, No. 4:21-cv-0579-P, 2022 WL 658579, at \*16-18 (N.D. Tex. Mar. 4, 2022).

<sup>19</sup> 86 Fed. Reg. 42828, 42841.

<sup>20</sup> *COVID-19 Community Levels*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/science/community-levels.html> (updated Mar. 24, 2022); see *infra* I.B.1.

<sup>21</sup> *National COVID-19 Preparedness Plan – March 2022*, available at <https://www.whitehouse.gov/wp-content/uploads/2022/03/NAT-COVID-19-PREPAREDNESS-PLAN.pdf> (last visited Mar. 30, 2022).



the August Order, into the United States will result in the introduction, transmission, and spread of COVID-19 and that a suspension of the introduction of covered noncitizens is no longer required in the interest of public health. While the introduction, transmission, and spread of COVID-19 into the United States is likely to continue to some degree, the cross-border spread of COVID-19 due to covered noncitizens does not present the serious danger to public health that it once did, given the range of mitigation measures now available. CDC continues to stress the need for robust COVID-19 mitigation measures at the border, including vaccination and continued masking in congregate settings. CDC has 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 that are now available to mitigate the introduction, transmission, and spread of COVID-19. Therefore, as described below, CDC is terminating the August Order and all related prior orders issued pursuant to 42 U.S.C. §§ 265, 268 and 42 C.F.R. § 71.40. This Termination will be implemented on May 23, 2022, to enable DHS to implement appropriate COVID-19 protocols, such as scaling up a program to offer COVID-19 vaccinations to migrants, and prepare for full resumption of regular migration under Title 8 authorities.

## **A. Evolution of the COVID-19 Pandemic and the U.S. Government Response**

Since late 2019, SARS-CoV-2, the virus that causes COVID-19, has spread throughout the world, resulting in a pandemic. As of March 30, 2022, there have been over 480 million confirmed cases of COVID-19 globally, resulting in over six million deaths.<sup>22</sup> The United States has reported over 79 million cases resulting in over 975,000 deaths due to the disease<sup>23</sup> and is currently averaging around 26,000 new cases of COVID-19 a day as of March 28, 2022.<sup>24</sup>

The U.S. government response to the COVID-19 pandemic has focused on taking actions and providing guidance based on the best available scientific information. The United States has experienced five waves of the pandemic, each with its own unique epidemiologic characteristics.<sup>25</sup> As the waves of COVID-19 cases have surged and ebbed, so too have actions taken in response to the pandemic. Earlier phases of the pandemic required extraordinary actions by the U.S. government and society at large. However, epidemiologic data, scientific knowledge, and the availability of public health mitigation measures, vaccines, and therapeutics have permitted many of those early actions to be relaxed in favor of more nuanced, targeted, and narrowly tailored guidance that provides a less burdensome means of preventing and controlling the SARS-CoV-2 virus and COVID-19. Of note for this Determination are the multiple travel- and migration-related measures taken by the U.S. government in each phase.

### **1. First Wave – January to June 2020**

SARS-CoV-2 was first identified as the cause of an outbreak of respiratory illness that began in Wuhan, Hubei Province, People's Republic of China.<sup>26</sup> The United States reported its first COVID-19

<sup>22</sup> *Coronavirus disease (COVID-19) pandemic*, World Health Organization, <https://covid19.who.int/> (last visited Mar. 30, 2022).

<sup>23</sup> *COVID Data Tracker*, Centers for Disease Control and Prevention, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last visited Mar. 30, 2022).

<sup>24</sup> *See Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, Centers for Disease Control and Prevention, [https://covid.cdc.gov/covid-data-tracker/#trends\\_dailycases](https://covid.cdc.gov/covid-data-tracker/#trends_dailycases), noting a seven-day moving average of 26,190 cases on March 28, 2022.

<sup>25</sup> *Supra* note 21.

<sup>26</sup> Patel A, Jernigan DB. *Initial Public Health Response and Interim Clinical Guidance for the 2019 Novel Coronavirus Outbreak — United States, December 31, 2019–February 4, 2020*. *MMWR Morb Mortal Wkly Rep* 2020;69:140–146. DOI: <http://dx.doi.org/10.15585/mmwr.mm6905e1>.



case on January 21, 2020,<sup>27</sup> and the HHS Secretary declared COVID-19 a public health emergency on January 31, 2020.<sup>28</sup> Community transmission was detected in the United States in February 2020.<sup>29</sup> COVID-19 cases initially spread in a small number of U.S. metropolitan areas, most notably in New York City and surrounding areas.<sup>30</sup> The resulting first wave of the pandemic peaked in the United States on April 7, 2020, with two million cases (3% of cumulative cases) and over 127,000 deaths (13% of cumulative deaths).<sup>31</sup> During this period, public health officials monitored the situation closely and began instituting community-level nonpharmaceutical interventions such as school closures and physical distancing, in addition to promoting respiratory and hand hygiene practices.<sup>32</sup> Vaccines and approved therapeutics were not available during this time.<sup>33</sup>

As public health officials learned more about the epidemiology of SARS-CoV-2, the U.S. government, state and local health departments, and other partners implemented aggressive measures to slow transmission of the virus in the United States.<sup>34</sup> Many of the mitigation actions taken by the U.S. government during this wave involved travel and migration. The President issued a series of actions limiting entry into the United States, including proclamations suspending entry into the country of immigrants or nonimmigrants who were physically present within certain countries during the 14-day period preceding their entry or attempted entry,<sup>35</sup> and Canada and Mexico joined the United States in temporarily restricting travelers across land borders for non-essential purposes.<sup>36</sup> CDC began screening travelers from certain countries at airports and issued several travel health notices<sup>37</sup> and, following a series of COVID-19 outbreaks on cruise ships, issued a No Sail Order and Suspension of Further Embarkation.<sup>38</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> *Determination that a Public Health Emergency Exists*, U.S. Department of Health and Human Services (Jan. 31, 2020), <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx> (last visited Mar. 30, 2022).

<sup>29</sup> *Geographic Differences in COVID-19 Cases, Deaths, and Incidence — United States, February 12–April 7, 2020*. MMWR Morb Mortal Wkly Rep 2020;69:465–471. DOI: <http://dx.doi.org/10.15585/mmwr.mm6915e4>.

<sup>30</sup> *Id.*

<sup>31</sup> *Case notifications from state, local and territorial public health jurisdictions*, Centers for Disease Control and Prevention, <https://data.cdc.gov/Case-Surveillance/COVID-19-Case-Surveillance-Public-Use-Data/vbim-akqf>, (last accessed Mar. 30, 2022); *Provisional COVID-19 Death Counts by Week Ending Date and State*, Centers for Disease Control and Prevention, <https://data.cdc.gov/NCHS/Provisional-COVID-19-Death-Counts-by-Week-Ending-D/r8kw-7aab> (last accessed Mar. 30, 2022); *COVID-19 Reported Patient Impact and Hospital Capacity by State Timeseries*, Unified Hospital Analytic, <https://healthdata.gov/Hospital/COVID-19-Reported-Patient-Impact-and-Hospital-Capa/g62h-syeh> (last accessed Mar. 30, 2022).

<sup>32</sup> Jernigan DB. *Update: Public Health Response to the Coronavirus Disease 2019 Outbreak — United States, February 24, 2020*. MMWR Morb Mortal Wkly Rep 2020;69:216–219. DOI: <http://dx.doi.org/10.15585/mmwr.mm6908e1>.

<sup>33</sup> *Id.*

<sup>34</sup> *See supra* note 26.

<sup>35</sup> *See* Proclamation 9984 (Jan. 31, 2020), 85 Fed. Reg. 6709 (Feb. 5, 2020) (regarding the People's Republic of China); Proclamation 9992 (Feb. 28, 2020), 85 Fed. Reg. 12855 (Mar. 4, 2020) (regarding the Republic of Iran); Proclamation 9993 (Mar. 11, 2020), 85 Fed. Reg. 15045 (Mar. 16, 2020) (regarding the Schengen Area of Europe); Proclamation 9996 (Mar. 14, 2020), 85 Fed. Reg. 15341 (Mar. 18, 2020) (regarding the United Kingdom and Republic of Ireland); and Proclamation 10041, as amended by Proclamation 10042 (May 24, 2020), 85 Fed. Reg. 31933 (May 28, 2020) (regarding the Federative Republic of Brazil).

<sup>36</sup> *See* 85 Fed. Reg. 16547 (Mar. 24, 2020); 85 Fed. Reg. 16548 (Mar. 24, 2020).

<sup>37</sup> *Supra* note 32; *see also* *CDC Advises Travelers to Avoid All Nonessential Travel to China*, Centers for Disease Control and Prevention, <https://www.cdc.gov/media/releases/2020/s0128-travelers-avoid-china.html> (Jan. 28, 2020), advising travelers to avoid all nonessential travel to countries with known viral spread.

<sup>38</sup> 85 Fed. Reg. 16628 (Mar. 24, 2020); extended 85 Fed. Reg. 21004 (Apr. 15, 2020); *see also* Moriarty LF, Plucinski MM, Marston BJ, et al. *Public Health Responses to COVID-19 Outbreaks on Cruise Ships — Worldwide, February–March 2020*. MMWR Morb Mortal Wkly Rep 2020;69:347–352. DOI: <http://dx.doi.org/10.15585/mmwr.mm6912e3>.

It was in the context of this initial wave of the pandemic and travel- and migration-related actions that the CDC Director promulgated an interim final rule at 42 C.F.R. § 71.40 implementing his authority under 42 U.S.C. §§ 265, 268<sup>39</sup> and issued an Order under the interim final rule suspending the introduction of certain “covered aliens” on March 20, 2020 (March Order).<sup>40</sup> The March Order sought to avert the serious danger of the introduction of COVID-19 into the land POEs and Border Patrol stations at or near the United States borders with Canada and Mexico due to encountered noncitizens otherwise being held in the common areas of the facilities and in close proximity to one another as they undergo immigration processing. The March Order applied to SA, FMU, and UC and was subsequently amended and extended in April and May 2020.<sup>41</sup>

## 2. Second Wave – June to August 2020

During the second wave of the pandemic, from approximately June to August 2020, COVID-19 spread geographically throughout the United States.<sup>42</sup> Case numbers peaked on July 14, 2020, and in total the second wave resulted in approximately 2.6 million COVID-19 cases (4% of cumulative cases) and over 75,000 deaths (4% of cumulative deaths). During the second wave, public health officials and scientists learned more about COVID-19 transmission, including asymptomatic transmission,<sup>43</sup> particularly in congregate, high-density settings, such as meat-packing plants and correctional facilities.<sup>44</sup> The medical community learned more about potential effects of COVID-19 on specific populations, such as pregnant people,<sup>45</sup> the elderly, and immunocompromised people. In July 2020, CDC announced that cloth face coverings (masks) are a critical public health tool in reducing the spread of COVID-19, particularly when used universally within communities.<sup>46</sup> As stay-at-home orders issued during the first wave were lifted, CDC continued to promote broad implementation of masking and face covering requirements.<sup>47</sup> One pivotal marker of the second wave was the creation of Operation Warp

<sup>39</sup> See 85 Fed. Reg. 16559 (Mar. 24, 2020).

<sup>40</sup> See 85 Fed. Reg. 17060 (Mar. 26, 2020).

<sup>41</sup> See *supra* note 7.

<sup>42</sup> Oster AM, Kang GJ, Cha AE, et al. *Trends in Number and Distribution of COVID-19 Hotspot Counties — United States, March 8–July 15, 2020*. MMWR Morb Mortal Wkly Rep 2020;69:1127–1132. DOI: <http://dx.doi.org/10.15585/mmwr.mm6933e2>.

<sup>43</sup> Payne DC, Smith-Jeffcoat SE, Nowak G, et al. *SARS-CoV-2 Infections and Serologic Responses from a Sample of U.S. Navy Service Members — USS Theodore Roosevelt, April 2020*. MMWR Morb Mortal Wkly Rep 2020;69:714–721. DOI: <http://dx.doi.org/10.15585/mmwr.mm6923e4>.

<sup>44</sup> Dyal JW, Grant MP, Broadwater K, et al. *COVID-19 Among Workers in Meat and Poultry Processing Facilities — 19 States, April 2020*. MMWR Morb Mortal Wkly Rep 2020;69:557–561. DOI: <http://dx.doi.org/10.15585/mmwr.mm6918e3>; see also Hagan LM, Williams SP, Spaulding AC, et al. *Mass Testing for SARS-CoV-2 in 16 Prisons and Jails — Six Jurisdictions, United States, April–May 2020*. MMWR Morb Mortal Wkly Rep 2020;69:1139–1143. DOI: <http://dx.doi.org/10.15585/mmwr.mm6933a3>; Njuguna H, Wallace M, Simonson S, et al. *Serial Laboratory Testing for SARS-CoV-2 Infection Among Incarcerated and Detained Persons in a Correctional and Detention Facility — Louisiana, April–May 2020*. MMWR Morb Mortal Wkly Rep 2020;69:836–840. DOI: <http://dx.doi.org/10.15585/mmwr.mm6926e2>.

<sup>45</sup> Ellington S, Strid P, Tong VT, et al. *Characteristics of Women of Reproductive Age with Laboratory-Confirmed SARS-CoV-2 Infection by Pregnancy Status — United States, January 22–June 7, 2020*. MMWR Morb Mortal Wkly Rep 2020;69:769–775. DOI: <http://dx.doi.org/10.15585/mmwr.mm6925a1>.

<sup>46</sup> CDC calls on Americans to wear masks to prevent COVID-19 spread (press release), Centers for Disease Control and Prevention, <https://www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html> (Jul. 14, 2020) (noting the growing body of evidence supporting cloth face coverings as a source control to help prevent the person wearing the mask from spreading COVID-19 to others; the main protection individuals gain from masking occurs when others in their communities also wear face coverings).

<sup>47</sup> Hendrix MJ, Walde C, Findley K, Trotman R. *Absence of Apparent Transmission of SARS-CoV-2 from Two Stylists After Exposure at a Hair Salon with a Universal Face Covering Policy — Springfield, Missouri, May 2020*. MMWR Morb Mortal Wkly Rep 2020;69:930–932. DOI: <http://dx.doi.org/10.15585/mmwr.mm6928e2>.

Speed, a partnership between the HHS and Department of Defense (DOD) aimed to help accelerate the development of a COVID-19 vaccine.<sup>48</sup>

As concerns about asymptomatic transmission grew and vaccines and therapeutics were still being developed, the U.S. government continued to take steps to protect the public health. CDC extended the No Sail Order and Suspension of Further Embarkation for cruise ships<sup>49</sup> and, as the second wave was being replaced by the third, issued an Order temporarily halting evictions in the United States due to the potential for accelerated transmission in congregate settings such as shelters for displaced persons.<sup>50</sup> The CDC Order under 42 U.S.C. §§ 265, 268 and 42 C.F.R. § 71.40 issued in March 2020 and amended and extended in April and May 2020, continued to be in place throughout this period.

### 3. Third Wave – Alpha Variant – September 2020 to May 2021

COVID-19 variants, including the B.1.1.7 (Alpha) variant, emerged in the fall of 2020, heralding the third wave of the pandemic<sup>51</sup> and resulting in 22.5 million COVID-19 cases (34% of cumulative cases) and over 398,000 deaths (21% of cumulative deaths) in the United States.<sup>52</sup> The third wave lasted from approximately September 2020 to May 2021 and coincided with the initial availability of vaccines for COVID-19<sup>53</sup> and increased availability of therapeutics.<sup>54</sup> Even as the third wave began to ebb, however, a new variant—B.1.617.2 (Delta)—began circulating in India and other countries.

The U.S. government responded to the Alpha variant and resulting surge in cases with additional travel- and migration-related restrictions, beginning with a requirement for air passengers from the United Kingdom (where the Alpha variant was first identified) to present a negative COVID-19 test

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<sup>48</sup> *Operation Warp Speed: Accelerated COVID-19 Vaccine Development Status and Efforts to Address Manufacturing Challenges*, Government Accountability Office, <https://www.gao.gov/products/gao-21-319> (Feb. 11, 2021).

<sup>49</sup> See 85 Fed. Reg. 44085 (July 21, 2020).

<sup>50</sup> See 85 Fed. Reg. 55292 (Sept. 4, 2020). The CDC Director subsequently renewed the “eviction moratorium” Order until March 31, 2021 (86 Fed. Reg. 8020 (Feb. 3, 2021)), then modified and extended the Order until June 30, 2021 (86 Fed. Reg. 16731 (Mar. 31, 2021)) and extended the Order until July 31, 2021 (86 Fed. Reg. 34010 (Jun. 28, 2021)). On August 3, 2021, the CDC Director announced a new Order to temporarily halt residential evictions in communities with substantial or high transmission of COVID-19 to prevent the further spread of COVID-19 (86 Fed. Reg. 43244 (Aug. 6, 2021)).

<sup>51</sup> *Science Brief: Emerging SARS-CoV-2 Variants – Updated*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/scientific-brief-emerging-variants.html> (updated Jan. 28, 2021).

<sup>52</sup> Per internal CDC calculations.

<sup>53</sup> COVID-19 vaccines were initially available only for those persons with higher risk of COVID-19, such as immunocompromised individuals and healthcare workers, but access was subsequently expanded to the general population aged 16 years and older. The U.S. Food and Drug Administration (FDA) issued emergency use authorizations for three COVID-19 vaccines: two mRNA vaccines (produced by Pfizer-BioNTech and Moderna) and one viral vector vaccine (produced by Johnson & Johnson/Janssen); see generally <https://www.fda.gov/emergency-preparedness-and-response/mcm-legal-regulatory-and-policy-framework/emergency-use-authorization#coviddrugs>; Dooling K, McClung N, Chamberland M, et al. *The Advisory Committee on Immunization Practices’ Interim Recommendation for Allocating Initial Supplies of COVID-19 Vaccine — United States*, 2020. MMWR Morb Mortal Wkly Rep 2020;69:1857-1859. DOI: <http://dx.doi.org/10.15585/mmwr.mm6949e1>. In May 2021, adolescents 12 to 15 years old became eligible to receive COVID-19 vaccines. Wallace M, Woodworth KR, Gargano JW, et al. *The Advisory Committee on Immunization Practices’ Interim Recommendation for Use of Pfizer-BioNTech COVID-19 Vaccine in Adolescents Aged 12–15 Years — United States, May 2021*. MMWR Morb Mortal Wkly Rep 2021;70:749–752. DOI: <http://dx.doi.org/10.15585/mmwr.mm7020e1>.

<sup>54</sup> U.S. Food and Drug Administration, *Emergency Use Authorization*, <https://www.fda.gov/emergency-preparedness-and-response/mcm-legal-regulatory-and-policy-framework/emergency-use-authorization#coviddrugs> (last accessed Mar. 30, 2022).

result before boarding a flight to the United States;<sup>55</sup> CDC subsequently expanded the predeparture testing requirement to air passengers departing to the United States from any foreign country.<sup>56</sup> Due to the inherent risk of transmission of COVID-19 in the travel context,<sup>57</sup> CDC also issued an Order requiring face masks to be worn while on conveyances traveling into, within, or out of the United States and at U.S. transportation hubs.<sup>58</sup> Based on developments with respect to variants and the continued spread of COVID-19, the U.S. government expanded the list of countries from which entry into the United States was limited.<sup>59</sup> CDC also announced a Conditional Sailing Order framework under which cruise ships could resume passenger operations only after meeting stringent public health mitigation measures, such as frequent testing of crew members.<sup>60</sup>

In October 2020, following the promulgation of the Final Rule for 42 C.F.R. § 71.40,<sup>61</sup> CDC published a new Order under 42 U.S.C. §§ 265 and 268 and the regulation suspending the right to introduce certain covered persons into the United States.<sup>62</sup> As with all prior CDC Orders, the October Order applied to “covered aliens,” which included certain SA, FMU, and UC seeking entry into the United States without valid travel documents and provided certain exceptions, including a case-by-case exception to be applied by CBP officers with supervisor approval upon a determination that an individual should be excepted from application of the Order based on the totality of the circumstances, including consideration of significant law enforcement, officer and public safety, humanitarian, and public health interests. The October Order was the subject of litigation regarding its application to both FMU and UC.<sup>63</sup>

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<sup>55</sup> *CDC to Require Negative COVID-19 Test for Air Travelers from the United Kingdom to the U.S.*, Centers for Disease Control and Prevention, <https://www.cdc.gov/media/releases/2020/s1224-CDC-to-require-negative-test.html> (Dec. 24, 2020).

<sup>56</sup> See 86 Fed. Reg. 7387 (Jan. 26, 2021).

<sup>57</sup> CDC has issued orders and guidance focusing on the “travel context,” which encompasses both conveyances and transportation hubs, because these are locations where large numbers of people may gather and physical distancing can be difficult. Furthermore, many people need to take public transportation for their livelihoods. Passengers (including young children) may be unvaccinated and some on board, including personnel operating the conveyances or working at the transportation hub, may have underlying health conditions that cause them to be at increased risk of severe illness (i.e., those who might not be protected by vaccination because of weakened immune systems). Such people may not have the option to disembark or relocate to another area of the conveyance. Transportation hubs are also places where people depart to different geographic locations, both across the United States and around the world. Therefore, an exposure in a transportation hub can have consequences to many destination communities if people become infected after they travel. See *Requirement for Face Masks on Public Transportation Conveyances and at Transportation Hubs*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/travelers/face-masks-public-transportation.html> (updated Feb. 25, 2022).

<sup>58</sup> *Id.*

<sup>59</sup> This included restrictions and suspension of entry of noncitizens (immigrants and nonimmigrants) who were present within the European Schengen Area, the United Kingdom (excluding overseas territories outside of Europe), the Republic of Ireland, the Federative Republic of Brazil, the Republic of South Africa, and the Republic of India in the 14-day period prior to attempted entry. See Proclamation 10143 (Jan. 25, 2021), 86 Fed. Reg. 7467 (Jan. 28, 2021) (regarding the Schengen Area of Europe, the United Kingdom, the Republic of Ireland, the Federative Republic of Brazil, and the Republic of South Africa); Proclamation 10199 (Apr. 30, 2021), 86 Fed. Reg. 24297 (May 6, 2021) (regarding the Republic of India).

<sup>60</sup> See 86 Fed. Reg. 59720 (Oct. 28, 2021). The Order was extended in April, May, and October 2021.

<sup>61</sup> See 85 Fed. Reg. 56424 (Sept. 11, 2020).

<sup>62</sup> Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 85 Fed. Reg. 65806 (Oct. 16, 2020).

<sup>63</sup> For example, on November 18, 2020, the United States District Court for the District of Columbia preliminarily enjoined the U.S. government from expelling UC pursuant to the October 2020 Order. *PJES v. Mayorkas*, No. 1:20-cv-02245 (D.D.C.), Dkt. Nos. 79–80. While prohibited from expelling UC, the U.S. government worked to create solutions for the appropriate care of UC pursuant to regular immigration authorities. On Friday, January 29, 2021, the United States Court of Appeals for the District of Columbia Circuit granted a stay pending appeal of the District Court’s preliminary injunction (*PJES v. Mayorkas*, No. 20–5357, Doc. No. 1882899), thereby permitting CDC and DHS to resume enforcement of the



#### 4. Fourth Wave – Delta Variant – June to October 2021

The COVID-19 pandemic's fourth wave lasted from June to October 2021 and was characterized by the spread of the Delta variant in the United States; during this period the United States experienced 9.8 million cases (15% of cumulative cases) and over 179,000 deaths (9% of cumulative deaths).<sup>64</sup> Vaccines were widely available during the fourth wave and uptake rose slightly throughout this period.<sup>65</sup>

Given the predictable global spread of the virus, the effectiveness of COVID-19 vaccines, and the rising availability of COVID-19 vaccines globally, and recognizing the need to allow the domestic and global economy to continue recovering from the effects of the pandemic, the President issued a Proclamation reflecting the United States' desire to move away from the country-by-country restrictions previously applied during the COVID-19 pandemic and to adopt an air travel policy that relies primarily on vaccination to advance the safe resumption of international air travel to the United States.<sup>66</sup> The Proclamation was followed by a suite of travel-related mitigation measures.<sup>67</sup> Even as available mitigation measures allowed the U.S. government to shift its pandemic approach in the travel context, the country continued to see a surge in COVID-19 cases caused by the Delta variant necessitating different measures in non-travel contexts. For example, as a result, the CDC Director extended the aforementioned eviction moratorium<sup>68</sup> for persons in counties experiencing substantial or high rates of transmission.<sup>69</sup>

During the fourth wave, CDC also issued the July Exception excepting UC from the October 2020 Order, which followed CDC's decision in January 2021 to temporarily except UC from expulsion pending a public health reassessment of the October Order.<sup>70</sup> The October 2020 Order was subsequently replaced by the August Order under 42 U.S.C. §§ 265 and 268 and 42 C.F.R. § 71.40, which fully incorporated the July Exception. The August Order explained why the mitigation measures specific to UC and discussed in the July Exception were not available to SA and FMU and, thus, why the August Order applied only to SA and FMU.<sup>71</sup> As with many of the other actions taken by the U.S. government

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October Order and immediately expel UC. On January 30, 2021, CDC exercised its discretion to temporarily except UC from expulsion pending the outcome of its public health reassessment of the October Order. *See* 86 Fed. Reg. 9942 (Feb. 17, 2021).

<sup>64</sup> Per internal CDC calculations.

<sup>65</sup> *Trends in Number of COVID-19 Vaccinations in the US*, Centers for Disease Control and Prevention, <https://covid.cdc.gov/covid-data-tracker/#vaccination-trends> (last updated Mar. 29, 2022).

<sup>66</sup> *See* Proclamation 10294 (Oct. 25, 2021), 86 Fed. Reg. 59603 (Oct. 28, 2021) (terminating the suspension of entry into the United States regarding the People's Republic of China, the Republic of Iran, the Schengen Area of Europe, the United Kingdom and Republic of Ireland, the Federative Republic of Brazil, the Republic of South Africa, and the Republic of India).

<sup>67</sup> Including amending the *Requirement for Proof of Negative COVID-19 Test or Recovery from COVID-19 for All Air Passengers Arriving in the United States* (<https://www.cdc.gov/quarantine/fr-proof-negative-test.html>) to shorten the time window for predeparture testing to one day for air passengers who were not fully vaccinated against COVID-19; *Order Requiring Airlines to Collect Contact Information for All Passengers Arriving into the United States* (<https://www.cdc.gov/quarantine/order-collect-contact-info.html>), and the *Order Implementing Presidential Proclamation on Safe Resumption of Global Travel During the COVID-19 Pandemic*, which required all non-U.S.-citizen, non-immigrants, with limited exceptions, traveling to the United States by air to be fully vaccinated against COVID-19 and show proof of vaccination (<https://www.cdc.gov/quarantine/order-safe-travel.html>).

<sup>68</sup> *See* 85 Fed. Reg. 55292, (Sept. 4, 2020).

<sup>69</sup> *See* 86 Fed. Reg. 43244, (Aug. 6, 2021).

<sup>70</sup> *See supra* note 63.

<sup>71</sup> 86 Fed. Reg. 42828, 42837-38.

during this wave, the August Order was predicated, in part, on the significant increase in community transmission levels brought forth by the Delta variant.

## 5. Fifth Wave – Omicron Variant – November 2021 to March 2022

The highly infectious SARS-CoV-2 variant B.1.1.529 (Omicron) is responsible for the currently receding fifth wave of the pandemic. The fifth wave resulted in an extraordinary and unparalleled increase in COVID-19 cases around the world.<sup>72</sup> Although the emergence of the Omicron variant resulted in the highest reported numbers of cases and hospitalizations during the pandemic, disease severity indicators, including hospital length of stay, intensive care unit admissions, and deaths, remained lower than during previous pandemic waves.<sup>73</sup> As a result of the Omicron surge, the United States experienced almost 24 million cases (36% of cumulative cases); given this volume of cases, however, the resulting number of deaths in the United States (163,000 deaths, or 9% of cumulative deaths) was comparatively small.<sup>74</sup> Vaccination efforts continued across the country during this fifth wave and were expanded to include children aged 5 to 11 years.<sup>75</sup> Despite breakthrough cases due to Omicron, vaccines continued to provide substantial protection against severe illness, hospitalizations, and deaths due to COVID-19.<sup>76</sup>

Although the COVID-19 public health emergency continues,<sup>77</sup> scientific understanding about the epidemiology of COVID-19 and its variants as well as the effectiveness of pharmaceuticals and nonpharmaceutical interventions have substantially expanded, allowing the U.S. government and CDC to transition to a more narrowly tailored set of tools to prevent and control the spread of the SARS-CoV-2 virus and COVID-19. The U.S. government continues to pivot away from country-specific measures. Following the temporary issuance of country-based restrictions as Omicron emerged,<sup>78</sup> all country-based

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<sup>72</sup> Omicron was first reported to the World Health Organization (WHO) by South Africa on November 24, 2021; on November 26, 2021, WHO designated it a Variant of Concern (VOC). On November 30, 2021, the U.S. also decided to classify Omicron as a VOC. This decision was based on a number of factors, including detection of cases attributed to Omicron in multiple countries, even among persons without travel history, transmission and replacement of Delta as the predominant variant in South Africa, changes in the spike protein of the virus, and concerns about potential decreased effectiveness of vaccination and treatments.

<sup>73</sup> Iuliano AD, Brunkard JM, Boehmer TK, et al. *Trends in Disease Severity and Health Care Utilization During the Early Omicron Variant Period Compared with Previous SARS-CoV-2 High Transmission Periods — United States, December 2020–January 2022*. MMWR Morb Mortal Wkly Rep. ePub: 25 January 2022. DOI: <http://dx.doi.org/10.15585/mmwr.mm7104e4>; see also *supra* note 26.

<sup>74</sup> Per internal CDC calculations.

<sup>75</sup> Woodworth KR, Moulia D, Collins JP, et al. *The Advisory Committee on Immunization Practices' Interim Recommendation for Use of Pfizer-BioNTech COVID-19 Vaccine in Children Aged 5–11 Years — United States, November 2021*. MMWR Morb Mortal Wkly Rep 2021;70:1579–1583. DOI: <http://dx.doi.org/10.15585/mmwr.mm7045e1>.

<sup>76</sup> *Omicron Variant: What You Need to Know*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html> (updated Feb. 2, 2022). See also Tenforde MW, Self WH, Gaglani M, et al. *Effectiveness of mRNA Vaccination in Preventing COVID-19–Associated Invasive Mechanical Ventilation and Death — United States, March 2021–January 2022*. MMWR Morb Mortal Wkly Rep. ePub: 18 March 2022. DOI: <http://dx.doi.org/10.15585/mmwr.mm7112e1>.

<sup>77</sup> The public health emergency determination has been renewed by the Secretary of HHS at 90-day intervals since January 2020, most recently on January 14, 2022. See *Renewal of Determination That A Public Health Emergency Exists*, Office of the Assistant Secretary for Preparedness and Response, <https://aspr.hhs.gov/legal/PHE/Pages/COVID19-14Jan2022.aspx> (last visited Mar. 9, 2022).

<sup>78</sup> Those restrictions included suspending entry into the United States of immigrants or nonimmigrants who were physically present within eight southern African countries during the 14-day period preceding their entry or attempted entry into the United States. See Proclamation 10315 (Nov. 26, 2021), 86 Fed. Reg. 68385 (Dec. 1, 2021).

restrictions were later lifted by the President, as recommended by CDC.<sup>79</sup> Based on an increasing body of evidence, CDC recommended that everyone be vaccinated and remain up to date with vaccines, including boosters for those eligible.<sup>80</sup> As more information about the Omicron variant and vaccine effectiveness became available, CDC calibrated its mitigation measures in accordance with the epidemiology of the virus and the different characteristics of the predominant variants. This included shortening the recommended duration of quarantine and isolation for most members of the general public in community settings<sup>81</sup> and also shortening the timeframe for its COVID-19 testing requirements for all air passengers boarding flights to the United States.<sup>82</sup> DHS also required that all inbound non-citizen, non-lawful permanent residents traveling to the United States via land POE—whether for essential or non-essential reasons—must provide proof of full COVID-19 vaccination status upon request.<sup>83</sup> These refinements in policy reflect CDC’s increased understanding of the science and its desire to tailor mitigation measures so that they are no more burdensome than necessary. The ability of CDC to be responsive to the public health landscape and adjust such measures up and down is critical to successfully fighting the pandemic.

During the fifth wave of the pandemic and as specified in the August Order, CDC reviewed the public health rationale underlying the need for the Order every 60 days. By the time of the second reassessment in late November 2021 the public health situation with respect to COVID-19 was improving. However, the sudden emergence of the Omicron variant led CDC to find that the August Order continued to be necessary. Because case numbers remained historically high in January, CDC’s third public health reassessment determined that the need for the August Order remained.

## **B. Current Status of the COVID-19 Pandemic**

As a result of the Omicron variant, the United States recorded its highest seven-day moving average number of cases on January 15, 2022.<sup>84</sup> Following this unprecedented peak, however, the number of COVID-19 cases in the United States began to rapidly decrease, falling by over 95% as of

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<sup>79</sup> See Proclamation 10329 (Dec. 28, 2021), 87 Fed. Reg. 149 (Jan. 3, 2022) (terminating Proclamation 10315 regarding eight southern African countries).

<sup>80</sup> A person is considered up to date after receiving all recommended COVID-19 vaccines, including any booster dose(s) when eligible, *Stay Up to Date with Your Vaccines*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/stay-up-to-date.html> (issued Jan. 2022, updated Mar. 22, 2022).

<sup>81</sup> *CDC Updates and Shortens Recommended Isolation and Quarantine Period for General Population*, Centers for Disease Control and Prevention, <https://www.cdc.gov/media/releases/2021/s1227-isolation-quarantine-guidance.html> (Dec. 27, 2021). Specifically, the length of isolation period for the general public was shortened to five days, followed by five days of wearing a well-fitting mask. See also *What We Know About Quarantine and Isolation*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/quarantine-isolation-background.html> (updated Feb. 25, 2022).

<sup>82</sup> *Requirement for Proof of Negative COVID-19 Test or Recovery from COVID-19 for All Air Passengers Arriving in the United States*, updating COVID-19 testing requirements (available at [https://www.cdc.gov/quarantine/pdf/Amended-Global-Testing-Order\\_12-02-2021-p.pdf](https://www.cdc.gov/quarantine/pdf/Amended-Global-Testing-Order_12-02-2021-p.pdf)). All air passengers two years or older with a flight departing to the United States from a foreign country starting on December 6, 2021, are required show a negative COVID-19 viral test result taken no more than one day before travel, or documentation of having recovered from COVID-19 in the past 90 days, before they board their flight. This requirement remains in place.

<sup>83</sup> See 87 Fed. Reg. 3429 (Jan. 24, 2022) (applying restrictions to the U.S.-Canada border) and 87 Fed. Reg. 3425 (applying restrictions to the U.S.-Mexico border).

<sup>84</sup> See *supra* note 24, citing a seven-day moving average of 806,324 cases on January 15, 2022 (last updated Mar. 29, 2022).

March 30, 2022.<sup>85</sup> After a brief period of continued increases,<sup>86</sup> deaths and hospitalizations also reversed course and began a swift descent.<sup>87</sup> Even at their peaks, however, the number of deaths and hospitalizations during Omicron were substantially lower than would have been expected from previous waves, based on the case counts. These welcomed changes were due, in part, to widespread population immunity<sup>88</sup> and a generally lower overall risk of severe disease due to the nature of the Omicron variant.

As the overall COVID-19 case count decreases, CDC has observed an increased percentage of cases due to a newly detected subvariant of Omicron, BA.2. As of March 24, 2022, the BA.2 subvariant is estimated to represent approximately 54.9% of sequenced cases in the United States.<sup>89</sup> Experts do not expect this subvariant to lead to a large surge in cases or hospitalizations, due in part to the levels of immunity provided by other Omicron subvariants (B.1.1.529 and BA.1.1) and by vaccination. Should COVID-19 cases show signs of potentially straining the U.S. healthcare system in the future, CDC's Community COVID-19 Levels framework described below better equips the country to swiftly respond.

As the waves of the pandemic have surged and ebbed, so too have actions the U.S. government has taken in response to the pandemic. While earlier phases of the pandemic required extraordinary actions by the government and society at large, epidemiologic data, scientific knowledge, and the availability of public health mitigation measures, vaccines, and therapeutics have permitted the country to safely transition to more normal routines.<sup>90</sup> As part of that transition, CDC is also shifting to more nuanced and narrowly tailored guidance that provides a less burdensome means of preventing and controlling the SARS-CoV-2 virus and COVID-19.

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<sup>85</sup> *Id.* (noting a peak of 806,324 seven-day moving average number of cases to 26,190 seven-day moving average number of cases on March 29, 2022).

<sup>86</sup> *COVID Data Tracker Weekly Review: Stay Up to Date – Interpretive Summary for Jan. 28, 2022*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/past-reports/01282022.html> (Jan. 28, 2022).

<sup>87</sup> *See New Admissions of Patients with Confirmed COVID-19, United States*, Centers for Disease Control and Prevention, <https://covid.cdc.gov/covid-data-tracker/#new-hospital-admissions> (last updated Mar. 28, 2022); *see also supra* note 24, noting a peak of 4,172 seven-day moving average number of deaths declining to 644 seven-day moving average number of deaths on March 29, 2022.

<sup>88</sup> In addition to vaccine-induced immunity, studies have consistently shown that infection with SARS-CoV-2 lowers an individual's risk of subsequent infection and an even lower risk of hospitalization and death. National estimates of both vaccine- and infection-induced antibody seroprevalence have been measured among blood donors; as of December 2021, these measures demonstrated 94.7% of persons 16 years and older showed antibody seroprevalence for COVID-19. *Science Brief: Indicators for Monitoring COVID-19 Community Levels and Making Public Health Recommendations*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/indicators-monitoring-community-levels.html> (updated Mar. 4, 2022); *Nationwide COVID-19 Infection- and Vaccination-Induced Antibody Seroprevalence (Blood donations)*, Centers for Disease Control and Prevention, <https://covid.cdc.gov/covid-data-tracker/#nationwide-blood-donor-seroprevalence> (last updated Feb. 18, 2022).

<sup>89</sup> *Variant Proportions*, Centers for Disease Control and Prevention, <https://covid.cdc.gov/covid-data-tracker/#variant-proportions> (showing data for the week ending March 26, 2022).

<sup>90</sup> *Transcript for CDC Media Telebriefing: Update on COVID-19*, Centers for Disease Control and Prevention, <https://www.cdc.gov/media/releases/2022/t0225-covid-19-update.html> (Feb. 25, 2022). COVID-19 vaccines are highly effective against severe illness and death. Widespread uptake of these vaccines, coupled with higher rates of infection-induced immunity at the population level, as well as the broad availability of mitigation measures and effective therapeutics have moved the pandemic to a different phase. *See also State of the Union Address*, <https://www.whitehouse.gov/state-of-the-union-2022/> (Mar. 1, 2022).



## 1. Community COVID-19 Levels

During the first four waves of the pandemic, CDC relied on a formula to calculate community transmission levels and update COVID-19 prevention strategies.<sup>91</sup> These indicators reflected the goal of limiting transmission as vaccine availability increased.<sup>92</sup> The CDC Director examined these indicators in conducting the public health assessment for the August Order.<sup>93</sup>

The COVID-19 pandemic has shifted to a new phase, however, due to the widespread uptake of highly effective COVID-19 vaccines, the accrual of high rates of vaccine- and infection-induced immunity at the population level, and the availability of effective therapeutics, testing, and masks or respirators.<sup>94</sup> As a result, CDC released a new framework in February 2022, “COVID-19 Community Levels,” reflecting a shift in focus from eliminating SARS-CoV-2 transmission toward disease control and healthcare system protection.<sup>95</sup> This new framework examines three currently relevant metrics for each U.S. county: new COVID-19 hospital admissions per 100,000 population in the past seven days, the percent of staffed inpatient beds occupied by patients with COVID-19, and total new COVID-19 cases per 100,000 population in the past seven days.<sup>96</sup> CDC determined that data on disease severity and healthcare system strain complement case rates, and that these data together are more informative for public health recommendations for individual, organizational, and jurisdictional decisions than data on community transmission rates alone.<sup>97</sup> This comprehensive approach to assessing COVID-19 Community Levels can inform decisions about layered COVID-19 prevention strategies, including testing and masking to reduce medically significant disease and limit strain on the healthcare system and other societal functions.<sup>98</sup>

Using these data, the COVID-19 Community Levels for each county are classified as low, medium, or high. CDC recommends using county COVID-19 Community Levels to help determine which mitigation measures should be implemented within a community.<sup>99</sup> As of March 31, 2022, 94.9% of U.S. counties are classified at the low COVID-19 Community Level, 4.5% of U.S. counties are classified at the medium COVID-19 Community Level; only 0.5% of U.S. counties are classified at the

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<sup>91</sup> In September 2020, CDC released the Indicators of Community Transmission framework, which incorporated two metrics to define community transmission: total new cases per 100,000 persons in the past seven days, and percentage of Nucleic Acid Amplification Test results that are positive during the past seven days. CDC also encouraged local decision-makers to also assess the following factors, in addition to levels of SARS-CoV-2, to inform the need for layered prevention strategies across a range of settings: health system capacity, vaccination coverage, capacity for early detection of increases in COVID-19 cases, and populations at risk for severe outcomes from COVID-19. See Christie A, Brooks JT, Hicks LA, et al. *Guidance for Implementing COVID-19 Prevention Strategies in the Context of Varying Community Transmission Levels and Vaccination Coverage*. MMWR Morb Mortal Wkly Rep. ePub: 27 July 2021. DOI: <http://dx.doi.org/10.15585/mmwr.mm7030e2>.

<sup>92</sup> *Id.*

<sup>93</sup> *Supra* note 1.

<sup>94</sup> *Supra* note 88.

<sup>95</sup> *Indicators for Monitoring COVID-19 Community Levels and Implementing Prevention Strategies*, Centers for Disease Control and Prevention, [https://www.cdc.gov/coronavirus/2019-ncov/downloads/science/Scientific-Rationale-summary\\_COVID-19-Community-Levels\\_2022.02.23.pptx](https://www.cdc.gov/coronavirus/2019-ncov/downloads/science/Scientific-Rationale-summary_COVID-19-Community-Levels_2022.02.23.pptx) (Feb. 23, 2022).

<sup>96</sup> New COVID-19 admissions and the percent of staffed inpatient beds occupied represent the current potential for strain on the health system, while data on new cases acts as an early warning indicator of potential increases in health system strain in the event of a COVID-19 surge. Community vaccination coverage and other local information, like early alerts from surveillance, such as through wastewater or the number of emergency department visits for COVID-19, when available, can also inform decision making for health officials and individuals. *Supra* note 20.

<sup>97</sup> *Supra* note 88.

<sup>98</sup> *Id.*

<sup>99</sup> *See supra* note 20.

high COVID-19 Community Level.<sup>100</sup> Furthermore, 97.1% of the U.S. population lives in counties classified as “low,” 2.5% live in counties classified as “medium,” and 0.4% live in counties classified as “high.”<sup>101</sup>

## 2. Healthcare Systems and Resources

With the ebb of the fifth wave, the number of new hospital admissions of patients with confirmed COVID-19 has similarly receded. Daily new hospitalization admissions peaked with 154,696 daily new admissions on January 15, 2022. The large number of cases in a very short time led to a high volume of hospitalizations that strained some local healthcare systems and, in some instances, impacted care for non-COVID-19-related concerns.<sup>102</sup> Despite this high volume of COVID-19 cases and hospitalizations, COVID-19 cases caused by the Omicron variant were, on average, less severe.<sup>103</sup>

The observed reduction in severity of COVID-19 cases and ongoing effective use of pharmaceutical interventions make it possible to minimize medically significant disease and prevent excessive strain on the healthcare sector, even with the occurrence of SARS-CoV-2 transmission.<sup>104</sup> Accordingly, at this stage of the pandemic, data on disease severity and healthcare system strain complement case rates and result in a more comprehensive approach to assessing COVID-19 Community Levels.

## 3. Mitigation Measures

Effective public health mitigation measures have contributed to the vast majority of the U.S. population living in a county identified by CDC as having either a “low” or “medium” COVID-19 Community Level. In addition to earlier public health measures, such as masking and physical distancing, the development and widespread deployment of COVID-19 tests, vaccines, and therapeutics have greatly reduced the transmission of the virus and severity of the disease throughout the United States and provided a new understanding of how prevention measures may be used to minimize the impact of COVID-19 on health and society.<sup>105</sup> These measures and the resulting current status of the COVID-19 pandemic are a major factor in CDC’s determination that the Orders issued under the authorities of 42 U.S.C. §§ 265, 268 and 42 C.F.R. § 71.40 suspending the right to introduce certain persons into the United States are no longer necessary to protect the public health.

### a. Test Availability

Testing continues to be an essential part of COVID-19 mitigation due to the potential for asymptomatic and pre-symptomatic transmission. Compared to earlier in the pandemic, COVID-19 tests are widely available in the United States. During January 2022, Americans had access to over 480

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<sup>100</sup> *COVID-19 Integrated County View*, Centers for Disease Control and Prevention, [https://covid.cdc.gov/covid-data-tracker/#county-view?list\\_select\\_state=all\\_states&list\\_select\\_county=all\\_counties&data-type=CommunityLevels&null=CommunityLevels](https://covid.cdc.gov/covid-data-tracker/#county-view?list_select_state=all_states&list_select_county=all_counties&data-type=CommunityLevels&null=CommunityLevels) (last updated Mar. 31, 2022); *see also infra* note 152.

<sup>101</sup> Per internal CDC calculations.

<sup>102</sup> *Supra* note 73.

<sup>103</sup> *Id.*

<sup>104</sup> *Supra* note 88.

<sup>105</sup> *See COVID Data Tracker Weekly Review: Interpretive Summary for March 4, 2022*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/past-reports/03042022.html> (Mar. 4, 2022), indicating that the whole community can be safe only when [everyone] take[s] steps to protect each other, even when the COVID-19 Community Level is low or medium.

million at-home tests in addition to rapid point of care and laboratory tests.<sup>106</sup> With the additional testing capacity available through antigen tests, rapid testing can be implemented to identify infected persons for isolation and identification of close contacts for quarantine and testing if indicated.<sup>107</sup>

Testing is also particularly helpful in congregate settings, where testing facility residents and personnel can help facilitate early identification of increased infection rates and prompt mitigation actions to help avoid strain on facility operations.<sup>108</sup> CDC recommends broad use of COVID-19 tests among facility workforces and within the larger community; such workforce testing may decrease the necessity for testing residents in congregate settings.

### ***b. Vaccines and Boosters***

Since August 2021, the scientific community has made significant strides in the development and distribution of COVID-19 vaccines, including booster shots. When the August Order was issued, three COVID-19 vaccines were authorized by the U.S. Food and Drug Administration (FDA) for emergency use and recommended for all people 12 years of age and up. While the daily count of total COVID-19 vaccine doses administered across the United States has plateaued, the cumulative number of people protected by COVID-19 vaccination has grown since the August Order.<sup>109</sup> As of March 30, 2022, over 209 million people in the United States 12 years of age or older (73.9% of the population 12 years or older) have been fully vaccinated and over 245 million people in the United States 12 years or older (86.6%) have received at least one dose.<sup>110</sup> To address concerns with potential waning immunity,<sup>111</sup> booster shots are now recommended for all adults ages 18 years and older.<sup>112</sup> As of March 30, 2022, 48.3% of fully vaccinated individuals 18 years and older in the United States have also received a booster dose.<sup>113</sup>

Since the August Order, eligibility for COVID-19 vaccines has expanded to include children ages five to 11.<sup>114</sup> Children ages six months through four years may soon become eligible for a COVID-

<sup>106</sup> Testing is available for free at 21,500 locations around the country. *See supra* note 21.

<sup>107</sup> *See* COVID-19 Testing and Diagnostics Working Group (TDWG). U.S. Department of Health and Human Services, <https://www.hhs.gov/coronavirus/testing/testing-diagnostics-working-group/index.html> (last visited Mar. 31, 2022) (defining the role of the COVID-19 TDWG, which develops testing-related guidance and provides targeted investments to expand the available testing supply and maximize testing capacity).

<sup>108</sup> *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#Strategies> (updated Feb. 15, 2022).

<sup>109</sup> *Supra* note 65.

<sup>110</sup> In comparison, as of July 28, 2021, over 163 million people in the United States (57.6% of the population 12 years or older) had been fully vaccinated and over 189 million people in the United States (66.8% of the population 12 years or older) had received at least one dose. *Id.*; *see also* *COVID-19 Vaccinations in the United States*, Centers for Disease Control and Prevention, <https://covid.cdc.gov/covid-data-tracker/#vaccinations> (last updated Mar. 30, 2022).

<sup>111</sup> Thompson MG, Natarajan K, Irving SA, et al. *Effectiveness of a Third Dose of mRNA Vaccines Against COVID-19–Associated Emergency Department and Urgent Care Encounters and Hospitalizations Among Adults During Periods of Delta and Omicron Variant Predominance — VISION Network, 10 States, August 2021–January 2022*. *MMWR Morb Mortal Wkly Rep* 2022;71:139–145. DOI: <http://dx.doi.org/10.15585/mmwr.mm7104e3>.

<sup>112</sup> *CDC Expands Eligibility for COVID-19 Booster Shots to All Adults*, Centers for Disease Control and Prevention, <https://www.cdc.gov/media/releases/2021/s1119-booster-shots.html> (released Nov. 19, 2021). *See also* *COVID-19 Vaccine Booster Shots*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/booster-shot.html> (updated Feb. 2, 2022).

<sup>113</sup> *See supra* note 112 (citing data as of Mar. 30, 2022). Additionally, 46.5% of fully vaccinated individuals 12 years of age and older in the United States have received a booster dose.

<sup>114</sup> *See supra* note 75.

19 vaccine; CDC is working with state and local jurisdictions for the eventual rollout of this critical product.<sup>115</sup> Improving COVID-19 vaccination coverage among children and adolescents is crucial to maintaining low rates of COVID-19-associated morbidity and mortality among these groups and ensuring a safe and expedited return to normal routines for everyone.<sup>116</sup>

Vaccines, including boosters, continue to be the single most important public health tool for fighting COVID-19 and CDC recommends that all people get vaccinated as soon as they are eligible and stay up to date on vaccinations.<sup>117</sup> Evidence shows that people who have completed the primary COVID-19 vaccination series, and received a booster when eligible, are at substantially reduced risk of severe illness and death from COVID-19; in contrast, the cumulative rate of COVID-19-associated hospitalizations is substantially higher in unvaccinated adults than in those who are up to date on COVID-19 vaccines.<sup>118</sup> Therefore, vaccines, including booster doses when appropriate, provide a substantial measure of protection against COVID-19-associated hospitalization and severe disease, including from the Omicron variant.<sup>119</sup> The increased percentage of individuals who are not only vaccinated but have also received a booster—which was not available at the time of the August Order—strengthens community protection levels and is a critical step toward resuming normal routines safely.

The availability of COVID-19 vaccines globally has also increased dramatically since the August Order.<sup>120</sup> On August 2, 2021, only 29% of the world had received at least one dose of a COVID-19 vaccine, with 12% being fully vaccinated.<sup>121</sup> As of March 30, 2022, 64.9% of the world population has received at least one dose of a COVID-19 vaccine and 57% of the global population is fully vaccinated with a primary vaccine series.<sup>122</sup> Fighting COVID-19 abroad is key to the nation's effort to protect people at home and stay ahead of new variants; therefore, the United States remains committed to accelerating global vaccination efforts.<sup>123</sup>

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<sup>115</sup> *COVID-19 Vaccination for Children*, Centers for Disease Control and Prevention, <https://www.cdc.gov/vaccines/covid-19/planning/children.html> (last reviewed Dec. 9, 2021).

<sup>116</sup> See generally Murthy BP, Zell E, Saelee R, et al. *COVID-19 Vaccination Coverage Among Adolescents Aged 12–17 Years — United States, December 14, 2020–July 31, 2021*. *MMWR Morb Mortal Wkly Rep* 2021;70:1206–1213. DOI: <http://dx.doi.org/10.15585/mmwr.mm7035e1>.

<sup>117</sup> *COVID-19 Vaccines Work*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/work.html> (updated Dec. 23, 2021). See also *supra* note 111, attributing decline of vaccine effectiveness to waning vaccine induced immunity over time, possible increased immune evasion by SARS-CoV-2 variants, or a combination of these and other factors and finding that receiving a booster shot was highly effective at preventing COVID-19-associated emergency department and urgent care encounters and preventing COVID-19-associated hospitalizations). See also *Stay Up to Date with Your Vaccines*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/stay-up-to-date.html> (updated Mar. 30, 2022), a person is considered up to date after receiving all recommended COVID-19 vaccines, including any booster dose(s) when eligible. See also *infra* I.B.5.

<sup>118</sup> This pattern applies to all age groups but is most pronounced among adults aged 65 years and older, who are at increased risk for hospitalization and death.

<sup>119</sup> A recent CDC study found that among people hospitalized with COVID-19, severe outcomes during the Omicron wave appear lower than during previous high transmission waves. *COVID Data Tracker Weekly Review: Boosters Work – Interpretive Summary for Feb. 11, 2022*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/past-reports/02112022.html>.

<sup>120</sup> *Coronavirus disease (COVID-19): Vaccine access and allocation*, World Health Organization, [https://www.who.int/news-room/questions-and-answers/item/coronavirus-disease-\(covid-19\)-vaccine-access-and-allocation](https://www.who.int/news-room/questions-and-answers/item/coronavirus-disease-(covid-19)-vaccine-access-and-allocation) (Aug. 6, 2021).

<sup>121</sup> *Coronavirus (COVID-19) Vaccinations*, Our World in Data, <https://ourworldindata.org/covid-vaccinations#what-share-of-the-population-has-received-at-least-one-dose-of-the-covid-19-vaccine> (updated Mar. 30, 2022).

<sup>122</sup> *Id.*

<sup>123</sup> See *supra* note 21.

### c. *Treatments*

Compared to August 2021, treatments for COVID-19 are more widely available. Although monoclonal antibodies were available in August 2021 and some continue to be effective and were widely used during the Omicron wave, such treatments must be administered by infusion and are cumbersome to administer. The FDA has issued emergency use authorizations (EUA) for a number of treatments for COVID-19 for people at high risk of COVID-19 disease progression, some of which were developed after August 2021.<sup>124</sup> In February 2022, FDA issued an EUA for a new monoclonal antibody that is specifically effective in combatting the Omicron variant.<sup>125</sup> FDA has also authorized oral antiviral medications that target the SARS-CoV-2 virus.<sup>126</sup> The U.S. government has expedited the development, manufacturing, and procurement of these treatments, securing 20 million courses of antiviral pills, which have been shown to reduce the risk of hospitalization or death by 89%.<sup>127</sup> The availability of efficacious and accessible treatments add a powerful layer of protection against severe COVID-19 that was not available in the summer of 2021.<sup>128</sup> The U.S. government's commitment to making such medications available and the ability to produce variant-specific treatments are critical components of the next phase of the fight against COVID-19.

### 4. Congregate Settings

As highlighted in the August Order, the very nature of congregate settings increases the risk for COVID-19 outbreaks.<sup>129</sup> Now, however, numerous non-pharmaceutical and pharmaceutical interventions are available to decrease the spread and severity of COVID-19 in these settings.<sup>130</sup> Throughout the pandemic, congregate settings have adapted processes to mitigate COVID-19 risk, including incorporating mask use, improving ventilation, enhancing cleaning and disinfection procedures, and connecting people to medical care. Current CDC guidance for correctional and detention facilities recommends that certain key mitigation measures, including provision of vaccinations and use of standard infection controls remain in place at all times.<sup>131</sup> In addition, facilities

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<sup>124</sup> *Treatments Your Healthcare Provider Might Recommend if You Are Sick*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/your-health/treatments-for-severe-illness.html> (updated Jan. 13, 2022), noting monoclonal antibody treatments may help the immune system recognize and respond more effectively to the virus.

<sup>125</sup> *FDA News Release: Coronavirus (COVID-19) Update: FDA Authorizes New Monoclonal Antibody for Treatment of COVID-19 that Retains Activity Against Omicron Variant*, U.S. Food and Drug Administration, <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-authorizes-new-monoclonal-antibody-treatment-covid-19-retains> (Feb. 11, 2022).

<sup>126</sup> *See supra* note 124.

<sup>127</sup> *See supra* note 21. The availability of new oral antiviral medications makes treatment more accessible to patients who are at risk for progression to severe COVID-19, *see FDA News Release: Coronavirus (COVID-19) Update: FDA Authorizes First Oral Antiviral for Treatment of COVID-19*, U.S. Food and Drug Administration, <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-authorizes-first-oral-antiviral-treatment-covid-19> (Dec. 22, 2022).

<sup>128</sup> *Id.* Antiviral pills will also be added to the stockpile for the first time.

<sup>129</sup> *See supra* note 44, explaining preventing coronavirus disease 2019 (COVID-19) in correctional and detention facilities can be challenging because of population-dense housing, varied access to hygiene facilities and supplies, and limited space for isolation and quarantine.

<sup>130</sup> *See supra* note 108.

<sup>131</sup> *Id.* CDC recommends facilities should maintain, at all times, the following aspects of standard infection control, monitoring, and capacity to respond to cases of COVID-19: (1) provide COVID-19 vaccination, including boosters; (2) maintain standard infection control; (3) maintain SARS-CoV-2 testing strategies; (4) prevent COVID-19 introduction from the community; and (5) prepare for outbreaks.



are encouraged to identify their own risk levels and apply additional mitigation measures as necessitated by local conditions.<sup>132</sup>

Rather than requiring physical distancing to be kept in place at all times, CDC's congregate settings guidance allows such measures to be scaled up or down based on local data trends and facility characteristics.<sup>133</sup> Because case counts and hospitalizations are decreasing in most areas of the country, many correctional and detention facilities are resuming certain activities that had previously been paused to facilitate physical distancing, signaling the resumption of more normal operations for many congregate settings.<sup>134</sup>

## 5. DHS Mitigation Measures

It is CDC's understanding that DHS facilities incorporate some of the recommended COVID-19 mitigation measures for congregate settings into their protocols. In particular, CBP continues to implement a variety of mitigation measures based on the infection prevention strategy referred to as the hierarchy of controls, which includes engineering upgrades, masking for migrants, and PPE for its workforce.<sup>135</sup> Moreover, vaccine uptake among the CBP workforce has reached approximately 86% among personnel on the U.S.-Mexico border.

Of particular note, DHS has recently begun implementing a vaccination program for migrants processed under Title 8 immigration authorities and held in CBP facilities. The DHS vaccination program will apply to all age-appropriate migrants who lack legal status and are processed pursuant to Title 8 authorities; have entered the United States after crossing the Southwest Border; and are taken into DHS custody. DHS has conveyed to CDC that all such migrants who are unable to provide proof of vaccination with an FDA EUA- or WHO EUL-approved vaccine will be provided an initial dose of a COVID-19 mRNA vaccine. DHS began implementing their vaccination program at 11 sites on March 28, 2022. DHS is working to expand this program over the next two months and states that their goal is to provide vaccinations to up to 6,000 migrants a day across 27 sites across the Southwest Border by May 23, 2022.

In addition, since the August Order, the DHS Office of the Chief Medical Officer has worked with partners in local communities to move individuals safely out of CBP custody and through the appropriate Title 8 immigration procedures, as applicable to the individual noncitizens. Through these partnerships, DHS has supported state, local, tribal, and territorial partners and NGOs in developing robust COVID-19 testing and quarantine programs along the Southwest Border.

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<sup>132</sup> Some congregate settings and detention facilities are resuming activities such as inter-facility transfers and detention of individuals for non-violent offenses, which has previously been paused due to the pandemic.

<sup>133</sup> *Id.* (Recommending that facilities develop and use metrics to guide modification of COVID-19 prevention measures using data on local trends and facility characteristics).

<sup>134</sup> Per information provided by DHS.

<sup>135</sup> These mitigation efforts include installing plexiglass dividers in facilities, enhancing ventilation systems, adhering to CDC guidance of cleaning and disinfection, and providing masks to migrants, as well as PPE to CBP personnel. These measures generally follow the infection prevention control referred to as the hierarchy of controls. *See Hierarchy of Controls*, Centers for Disease Control and Prevention, available at <https://www.cdc.gov/niosh/topics/hierarchy/default.html> (last visited Mar. 30, 2022). The hierarchy of controls is used as a means of determining how to implement feasible and effective control solutions. The hierarchy is outlined as: (1) Elimination (physically remove the hazard); (2) Substitution (replace the hazard); (3) Engineering Controls (isolate people from the hazard); (4) Administrative Controls (change the way people work); and (5) PPE (protect people with Personal Protective Equipment). CBP also continues to update the CBP Job Hazard Analysis and the CBP COVID toolkit based on the latest relevant public health guidance.

## II. Public Health Determination

As the COVID-19 pandemic and public health landscape evolve, CDC reassesses the need for continued measures under 42 U.S.C. §§ 265, 268 and 42 C.F.R. § 71.40, the authorities that support the CDC Orders.<sup>136</sup> This Public Health Determination and Termination is based upon the most recent science and data available to CDC. Based upon the data, CDC has determined that, although the implementation of the CDC Orders to reduce the numbers of noncitizens held in congregate settings in POEs and Border Patrol stations has been part of the layered COVID-19 mitigation strategy used over the past two years, less burdensome measures are now available to mitigate the introduction, transmission, and spread of COVID-19 resulting from the entry of covered noncitizens.

This Public Health Determination and Termination is the most recent step in CDC's continued efforts toward aligning the public health measures response to the COVID-19 pandemic with the best available science. Throughout the COVID-19 pandemic, CDC has taken a range of actions to help protect the public's health. These actions have been informed by the status of the pandemic based on the scientific and epidemiological information available at the time. The actions fall along a spectrum of restrictions on movement and activities in public. Some, like the masking order for conveyances, impact individuals but do not restrict movement; others, like the No Sail Order, apply to entire industries.

The CDC Orders issued under the authorities of 42 U.S.C. §§ 265, 268 and 42 C.F.R. § 71.40 suspending the right to introduce certain persons into the United States are among the most restrictive measures CDC has undertaken in the fight against COVID-19. The U.S. government has only used the extraordinary authority available under 42 U.S.C. § 265 to restrict the introduction of persons in one instance prior to the COVID-19 pandemic—in 1929, in response to a meningitis outbreak.<sup>137</sup> During the earlier periods of the COVID-19 pandemic, while scientists were still learning about its epidemiology and developing therapeutics and vaccines, the CDC Orders were deemed necessary due to the rapid spread of the virus. As the understanding of the virus has grown and vaccines and therapeutics for the disease have become more widely available, lower COVID-19 Community Levels have been observed.

The August Order recognized the full panoply of mitigation measures available as key to slowing the spread of the virus and protecting U.S. healthcare systems while widespread vaccination efforts continued. Like other COVID-19 mitigation measures issued by CDC, the August Order was always intended as a temporary measure as understanding of the virus evolved. The scientific knowledge, availability of vaccines and therapeutics, and high percentage of the U.S. population living in a county identified as having “low” or “medium” COVID-19 Community Levels have permitted CDC to carefully step-down the various public health mitigation measures used. This step-down involves purposeful narrowing of some restrictions while terminating others when the public health need for and efficacy of the measures no longer outweigh the severity of the restriction. For example, CDC took the unprecedented step of halting cruise ship travel during the earliest phases of the pandemic, but permitted gradual resumption of cruises as the public health situation evolved.<sup>138</sup> Likewise, the United States has

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<sup>136</sup> As noted above, CDC reviews the public health rationale underlying the need for the Order every 60 days.

<sup>137</sup> See 85 Fed. Reg. 56424, 56440-42 (noting that, despite passing the precursor to 42 U.S.C. § 265 during a cholera epidemic in 1893, the U.S. government did not exercise this authority until 1929).

<sup>138</sup> CDC issued the original No Sail Order on March 14, 2020, and a version of the order remained in place until October 29, 2020, when it was replaced with a Framework for Conditional Sailing which permitted a phased resumption of cruise ship operations as long as certain public health mitigation measures were met. This Framework for Conditional Sailing became non-binding for cruise ships in Florida by court order in July 2021 and was allowed to expire on January 15, 2022. The

transitioned from suspending the entry of persons traveling from specified countries<sup>139</sup> to a framework of CDC travel health notices and testing and proof of vaccination requirements<sup>140</sup> that allow for reopening global travel and migration while still implementing necessary mitigation measures. CDC believes that the restrictions remaining in place as part of the travel framework (e.g., proof of vaccination requirements for noncitizens entering the United States by air or land POE, and proof of a negative COVID-19 test result)<sup>141</sup> continue to be necessary and are appropriately balanced to minimize restrictions on individuals. CDC continually evaluates the need for these measures and is committed to tailoring them to meet the current public health needs. These careful step-downs have been driven by the evolution of the COVID-19 pandemic and scientific developments and are part of CDC's commitment to exercise its authorities in a manner that provides the greatest benefit for public health while imposing the minimum necessary burden on individuals and communities.

In the context of the CDC Orders issued under 42 U.S.C. §§ 265, 268 and 42 C.F.R. § 71.40, this public health-driven step-down first narrowed implementation to except UC and then fully terminated the Orders with respect to UC once there was no longer public health justification for such a suspension. While the CDC Orders under 42 U.S.C. §§ 265, 268 and 42 C.F.R. § 71.40 provided an important measure to protect against the introduction, transmission, and spread of COVID-19 during earlier phases of the pandemic by reducing the number of noncitizens held in congregate settings, other public health measures are now available to provide necessary public health protection for noncitizens, Americans, and the DHS workforce.<sup>142</sup> CDC acknowledges that public health concerns may arise in congregate settings, including COVID-19 transmission. CDC has determined that, although there is still a risk of COVID-19 transmission in crowded congregate settings, including DHS facilities, that risk does not present a sufficiently serious danger to public health to necessitate maintaining the August Order. Furthermore, the mitigation measures available will help reduce severe outcomes and reduce the serious danger of introduction, transmission, and spread of COVID-19 into the United States by covered noncitizens.

Both at home and abroad, vaccination rates are increasing. Vaccination among the American public and the DHS workforce in particular has been largely successful and, as stated in the August Order, widespread vaccination of federal employees and personnel in congregate settings at POE and Border Patrol stations demonstrates important progress toward the normalization of border operations.<sup>143</sup> Since August 2021, vaccination rates in the countries of origin for the current majority of incoming

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Framework was replaced by a voluntary program, CDC's COVID-19 Program for Cruise Ships, wherein cruise lines choosing to opt into the program are required to follow all recommendations and guidance as a condition of their participation in the program. See *Technical Instructions for CDC's COVID-19 Program for Cruise Ships Operating in U.S. Waters*, Centers for Disease Control and Prevention, <https://www.cdc.gov/quarantine/cruise/management/technical-instructions-for-cruise-ships.html#program-for-cruise-ships> (last updated Mar. 18, 2022); see also *supra* notes 38, 49, and 60.

<sup>139</sup> See *supra* notes 35, 59, 66, 78, and 79.

<sup>140</sup> See *supra* note 67.

<sup>141</sup> CDC Orders, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/cdcresponse/laws-regulations.html> (updated Mar. 12, 2022).

<sup>142</sup> Since the August Order, the collection, production, and analysis of key COVID-19 response metrics has continued to expand. Advances in public health surveillance may enable officials and facilities (including congregate setting facilities) to rapidly institute necessary mitigation measures in the event of an outbreak. For example, CDC launched and is continually enhancing the National Wastewater Surveillance System to track the presence of SARS-CoV-2 in wastewater samples collected across the country. See *supra* note 21.

<sup>143</sup> CBP most recently reported vaccination rates between 75% and 91% among its U.S. Border Patrol and Office of Field Operations personnel.



noncitizens have also increased dramatically.<sup>144</sup> Such global increases in vaccination rates and infection-induced immunity provide additional layers of protection. As noted above, DHS is currently scaling up a program that provides vaccines to encountered noncitizens taken into CBP custody along the Southwest Border.<sup>145</sup> CDC is supportive of these efforts as a public health measure as they align with CDC's and the U.S. government's emphasis on global vaccination to fight COVID-19. Even if full COVID-19 vaccination cannot be assured, partial vaccination provides some level of protection against severe illness and hospitalization and helps maintain U.S. healthcare resources.<sup>146</sup>

The August Order also highlighted the threat posed by emerging variants and the potential for a future, vaccine-resistant variant, either of which could negatively impact U.S. communities and local healthcare resources.<sup>147</sup> Based in part on these threats, CDC concluded at that time that SA and FMU should continue to be subject to the August Order, pending further improvements in the public health situation, and subject to continual reassessment.<sup>148</sup> Since the August Order was implemented, public health officials have learned a great deal about variants and how best to respond to them. In response to Omicron, the U.S. government updated the National COVID-19 Preparedness Plan for monitoring COVID-19 to swiftly adapt tools to combat a new variant and deploy emergency resources to help communities.<sup>149</sup> The Plan includes steps to ensure that variant surveillance, vaccines, tests, and treatments can be updated and deployed quickly.<sup>150</sup>

At this point in the pandemic, the United States has high rates of vaccine and infection-induced immunity in the population, as well as availability of effective therapeutics, testing, and well-fitting masks. These tools, which have been developed and distributed over the past two years, help minimize medically significant disease and prevent excessive strain on the healthcare sector even while SARS-CoV-2 virus continues to circulate. As noted above, 97.1% of the U.S. population is currently living in an area classified as having a "low" COVID-19 Community Levels, meaning most of the population can operate under more relaxed COVID-19 mitigation strategies.<sup>151</sup> Noteworthy for purposes of this Determination, as of March 31, 2022, all 24 U.S. counties along the U.S.-Mexico border are classified as having a "low" COVID-19 Community Level.<sup>152</sup> Like prior CDC Orders, the August Order, issued

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<sup>144</sup> Thus far in 2022, Mexico, Cuba, Guatemala, Honduras, and Nicaragua constitute the top five countries of origin for covered noncitizens. Rates of vaccination for each country are as follows: Cuba: 88% fully vaccinated, 94% only partly vaccinated; Guatemala: 33% fully vaccinated, 9.8% only partly vaccinated; Honduras: 47% fully vaccinated, 6% only partly vaccinated; Mexico: 61% fully vaccinated, 4.5% only partly vaccinated; Nicaragua: 61% fully vaccinated, 82% only partly vaccinated. *Coronavirus (COVID-19) Vaccinations*, Our World in Data, <https://ourworldindata.org/covid-vaccinations> (last visited Mar. 31, 2022).

<sup>145</sup> See *supra* I.B.5. CDC strongly supports broad vaccination at the Southwest Border in furtherance of public health, and will implement termination of the Order on May 23, 2022, in part to give DHS time to scale up its vaccination program. That said, given the current status of the pandemic and the range of mitigation measures currently in place and in the process of being implemented, CDC believes the serious risk to public health that the CDC Orders were intended to address has been sufficiently alleviated, even in the absence of complete implementation of the DHS vaccination program.

<sup>146</sup> As demonstrated by the U.S. government's experience with Operation Artemis and Operation Allies Welcome, a COVID-19 vaccination program helps protect noncitizens, as well as personnel serving these populations and American communities. Vaccination of all encountered noncitizens aligns with larger U.S. government pandemic efforts and safe travel policies.

<sup>147</sup> 86 Fed. Reg. 42828, 42837.

<sup>148</sup> *Id.*

<sup>149</sup> See *supra* note 21.

<sup>150</sup> *Id.*

<sup>151</sup> Per internal CDC calculations.

<sup>152</sup> *COVID-19 Integrated County View*, Centers for Disease Control and Prevention, [https://covid.cdc.gov/covid-data-tracker/#county-view?list\\_select\\_state=all\\_states&list\\_select\\_county=all\\_counties&data-type=CommunityLevels](https://covid.cdc.gov/covid-data-tracker/#county-view?list_select_state=all_states&list_select_county=all_counties&data-type=CommunityLevels) (last

during the fourth wave of the pandemic, noted the goal of slowing the introduction, transmission, and spread of SARS-CoV-2 into the United States by covered noncitizens.<sup>153</sup> With the ebb of the Omicron surge across the United States, however, the public health findings underlying the August Order have changed. Although COVID-19 remains a concern, the readily available and less burdensome public health mitigation tools to combat the disease render an order under 42 U.S.C. § 265 to prevent a serious danger to the public health unnecessary. At this point in the pandemic, the previously identified public health risk is no longer commensurate with the extraordinary measures instituted by the CDC Orders. As the pandemic evolves, CDC will continue to monitor the situation with respect to COVID-19 at U.S. borders and will continue to consult with DHS on combatting COVID-19 in DHS facilities following the Termination of the August Order.

### III. Legal Considerations

#### A. Temporary Nature of Orders under 42 U.S.C. § 265 and Absence of Reliance Interests

In issuing this Public Health Determination and Termination, CDC has considered whether state or local governments, or their subdivisions, have any “legitimate reliance”<sup>154</sup> interests in the continued expulsion of covered noncitizens pursuant to 42 U.S.C. § 265 (Section 265). CDC has determined that no state or local government could be said to have legitimately relied on the CDC Orders issued under 42 U.S.C. §§ 265, 268 and 42 C.F.R. § 71.40 to implement long-term or permanent changes to its operations because those orders are, by their very nature, short-term orders, authorized only when specified statutory criteria are met, and subject to change at any time in response to an evolving public health crisis. Section 265 may be invoked only if CDC determines that there is a “serious danger of the introduction of [a communicable] disease into the United States, and that this danger is so increased by the introduction of persons or property from such country [where the communicable disease exists] that a suspension of the right to introduce such persons and property is required in the interest of the public health.”<sup>155</sup> Moreover, the statute may be invoked only “for such period of time as [CDC] may deem necessary” to avert such a danger.<sup>156</sup> As HHS’s implementing regulation further recognizes, in prohibiting the introduction of covered persons “in whole or in part,”<sup>157</sup> a CDC Order is effective “only for such period of time that the Director deems necessary to avert the serious danger of the introduction of a quarantinable communicable disease.”<sup>158</sup>

For these reasons, the CDC Orders have consistently been subject to periodic reviews to ensure their continued necessity. CDC’s initial order issued in March 2020 made clear that the Order represented a “*temporary* suspension of the introduction of [covered] persons into the United States”<sup>159</sup> and that the order would remain effective only for “30 days, or until [CDC] determine[s] that the danger

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updated Mar. 31, 2022), noting 100% (n=24) of counties along the U.S.-Mexico border are considered “Low”: California (San Diego County, Imperial County); Arizona (Pima County, Santa Cruz County, Cochise County, Yuma County); New Mexico (Luna County, Dona Ana County, Otero County, Eddy County, Lea County); and Texas (Presidio County, Brewster County, Terrell County, Webb County, Zapata County, Cameron County, El Paso County, Hudspeth County, Val Verde County, Kinney County, Maverick County, Starr County, Hidalgo County).

<sup>153</sup> See 86 Fed. Reg. 42828, 42834 and 42838.

<sup>154</sup> See *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020).

<sup>155</sup> 42 U.S.C. § 265.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> 42 C.F.R. § 71.40(a).

<sup>159</sup> 85 Fed. Reg. at 17061 (emphasis added).

of further introduction of COVID-19 into the United States has ceased to be a serious danger to the public health, *whichever is shorter*.”<sup>160</sup> The March 2020 Order was subsequently extended on April 20, 2020, and then amended on May 19, 2020. The fact that the policy was frequently reviewed should have underscored that CDC’s use of its authority under 42 U.S.C. § 265 was a temporary measure subject to change at any time. The October 2020 Order again confirmed this understanding of CDC’s authority, noting the “temporary” nature of the suspension of the introduction of covered persons, as well as the facts that the Order would be reviewed every 30 days based on “the latest information regarding the status of the COVID-19 pandemic and associated public health risks,” and that CDC “retain[ed] the authority to extend, modify, or terminate the Order, or implementation of [the] Order, at any time as needed to protect public health.”<sup>161</sup>

In addition, CDC’s ability to exercise its authority under Section 265 as to certain groups has fluctuated due to litigation, further rendering it unreasonable for any state or local government to have acted in reliance on the continued exercise of the authority. CDC’s exercise of the Section 265 authority was first challenged shortly after CDC issued its initial order in March 2020, and subsequent court orders enjoining CDC from exercising its authority under 42 U.S.C. § 265 as to certain groups of covered noncitizens should have further discouraged reliance on temporary CDC orders. For example, in November 2020, the United States District Court for the District of Columbia enjoined the expulsion of UC on the basis that Section 265 likely did not authorize such expulsions.<sup>162</sup> Although the government obtained a stay of the injunction in January 2021,<sup>163</sup> the extent of the government’s authority under Section 265 remained contested. In addition, in September 2021, the United States District Court for the District of Columbia similarly enjoined the expulsion of FMU, again on the basis that Section 265 likely did not authorize such expulsions.<sup>164</sup> The U.S. Court of Appeals for the D.C. Circuit recently upheld the government’s authority under 42 U.S.C. § 265 to expel FMU, but the court held that such expulsions cannot be to places where the noncitizen are likely to be persecuted or tortured.<sup>165</sup> Although the decision will not take effect until the mandate issues in late April 2022, the decision should have put any state or local government on notice that there might be significant practical constraints on the government’s ability to expel covered FMU quickly.

Moreover, by August 2021, state and local governments were on notice that the federal government would be taking steps towards the resumption of normal border operations. In the August 2021 Order, CDC stated that it “view[ed] this public health reassessment as setting forth a roadmap toward the safe resumption of normal processing of arriving noncitizens, taking into account COVID-19 concerns and immigration facilities’ ability to implement mitigation measures.”<sup>166</sup> Accordingly, state

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<sup>160</sup> 85 Fed. Reg. at 17068.

<sup>161</sup> 85 Fed. Reg. at 65807, 65812.

<sup>162</sup> See *P.J.E.S. v. Wolf*, 502 F. Supp. 3d 492 (D.D.C. 2020).

<sup>163</sup> Order, *P.J.E.S. v. Mayorkas, et al.*, No. 20-5357 (D.C. Cir. Jan. 29, 2021), Doc. No. 1882899.

<sup>164</sup> See *Huisha-Huisha v. Mayorkas*, No. CV 21-100 (EGS), 2021 WL 4206688, at \*12 (D.D.C. Sept. 16, 2021).

<sup>165</sup> *Id.* at \*1. The D.C. Circuit also noted the “considerable difference” in public health situations between March 2020 and March 2022. *Id.* at \*13.

<sup>166</sup> 86 Fed. Reg. 42828, 42831; see also *id.* at 42837 (discussing a necessary mitigation measure “as DHS moves towards the resumption of normal border operations”); *id.* at 42838 (“CDC believes that the gradual resumption of normal border operations under Title 8 is feasible. With careful planning, this may be initiated in a stepwise manner that complies with COVID-19 mitigation protocols.”); *id.* at 42840 (noting that “although this Order will continue with respect to SA and FMU, DHS will use case-by-case exceptions based on the totality of the circumstances where appropriate to except individual SA and FMU in a manner that gradually recommences normal migration operations as COVID-19 health and safety protocols and capacity allows”); *id.* (CDC considered “the use of case-by-case exceptions as a step towards the resumption of normal border operations under Title 8”).

and local governments could not have reasonably relied on CDC's indefinite use of its expulsion authority under Section 265. As a factual matter, CDC is not aware of any reasonable or legitimate reliance on the continued expulsion of covered noncitizens under 42 U.S.C. § 265 beyond potentially local healthcare systems' allocation of resources, which CDC has considered in this Order.<sup>167</sup>

Even if a state or local government had relied on the continued existence of a CDC order under this authority, 42 U.S.C. § 265 only authorizes CDC to prevent the introduction of noncitizens when it is required in the interest of public health. No state or local government could reasonably rely on CDC's continued application of Section 265 once CDC determined that there is no longer sufficient public health risk present with respect to the introduction of covered noncitizens. Therefore, CDC's considered judgment is that any reliance interest that might be said to exist in connection with the continued suspension of the right to introduce covered noncitizens under 42 U.S.C. § 265 is not weighty enough to displace CDC's determination that there is no public health justification for such a suspension at this time.<sup>168</sup> To the extent that any state or local government did rely on the expulsion of noncitizens for purposes of resource allocation despite the reasons cautioning against such reliance, CDC concludes that resource allocation concerns do not outweigh CDC's determination that the suspension of the right to introduce covered noncitizens is not required to avert a serious danger to public health.

CDC has also considered whether there may be any short-term reliance on the continued expulsion of noncitizens under the August 2021 Order. CDC concludes that any short-term reliance interests should be limited for all the reasons explained above, and particularly in light of the expressly temporary nature of the Order. For the same reasons, CDC concludes that any such reliance does not outweigh CDC's determination that the expulsion of covered noncitizens is not required to avert a serious danger to public health. Moreover, to the extent that any state or local government has made any short-term plans based on the existence of the August Order, the effective date of this Termination has been set for 52 days from the date of issuance, thus providing state and local governments time to adjust to the resumption of regular Title 8 immigration processing.

Finally, the CDC Orders issued under 42 U.S.C. §§ 265, 268 and 42 C.F.R. § 71.40 are not, and do not purport to be, policy decisions about controlling immigration; rather, as explained, CDC's exercise of its authority under Section 265 depends on the existence of a public health need. Thus, to the extent that state and local governments along the border or elsewhere were relying on an order under 42 U.S.C. § 265 as a means of controlling immigration, such reliance would not be reasonable or legitimate. And even if such reliance were reasonable or legitimate, that reliance would not outweigh CDC's conclusion that expulsions are not necessary under the terms of 42 U.S.C. § 265 or warrant disruption of ordinary processing of covered noncitizens.

## **B. Basis for Termination under 42 U.S.C. §§ 265, 268 and 42 C.F.R. § 71.40**

CDC is hereby terminating the August Order<sup>169</sup> and all prior orders issued pursuant to sections 362 and 365 of the PHS Act (42 U.S.C. §§ 265, 268) and the implementing regulation at 42 C.F.R. § 71.40.<sup>170</sup> This Termination will be implemented on May 23, 2022, for the operational reasons outlined

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<sup>167</sup> See *supra* I.B.2.

<sup>168</sup> See *Regents*, 140 S. Ct. at 1913 (explaining that features evidencing the temporary and non-rights-conferring nature of a government program "surely are pertinent in considering the strength of any reliance interests," and can be considered by the agency).

<sup>169</sup> See *supra* notes 1 and 4.

<sup>170</sup> See *supra* note 7.

herein, including to give DHS time to implement additional COVID-19 mitigation measures. The statutory and regulatory authorities permit the CDC Director to issue Orders prohibiting, in whole or in part, the introduction into the United States of persons from designated foreign countries (or one or more political subdivisions or regions thereof) or places, *only for such period of time that the Director deems necessary* to avert the serious danger of the introduction of a quarantinable communicable disease, based on a determination by the Director that:

- (1) By reason of the existence of any quarantinable communicable disease in a foreign country (or one or more political subdivisions or regions thereof) or place there is serious danger of the introduction of such quarantinable communicable disease into the United States; and
- (2) This danger is so increased by the introduction of persons from such country (or one or more political subdivisions or regions thereof) or place that a suspension of the right to introduce such persons into the United States is required in the interest of public health.<sup>171</sup>

Pursuant to 42 U.S.C. § 265 and the implementing regulation, the CDC Director has the authority to issue orders to mitigate the introduction and further spread of COVID-19 disease.<sup>172</sup> In recognition of the extraordinary nature of these emergency public health powers, section 265 and its implementing regulation contemplate that the exercise of these authorities will be temporally and geographically limited in scope as described below. Critically, these authorities also require that any orders issued will be terminated when they are no longer necessary to protect the public health. The authority to make this determination has been delegated to the CDC Director.

CDC explained in the preamble to the Final Rule for 42 C.F.R. § 71.40 that, in issuing an Order under these authorities, it may “consider a wide array of facts and circumstances when determining what is required in the interest of public health in a particular situation . . . includ[ing]: the overall number of cases of disease; any large increase in the number of cases over a short period of time; the geographic distribution of cases; any sustained (generational) transmission; the method of disease transmission; morbidity and mortality associated with the disease; the effectiveness of contact tracing; the adequacy of state and local healthcare systems; and the effectiveness of state and local public health systems and control measures.”<sup>173</sup> Other factors noted in the Final Rule are the potential for disease spread among persons held in congregate settings, the potential for disease spread to the community at large, and strain on healthcare systems.<sup>174</sup>

CDC is committed to avoiding the imposition of unnecessary burdens in exercising its communicable disease authorities. This 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.<sup>175</sup> Such an order must also be predicated, in part, upon a determination that the danger of such introduction is so increased that a suspension of the right to introduce such persons into the United States is *required in the interest of public health*.<sup>176</sup>

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<sup>171</sup> 42 U.S.C. § 265; 42 C.F.R. § 71.40.

<sup>172</sup> 85 Fed. Reg. 56424, 56425-26. The Director may suspend the introduction of persons not only to prevent the introduction of a quarantinable communicable disease, but also to aid in continued efforts to mitigate spread of that disease.

<sup>173</sup> *Id.* at 56444.

<sup>174</sup> *Id.* at 56431; 56434.

<sup>175</sup> 42 U.S.C. § 265; 42 C.F.R. § 71.40.

<sup>176</sup> 42 C.F.R. § 71.40.



CDC has considered these and other relevant factors in the foregoing determination, including the overall shift in the U.S. government response to the pandemic, and 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. Although COVID-19 continues to spread within the United States, as a result of the numerous tools for disease prevention, mitigation, and treatment which have become available over the past two years, and the other considerations explained above, an order suspending the right to introduce covered noncitizens under 42 U.S.C. § 265 is no longer required in the interest of public health.

#### **IV. Issuance and Implementation**

Based on the foregoing Public Health Determination, I hereby Terminate the August Order and all previous orders issued pursuant to Sections 362 and 365 of the PHS Act (42 U.S.C. §§ 265, 268), and their implementing regulations under 42 C.F.R. § 71.40.<sup>177</sup> This Termination will be implemented on May 23, 2022.

Following an assessment of the current epidemiologic status of the COVID-19 pandemic and the U.S. government's ongoing response efforts, I find there is no longer a public health justification for the August Order and previous Orders issued under these authorities; employing such a broad restriction to preserve the health and safety of U.S. citizens, U.S. nationals, and lawful permanent residents, and personnel and noncitizens in POE and U.S. Border Patrol stations is no longer necessary to protect the public health. Other current public health mitigation measures sufficiently reduce the serious danger of introduction, transmission, and spread of the virus that causes COVID-19 as a result of the entry of covered noncitizens, including in congregate settings where such noncitizens would otherwise be held while undergoing immigration processing, including at POE and U.S. Border Patrol stations at or near the U.S. land and adjacent coastal borders.

Termination of the August Order is based on the current status of the COVID-19 pandemic and the available public health mitigation measures. In making this determination, I have considered myriad facts, including epidemiological information such as the viral transmissibility and asymptomatic transmission of COVID-19, the epidemiology and spread of SARS-CoV-2 variants, the morbidity and mortality associated with the disease for individuals in certain risk categories, COVID-19 Community Levels, national levels of transmission and immunity, the availability and efficacy of vaccination and treatments, as well as public health concerns with congregate settings at border facilities. While holding noncitizens in congregate settings with limited options for COVID-19 mitigation is accompanied by inherent risk, the overall public health landscape in the United States has changed such that the justification for the August Order is no longer sustained.

The COVID-19 pandemic is ongoing and appropriate public health mitigation measures must continue to be applied.<sup>178</sup> Although it cannot be known how the spread of SARS-CoV-2 will change in the future (e.g., due to the emergence of a new variant), CDC plans to rely on COVID-19 Community Levels, among other factors, to inform how prevention measures may be used to minimize the impact of

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<sup>177</sup> Control of Communicable Diseases; Foreign Quarantine: Suspension of the Right to Introduce and Prohibition of Introduction of Persons into United States from Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 56424 (Sept. 11, 2020).

<sup>178</sup> See *supra* note 105, indicating that the whole community can be safe only when [everyone] take[s] steps to protect each other, even when the COVID-19 Community Level is low or medium.

COVID-19 on health and society, including at the U.S. borders.<sup>179</sup> To that end, CDC will continue to assess the public health situation at the U.S. borders even after this Termination as part of its comprehensive COVID-19 response. If, for example, there is a substantial change in the public health situation with respect to the pandemic, such as due to new and particularly concerning SARS-CoV-2 variants, CDC could determine a new order under 42 U.S.C. §§ 265, 268 and 42 C.F.R. § 71.40 is necessary. Any such determination would be based on the public health needs identified at that time.

#### **A. Implementation of this Termination**

CDC is required by the Final Rule to consult with “all Federal departments or agencies whose interests would be impacted by this order,” “as practicable under the circumstances.”<sup>180</sup> CDC recognizes that resumption of border operations under Title 8 authorities, and the need to put additional appropriate COVID-19 mitigation measures in place, requires time to operationalize in a manner that protects the health and safety of the migrants, workforce, and American communities. Based on DHS’ recommendation and in order to provide DHS time to implement operational plans for fully resuming Title 8 processing, including incorporating appropriate COVID-19 measures, this Termination will be implemented on May 23, 2022.

DHS has represented that over the next several weeks it is taking important steps to implement processes in preparation for the full resumption of border operations pursuant to Title 8 authorities, in a manner that promotes the health and safety of migrants, CBP employees, and the local communities. Most recently, DHS has initiated a vaccination program for all age-eligible migrants who lack legal status and are processed pursuant to Title 8 authorities; this program will be scaled up over the next two months.<sup>181</sup> As stated above, CDC recognizes vaccination as the single most important public health tool for fighting COVID-19 and recommends that all eligible persons, regardless of citizenship, be vaccinated and remain up to date with boosters.<sup>182</sup> The implementation timeline of this Termination will provide DHS with time to scale its vaccination program, as well as ready its operational capacity, implement appropriate COVID-19 protocols, and prepare for resumption of regular migration under Title 8.

CDC recognizes that the Termination of the August Order will lead to an increase in the number of noncitizens being processed in DHS facilities which could result in overcrowding in congregate settings. Moreover, DHS projects, based on available intelligence as well as seasonal migration patterns, an increase in encounters in the coming months, which could lead to further crowding in DHS facilities. DHS reports that it is taking steps to plan for such increases, including by readying decompression plans, deploying additional personnel and resources to support U.S. Border Patrol, and enhancing its ability to safely hold noncitizens it encounters. Putting such plans in place, ensuring that the workforce is adequately and appropriately trained for their shifting roles, and deploying critical resources require time. This Termination will be implemented on May 23, 2022, to provide DHS with additional time to ready such operational plans and prepare for full resumption of regular migration under Title 8.

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<sup>179</sup> *Id.*

<sup>180</sup> 42 C.F.R. § 71.40.

<sup>181</sup> *See supra* I.B.5.

<sup>182</sup> In line with CDC’s emphasis on the importance of vaccination, CDC has kept its requirement for noncitizens to provide proof of vaccination for air travel and also supports DHS’s Order requiring the same at the land borders (*see supra* notes 67 and 83).

For the foregoing reasons, this Termination will be implemented on May 23, 2022. To the extent that any state or local government has a misplaced reliance interest on the August Order, the timeline for implementation of the Termination also allows time for such entities to adjust their planning in anticipation of the full resumption of Title 8 border processing. During this temporary period of continued application of the August Order, DHS will continue to exercise its discretion to issue case-by-case exceptions based on the totality of the circumstances as set forth in the August Order.<sup>183</sup> DHS has represented that it will continue to make use of this exception where, for example, a noncitizen may suffer particular harms associated with expulsion (e.g., vulnerable and medically fragile persons) until the Termination is effective.

## **B. APA Review**

This Termination shall be implemented on May 23, 2022. I consulted with DHS and other federal departments as required by the Final Rule before I issued this Order and requested that DHS aid in the implementation of this Termination.<sup>184</sup> DHS is developing operational plans for implementing this Termination. CDC will review these plans and ensure that they are consistent with the language of this Termination and public health best practices.

This Termination, like the preceding Orders issued under this authority, is not a rule subject to notice and comment under the Administrative Procedure Act (APA).<sup>185</sup> Even if it were, notice and comment are not required because there is good cause to dispense with prior public notice and the opportunity to comment on this Termination.<sup>186</sup> Given the extraordinary nature of an order under Section 265, the resultant restrictions on application for asylum and other immigration processes under Title 8, and the statutory and regulatory requirement that an CDC order under the authority last no longer than necessary to protect public health, it would be impracticable and contrary to the public interest and immigration laws that apply in the absence of an order under 42 U.S.C. § 265 to delay the effective date of this termination beyond May 23, 2022 for the reasons outlined herein.<sup>187</sup> As explained, DHS requires time to institute operational plans to implement this order, including COVID-19 mitigation measures, and begin regular immigration processing pursuant to Title 8. In light of the August Order's significant disruption of ordinary immigration processing and DHS's need for time to implement an orderly and safe termination of the order, there is good cause not to delay issuing this termination or to delay the termination of this order past May 23, 2022. In addition, this Order concerns ongoing discussions with Canada, Mexico, and other countries regarding immigration and how best to control COVID-19 transmission over shared borders and therefore directly "involve[s] . . . a . . . foreign affairs function of the United States;"<sup>188</sup> thus, notice and comment are not required.

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<sup>183</sup> "Persons whom customs officers determine, with approval from a supervisor, should be excepted from this Order based on the totality of the circumstances, including consideration of significant law enforcement, officer and public safety, humanitarian, and public health interests. DHS will consult with CDC regarding the standards for such exceptions to help ensure consistency with current CDC guidance and public health recommendations." 86 Fed. Reg. 42828, 42841 (Aug. 5, 2021).

<sup>184</sup> 42 U.S.C. § 268; 42 C.F.R. § 71.40(d).

<sup>185</sup> While this Termination is not a rule subject to notice and comment under the APA (5 U.S.C. § 553), the Office of Information and Regulatory Affairs has determined that this is a major rule as defined by Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, also known as the Congressional Review Act (CRA). 5 U.S.C. § 804(2). The agency finds, for the reasons listed above, that good cause exists to make this rule effective on May 23, 2022, under 5 U.S.C. § 808(2).

<sup>186</sup> 5 U.S.C. § 553(b)(3)(B).

<sup>187</sup> 5 U.S.C. § 553(a)(1).

<sup>188</sup> 5 U.S.C. § 553(a)(1).



With this Termination, I hereby determine that the danger of further introduction, transmission, or spread of COVID-19 into the United States from covered noncitizens, as defined in the August Order, has ceased to be a serious danger to the public health and therefore the continuation of the August Order, and all previous orders issued under the same authority, is no longer necessary to protect public health. Nothing in this Termination will prevent me from issuing a new Order under 42 U.S.C. §§ 265, 268 and 42 C.F.R. § 71.40 based on new findings, as dictated by public health needs.

In testimony whereof, the Director, Centers for Disease Control and Prevention, U.S. Department of Health and Human Services, has hereunto set her hand at Atlanta, Georgia, this 1<sup>st</sup> day of April, 2022.

A handwritten signature in black ink, appearing to read "Rochelle P. Walensky", with a horizontal line underneath.

Rochelle P. Walensky, MD, MPH  
Director  
Centers for Disease Control and Prevention

# EXHIBIT B

**AGREEMENT BETWEEN THE DEPARTMENT OF HOMELAND SECURITY AND  
THE ARIZONA ATTORNEY GENERAL'S OFFICE AND THE ARIZONA  
DEPARTMENT OF LAW**

The parties to this Sanctuary for Americans First Enactment (SAFE) Agreement (Agreement) are on the one hand:

- (1) The Department of Homeland Security,
- (2) U.S. Customs and Border Protection (CBP),
- (3) U.S. Immigration and Customs Enforcement (ICE), and
- (4) U.S. Citizenship and Immigration Services (USCIS);<sup>1</sup>

and on the other hand:

- (5) the Arizona Attorney General's Office and the Arizona Department of Law (Agency).

**I. AUTHORITY**

The authorities governing this Agreement include, but are not limited to:

- (1) Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, as amended.
- (2) Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, as amended.
- (3) Privacy Act, 5 U.S.C. Section 552a, as amended.
- (4) The Inter-Governmental Cooperation Act, 31 U.S.C. Section 6501, *et seq.* as amended.
- (5) Homeland Security Act of 2002, 116 Stat. 2135, 6 U.S.C. Section 101, *et seq.* as amended.
- (6) Immigration and Nationality Act, 8 U.S.C. Section 1101, *et seq.* as amended.

**II. PURPOSE AND COMMITMENT**

DHS recognizes that Agency, like other state agencies and municipalities, is directly and concretely affected by changes to DHS rules and policies that have the effect of easing, relaxing, or limiting immigration enforcement. Such changes can negatively impact Agency's law enforcement needs and budgets, as well as its other important health, safety, and pecuniary interests of the State of Arizona. The harm to Agency is particularly acute where Agency's

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<sup>1</sup> The Department of Homeland Security, CBP, ICE, and USCIS are collectively referred to in this Agreement as "DHS." The Department of Homeland Security, CBP, ICE, and USCIS enter into this Agreement individually and collectively, such that termination or removal of one or more of those parties (whether by law or contract) (including the Department of Homeland Security) does not terminate this Agreement as to any other parties.

budget has been set months or years in advance and it has no time to adjust its budget to respond to DHS policy changes. Specifically, DHS recognizes that the following actions result in direct and concrete injuries to Agency, including increasing the rate of crime, consumption of public benefits and services, strain upon the healthcare system, and harm to the environment, as well as increased economic competition with the State of Arizona's current residents for, among other things, employment, housing, goods and services:

- (1) a decrease of any immigration enforcement priorities;
- (2) a voluntary reduction in the number of DHS agents performing immigration enforcement functions;
- (3) a decrease or pause on returns or removals of removable or inadmissible aliens;
- (4) a decrease or pause on apprehensions or administrative arrests;
- (5) relaxation of the standards for granting relief from return or removal, such as asylum;
- (6) an increase in releases from detention;
- (7) a relaxation of the standards for granting release from detention;
- (8) changes to immigration benefits or eligibility, including work authorization, discretionary actions, or discretionary decisions; and
- (9) rules, policies, procedures, and decisions that could result in significant increases to the number of people residing in a community.

At the same time, Agency recognizes that DHS relies on cooperation with Agency and information shared by Agency to carry out DHS's functions, including but not limited to combating financial crimes, internet crimes against children, and human trafficking, as well as immigration enforcement. Any decrease in a State's or municipality's cooperation or information sharing with DHS can result in a decrease in these law enforcement priorities.

To that end, this Agreement establishes a binding and enforceable commitment between DHS and Agency, in which Agency will provide information and assistance to help DHS perform its border security, legal immigration, immigration enforcement, national security, and other law enforcement missions in exchange for DHS's commitment to consult Agency and consider its views before taking any action, adopting or modifying a policy or procedure, or making any decision that could:

- (1) reduce, redirect, reprioritize, relax, or in any way modify immigration enforcement;
- (2) decrease the number of ICE agents performing immigration enforcement duties;
- (3) pause or decrease the number of returns or removals of removable or inadmissible aliens from the country;
- (4) increase or decline to decrease the number of lawful, removable, or inadmissible aliens;
- (5) increase or decline to decrease the number of releases from detention;
- (6) relax the standards for granting relief from return or removal, such as asylum;



- (7) relax the standards for granting release from detention;
- (8) relax the standards for, or otherwise decrease the number of, apprehensions or administrative arrests;
- (9) increase, expand, extend, or in any other way change the quantity and quality of immigration benefits or eligibility for other discretionary actions for aliens; or
- (10) otherwise negatively impact Agency.

In case of doubt, DHS will err on the side of consulting with Agency.

### **III. RESPONSIBILITIES**

#### **A. DHS agrees to:**

- (1) Utilize its immigration authorities, to the maximum extent possible, to prioritize the protection of the United States and its existing communities. This includes:
  - a. enforcing the immigration laws of the United States to prohibit the entry into, and promote the return or removal from, the United States of inadmissible and removable aliens;
  - b. enforcing the immigration laws of the United States to prioritize detention over release of inadmissible and removable aliens;
  - c. enforcing the immigration laws of the United States to apprehend and administratively arrest inadmissible and removable aliens;
  - d. eliminating incentives and so-called "pull factors" for illegal immigration;
  - e. limiting eligibility for asylum and other relief from detention, return, or removal to the statutory criteria; and
  - f. refusing asylum and other relief from detention, return, or removal for those aliens who pose a danger to the United States, whether due to prior criminal history, the security of the United States, health, or some other bar.
- (2) Consult with Agency before taking any action or making any decision that could reduce immigration enforcement, increase the number of illegal aliens in the United States, or increase immigration benefits or eligibility for benefits for removable or inadmissible aliens. This includes policies, practices, or procedures which have as their purpose or effect:
  - a. reducing, redirecting, reprioritizing, relaxing, lessening, eliminating, or in any way modifying immigration enforcement;
  - b. decreasing the number of ICE agents within Agency's territorial jurisdiction performing immigration enforcement duties;
  - c. pausing or decreasing the number of returns or removals of removable or inadmissible aliens from the country;
  - d. decreasing the number of or criteria for detention of removable or inadmissible aliens from the country;
  - e. decreasing or pausing apprehensions or administrative arrests;

- f. increasing or declining to decrease the number of lawful, removable, or inadmissible aliens residing in the United States;
  - g. increasing, expanding, extending, or in any way changing the quantity or quality of immigration benefits or eligibility for these benefits or other discretionary actions for aliens; or
  - h. otherwise negatively impacting Agency.
- (3) Provide Agency with 180 days' written notice (in the manner provided for in Sections IV of this Agreement) of the proposed action and an opportunity to consult and comment on the proposed action, before taking any such action listed above.
- (4) Consider Agency's input and provide a detailed written explanation of the reasoning behind any decision to reject Agency's input before taking any action listed in Section III.A.2.
- (5) Err on the side of consulting with Agency in case of doubt as to whether DHS's action is implicated by this provision.

**B. Agency agrees to:**

- (1) Provide the support, cooperation, assistance, and information that is reasonably necessary for DHS to perform its missions.
- (2) To the extent permitted by Agency's budget and resources in the good-faith determination of the Arizona Attorney General, continue participating in law enforcement task forces, including working with Homeland Security Investigations as part of the Financial Crimes Task Force, Internet Crimes Against Children (ICAC) Task Force, and any applicable anti-human trafficking task force(s), as well as any future task forces on these subjects. DHS and Agency understand and agree that the specifics of cooperation for any particular task force may be governed by a separate agreement regarding the particular task force.
- (3) Honor and assist DHS, to the extent consistent with applicable state and federal law and when covered under Agency's jurisdiction, with (1) ICE or CBP "detainer requests" or "requests to hold" issued to Agency and (2) DHS requests for records or information from Agency.

**IV. NOTICES**

All notices required hereunder shall be given by certified United States mail, postage prepaid return receipt requested, and addressed to the respective parties at their addresses set forth below,



or at such other address as any party shall hereafter inform the other party by written notice. All written notices so given shall be deemed effective upon receipt.

Department of Homeland Security  
Secretary of Homeland Security  
Washington, DC 20528

U.S. Customs and Border Protection  
Office of the Commissioner  
1300 Pennsylvania Ave. NW  
Washington, D.C. 20229

U.S. Immigration and Customs Enforcement  
Office of the Director  
500 12th Street SW  
Washington, D.C. 20536

U.S. Citizenship and Immigration Services  
Office of the Director  
5900 Capital Gateway Drive  
Suitland, MD 20746

Arizona Attorney General's Office  
Attn: Chief Deputy Attorney General  
2005 N. Central Avenue  
Phoenix, AZ 85004

## **V. PENALTIES**

Agency acknowledges the information it receives from DHS pursuant to this Agreement is governed by the Privacy Act, 5 U.S.C. section 552a(i)(1), and that any person who obtains this information under false pretenses or uses it for any purpose other than as provided for in this Agreement, or otherwise permitted by another agreement with DHS or applicable law, may be subject to civil or criminal penalties.

## **VI. INJUNCTIVE RELIEF**

It is hereby agreed and acknowledged that it will be impossible to measure in money the damage that would be suffered if the parties fail to comply with any of the obligations herein imposed on them and that in the event of any such failure, an aggrieved party will be irreparably damaged and will not have an adequate remedy at law. Any such party shall, therefore, be entitled to injunctive relief (in addition to any other remedy to which it may be entitled in law or in equity), including specific performance, to enforce such obligations. If any action should be brought in

equity to enforce any of the provisions of this Agreement, none of the parties hereto shall raise the defense that there is an adequate remedy at law.

## **VII. THIRD PARTY LIABILITY**

Each party to this Agreement shall be solely responsible for its own defense against any claim or action by third parties arising out of or related to the execution or performance of this Agreement, whether civil or criminal, and retains responsibility for the payment of any corresponding liability.

Nothing in this Agreement is intended, or should be construed, to create any right or benefit, substantive or procedural, enforceable at law by any non-party to this Agreement against any party, its agencies, officers, or employees.

## **VIII. DISPUTE RESOLUTION**

DHS and Agency will endeavor to the best of their ability to resolve their disputes informally and through consultation and communication. Disagreements on the interpretation of the provisions of this Agreement that cannot be resolved between the parties should be provided in writing to the heads of all parties for resolution. If settlement cannot be reached at this level, the disagreement may be adjudicated by invoking the judicial or alternative dispute resolution process.

## **IX. CONFLICTS**

This Agreement constitutes the full agreement on this subject between DHS and Agency. Any inconsistency or conflict between or among the provisions of this Agreement will be resolved in the following order of precedence: (1) this Agreement and (2) other documents incorporated by reference in this Agreement.

## **X. SEVERABILITY**

The Parties agree that if a binding determination is made that any term of this Agreement is unenforceable, such unenforceability shall not affect any other provision of this Agreement, and the remaining terms of this Agreement shall, unless prohibited by law, remain effective as if such unenforceable provision was never contained in this Agreement.

The parties additionally agree that if this Agreement is found to be unenforceable as to one or more of the parties comprising DHS, including the Department of Homeland Security, such unenforceability shall not affect the validity of this Agreement as to the remaining parties and this Agreement shall remain effective as if such party was never a party to this Agreement.



## **XI. ASSIGNMENT**

Agency may not assign this Agreement, nor may it assign any of its rights or obligations under this Agreement. To the greatest extent possible, this Agreement shall inure to the benefit of, and be binding upon, any successors to DHS and Agency without restriction.

## **XII. WAIVER**

No waiver by any party of any breach of any provision of this Agreement shall constitute a waiver of any other breach. Failure of any party to enforce at any time, or from time to time, any provision of this Agreement shall not be construed to be a waiver thereof.

## **XIII. EFFECTIVE DATE**

This Agreement shall be effective immediately when both the DHS authorized officials and the Agency authorized official have signed this Agreement. This Agreement shall continue in effect unless modified or terminated in accordance with the provisions of this Agreement.

## **XIV. MODIFICATION**

This Agreement is subject to periodic review by DHS, its authorized agents or designees, and, if necessary, periodic modification or renewal, consistent with this Agreement's terms, to assure compliance with current law, policy, and standard operating procedures. This Agreement constitutes the complete Agreement between the parties for its stated purpose, and no modification or addition will be valid unless entered into by mutual consent of all parties evidenced in writing and signed by all parties.

Any party may accomplish a unilateral administrative modification to change POC information. A written bilateral modification (*i.e.*, agreed to and signed by authorized officials of all parties) is required to change any other term of this Agreement.

## **XV. TERMINATION**

Any party may terminate its involvement in this Agreement by submitting a request in writing to the other parties and providing 180 days' notice of intent to terminate its involvement in this Agreement. The termination will be effective 180 days after the written termination request was submitted or upon a date agreed upon by all parties, whichever is earlier. Termination by one party of its involvement in this Agreement shall not terminate the Agreement as to the remaining parties.

## **XVI. STATUS**

The foregoing constitutes the full agreement on this subject between DHS and Agency.

Nothing in this Agreement may be construed to (1) negate any right of action for a State, local government, other person, or other entity affected by this Agreement; or (2) alter the laws of the United States.

#### **XVII. KNOWING AND VOLUNTARY ACKNOWLEDGMENT**

The parties enter into this Agreement voluntarily, without coercion or duress, and fully understand its terms. The parties acknowledge they had an opportunity to review and reflect on this Agreement and have discussed its provisions with their respective counsel, if any. The parties attest they understand the effect of each of the provisions in this Agreement and that it is binding on all parties.

#### **XVIII. COUNTERPARTS**

This Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one agreement.

#### **XIX. FORMALIZATION**

The undersigned represent that they are authorized to execute this Agreement on behalf of CBP, ICE, USCIS, and Agency, respectively.

Furthermore, the undersigned execute this Agreement on behalf of CBP, ICE, USCIS, Agency, respectively.

[Signatures on the following pages]

**Signature for the Department of Homeland Security**

DEPARTMENT OF HOMELAND SECURITY



1/8/2021

Kenneth T. Cuccinelli II

Date

Senior Official Performing the Duties of the Deputy Secretary


Signed individually and collectively<sup>2</sup>

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<sup>2</sup> “Signed individually and collectively” as used here indicates that the agency is entering into this Agreement both (1) for itself, independently, and (2) along with the other entities that comprise DHS, collectively. Should one agency, for whatever reason, cease to be a party to this Agreement, this Agreement shall still survive for all other parties and be read and interpreted as if the removed party had never been a party to this Agreement.

Signature for the Arizona Attorney General's Office and the Arizona Department of Law

THE ARIZONA ATTORNEY GENERAL'S OFFICE AND THE ARIZONA DEPARTMENT OF LAW

 29 Dec 20

Mark Brnovich  
Attorney General

Date

# EXHIBIT C

## **AGREEMENT BETWEEN THE DEPARTMENT OF HOMELAND SECURITY AND THE LOUISIANA DEPARTMENT OF JUSTICE**

The parties to this Sanctuary for Americans First Enactment (SAFE) Agreement (Agreement) are on the one hand:

- (1) The Department of Homeland Security,
- (2) U.S. Customs and Border Protection (CBP),
- (3) U.S. Immigration and Customs Enforcement (ICE), and
- (4) U.S. Citizenship and Immigration Services (USCIS);<sup>1</sup>

and on the other hand:

- (5) Louisiana Department of Justice (Agency).

### **I. AUTHORITY**

The authorities governing this Agreement include, but are not limited to:

- (1) Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, as amended.
- (2) Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, as amended.
- (3) Privacy Act, 5 U.S.C. Section 552a, as amended.
- (4) The Inter-Governmental Cooperation Act, 31 U.S.C. Section 6501, *et seq.* as amended.
- (5) Homeland Security Act of 2002, 116 Stat. 2135, 6 U.S.C. Section 101, *et seq.* as amended.
- (6) Immigration and Nationality Act, 8 U.S.C. Section 1101, *et seq.* as amended.

### **II. PURPOSE AND COMMITMENT**

DHS recognizes that Agency, like other States and municipalities, is directly and concretely affected by changes to DHS rules and policies that have the effect of easing, relaxing, or limiting immigration enforcement. Such changes can negatively impact Agency's law enforcement, housing, medical, education, employment, commerce, and healthcare needs and budgets, as well as its other important health, safety, and pecuniary interests. The harm to Agency is particularly acute where Agency's budget has been set months or years in advance and it has no time to adjust its budget to respond to DHS policy changes. Specifically, DHS recognizes that the following actions result in direct and concrete injuries to Agency, including increasing the rate of crime, consumption of public benefits and services, strain upon the healthcare system, and harm to the

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<sup>1</sup> The Department of Homeland Security, CBP, ICE, and USCIS are collectively referred to in this Agreement as "DHS." The Department of Homeland Security, CBP, ICE, and USCIS enter into this Agreement individually and collectively, such that termination or removal of one or more of those parties (whether by law or contract) (including the Department of Homeland Security) does not terminate this Agreement as to any other parties.



environment, as well as increased economic competition with Agency's current residents for, among other things, employment, housing, goods and services:

- (1) a decrease of any immigration enforcement priorities;
- (2) a voluntary reduction in the number of DHS agents performing immigration enforcement functions;
- (3) a decrease or pause on returns or removals of removable or inadmissible aliens;
- (4) a decrease or pause on apprehensions or administrative arrests;
- (5) relaxation of the standards for granting relief from return or removal, such as asylum;
- (6) an increase in releases from detention;
- (7) a relaxation of the standards for granting release from detention;
- (8) changes to immigration benefits or eligibility, including work authorization, discretionary actions, or discretionary decisions; and
- (9) rules, policies, procedures, and decisions that could result in significant increases to the number of people residing in a community.

At the same time, Agency recognizes that DHS relies on cooperation with Agency and information shared by Agency to carry out DHS's immigration enforcement functions. Any decrease in a State's or municipality's cooperation or information sharing with DHS can result in a decrease in immigration enforcement.

To that end, this Agreement establishes a binding and enforceable commitment between DHS and Agency, in which Agency will provide information and assistance to help DHS perform its border security, legal immigration, immigration enforcement, and national security missions in exchange for DHS's commitment to consult Agency and consider its views before taking any action, adopting or modifying a policy or procedure, or making any decision that could:

- (1) reduce, redirect, reprioritize, relax, or in any way modify immigration enforcement;
- (2) decrease the number of ICE agents performing immigration enforcement duties;
- (3) pause or decrease the number of returns or removals of removable or inadmissible aliens from the country;
- (4) increase or decline to decrease the number of lawful, removable, or inadmissible aliens;
- (5) increase or decline to decrease the number of releases from detention;
- (6) relax the standards for granting relief from return or removal, such as asylum;
- (7) relax the standards for granting release from detention;
- (8) relax the standards for, or otherwise decrease the number of, apprehensions or administrative arrests;
- (9) increase, expand, extend, or in any other way change the quantity and quality of immigration benefits or eligibility for other discretionary actions for aliens; or
- (10) otherwise negatively impact Agency.

In case of doubt, DHS will err on the side of consulting with Agency.



### **III. RESPONSIBILITIES**

#### **A. DHS agrees to:**

- (1) Utilize its immigration authorities, to the maximum extent possible, to prioritize the protection of the United States and its existing communities. This includes:
  - a. enforcing the immigration laws of the United States to prohibit the entry into, and promote the return or removal from, the United States of inadmissible and removable aliens;
  - b. enforcing the immigration laws of the United States to prioritize detention over release of inadmissible and removable aliens;
  - c. enforcing the immigration laws of the United States to apprehend and administratively arrest inadmissible and removable aliens;
  - d. eliminating incentives and so-called “pull factors” for illegal immigration;
  - e. limiting eligibility for asylum and other relief from detention, return, or removal to the statutory criteria; and
  - f. refusing asylum and other relief from detention, return, or removal for those aliens who pose a danger to the United States, whether due to prior criminal history, the security of the United States, health, or some other bar.
- (2) Consult with Agency before taking any action or making any decision that could reduce immigration enforcement, increase the number of illegal aliens in the United States, or increase immigration benefits or eligibility for benefits for removable or inadmissible aliens. This includes policies, practices, or procedures which have as their purpose or effect:
  - a. reducing, redirecting, reprioritizing, relaxing, lessening, eliminating, or in any way modifying immigration enforcement;
  - b. decreasing the number of ICE agents within Agency’s territorial jurisdiction performing immigration enforcement duties;
  - c. pausing or decreasing the number of returns or removals of removable or inadmissible aliens from the country;
  - d. decreasing the number of or criteria for detention of removable or inadmissible aliens from the country;
  - e. decreasing or pausing apprehensions or administrative arrests;
  - f. increasing or declining to decrease the number of lawful, removable, or inadmissible aliens residing in the United States;
  - g. increasing, expanding, extending, or in any way changing the quantity or quality of immigration benefits or eligibility for these benefits or other discretionary actions for aliens; or
  - h. otherwise negatively impacting Agency.

- (3) Provide Agency with 180 days' written notice (in the manner provided for in Sections IV of this Agreement) of the proposed action and an opportunity to consult and comment on the proposed action, before taking any such action listed above.
- (4) Consider Agency's input and provide a detailed written explanation of the reasoning behind any decision to reject Agency's input before taking any action listed in Section III.A.2.
- (5) Err on the side of consulting with Agency in case of doubt as to whether DHS's action is implicated by this provision.

**B. Agency agrees to:**

- (1) Provide the support, cooperation, assistance, and information that is reasonably necessary for DHS to perform its missions.
- (2) Honor, to the extent consistent with law, (1) ICE or CBP "detainer requests" or "requests to hold" issued to Agency and (2) DHS requests for records or information from Agency's Department of Motor Vehicles.

**IV. NOTICES**

All notices required hereunder shall be given by certified United States mail, postage prepaid return receipt requested, and addressed to the respective parties at their addresses set forth below, or at such other address as any party shall hereafter inform the other party by written notice. All written notices so given shall be deemed effective upon receipt.

Department of Homeland Security  
Secretary of Homeland Security  
Washington, DC 20528

U.S. Customs and Border Protection  
Office of the Commissioner  
1300 Pennsylvania Ave. NW  
Washington, D.C. 20229

U.S. Immigration and Customs Enforcement  
Office of the Director  
500 12th Street SW  
Washington, D.C. 20536

U.S. Citizenship and Immigration Services  
Office of the Director  
5900 Capital Gateway Drive  
Suitland, MD 20746

Louisiana Department of Justice  
Deputy Director of the Louisiana Bureau of Investigation  
1885 N. 3rd. Street  
Baton Rouge, Louisiana 70802

## **V. PENALTIES**

Agency acknowledges the information it receives from DHS is governed by the Privacy Act, 5 U.S.C. section 552a(i)(1), and that any person who obtains this information under false pretenses or uses it for any purpose other than as provided for in this Agreement may be subject to civil or criminal penalties.

## **VI. INJUNCTIVE RELIEF**

It is hereby agreed and acknowledged that it will be impossible to measure in money the damage that would be suffered if the parties fail to comply with any of the obligations herein imposed on them and that in the event of any such failure, an aggrieved party will be irreparably damaged and will not have an adequate remedy at law. Any such party shall, therefore, be entitled to injunctive relief (in addition to any other remedy to which it may be entitled in law or in equity), including specific performance, to enforce such obligations. If any action should be brought in equity to enforce any of the provisions of this Agreement, none of the parties hereto shall raise the defense that there is an adequate remedy at law.

## **VII. THIRD PARTY LIABILITY**

Each party to this Agreement shall be solely responsible for its own defense against any claim or action by third parties arising out of or related to the execution or performance of this Agreement, whether civil or criminal, and retains responsibility for the payment of any corresponding liability.

Nothing in this Agreement is intended, or should be construed, to create any right or benefit, substantive or procedural, enforceable at law by any non-party to this Agreement against any party, its agencies, officers, or employees.

## **VIII. DISPUTE RESOLUTION**

DHS and Agency will endeavor to the best of their ability to resolve their disputes informally and through consultation and communication. Disagreements on the interpretation of the provisions of this Agreement that cannot be resolved between the parties should be provided in writing to the heads of all parties for resolution. If settlement cannot be reached at this level, the disagreement may be adjudicated by invoking the judicial or alternative dispute resolution process.

## **IX. CONFLICTS**

This Agreement constitutes the full agreement on this subject between DHS and Agency. Any inconsistency or conflict between or among the provisions of this Agreement, will be resolved in the following order of precedence: (1) this Agreement and (2) other documents incorporated by reference in this Agreement.

## **X. SEVERABILITY**

The Parties agree that if a binding determination is made that any term of this Agreement is unenforceable, such unenforceability shall not affect any other provision of this Agreement, and the remaining terms of this Agreement shall, unless prohibited by law, remain effective as if such unenforceable provision was never contained in this Agreement.

The parties additionally agree that if this Agreement is found to be unenforceable as to one or more of the parties comprising DHS, including the Department of Homeland Security, such unenforceability shall not affect the validity of this Agreement as to the remaining parties and this Agreement shall remain effective as if such party was never a party to this Agreement.

## **XI. ASSIGNMENT**

Agency may not assign this Agreement, nor may it assign any of its rights or obligations under this Agreement. To the greatest extent possible, this Agreement shall inure to the benefit of, and be binding upon, any successors to DHS and Agency without restriction.

## **XII. WAIVER**

No waiver by any party of any breach of any provision of this Agreement shall constitute a waiver of any other breach. Failure of any party to enforce at any time, or from time to time, any provision of this Agreement shall not be construed to be a waiver thereof.

## **XIII. EFFECTIVE DATE**

This Agreement shall be effective immediately when both the DHS authorized officials and the Agency authorized official have signed this Agreement. This Agreement shall continue in effect unless modified or terminated in accordance with the provisions of this Agreement.

## **XIV. MODIFICATION**

This Agreement is subject to periodic review by DHS, its authorized agents or designees, and, if necessary, periodic modification or renewal, consistent with this Agreement's terms, to assure compliance with current law, policy, and standard operating procedures. This Agreement constitutes the complete Agreement between the parties for its stated purpose, and no modification

or addition will be valid unless entered into by mutual consent of all parties evidenced in writing and signed by all parties.

Any party may accomplish a unilateral administrative modification to change POC information. A written bilateral modification (*i.e.*, agreed to and signed by authorized officials of all parties) is required to change any other term of this Agreement.

#### **XV. TERMINATION**

Any party may terminate its involvement in this Agreement by submitting a request in writing to the other parties and providing 180 days' notice of intent to terminate its involvement in this Agreement. The termination will be effective 180 days after the written termination request was submitted or upon a date agreed upon by all parties, whichever is earlier. Termination by one party of its involvement in this Agreement shall not terminate the Agreement as to the remaining parties.

#### **XVI. STATUS**

The foregoing constitutes the full agreement on this subject between DHS and Agency.

Nothing in this Agreement may be construed to (1) negate any right of action for a State, local government, other person, or other entity affected by this Agreement; or (2) alter the laws of the United States.

#### **XVII. KNOWING AND VOLUNTARY ACKNOWLEDGMENT**

The parties enter into this Agreement voluntarily, without coercion or duress, and fully understand its terms. The parties acknowledge they had an opportunity to review and reflect on this Agreement and have discussed its provisions with their respective counsel, if any. The parties attest they understand the effect of each of the provisions in this Agreement and that it is binding on all parties.

#### **XVIII. COUNTERPARTS**

This Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one agreement.

#### **XIX. FORMALIZATION**

The undersigned represent that they are authorized to execute this Agreement on behalf of CBP, ICE, USCIS, and Agency, respectively.

Furthermore, the undersigned execute this Agreement on behalf of CBP, ICE, USCIS, Agency, respectively.

[Signatures on the following pages]

**Signature for the Department of Homeland Security**

DEPARTMENT OF HOMELAND SECURITY



1/8/2021

Kenneth T. Cuccinelli II

Date

Senior Official Performing the Duties of the Deputy Secretary

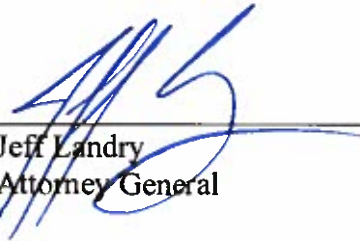
Signed individually and collectively<sup>2</sup>

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<sup>2</sup> “Signed individually and collectively” as used here indicates that the agency is entering into this Agreement both (1) for itself, independently, and (2) along with the other entities that comprise DHS, collectively. Should one agency, for whatever reason, cease to be a party to this Agreement, this Agreement shall still survive for all other parties and be read and interpreted as if the removed party had never been a party to this Agreement.

**Signature for the Louisiana Department of Justice**

LOUISIANA DEPARTMENT OF JUSTICE

 12-15-20  
Jeff Landry Date  
Attorney General



## CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

## I. (a) PLAINTIFFS

(b) County of Residence of First Listed Plaintiff n/a - State Plaintiffs  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Elizabeth B. Murrill; 1885 N. 3rd Street;  
Baton Rouge, LA 70804; (225) 326-6766

## DEFENDANTS

County of Residence of First Listed Defendant \_\_\_\_\_  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF  
THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

## II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   | PTF                        | DEF                        |   | PTF                        | DEF                        |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

## IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>INTELLECTUAL PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 880 Defend Trade Secrets Act of 2016 <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title VI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692) <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input checked="" type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<b>PRISONER PETITIONS</b> <b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

## V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

## VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
5 U.S.C. 704

Brief description of cause:

## VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ n/a CHECK YES only if demanded in complaint:  
JURY DEMAND: ☐ Yes ☒ No

## VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE \_\_\_\_\_ DOCKET NUMBER \_\_\_\_\_

DATE  
4/3/22

SIGNATURE OF ATTORNEY OF RECORD

*Elizabeth B. Murrill*

## FOR OFFICE USE ONLY

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_