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The Afterlife of "Title 42": Autopsy and Reformation

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"Title 42" is dead—or does it only sleep? This system of rapid "expulsion" that claimed the power to set aside the protections guaranteed in United States immigration laws expired in May 2023 when the COVID-19 emergency officially ended. Nonetheless, the public health regulation that the Trump administration adopted to legitimate the system remains in force and could be abused again at a moment's notice.

While it is important for immigration scholars to turn from the controversies of the emergency period to the new challenges that have replaced them, it is also essential to look back critically and sort out the lessons to be learned from the "Title 42" episode. The system was extreme and pretextual, and its legality was never definitively resolved despite a series of lawsuits, most of which became moot when the emergency was terminated. Yet its effects persist, not only in the politics of immigration enforcement, but in the permanent regulation that took its shape from the Trump administration's goal of suppressing the protection of refugees.

For that reason, this Article undertakes the task of looking back, and closely examines the course of the "Title 42" expulsion regime from its hurried start to its dragged-out end, and the litigation that sought to challenge it or to maximize it. The Article analyzes the reasoning of the courts on the lawfulness of the "Title 42" process, and especially of the 2020 Final Rule. I conclude that the Final Rule must be repealed or amended, before it once again enables deliberate abuse or distorts the government's response in a true emergency.

The starting point is an obscure provision of the Public Health Service Act of 1944, essentially unknown to immigration lawyers before 2020. It is codified at 42 U.S.C. § 265 (hence the name "Title 42"[1]) and should be presented to the reader in full:

> § 265. Suspension of entries and imports from designated places to prevent spread of communicable diseases.
>
> Whenever the Surgeon General determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, and that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required in the interest of the public health, the Surgeon

1. The reason for keeping the phrase in scare quotes is explained at the end of subsection II.A.1 *infra*.

> General, in accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose.[2]

Authority under Section 265 was later transferred to the Secretary of Health and Human Services (HHS), which has delegated it to the Centers for Disease Control (CDC), an agency within HHS that is based in Atlanta, Georgia.[3] The 1944 provision was a recodified version of a section in an 1893 quarantine act.[4] The 1893 version had been applied only once, in a different manner in 1929, and the 1944 version had never been applied until 2020.[5]

To make sense of the recent history, this Article begins in Part I by describing some of the norms that the Trump administration hoped Section 265 would suppress: the refugee protection institutions of asylum and withholding of removal, the right to be protected against return to torture, and the special protections for unaccompanied children enacted in 2008. It then summarizes some of the Trump administration's earlier attacks on the asylum system. Part II is the longest portion of the Article, narrating the life cycle of the "Title 42" system from its invention until its termination, first in the political branches and then in the courts. Part III examines the effects of "Title 42" enforcement statistically, unpacking the 3 million expulsions with reported data about their incidence. Part IV then

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2. 42 U.S.C. § 265 (2018) (codifying § 362 of the Public Health Service Act, ch. 373, tit. III, 58 Stat. 704 (1944)).

3. *See* Control of Communicable Diseases, Notice of Proposed Rulemaking, 81 Fed. Reg. 54230, 54232-33 & n.1, 3 (Aug. 15, 2016); *see* Eleanor Schiff & Daniel J. Mallinson, *Trumping the Centers for Disease Control: A Case Comparison of the CDC's Response to COVID-19, H1N1, and Ebola*, 55 ADMIN. AND SOC'Y 158, 159-62 (2023) (on the history and structure of the CDC) Tanja Popovic & Dixie E. Snider, Jr., *60 Years of Progress—CDC and Infectious Disease*, 12 EMERGING INFECTIOUS DISEASES 1160 (2006).

4. An act granting additional quarantine powers and imposing additional duties upon the Marine-Hospital Service, Feb. 15, 1893, ch. 114, § 7, 27 Stat. 452. The original provision read:

> Sec. 7. That whenever it shall be shown to the satisfaction of the President that by reason of the existence of cholera or other infectious or contagious diseases in a foreign country there is serious danger of the introduction of the same into the United States, and that notwithstanding the quarantine defense this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce the same is demanded in the interest of the public health, the President shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate and for such period of time as he may deem necessary.

5. *See infra* note 96 (discussing the 1929 episode).

analyzes the two main judicial decisions on the legality of the "Title 42" process and draws its own conclusions about the unlawfulness of the Final Rule and the need to repeal or amend it.

I. PRELUDE

A central question in the disputes about the "Title 42" policy has been the relationship between the 1944 enactment and a group of much later statutes with human rights underpinnings. These statutes offer protection from serious harms that may result from removing a noncitizen from the United States to another country, offering: the protection of refugees from persecution, the protection of anyone from torture, and the protection of unaccompanied children from trafficking and abuse. These norms were jeopardized by Trump administration policies.

After the Second World War, the United States participated in the development of the international refugee regime, including the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.[6] The United States ratified the Protocol in 1968, and formalized statutory implementation of some of its obligations under the Protocol in the Refugee Act of 1980. One of the key obligations, spelled out in Article 33 of the 1951 Convention, is the prohibition of "refoulement" or return to persecution, which provides:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the borders of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[7]

There are only two exceptions to the prohibition of refoulement for a person who meets the definition of refugee: where the individual endangers the security of the country and where the individual has been convicted of certain crimes.[8] Congress has implemented the non-refoulement obligation for the immigration context in a provision of the Immigration and Nationality Act (INA) currently codified at 8 USC

6. Convention Relating to the Status of Refugees, July 28, 1951, 189 UNTS 150; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 UNTS 267.

7. Refugee Convention art. 33(1). The 1967 Protocol incorporates the substantive provisions of the 1951 Convention, including Article 33, and expands their geographical and temporal scope of application. *See* Protocol, Art. 1.

8. Refugee Convention art. 33(2) ("The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.").

§ 1231(b)(3).[9] For historical reasons, this procedure is known as "withholding of removal." [10] The 1980 Refugee Act separately created an opportunity to apply for the more favorable status of "asylum," which not only protects against return to particular countries but gives refugees the right to live in the United States; unlike the guarantee of non-refoulement, Congress structured asylum as a benefit granted on a discretionary basis in the INA.[11]

The distinction between mandatory withholding, required by the international prohibition of refoulement, and discretionary asylum, which the Refugee Convention encourages but does not require, has led to a long-standing problem in U.S. law. After Congress adopted the Refugee Act, the Supreme Court unexpectedly interpreted the INA provisions as requiring a higher level of proof of danger as a prerequisite to the right to withholding than as an element of eligibility for asylum.[12] The Reagan administration had not argued in favor of this bifurcation of the standard of proof. It was then, and remains, unique to the United States.[13] The awkward consequence is that when an adjudicator evaluates the likelihood of harm as falling between the lower and higher standards, and denies asylum as a matter of discretion, the United States may be openly returning refugees with a well-founded fear of persecution to the hands of their persecutors. The resulting divergence from usual international practice then led immigration authorities to emphasize in 1987 that when asylum seekers meet the lower standard of proof, the danger that they would be sent back to persecution "should generally outweigh all but the most egregious of adverse factors" in the exercise of discretion.[14] Refugee

9. *See* 8 U.S.C. § 1231(b)(3)(A) ("Notwithstanding [preceding paragraphs on destinations of removal], the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."). Subparagraph 1231(b)(3)(B) lists exceptions that the U.S. regards as consistent with Article 33(2) of the Refugee Convention and the definition of "refugee" in Article 1.

10. The term derives from a predecessor provision in the INA, predating the 1980 Refugee Act, that authorized the attorney general to "withhold deportation." *See* I.N.S. v. Stevic, 467 U.S. 407, 410 (1984) (citing 8 U.S.C. § 1253(h) (1976)).

11. *See* 8 U.S.C. § 1158.

12. *See* INS v. Stevic, 467 US 407, 429-30 (1984) (adopting the standard of "more likely than not" for withholding); INS v. Cardoza-Fonseca, 467 US 421, 430-31 (1987) (describing the "well-founded fear" standard for asylum as less demanding).

13. *See* GUY S. GOODWIN-GILL and JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 266-67 (4th ed. 2021).

14. Matter of Pula, 19 I&N Dec. 467, 474 (BIA 1987).

lawyers have remained conscious of this dilemma, but politicians and executive officials have not always given it respect.

Another later restriction on removal from the United States grew out of the U.S.'s ratification of the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment in 1994. That treaty includes an explicit non-refoulement prohibition that is absolute and exceptionless. According to Article 3, "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[15] Congress implemented the non-refoulement obligations through a section of a 1998 foreign affairs statute; it is not formally part of the INA but, in the context of immigration removal, it is enforced in conjunction with the INA asylum and withholding procedures.[16]

Concerns in the 1990s about perceived manipulation of the asylum system by newly arriving noncitizens at official ports of entry and across the borders in between them led Congress to enact new procedures for "expedited removal" with severely truncated procedural rights.[17] The 1996 immigration act required application of this procedure to noncitizens who arrive at ports of entry and who are inadmissible due to misrepresentations, or who possess no entry documents or invalid entry documents.[18] The statute included an off-ramp from the process for noncitizens who indicated a fear of persecution, subject to a screening as to whether they had a credible fear of persecution.[19] The statute also authorized the Attorney General to expand expedited removal beyond ports of entry by designating categories of noncitizens who had entered

15. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 UNTS 85, Art. 3(1). The United States ratified with a set of reservations, understandings and declarations that narrowed the definition of torture and that raised the standard for non-refoulement from "substantial grounds" to "more likely than not," in order to be consistent with the Supreme Court's interpretation of the standard for non-refoulement to persecution. *See* 136 Cong. Rec. 36198 (1990) (Senate consent to ratification); Sen. Treaty Doc. 100-20, 100th Cong., 2d Sess., at 6 (1988) (explaining the proposed "understanding").

16. Foreign Affairs Reform and Restructuring Act (FARRA), Pub.L. 105-277, div. G, title xxii, § 2242, Oct. 21, 1998, 112 Stat. 2681-822 (codified at 8 U.S.C. § 1231, Note). On implementation *see, e.g.*, 8 CFR § 208.16.

17. *See* David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT'L L. 673 (2000) (describing the origin of the statute and its initial implementation).

18. *See* 8 U.S.C. § 1225(b)(1)(A)(i) (cross-referencing inadmissibility grounds under 8 U.S.C. § 1182(a)(6)(C), 1182(a)(7)), added by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, div. C, § 302, 110 Stat. 3009-579 (1996).

19. *See* 8 U.S.C. § 1225(b)(1)(A)(ii), 1225(b)(1)(B).

without permission and who had not been present for a two-year period and making them subject to the process (including the credible fear screenings).[20] By 2007, expedited removal had been extended to noncitizens encountered within 100 miles of the border who had not been present for fourteen days.[21]

Until 2008, expedited removal had applied equally to adults and children. That changed when Congress enacted the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), which was designed to strengthen protection against trafficking in persons, both within the United States and abroad.[22] The TVPRA contained measures focused specifically on children as victims or potential victims of trafficking and increased the government's affirmative obligations in protecting children who were involved in removal proceedings. Section 235 of the TVPRA, codified at 8 USC § 1232, includes detailed provisions regarding procedures for cross-border cooperation to protect unaccompanied children from "contiguous countries" (Mexico and Canada), and some less detailed requirements regarding unaccompanied children from "noncontiguous countries."[23] Section 235(a)(5)(D) explicitly requires that unaccompanied children from noncontiguous countries, and certain unaccompanied children from contiguous countries, shall be placed in removal proceedings under INA Section 240—that is, ordinary immigration judge proceedings, and not expedited removal—and should have access to counsel to represent them and "protect them from mistreatment, exploitation and trafficking."[24]

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20. *See* 8 U.S.C. § 1225(b)(1)(A)(iii). More specifically, the temporal criterion is whether the noncitizens have "affirmatively shown, to the satisfaction of an immigration officer, that [they] have been physical present in the United States continuously" for the relevant period of time. *Id.*

21. *See* 69 Fed. Reg. 48877 (Aug. 11, 2004) (for southern border only); *DHS Announces Expedited Removal Along Northern Border and All Coastal Areas*, 83 Interpreter Releases 253 (2006). The Bush administration had also designated a broader category of noncitizens who had illegally arrived by sea. 67 Fed. Reg. 68926 (2002). In 2019 the Trump administration extended expedited removal to the fullest extent permitted by statute, nationwide and for two years after entry, and in 2022 the Biden administration formally rescinded this expansion. DHS, Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409 (2019); DHS, Rescission of the Notice of July 23, 2019, Designating Aliens for Expedited Removal, 87 Fed. Reg. 16022 (2022).

22. Pub. L. 110-457, 122 Stat. 5044 (2008); *See* H.R. REP. 101-430, 110th Cong, 1st Sess. (2007) (report on earlier bill).

23. TVPRA, at § 235; *See* H.R. REP. 101-430, (on the section then numbered 236). (Though codified in Title 8, this provision is not formally part of the INA).

24. 8 U.S.C. § 1232(a)(5)(D), 1232(c)(5). These requirements also apply to children from contiguous countries unless DHS determines that the particular child has not already been a victim of severe trafficking and is not at risk of trafficking on return, that the child does not have a credible fear of persecution on return, and that the child is able to make an independent decision on whether

Thus, the TVPRA affirmatively guarantees unaccompanied children from most countries in the world more protective proceedings than expedited removal.

Hostility to immigration and refugees was a central theme of Donald Trump's 2016 campaign, and a focus of the Trump administration's early executive actions.[25] He issued his first ban on immigrants from predominantly Muslim countries a week after his inauguration, suspending entry of several categories of immigrants, nonimmigrants, and refugees under 8 USC § 1182(f).[26] That broadly worded provision permits the president personally to suspend entry of "any aliens or of any class of aliens" on finding their entry to be "detrimental to the interests of the United States." In addition, the executive order wholly suspended the overseas refugee program for 120 days and lowered the annual target for refugee admissions.[27] In 2018, Trump attempted to use Section 1182(f), in conjunction with a DHS regulation, to bar asylum applications (but not withholding applications) by noncitizens who had unlawfully crossed the southern border between ports of entry.[28] This strategy was blocked by the lower courts as inconsistent with the asylum statute, and Joe Biden revoked the proclamation in early 2021.[29]

On a different issue of immigration policy, in 2019 Trump also invoked Section 1182(f) to suspend the entry of immigrants who lacked

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to return. *See* 8 U.S.C. § 1232(a)(2)(A) (briefly summarized); Congressional Research Service, Unaccompanied Alien Children: An Overview 6-9 (2021) (Report R43599).

25. *See* SARAH PIERCE, JESSICA BOLTER & ANDREW SELEE, U.S. IMMIGRATION POLICY UNDER TRUMP: DEEP CHANGES AND LASTING IMPACTS, MIGRATION POL'Y INST. (July 2018); Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. TIMES, Dec. 24, 2017, at A1.

26. Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (suspending entry of persons from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen). A later version of this poorly drafted order that better disguised its motivation was upheld by a divided Supreme Court in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). Biden revoked these travel bans on his first day in office. Proclamation No. 10141, 87 Fed. Reg. 7005 (Jan. 20, 2021).

27. Executive Order 13769, § 5.

28. Presidential Proclamation 9822, 83 Fed. Reg. 57661 (2018); DHS/DOJ, Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations, 83 Fed. Reg. 55934 (2018). The Proclamation suspended entry of noncitizens who entered across the border with Mexico except at a port of entry, and the accompanying regulation made the persons who violated the Proclamation ineligible to apply for asylum, and raised the screening standard for applications for withholding of removal based on claims of persecution or torture. *Id.* at 55952-53.

29. *See* East Bay Sanctuary Covenant v. Biden, 993 F.3d. 640 (9th Cir. 2021) (affirming the preliminary injunction); *See also* O.A. v. Trump, 404 F. Supp. 3d. 109 (D.D.C. 2019) (ordering vacatur of the regulation), *appeal dismissed*, 2023 WL 7228024 (D.C. Cir. 2023); Exec. Order No. 14010, § 4, 86 Fed. Reg. 8,267 (Feb. 2, 2021) (revoking the amended version of the proclamation).

approved health insurance coverage.[30] More frequently, however, Trump used the Section 1182(f) authority for purposes of imposing sanctions relating to foreign policy disputes or human rights violations, as earlier presidents had done.[31]

The 1182(f) orders were only part of an unprecedented assault on the asylum system in the United States pursued under the Trump administration in the years preceding the pandemic. As many observers have noted, the executive employed a wide variety of methods to decrease the possibilities for asylum seekers to get access to decision-makers, to prove their claims, or to receive protection.[32] They ranged from highly visible orders and regulations to seemingly technical procedural changes with exclusionary effects. Illustrations include prosecuting asylum seekers for crossing the border, separating children from parents to deter arrivals, the "Migrant Protection Protocol" that required refugees requesting asylum at ports of entry to remain in Mexico and wait for a hearing in the distant future, and a policy of rejecting application forms that left any space blank. The government negotiated "Asylum Cooperative Agreements" with Guatemala, Honduras, and El Salvador for sending them asylum seekers from other countries despite their lack of functional refugee determination systems and unsafe conditions. Another regulation barred asylum for refugees who transited a third country on the way to Mexico if they had not applied for protection and received a final denial in at least one country.[33] Attorney General Jeff Sessions narrowed the definition of persecution based on membership of a particular social group through an adjudicatory decision, *Matter of A-B*,[34] that overturned precedent on domestic violence and encouraged immigration officers to apply it to deny eligibility at the credible fear stage; this issue has been particularly significant for female refugees from Central America. Attorney General William Barr similarly overturned

30. Proclamation No. 9945, 84 Fed. Reg. 53991 (Oct. 4, 2019) (A preliminary injunction was issued against implementation in November 2019, which was then initially reversed on appeal in December 2020, Doe #1 v. Trump, 984 F.3d. 848 (9th Cir. 2020), but the case became moot when Biden revoked the proclamation. *See* Doe #1 v. Biden, 2 F.4th 1284 (9th Cir. 2021); Proclamation No. 10209, 86 Fed. Reg. 27015 (May 18, 2021).

31. *See* CONG. RSCH. SERV., PRESIDENTIAL AUTHORITY TO SUSPEND ENTRY OF ALIENS UNDER 8 U.S.C. § 1182(F), LSB10458 (2024) (listing prior uses).

32. For helpful overviews, *see, e.g.*, ANDREW I. SCHOENHOLTZ, JAYA RAMJI-NOGALES & PHILIP G. SCHRAG, THE END OF ASYLUM (2021), chapters 3-4; Lindsay M. Harris, *Asylum Under Attack: Restoring Asylum Protection in the United States*, 67 LOYOLA L. REV. 121 (2021).

33. Dep't of Homeland Sec. & Dep't of Justice, Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33829 (July 16, 2019) (Third Country Transit Bar).

34. 27 I&N Dec. 316 (A.G. 2018), *vacated*, 28 I&N Dec. 307 (A.G. 2021).

precedent on persecution based on family membership in *Matter of L-E-A-*.[35] Several of these initiatives were enjoined or invalidated in the lower courts, while others were upheld or avoided challenge.

The uneven success in adopting asylum restrictions undoubtedly increased the Trump administration's eagerness to seize the opportunity to dispense with asylum and withholding altogether by means of "Title 42." Yet, even during the 2020 pandemic, the government also issued a series of proposed and final regulations designed for the longer term, restricting procedures, multiplying bars to asylum, and narrowing the definitions of persecution and torture.[36]

II. A TWICE-TOLD TALE

The hasty rise and slow demise of the "Title 42" regime deserves close attention, both as a basis for badly needed reforms and as a source of lessons learned in case an attempt is made to start the process all over again. This part gives two parallel narratives of the regime's lifespan, first emphasizing the activity of the political branches in subsection A and second emphasizing the activity of the courts in subsection B, with occasional editorial comments. Legal issues raised by these narratives will be evaluated in more concentrated fashion in Part IV.

The basic plot of the story began with the Trump administration's pretextual use of 42 USC § 265 in the COVID-19 pandemic as an asserted public health power that allegedly overrode both substantive and procedural limitations on the conduct of migration control. This exercise of power was neither medically nor legally justified. The policy's regulatory momentum carried over into the Biden administration, where political polarization made it difficult to stop even when other COVID policies were being abandoned. Meanwhile, the courts played an inconsistent role, with some criticizing the legality of "Title 42" and others obstructing its termination, until the official end of the public health emergency made litigation moot.

A. Regulation and Politics

It is well known by now that the initiative for the "Title 42" process did not come from within the CDC. The outlines of the events were

35. 27 I&N Dec. 581 (A.G. 2018), *vacated*, 28 I&N Dec. 304 (A.G. 2021).

36. *See* Harris, *supra* note 32 at 178-83; Dep't of Homeland Sec. & Dep't of Justice, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80274 (2020) (known as the "Death to Asylum" rule).

reported in May 2020,[37] and confirmed in increasing detail in October 2020 and thereafter.[38] Stephen Miller, the Trump White House proponent of anti-immigrant policies, had long sought to use public health authorities as a vehicle for halting migration, and seized the opportunity afforded by COVID-19. The responsible experts within the CDC, in the Division of Global Health, Migration and Quarantine, rejected the proposal as lacking a public health justification, and refused to draft the order. The CDC was overruled at the White House task force level, and CDC Director Robert Redfield acquiesced. The actual drafting was performed by lawyers in the Department of Health and Human Services.

The interim final rule and first CDC order were part of a series of actions taken in March 2020 to place limits on international travel in light of the COVID-19 pandemic.[39] Other measures included partial closures

37. *See* Caitlin Dickerson & Michael D. Shear, *Before COVID-19, Trump Aide Sought to Use Disease to Close Borders*, N.Y. TIMES (May 3, 2020), https://www.nytimes.com/2020/05/03/us/coronavirus-immigration-stephen-miller-public-health.html.

38. *See* e.g. Michelle Hackman, Andrew Resluccia & Stephanie Armour, *CDC Officials Objected to Order Turning Away Migrants at Border,* WALL ST. J. ONLINE (Oct. 3, 2020), https://www.wsj.com/articles/cdc-officials-objected-to-order-turning-away-migrants-at-border-11601733601; James Bandler et al., *Inside the Fall of the CDC*, PROPUBLICA (Oct. 15, 2020), www.propublica.org/article/inside-the-fall-of-the-cdc; Jason Dearen & Garance Burke, *Pence Ordered Borders Closed After CDC Experts Refused*, AP NEWS (Oct. 3, 2020), https://apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health-4ef0c6c5263815a26f8aa17f6ea490ae; H.R. SELECT SUBCOMM. ON THE CORONAVIRUS CRISIS, INTERIM STAFF REPORT, INEFFICIENT, INEFFECTIVE, AND INEQUITABLE (Oct. 2020), at 38; Camilo Montoya-Galvez, *How Trump Officials Used COVID-19 to Shut US Borders to Migrant Children*, CBS NEWS (Nov. 2, 2020), https://www.cbsnews.com/news/trump-administration-closed-borders-migrant-children-covid-19/; *Emails Show Stephen Miller Led Efforts to Expel Migrants at Border Under Title 42*, AM. OVERSIGHT (Mar. 21, 2022), https://americanoversight.org/emails-show-stephen-miller-led-efforts-to-expel-migrants-at-the-border-under-title-42/; H.R. SELECT SUBCOMM. ON THE CORONAVIRUS CRISIS, STAFF REPORT, "IT WAS COMPROMISED": THE TRUMP ADMINISTRATION'S UNPRECEDENTED CAMPAIGN TO CONTROL CDC AND POLITICIZE PUBLIC HEALTH DURING THE CORONAVIRUS CRISIS, at 28-29 (Oct. 2022). H.R. SELECT SUBCOMM. ON THE CORONAVIRUS CRISIS, Interview of Anne Schuchat (2021), archived at https://web.archive.org/web/20221216035248/http://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/2021.10.01%20SSCC%20Interview%20of%20Anne%20Schuchat%20-%20REDACTED.pdf; H.R. SELECT SUBCOMM. ON THE CORONAVIRUS CRISIS, Interview of Martin Cetron (2022), archived at https://web.archive.org/web/20221017171725/https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/2022.05.02%20SSCC%20Interview%20of%20Martin%20Cetron%20-%20REDACTED.pdf.

39. Muzaffar Chishti & Sarah Pierce, *Crisis Within a Crisis: Immigration in the United States in a Time of COVID-19,* MIGRATION POL'Y INST. (Mar. 26, 2020), https://www.migrationpolicy.org/article/crisis-within-crisis-immigration-time-covid-19. (Travel from China, and then Iran, had previously been restricted in January and February. *See* Proclamation No. 9984, 85 Fed. Reg. 6709 (Feb. 5, 2020) (issued Jan. 31, 2020)). Proclamation No. 9984, 85 Fed. Reg. 6709 (Feb. 5, 2020) (Jan. 31, 2020); Proclamation No. 9992, 85 Fed. Reg. 12855 (Mar. 4, 2020).

of land borders that were negotiated with Canada and Mexico, and proclamations under 8 USC § 1182(f) restricting the entry of nonresidents who had been present in the preceding fourteen days in the Schengen zone of Europe, the United Kingdom, and Ireland, where outbreaks had recently occurred.[40] The land border regime permitted entry for a wide range of "essential travel," including work, education, and cross-border trade, and designated tourism as "non-essential travel."[41] That arrangement still enabled well over 100 million entries across the land borders between October 2020 and September 2021.[42] The categories of "essential travel" prominently omitted persons in need of international protection.[43] In contrast, the Section 1182 proclamations were expressly without prejudice to eligibility for asylum, withholding of removal, or CAT protection.[44] The Trump administration subsequently instrumentalized the pandemic for other immigration policy purposes as well.[45]

One might well ask why the Trump administration turned to the Public Health Service Act rather than have the president "suspend the entry" of noncitizens under 8 USC § 1182(f). The answer is presumably that proponents thought that a power derived outside of Title 8 was more likely to free the government of constraints that operate within Title 8, which had been taken seriously by lower courts adjudicating the Trump administration's earlier attacks on asylum. Even when the Supreme Court

40. *See* Proclamation No. 9993, 85 Fed. Reg. 12855 (Mar. 4, 2020); Proclamation No. 9996, 85 Fed. Reg. 15341 (Mar. 14, 2020). (The fourteen-day period had a quarantine-like purpose, reflecting the estimated delay during which symptoms would appear after exposure to the virus.)

41. *See* 85 Fed. Reg. 16548 (Mar. 24, 2020). ("Essential travel" included all travel by returning U.S. citizens and lawful permanent residents, travel to receive medical treatment, travel to attend educational institutions, travel to work in the United States, travel for truck drivers and other cross-border trade, official government travel, travel to assist emergency or public health responses, and military-related travel. *Id.*)

42. *See* CBP, CBP Trade and Travel Report: Fiscal Year 2021 (April 2022) at 5. The number includes multiple entries by the same noncitizens. DHS fiscal years run from October 1 to September 30.

43. 85 Fed. Reg. at 16548. The notice did give the CBP Commissioner discretion to make exceptions "on an individualized basis" for humanitarian reasons, which made the omission even more conspicuous.

44. *See, e.g.*, 85 Fed. Reg. 15047 (Mar. 13, 2020).

45. *See, e.g.*, Proclamation No. 10014, 85 Fed. Reg. 23441 (Apr. 27, 2020) (sixty-day suspensions for certain categories of immigrants); Proclamation No. 10052, 85 Fed. Reg. 38263 (June 25, 2020) (extending Proclamation 10014 for immigrant categories and adding categories of nonimmigrant entries). These suspensions of entry under 8 U.S.C. § 1182(f) expressly preserved the right to raise asylum or torture claims. *See* Proclamation 10014, § 3(c); Proclamation 10052 at § 4(c).

upheld the "Muslim ban" in *Trump v. Hawaii*, it had not treated Section 1182(f) as undermining the rest of the INA.[46]

This section will describe the career of "Title 42" in four stages, beginning with the invention of a "Title 42" regime by means of an interim final rule and an accompanying CDC order. Second comes the adoption of the Final Rule in September 2020, which is still in force despite the expiration of all the "Title 42" orders. Third, Joseph Biden becomes president but continues the "Title 42" system, with modifications; and fourth, the CDC attempts to terminate "Title 42" but faces resistance both from opposition politicians and from some courts.

1. The Invention of "Title 42"

The CDC asserted its authority in an interim final rule describing how it would "suspend the introduction of persons into the United States,"[47] and concurrently exercised that authority in an accompanying order.[48]

The new regulation, interim Section 71.40, defined the introduction of persons into the United States as including

> movement of a person from a foreign country . . . into the United States so as to bring the person into contact with persons or property in the United States in a manner that the Director determines to present a risk of transmission of a communicable disease to persons . . . .[49]

According to the regulatory preamble, "introduction" extended to travel further into the interior of the United States by persons who have already entered the United States, and "rapidly moving them outside the United States constitutes preventing their 'introduction' into the United States for purposes of § 71.40."[50] Moreover, the regulation defined "serious danger of the introduction of such communicable disease," as "the *potential* for introduction of vectors of the communicable disease into the United States, even if persons . . . in the United States are already infected . . . with the communicable disease."[51] It set no threshold for the

46. *See, e.g.*, Trump v. Hawaii, 585 US 667, 689 (2018) ("We may assume that § 1182(f) does not allow the President to expressly override particular provisions of the INA.").

47. CDC, Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons into United States from Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16559, 16563 (Mar. 20, 2020).

48. CDC, Order Suspending Introduction of Persons from a Country Where a Communicable Disease Exists, 85 Fed. Reg. 16567 (Mar. 20, 2020).

49. 42 CFR § 71.40(b)(1), 85 Fed. Reg. at 16566.

50. *Id.* at 16563.

51. *Id.* at 16566.

risk. The regulation authorized the CDC director to prohibit the introduction of persons from a foreign country, if the director determines that the existence of a communicable disease in that country leads to the minimal level of danger defined by the regulation, and that the danger is "so increased by introduction of persons from such country . . . that a suspension of the introduction of such persons into the United States is required in the interest of the public health."[52] The director's order could designate any "class of persons" for suspension of introduction, and could make "any relevant exceptions that the director determines are appropriate."[53] However, the regulation did not apply to U.S. citizens, lawful permanent residents, or (conditionally) to other Department of Defense personnel.[54] The regulation contemplated implementation by non-CDC officials, especially officers of U.S. Customs and Border Protection, an agency within the DHS that includes the Border Patrol and also operates at ports of entry.[55]

The accompanying March 2020 CDC order applied the authority created by the interim rule to the then-current stage of the COVID-19 pandemic. The order focused on a category of "covered aliens" who would otherwise be temporarily held in "congregate settings" that were "at or near the border" if they were examined under immigration procedures, even of an expedited nature.[56] The category was expressly intended to include noncitizens appearing at ports of entry without valid travel documents, or "otherwise contrary to law," and noncitizens apprehended near the border seeking to enter between ports of entry.[57] The order found that there was a serious danger (minimally defined as above) of introduction of COVID-19 into ports of entry and Border Patrol stations near the borders with Canada and Mexico, because COVID-19 existed in those countries and possibly in the covered noncitizens'

52. *Id.*

53. *Id.* at 16567.

54. *Id.* (The armed forces exception was conditioned on assurances of alternative controls by the Department of Defense.).

55. *Id.*

56. CDC, 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 (2020). The notice observed that the relevant persons

> would typically be aliens seeking to enter the United States at POEs who do not have proper travel documents, aliens whose entry is otherwise contrary to law, and aliens who are apprehended near the border seeking to unlawfully enter the United States between POEs. This order is intended to cover all such aliens.

85 Fed. Reg. at 17061.

57. *Id.* at 17061.

countries of origin. The order also found that the introduction of such noncitizens into ports of entry and Border Patrol stations "increases the seriousness of the danger to the point of requiring a temporary suspension of their introduction," and that they should be moved "as rapidly as possible" back across the border, or to their country of origin, or another location:

> The faster a covered alien is returned to the country from which they entered the United States, or to their country of origin, or another location as practicable, the lower the risk the alien poses of introducing, transmitting or spreading COVID-19 into POEs, Border Patrol stations, other congregate settings, and the interior.[58]

In reaching these conclusions, the CDC order pointed to factors including the lack of availability of rapid tests that could reveal which individuals actually had been infected with COVID-19, the lack of vaccines and therapies for COVID-19, and the lack of suitable facilities in which to house individuals pending examination of their claims to entry. The CDC order relied on information from the DHS that it would take time to build "hard-sided facilities" for the purpose and that "[c]ertain soft-sided facilities may be inappropriate . . . ."[59] The order gave absolutely no consideration to the harms that might be facing "covered aliens" if they were removed to Mexico or to their countries of origin, or to some other location.[60] It did, however, delegate to the DHS's discretion the ability to make individualized exceptions that could take into account "humanitarian" interests, among others.[61] The order recognized that the factual situation was developing and might change, and it limited the suspension to a period of thirty days, subject to later extension.[62] After

58. *Id.* at 17067. (In referring to "another location," the Trump administration may have had in mind the "Asylum Cooperative Agreements" it had negotiated with Guatemala, El Salvador, and Honduras. However, Guatemala quickly suspended the agreement to receive third-country nationals in light of the pandemic, and the other two agreements never took effect. Later, the Biden administration terminated all three agreements. *See, e.g.*, Harris, *supra* note 32, at 146-47); Mass. Coal. for Immigr. Reform v. U.S. Dep't of Homeland Sec., 698 F. Supp. 3d. 10, 20 (D.D.C. 2023).

59. CDC, *supra* note 47, at 17067 n. 66.

60. The point is not that *no one* at CDC gave consideration to those harms—internal critics of the interim final rule and the order unquestionably did. The point is that the public justification of the order made no mention of the harms in its reasoning and gave no explanation of why it would be acceptable for those harms to be given no weight in the analysis.

61. CDC, *supra* note 47, at 17061 ("based on the totality of the circumstances, including consideration of significant law enforcement, officer and public safety, humanitarian, and public health interests").

62. CDC, *supra* note 47, at 17061-62 & n.1, 17068. The order also left open the formal possibility that it could be terminated sooner if the CDC made a determination that the introduction

another thirty-day extension in April, the CDC renewed the order indefinitely.[63]

Neither the interim final rule nor the order prescribed any procedures to be employed by the CBP agents implementing a suspension order, or mentioned any procedural rights that noncitizens subjected to such an order might assert. This complete absence of constraint contrasts sharply with the parallel rule that the CDC had adopted in 2017, providing procedures for orders of isolation, quarantine, or conditional release of international travelers.[64]

Professor Lucas Guttentag cogently analyzed the interim rule and order in an April 2020 essay,[65] based on the information then available, including a recently leaked CBP implementation memo.[66] The rule created an unprecedented interpretation of Section 265 in order to create a "shadow immigration expulsion regime" that bypassed the procedures and protections of the immigration laws. That was its evident purpose:

> The CDC order is designed to accomplish under the guise of public health a dismantling of legal protections governing border arrivals that the Trump administration has been unable to achieve under the immigration laws. For more than a year, the administration has sought unsuccessfully to undo the asylum system at the southern border claiming that exigencies and limited government resources compel abrogating rights and protections for refugees and other noncitizens. The courts have rebuffed those attempts in critical respects. Now the administration has seized on a public health crisis to impose all it has been seeking—and more.[67]

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of the disease was no longer a serious danger to the public health. *Id.* at 17068. Later extensions contained variants of this wording.

63. 85 Fed. Reg. 22424 (Apr. 20 extension); 85 Fed. Reg. 31503 (May 2020 extension).

64. *See* CDC, Control of Communicable Diseases, 82 Fed. Reg. 6890, 6975-6978 (2017) (codified at 42 CFR § 71.1-71.39, and implementing 42 U.S.C. § 264, which immediately precedes Section 265).

65. Lucas Guttentag, *Coronavirus Border Expulsions: CDC's Assault on Asylum Seekers and Unaccompanied Minors*, JUST SECURITY (Apr. 13, 2020), https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-Seekers-and-unaccompanied-minors/.

66. *Id.* (The memo, entitled "COVID-19 CAPIO," was published by ProPublica on April 2, *see* Dara Lind, *Leaked Border Memo Tells Agents to Send Migrants Back Immediately—Ignoring Asylum Law*, https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law. It was later submitted in the ensuing litigation, *see, e.g.*, *PJES v. Wolf*, 502 F. Supp. 3d. 492, 505 (D.D.C. 2020). It has since been officially posted by DHS, *see* https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/COVID%2019%20Capio.pdf. As the memo explains, "Operation CAPIO" was the name given by CBP to its implementation of the CBP orders.)

67. Guttentag, *supra* note 65.

The goal was clear from the effect of the CDC order's definition of "covered aliens": It swept away protection for asylum seekers, as well as the additional protections for unaccompanied children, while allowing vastly more noncitizens to cross the border for purposes of trade, work, or education. The order did not significantly change the treatment of unauthorized adult entrants who made no protection claims, because they were already subject to summary removal under the immigration laws.

Guttentag argued, based on the language and history of Section 265, that the statute did not authorize expulsion from the United States at all, and focused its penalties on those transporting passengers rather than the individuals themselves. And even if it could be implemented by expulsion, the 1944 statute would have to be reconciled with restrictions in the later immigration statutes, protecting refugees, torture victims, and unaccompanied children.[68] The prohibition of refoulement applies to *all* forms of expulsion, however they are labeled.

The regulation authorized action against broad classes of persons without a showing that the imposition upon the whole class was necessary and without the consideration of less burdensome alternatives. The norms were also vague with regard to how long after their arrival in the United States noncitizens might still be treated as being "introduced." The CDC order made clear that it contemplated rapid return to the country where a refugee feared persecution, without a hearing, and the CAPIO memo confirmed that children were equally subject to such expulsion. The CAPIO memo mentioned an exception for "affirmative, spontaneous and reasonably believable claim" of torture, but Guttentag found it difficult to imagine in context that it would be given much effect.[69] Guttentag also pointed out that expulsion without a hearing raised procedural due process questions, and that if DHS insisted it was not exercising immigration

68. *See id.*

69. *Id.* (The analysis of the CAPIO memo by reporter Dara Lind also pointed out that CBP officers were not permitted to grant humanitarian exceptions from rapid removal without seeking the explicit approval of high-level supervisors. *See* Lind, *supra* note 66. Statistics on CBP's application of the exception were not published and are hard to find. CBS News reported in June 2020, based on unpublished USCIS statistics that it had obtained, that between March 20 and May 27, CBP gave only eighty-five individuals out of the thousands processed under "Title 42" access to an asylum officer. *As Trump Pushes to Reopen, U.S. Continues Expelling Migrants at Border, Citing Pandemic*, (June 1, 2020), https://www.cbsnews.com/news/as-trump-pushes-to-reopen-u-s-officials-continue-border-expulsion-policy-citing-pandemic/. Human Rights First added in December 2020, based on government records received under FOIA, that forty-one of these referrals occurred in the first four days of the new policy. Human Rights First, *Humanitarian Disgrace: U.S. Continues to Illegally Block, Expel Refugees to Danger*, (2020), a 17, at https://humanrightsfirst.org/wp-content/uploads/2022/09/HumanitarianDisgrace.pdf.

authority, then it could not rely on exceptional immigration law doctrines to justify the denial of a hearing.

A few additional observations might be added. First, the interim final rule noted that it constituted an "economically significant" rule, which would normally make it subject to executive branch review of a formal cost-benefit analysis, but that an emergency exception permitted its immediate issuance. Despite the absence of such a specification, the rule and the order make clear that their "public health" considerations assign no value to the lives of refugees who are expelled from the United States after seeking protection here. That assessment is similar to the evaluation underlying the essential/nonessential distinction employed at land borders—transportation of goods of any type or market price is an "essential" purpose, but protection of refugees is not.[70]

Second, the CDC order did not assign the CBP agents any public health activities or require them to use any public health knowledge. CBP agents were not testing or treating "covered aliens," but merely expelling them as quickly as possible. The CAPIO memo did not provide for new public health training, but instructed agents to rely on their prior training and experience to apply customary immigration law categories (without the normal exceptions for children and refugees).

Third, DHS quickly began selling new terminology to legitimate its activity. Its statutorily authorized immigration powers were relabeled as "Title 8" authority, and its new role delegated by regulation was described as "Title 42" authority. By early April, DHS was reporting statistics on enforcement, designated separately as "Title 42" and "Title 8."[71] In May 2020, DHS was routinely referring to its "Title 42" process in public statements, and journalists echoed the usage as if "Title 42" were the name of a law.[72] Of course, Title 42 is really an immense volume of the

70. The March CDC order also contained a footnote that illuminates the underlying values:

> An outbreak of COVID-19 among CBP personnel in land POEs or Border Patrol stations would impact CBP operations negatively. Although not part of the CDC public health analysis, it bears emphasizing that the impact on CBP could reduce the security of U.S. land borders and the speed with which cargo moves across the same.

85 Fed. Reg. at 17061 n.1.

71. *See* U.S. CBP, *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions* (Apr. 9, 2020), available at http://web.archive.org/web/20200409183619/https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics. (The earliest version of this page saved at the Internet Archive is from Apr. 9, 2020.).

72. *See, e.g.*, DHS, *Acting Secretary Wolf's Statement on the Extension of Title 42*, May 19, 2020, https://www.dhs.gov/archive/news/2020/05/19/acting-secretary-wolfs-statement-extension-title-42; CBP, *Yuma Sector Agents Discover Two Illegal Aliens Concealed in Trunk of*

U.S. Code, of which 42 U.S.C. § 265 is a tiny part. The invention of the "Title 8"/ "Title 42" distinction was clearly intended to support the claim that DHS officials were not bound by any constraints of Title 8 in their new exercise of power. (This Article will keep the "Title 42" label in scare quotes, to retain consciousness of its propagandistic nature.)

2. The 2020 Final Rule

After the "Title 42" process had been in operation for several months and thousands of noncitizens had been expelled, HHS replaced the original interim rule with a revised version, the Final Rule of 2020.[73] That is the version under which the "Title 42" process proceeded from the fall of 2020 until the termination of the process in May 2023. It is important to emphasize that this Final Rule is still in force as a regulation, because the orders issued under the rule were terminated and not the rule itself. Moreover, a subsequent challenge to the Final Rule became moot when the "Title 42" orders were terminated.

The March "interim final rule" had invited public comment, and allowed thirty days for input on the radically new regime. The government rejected suggestions that the comment period should be extended beyond April,[74] but the Final Rule was also clearly influenced by the need to develop responses to arguments made in litigation during the summer of 2020 that challenged "Title 42" expulsions of unaccompanied children.[75]

The Final Rule is in several respects worse than the interim rule.[76] It changed the focus of CDC authority from regulating the introduction of persons to "suspending any right" to introduce persons, thereby laying

Car, One with Warrant for Burglary, (May 22, 2020), https://www.cbp.gov/newsroom/local-media-release/yuma-sector-agents-discover-two-illegal-aliens-concealed-trunk-car-one ("The two illegal aliens were expelled under Title 42 at the San Luis Port of Entry."); Nick Miroff, *Virus Rules Slam Border Shut to Nearly All Seeking Refuge*, WASH. POST, (May 14, 2020) ("under a provision of U.S. code known as Title 42").

73. HHS, 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 (2020) (Sept. 4, 2020).

74. *Id.* at 56448.

75. Cf. Final rule, *supra* note 73 at 56438 (noting legal challenges to the interim final rule).

76. There are also small improvements. For example, the final rule limits its application to "quarantinable communicable disease" rather than referring more broadly to a "communicable disease," *see* 85 Fed. Reg. at 56443. Second, the final rule omits the suggestion that noncitizens may themselves be regarded as "vectors of the communicable disease," *see* 85 Fed. Reg. at 56444; describing human beings as vectors of disease is a traditional xenophobic trope.

explicit claim to a broad power to override any rule or legal norm that would limit the executive's ability to prevent the entry of persons or to expel persons who had already entered.[77] The regulatory preamble asserts that a CDC order's general statement of suspension prevails over all such norms, without needing to mention them.[78] The Final Rule also made explicit that the claimed power to prohibit introduction included the power to physically expel persons from the United States.[79] The regulation reformulated the minimal notion of "serious danger" as a standard based on "the probable introduction of *one or more persons* capable of transmitting" the disease, and the preamble appeared to treat the danger of a single such person being introduced as justifying the prohibition and expulsion of a group of any size.[80] In addition, the rule's preamble gave warning of how the Trump administration intended to interpret the regulation, and arguments that it would put forward to defend it.

Nonetheless, the Final Rule did retain the statutory language conditioning suspension on the CDC director's determination that the "danger is so increased" that the suspension is "required in the interest of [the] public health," and limiting the period of suspension to the time when the director deems it "necessary."[81] These criteria could be interpreted as imposing a more substantial standard of justification, as the Biden CDC later did in the spring of 2022.[82]

The texts justifying the Final Rule evaded some questions by asserting that the rule itself did not resolve them, and that objections should be directed to particular orders issued under the rule, even while authorizing the CDC director to override all statutory constraints.[83] In contrast with the interim rule, the final rule document asserted that the rule was not "economically significant"; as a result, no formal cost-benefit analysis was provided.[84]

77. HHS, Final rule sec 71.40(b)(2, 5), *supra* note 73, at 56429, 56446.

78. 85 Fed. Reg. 56447.

79. Final rule sec 71.40(b)(2).

80. Final rule sec 71.40(b)(3) (emphasis added); 85 Fed. Reg. 56446. The preamble explained that application of this standard does not require "a numerical finding or a quantitative or empirical showing of probability." *Id.* The preamble also gave an evasive answer to the objection that prevention of introduction should be based on examination of the individual, not on membership in a particular group; *id.* at 56454.

81. *Id.* at 56445; *id.* at sec. 71.40(a).

82. *See infra* subsection II.A.4.

83. *See, e.g.*, 85 Fed. Reg. At 56449-50.

84. *See* HHS, *supra* note 73, at 56456-57; *See* Reeve Bull & Jerry Ellig, *Judicial Review of Regulatory Impact Analysis: Why Not the Best?*, 69 ADMIN. L. REV. 725, 731-37 (2017)

Nonetheless, the analysis also defended the legality of discarding protection for unaccompanied children and refugees. It insisted that the statutory restrictions and consent decrees protecting children apply only when DHS officials are enforcing immigration laws, and not when the CDC authorizes the same officials to detain and expel children. The analysis claimed that the CDC need not consider the Refugee Convention and the Convention Against Torture because they are non-self-executing treaties,[85] that Congress had made no provision limiting its power to suspend refugee protections,[86] and that the CDC could stretch a "security" exception to the Refugee Convention to cover expulsions under public health authority.[87] There is no exception whatsoever to the non-refoulement obligation under the Convention Against Torture, and in that regard, the preamble contented itself with the claim that fears of torture could be accommodated by DHS officials as a matter of discretion.[88]

Although the Final Rule's preamble was forced to acknowledge that expulsion would affect refugees and children, it did not take the harms resulting from their expulsion into consideration when evaluating the policy decisions underlying its interpretation of the statute and the rule that implemented it. The lives of noncitizens after their expulsion appear to have been given zero value. The hostility to asylum seekers became explicit in another passage, which rejected the possibility of allowing "covered aliens" to self-quarantine. The preamble condemned them as necessarily "unprepared to comply with U.S. legal processes" and undeserving of being trusted to comply with medical protocols.[89]

The preamble also watered down the standard for setting aside noncitizens' rights even further by claiming that the CDC had the power

(describing regulatory analysis of agency rules in the Office of Management and Budget under Executive Order 12,866 and its limitation to "economically significant" rules).

85. HHS, *supra* note 73, at 56451. (Non-self-executing treaties bind the United States internationally just as much as self-executing ones do, and they create responsibilities for the executive, even if courts are not available to enforce the obligations. *See* Oona Hathaway, *The Trump Administration's Indefensible Legal Defense of Its Asylum Ban: Taking a Wrecking Ball to International Law*, JUST SECURITY, May 15, 2020.)

86. 85 Fed. Reg. at 56450.

87. *Id.* at 56452. (A dictum in an Attorney General's opinion concerning the deportation of a leader of a terrorist organization in Algeria, Matter of *H-*, 23 I&N Dec. 774 (2005), had construed the "danger to the security" exception to the prohibition of refoulement of refugees as including danger to "the Nation's defense, foreign relations, or economic interests." The analysis sought to extend this already overbroad interpretation to include risks to public health. It noted that the administration had more recently proposed to adopt the same expanded interpretation in a June 2020 Notice of Proposed Rulemaking, Security Bars and Processing, 85 Fed. Reg. 41201 (2020)).

88. 85 Fed. Reg. at 56451.

89. 85 Fed. Reg. at 56452.

to suspend them "regardless of the adequacy of any quarantine measures."[90] The interim final rule and the March order had appeared to treat the insufficiency of quarantine and isolation as an element making stronger measures "necessary" within the meaning of Section 265.[91] They had also referred to the unavailability of rapid tests, and the insufficient time to build appropriate facilities "in the near term."[92] The Final Rule discounted the value of testing compared with indiscriminate expulsion, and abandoned the idea of constructing appropriate permanent or temporary facilities.[93]

Although the Final Rule described itself as designed for future emergencies, it was, like the interim final rule, actually reverse-engineered as a rationalization for the shutdown of refugee protection on the southern border. The rule does not even offer a solution for extreme future emergencies, because it makes no provision whatsoever with regard to citizens and lawful permanent residents.[94] In this respect, the Final Rule contrasts with the sole known prior example in which the federal government had employed Section 265 and its predecessor provision—a 1929 order by President Herbert Hoover that the preamble, by convoluted reasoning, claimed as a precedent for its action.[95] The 1929 order had nothing to do with expulsion, and it applied equally to citizens and noncitizens.[96]

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90. 85 Fed. Reg. at 56442.

91. *See, e.g.*, CDC, *supra* note 47, at 16565 (explaining why quarantine and isolation would be impracticable in general for international travelers); *id.* at 16564 (explaining that quarantine and related measures could sufficiently mitigate transmission risks presented by returning U.S. citizens and lawful permanent residents (LPRs)).

92. CDC, *supra* note 56, at 17067 n. 66 (discussing facilities in the March order); *id.* at 17062 (discussing the lack of rapid tests in the March order); CDC, *supra* note 47, at 16561 (same in interim final rule).

93. *See* CDC, *supra* note 73, at 56433, n. 70.

94. *See* CDC, *supra* note 47, at 16567 ("This section shall not apply to U.S. citizens, U.S. nationals, and lawful permanent residents."); CDC, *supra* note 73, at 56455 ("The Director has no present intention to apply the section 362 authority to U.S. citizens, U.S. nationals, or LPRs in connection with the COVID-19 pandemic (indeed, the Director has never intended to do so)."

95. *Id.* at 56442 (citing Exec. Order No. 5143 (June 21, 1929)).

96. Responding to reports that the rate of meningitis among trans-Pacific passengers exceeded the capacity of West Coast quarantine facilities, Hoover's executive order authorized the secretary of the treasury to prescribe conditions for introduction of persons traveling from ports in China (including Hong Kong, then a British colony) or the Philippines (then a U.S. unincorporated territory, treated as foreign for some legal purposes). Executive Order 5143. The Public Health Service was located in the Department of the Treasury at the time.

The resulting public health regulations limited embarkation to a few ports where passengers and crew could be screened, addressed hygiene and density of passengers in steerage, and provided for the screening and quarantine of passengers and crew upon arrival. (As the final rule preamble

Notwithstanding—or perhaps because of—all these defects, the preamble to the Final Rule repeatedly insisted that the courts owed deference to the extreme interpretations of the statute on which the rule was based.[97] To that end, the preamble repeatedly cited *City of Arlington v. FCC*, an exemplar of heightened *Chevron* deference requiring courts to defer to an agency's definition of the scope of its own authority.[98] The preamble also insisted on deference to the CDC's expertise on these issues, and not merely the delegated authority of its director, despite the fact that the policy was imposed from outside the CDC.

An October 2020 CDC order followed the Final Rule, conforming its determinations to the language of the Final Rule, effective until terminated by the CDC director.[99] As the order stated, it was "substantially the same as the amended and extended March 20, 2020 Order."[100] The definition of "covered aliens" remained the same, but the October order added an exception, for pragmatic reasons, for "any alien who must test negative for COVID-19 before they are expelled directly to their home country."[101] Although rapid COVID tests, whose previous absence had been emphasized by earlier orders, had become increasingly available in the meantime, the October order did not even consider using them to avoid the summary expulsion of refugees and children. The order provided more recent data on the spread of the disease, and observed that vaccines were in development but not yet available; the FDA had granted

noted, 85 Fed. Reg. at 56442 n.160, the 1929 regulations are reprinted in Conn. Dep't of Health, Connecticut Health Bulletin, vol. 43, No. 9, 324-26 (Sept. 1929).) As the surgeon general reported to Congress, "These regulations applied without discrimination as to nationality of vessels or of passengers." Annual Report of the Surgeon General of the Public Health Service of the United States for the Fiscal Year 1930, HR Doc 521, 71st Cong., 3d. Sess. 134 (1930).

97. HHS, *supra* note 73, at 56445 (re "introduction"); *id.* at 56446 (re expulsion); *id.* (re "serious danger").

98. 569 U.S. 290 (2013). (Chief Justice Roberts's later majority opinion in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), which overruled altogether the doctrine of *Chevron* deference to agency interpretation of ambiguous statutes, echoed his dissent in *City of Arlington* by saying, "That is not less true when the ambiguity is about the scope of the agency's own power—perhaps the occasion on which abdication in favor of the agency is least appropriate." 144 S. Ct. at 2266.).

99. 85 Fed. Reg. 65806 (2020) (Oct. 13, 2020).

100. 85 Fed. Reg. at 65808.

101. *Id.* (The Order did not give reasons for this exception, but the CDC later explained that it was prompted by some countries that refused to receive expelled nationals who had not tested negative. *See* August 2021 order, 86 Fed. Reg. 42836 & n.62); *see also* Decision Requested (Sept. 4, 2020), in Appendix of Relevant Administrative Record at 280, *Huisha-Huisha v. Mayorkas*, 642 F. Supp. 3d. 1 (D.D.C. 2022) (internal CDC document explaining that this exception had already been implemented).

emergency use authorizations for some treatments.[102] (In fact, Donald Trump had been hospitalized and treated for COVID earlier in October.[103]) The order repeated, nearly verbatim, a revealing footnote from the March order: "Although not part of the CDC public health analysis, it bears emphasizing that the impact [of a COVID outbreak among CBP personnel] could reduce the security of the U.S. borders and the speed with which cargo moves across the same."[104] As usual, the order gave no consideration whatsoever to the impact of expulsion on refugees and children.

3. Continuation Under a New Administration

Then came the 2020 election. Joseph Biden won, but Trump did not accept his defeat. Trump provoked his supporters into waging a violent assault on the Congress to obstruct the official counting of the electoral votes, which was nevertheless completed. The Democrats retained a slim majority in the House of Representatives and achieved a fragile majority in an evenly divided Senate once Kamala Harris succeeded to the tie-breaking role of the vice president. The House impeached Trump for incitement of insurrection, but the trial was delayed and the Senate failed to convict.

President Biden had criticized the harsh and hostile immigration policies of the Trump administration during his campaign, and as the beginning of his term approached, advocates called for numerous reforms. Facing conflicting pressures, the administration took several early actions, which changed immigration policies or announced policy goals, while also seeking to avoid a massive increase in border crossings. In his first weeks as president, Biden reversed several Trump decrees, stopped midnight regulations from taking effect, and designated other policies for gradual review and reconsideration.[105] Biden's DHS ordered

102. *Supra* note 99 at 65809.

103. *See, e.g.*, Julie Bosman et al., *Most Patients' Covid-19 Care Looks Nothing Like Trump's*, N.Y. TIMES, (Oct. 7, 2020), https://www.nytimes.com/2020/10/06/us/trump-coronavirus-care-treatment.html.

104. 85 Fed. Reg. at 65808 n.8.

105. *See, e.g.*, Proclamation No. 10142, Termination of Emergency with Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction, 86 Fed. Reg. 7225 (Jan. 20, 2021); Proclamation No. 10141, Ending Discriminatory Bans on Entry to the United States, 86 Fed. Reg. 7005 (Jan. 20, 2021) (revoking the Muslim Ban); Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA), 86 Fed. Reg. 7053 (Jan. 25, 2021); Exec. Order No. 13,986, Ensuring a Lawful and Accurate Enumeration and Apportionment Pursuant to the Decennial Census, 86 Fed. Reg. 7015 (Jan. 20, 2021) (revoking the exclusion of persons without lawful immigration status from the apportionment base); Ronald

a pause on the execution of many existing Title 8 deportation orders so that it could implement its own policy preferences.[106] Almost immediately, the changes triggered strong Republican opposition, accusing the new administration of an "open borders" policy.[107] Furthermore, Texas began the first of a series of state lawsuits seeking to enjoin changes from Trump immigration policies, and secured court orders against the pause in deportations.[108] Texas also sought to enforce a bizarre agreement with an outgoing Trump DHS official that purported to prohibit changes from Trump immigration policies without a prior formal consultation process with Texas.[109] Such agreements illustrate the concerted effort by Trump partisans to keep his anti-immigrant policies in force by any means whatsoever.

A. Klain, Memorandum on Regulatory Freeze Pending Review, 86 Fed. Reg. 7424 (Jan. 28, 2021). *See Biden Administration Reverses Trump Administration Policies on Immigration and Asylum*, 115 AM. J. INT'L L. 340 (2021).

106. David Pekoske, Acting Secretary, Memo, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Priorities and Policies* (Jan. 20, 2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf.

107. *See* e.g., Patrick Svitek, *Gov. Greg Abbott Unveils Legislative Priorities*, TEX. TRIBUNE (Feb. 1, 2021), https://www.texastribune.org/2021/02/01/abbott-state-of-state-2021/; *Congressman Biggs Leads Delegation to Southern Border*, Rep. Andy Biggs, Feb. 1, 2021, https://biggs.house.gov/media/press-releases/congressman-biggs-leads-delegation-southern-border; 167 CONG. REC. S446, S452 (Feb. 4, 2021) (remarks of Sen. Scott); 167 CONG. REC. H391, H458 (Feb. 5, 2021) (remarks of Rep. LaMalfa); *Congressman Bob Good Recaps Arizona Border Tour*, Rep. Bob Good, Feb. 2, 2021, https://web.archive.org/web/20240620184902/https://good.house.gov/media/press-releases/congressman-bob-good-recaps-arizona-border-tour.

108. Texas v. United States, 515 F. Supp. 3d. 627 (ND Tex. Jan. 26, 2021) (TRO); Texas v. United States, 524 F. Supp. 3d. 598 (N.D. Tex. Feb. 23, 2021) (preliminary injunction). (A similar lawsuit brought by Arizona moved more slowly and with less success. *See* Arizona v. US Dept. of Homeland Sec., 2021 WL 2787930 (D. Ariz. 2021) (dismissing the challenge to a 100-day pause as moot, and finding the challenge to the successor policy unreviewable), *vacated as moot*, 2023 WL 3033414 (9th Cir. 2023). Texas also filed suit in April 2021 to challenge DHS's suspension of the Remain in Mexico policy (*see infra* note 112), later extending the action to cover the June 1 DHS order rescinding the MPP policy altogether. *See* Texas v. Biden, 554 F. Supp. 3d. 818 (N.D. Tex., Aug. 13, 2021) (vacating rescission and ordering the good faith implementation of the rejected policy), *rev'd*, 142 S. Ct. 2528 (2022). *See also* Texas Gen. Land Off. v. Biden, 2021 WL 5588160 (involving challenges by Texas and Missouri to the termination of construction of the border wall, filed October 21, 2021).

109. Texas v. United States, *supra*, at 608 & n.4 (noting a claim based on the agreement, but not resolving it). A full copy of the agreement was filed by Texas as an Exhibit, *See* 2021 U.S. DIST. CT. MOTIONS LEXIS 325065. The Biden DHS sent Texas a letter on February 2, 2021, stating that the agreement was "void, not binding, and unenforceable," and rescinding it. *See* Jennifer Doherty, *Biden Admin. Ditches Texas, Ariz. Immigration Deals with DHS*, LAW 360, Feb. 4, 2021 (attaching copy of the letter); *See also* Texas v. Biden, 554 F. Supp. 3d. 818, 835, 853 (N.D. Tex. 2021) (finding claims under the purported agreement moot after it expired), *rev'd on other grounds*, 142 S. Ct 2528 (2022).

In this highly contested atmosphere, Biden phrased his instructions on resumption of asylum tentatively, directing that the relevant officials "shall promptly begin taking steps to reinstate the safe and orderly reception and processing of arriving asylum seekers, consistent with public health and safety and capacity constraints," and "promptly review and determine whether termination, rescission, or modification of [the September 2020 Final Rule and the October 2020 CDC order] is necessary and appropriate."[110] The same executive order also directed the attorney general and DHS to reevaluate the standards used in deciding asylum claims based on "domestic or gang violence" and to issue joint regulations on the criteria for "particular social group[s],"[111] and to determine whether to terminate or modify the Trump administration's pre-pandemic "Remain in Mexico" policy for asylum applicants (euphemistically known as the "Migrant Protection Protocols").[112]

On February 11, the CDC issued an order creating, as a matter of its discretion, a temporary exception that excluded "unaccompanied noncitizen children"[113] from the "Title 42" process, pending reevaluation.[114] Meanwhile, the Department of Justice continued the prior

110. Executive Order No. 14010, 86 Fed. Reg. 8267 (2021) (Feb. 2, 2021), sec. 4(a)(ii)(A). The order explicitly instructed the secretary of HHS and the director of the CDC to consult with the secretary of DHS in making the latter determination. *Id.*

111. *Id.* at sec. 4(c). (The effort to resolve these issues later stalled.).

112. *Id.* at sec. 4(a)(ii)(B) (DHS had already suspended prospective application of the MPP, DHS, *Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program* (January 20, 2021), https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program, and later slowly began processing limited numbers of the existing backlog of applicants. *See* DHS Announces Process to Address Individuals in Mexico with Active MPP Cases (Feb. 11, 2021), https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases.).

113. The use of the term "noncitizen" rather than "alien" reflected the Biden administration's policy of more respectful terminology than that utilized by the Trump administration. *See* Michael D. Shear, *By Talking About 'Climate Change' but not 'Illegal Aliens,' the Biden Administration Is Changing the Language of Government*, N.Y. TIMES (Feb. 24, 2021) https://www.nytimes.com/2021/02/24/us/by-talking-about-climate-change-but-not-illegal-aliens-the-biden-administration-is-changing-the-language-of-government.html; Troy A. Miller, Memorandum, "Updated Terminology for CBP Communications and Materials," Apr. 19, 2021, https://www.lexisnexis.com/community/insights/legal/immigration/b/outsidenews/posts/cbp-memo-updated-terminology-for-cbp-communications-and-materials.

114. CDC, Notice of Temporary Exception from Expulsion of Unaccompanied Noncitizen Children Pending Forthcoming Public Health Determination, 86 Fed. Reg. 9942 (Feb. 11, 2021). (The Notice mentioned that the temporary exception had already gone into effect, after a preliminary injunction against application of the "Title 42" process to unaccompanied children had been stayed, as explained below. (*See* text accompanying *infra* notes 199-204.) The September 2020 Final Rule had given the CDC Director authority to carve out exceptions to CDC orders under the regulation. The succinct Notice did not give reasons for CDC's creation of the temporary

administration's defense of the legality of the process, including its application to children.[115] By early March, class actions challenging the legality of the process were held in abeyance pending the administration's consideration of possible changes.[116] The prospect that the DHS might agree to terminate or reduce "Title 42" expulsions provoked denunciations from Republicans in Congress, not only on claimed public health grounds, but on general border security grounds, praising the expulsions as a tool for preventing illegal migration and drug smuggling.[117]

Texas sued before a local federal judge to enjoin the CDC's categorical exception for unaccompanied children, as well as discretionary exceptions made for particular families.[118] The state's claims of harm included all the costs attributed to the presence of noncitizens who could otherwise have been expelled, such as education costs, general healthcare costs, and even the costs incurred in processing driver's licenses.[119] As these claims made manifest, the lawsuit was not focused on a risk of COVID-infected individuals; rather, the state objected broadly to any decrease in the use of "Title 42" as a device for migration control. Meanwhile, where citizens were concerned, Texas Governor Greg Abbott had already prohibited governmental requirements of face coverings,[120] and would soon move against public and private vaccine requirements.[121] Texas subsequently sought injunctions against several federal vaccine mandates.[122]

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exception, but the CDC provided updated reasoning for the appropriateness of the exception in its July 2021 Public Health Determination that extended the exception indefinitely.).

115. Corrected Brief for Appellants, PJES v. Mayorkas, No. 20-5357 (D.C. Cir. Feb. 22, 2021), in LEXIS.

116. PJES v. Mayorkas, No. 20-5357 (D.C. Cir. Mar. 2, 2021), Clerk's Order Granting the Joint Motion to Hold Briefing in Abeyance, in LEXIS; *Huisha Huisha*, Minute Order Granting Joint Motion to Hold in Abeyance, No. 1:21-cv-00100-EGS (D.D.C. Feb. 23, 2021), in LEXIS.

117. *See, e.g.*, 167 CONG. REC. H3799 (July 21, 2021) (remarks of Rep. Lesko); 167 CONG. REC. H3591 (July 1, 2021) (remarks of Rep. Meuser); 167 CONG. REC.H1747 (remarks of Rep. Meuser) (Apr. 14, 2021). (Some criticisms did include objections based on the pandemic, e.g., 167 CONG. REC. H1947-52 (remarks of Rep. Burgess) (Apr. 19, 2021)).

118. Texas v. Biden, 2021 WL 4552148 (ND Tex. 2021) (complaint filed Apr. 22, 2021).

119. *See* Brief in Support of Motion for Preliminary Injunction, *Texas v. Biden*, 2021 U.S. Dist. LEXIS 214810 (filed June 23, 2021), at 23-27.

120. Tex. Executive Order GA 36 (May 18, 2021).

121. Tex. Executive Order GA 38 (July 29, 2021); Tex. Executive Order GA 39 (prohibiting public vaccine mandates) (Aug. 25, 2021); Tex. Executive Order GA 40 (Oct. 11, 2021) (broadly prohibiting public and private vaccine mandates and challenging federal "bullying" of private entities).

122. *See* Abbott v. Biden, 70 F.4th 817 (5th Cir. 2023) (upholding a challenge to a vaccine mandate for National Guard, in action filed Jan. 4, 2022); Texas v. Biden, 2022 WL 18436750

In the summer of 2021, the CDC gave the results of its reexamination in two orders. First, the CDC confirmed with fuller reasoning the exclusion of unaccompanied children from the "Title 42" process.[123] This July order may have been timed to forestall judicial action in the Texas litigation challenging the exception.[124] The order observed that Biden's DHS had established alternative processing facilities for unaccompanied children and was taking advantage of COVID tests and newly available vaccines, and the CDC concluded that the risks posed by processing the children under normal immigration procedures could be adequately addressed.[125]

The CDC's August 2021 order reaffirmed the expulsion process for family units and single adults, differentiating those two categories from unaccompanied children.[126] The reassessment favored a "gradual resumption of normal border operations under Title 8" that could be "initiated in a stepwise manner that complies with COVID-19 mitigation protocols."[127] It discussed the course of the pandemic's development, and

(SD Tex 2022) (denying a motion for a preliminary injunction against a vaccine mandate for employees of federal contractors, originally filed Nov. 15, 2021); Texas v. Becerra, 577 F. Supp. 3d. 527 (SD Tex. 2021) (granting a preliminary injunction against vaccine and mask mandates in Head Start programs); Texas v. Becerra, 575 F. Supp. 3d. 701 (ND Tex. 2021) (granting a preliminary injunction against a vaccine mandate for health care workers).

123. CDC, *Public Health Determination Regarding an Exception for Unaccompanied Noncitizen Children from the Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists*, 86 Fed. Reg. 38717 (2021) (July 19, 2021).

124. Briefing and argument were ongoing in the district court on Texas's motion for a preliminary injunction when the July CDC order issued, and the district court then held that the motion was moot, but the litigation was not, and gave Texas leave to amend its complaint to challenge the new order (which it did). Texas v. Biden, 2021 WL 4552148 (ND Tex. 2021).

125. CDC, *Public Health Determination Regarding an Exception for Unaccompanied Noncitizen Children from the Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists*, 86 Fed. Reg. 38717 (2021) (July 19, 2021). The order continued to assert the authority to override the effect of other statutory provisions, and left open the possibility of reconsidering the exception if circumstances changed. 86 Fed. Reg. at 38718 n.7, 38720 n.22. For the creation of alternative processing sites, *see, e.g.*, Nirma D. Bustamante et al., *The Implementation of CDC COVID-19 Recommendations for Testing, Isolation, Quarantine and Movement at Emergency Intake Sites of Unaccompanied Children in the United States*, April 1-May 31, 2021, 25 J. Immigrant and Minority Health 1059 (2023).

126. CDC, *Public Health Reassessment and Order Suspending the Right to Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists*, 86 Fed. Reg. 42828 (2021) (Aug. 3, 2021). The order described a family unit (or "FMU") as a group of noncitizens "consisting of a minor or minors accompanied by their adult parent(s) or legal guardian(s)," and a single adult as a noncitizen 18 years or older who is not a member of a "family unit." 86 Fed. Reg. at 42830 nn.13, 14.

127. 86 Fed. Reg. at 42838.

the increased availability of mitigation measures. It also described in more detail how expulsion was being implemented, relying on information provided by DHS.[128] At times, the analysis distinguished between different legal categories of noncitizens instead of attributing effects to covered noncitizens as an aggregate class. The CDC noted that the ability to accomplish expulsion was constrained by the need for the consent of Mexico and other foreign states.[129] Some countries refused to receive their own nationals without negative COVID test results.[130] But the CBP was not generally testing noncitizens subject to expulsion, despite the wide availability of rapid tests.[131] Nor did it vaccinate them; the CBP merely "encouraged" its own personnel to get vaccinated, without enough success.[132] More generally, the DHS needed to "expand capacity in a COVID-safe manner similar to expansions undertaken by HHS and ORR to address UC [unaccompanied children],"[133] and had not yet done so. The reassessment considered that it was not yet feasible to terminate the Section 265 process with regard to the numerically larger categories of family units and single adults.

Nonetheless, the CDC created "an additional exception" for DHS-approved programs that involved prior COVID testing in Mexico before appearance at a port of entry, followed by the processing of asylum applications for acceptance or rejection under Title 8.[134] This "exception" actually gave CDC recognition to a practice already begun in the spring of 2021 by DHS. As an offshoot of settlement negotiations in a class action, DHS authorized the ACLU and a consortium of NGOs to pre-select a limited number of highly vulnerable asylum seekers for presentation at a port of entry.[135] The August order delegated standardless

128. Cf 86 Fed. Reg. at 42831 n. 27 (regarding reliance on DHS and HHS information).

129. Mexico had agreed to receive its own nationals and those of the "Northern Triangle" countries Guatemala, Honduras and El Salvador, and occasionally others, and sometimes placed age limits on the expulsion of children. 86 Fed. Reg. at 42836.

130. 86 Fed. Reg. at 42836 & n.82. Such refusals explain the provision in the October 2020 version of the order that excluded from its application persons "who must test negative for COVID-19 before they are expelled to their home country," 85 Fed. Reg. 65807.

131. 86 Fed. Reg. at 42836, 42838.

132. 86 Fed. Reg. at 42836, 42838 & n.93. *See also* Maria Sacchetti & Nick Miroff, *Anger in U.S. Customs and Border Protection as Biden Administration's Vaccine Mandate Looms*, WASH. POST, Oct. 8, 2021 (discussing refusals of CBP officers to vaccinate); Toby Bolsen and Risa Palm*, Politicization and COVID-19 Vaccine Resistance in the U.S.*, in MOLECULAR BIOLOGY AND CLINICAL MEDICINE IN THE AGE OF POLARIZATION (Bolsen & Palm eds., 2022).

133. 86 Fed. Reg. at 42838. ORR is the Office of Refugee Resettlement in HHS.

134. 86 Fed. Reg. 42838.

135. The practice is described in an amicus brief filed by some of the NGOs in *Huisha-Huisha v. Mayorkas* (D.C. Cir. 2022), Brief of HIAS et al., 2021 WL 5726292, which also

discretion to DHS to determine the size and parameters of such "programs." Once it became clear that the administration would not end "Title 42" or exempt families, the participating NGOs withdrew their cooperation and the challenge to the legality of the expulsion procedure resumed.[136] Subsequently, a similar exception process was established with the cooperation of other NGOs, with numerical limits set by DHS; it continued until January 2023.[137]

The August 2021 order also made a change regarding the eventual termination of the expulsion process, which became significant later. Instead of providing that the authority would cease only when the CDC determined that it was no longer needed, as in May and October 2020, the new order additionally provided that it would lose effect when the HHS declaration of a COVID-19 public health emergency expired, if that happened first.[138] That provision ultimately brought about the end of "Title 42" on May 11, 2023, mooting disputes over efforts to end it separately.[139]

Although the Biden CDC's reassessment was more nuanced than the Trump CDC's analysis and expressed a goal of phasing out the expulsions, it continued to show the dominant effect of migration control policies. The CDC claimed to be exercising a superior power that enabled it to override the legal obligations of its chosen agents, but these supposed

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describes the dangers it involved, both for migrants and for NGO personnel. Quantitatively, the ACLU could recommend up to 35 families per day, and the NGOs could recommend up to 250 individuals. The organizations were given responsibility for arranging the COVID tests. During the three months that it was in operation, this system allowed 16,000 individuals to request protection under Title 8.

136. *Advocates End Work with US to Pick Asylum-Seekers in Mexico*, AP, (July 30, 2021), https://apnews.com/article/health-mexico-immigration-coronavirus-pandemic-b503c2f8 7e4c7582c97d3383a3f03b20.

137. *See* Stephanie Leutert and Caitlyn Yates, *Asylum Processing at the U.S.-Mexico Border: November 2022* (describing NGO participation). A preliminary injunction in *Louisiana v. Centers for Disease Control & Prevention* (W.D. La. 2022) led to monthly reports of the numbers of exceptions made through the NGO-supported program, which increased from approximately 8,000 in May 2022 to 23,000 in December 2022. The program was largely discontinued in January 2023, during the initiation of an alternative system of making appointments at ports of entry through a CBP One app, in anticipation of the termination of the public health emergency in the spring of 2023. *See Defendants' Monthly Report for the Month of December Pursuant to the Court's Preliminary Injunction*, Louisiana v. CDC (W.D. La. 2022), at 6-7 (describing plans to replace NGO-assisted appointments with the CBP One app).

138. 86 Fed. Reg. at 42841.

139. As will be discussed *infra*, the CDC attempted to terminate the expulsion process in April 2022 but was enjoined in the Fifth Circuit, while litigation challenging the legality of the process was pending in the D.C. Circuit, and all the challenges became moot after the emergency declaration expired.

agents were being permitted to dictate the logistics of implementation, and the CDC merely cajoled them to make greater use of crucial public health tools such as testing and vaccination, and to expand their capacity. The reassessment gave no consideration whatsoever to the harms that refugees faced when they were expelled. The order allowed asserted resource limitations to outweigh the rights and interests of noncitizens, but continued to avoid a cost-benefit analysis that would have required comparison with alternatives and explicit articulation of the value being placed on the lives of refugees. The exception for DHS-approved programs recognized an avenue for protection, but no entitlement; its dimensions were wholly subject to DHS's choices, and it applied only to a subset of those waiting in Mexico, not to refugees present in U.S. territory.

The August order prompted renewed challenges from both sides, with Texas continuing to attack the exceptions, and a class action of families denying the legality of the expulsions.[140] As discussed below, the class action advanced more quickly, and a judge in the District of Columbia issued a preliminary injunction against applying the "Title 42 process"[141] to families, which was then stayed by a D.C. Circuit panel pending the government's appeal.[142]

The CDC had committed itself, in its August 2021 order, to review periodically whether the expulsion policy was still needed.[143] The internal assessment documents recounted the slow movement of DHS toward resumption of normal border operations with implementation of mitigation measures. By November 2021, the assessment expressed frustration that "DHS continue[d] to delay implementing necessary public health interventions for SA [single adults] and FMU [family units]," and identified this lack of progress as justification for the order.[144]

In the fall of 2021, as patience with other pandemic measures wore thin, Republicans in Congress continued to extoll "Title 42" for reasons other than prevention of disease. It was increasingly invoked as a tool that

140. Texas v. Biden, First Amended Complaint (ND Tex) (civil action no. 4:21-cv-00579P) (filed Aug 23, 2021).

141. Huisha-Huisha v. Mayorkas, 560 F. Supp. 3d. 146 (D.D.C. 2021), aff'd in part, 27 F.4th 718 (D.C. Cir. 2022).

142. Huisha-Huisha v. Mayorkas, 27 F.4th 718, 726 (D.C. Cir. 2022).

143. 86 Fed. Reg. at 42841 ("at least every 60 days").

144. *See* CDC, [Memo], from Martin S. Cetron to Rochelle P. Walensky, "*DECISION—Reassessment of Public Health Need for the 'Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists*," (Nov. 29, 2021), at 5-6, in Appendix of Relevant Administrative Record, *Huisha-Huisha v. Mayorkas* (D.D.C.) (filed Sept. 20, 2022), at 300-01. *See* also Jan. 28, 2022 memo at 7-8, in Appendix at 310-11.

should be deployed to protect against illegal immigrants, drug smugglers, human traffickers, and other criminals.[145]

4. How "Title 42" Eventually Ended

In 2022, the executive branch finally mustered the will to end the "Title 42" process as it was no longer justified. But that turned out to be only the beginning of a legal and political struggle to make the termination of "Title 42" effective. The administration's opponents in Congress and the states sought to extend "Title 42" for migration control purposes, or to replace it with an equivalent that dropped the public health pretext.

Between October 2021 and January 2022, the administration moved in stages from limiting "non-essential" travel by non-immigrant visitors to requiring vaccination for both "non-essential" and "essential" travel. Presidential Proclamation 10294 on the "safe resumption of global travel" emphasized that "vaccination is the most important measure for reducing the risk of COVID-19 transmission and for avoiding severe illness, hospitalization, and death."[146] DHS announced that noncitizens would be permitted to enter at land border ports of entry for "non-essential" reasons such as tourism with proof of vaccination, starting November 8, 2021, and that the same requirement would be applied in January to travel for reasons previously favored as "essential."[147] The distinction between "essential" and "non-essential" travel at land borders was accordingly replaced by a uniform vaccination requirement, with exceptions for particular categories of travelers, including some who were required to vaccinate after entry.[148] Meanwhile, "Title 42" continued to operate at ports of entry on the northern and southern borders and between ports of entry.

145. *See, e.g.*, 167 Cong. Rec. S6922 (Oct. 5, 2021) (remarks of Sen. Barroso) (describing "Title 42" as the Border Patrol's "last line of defense" against illegal immigration); 167 Cong. Rec. H5083 (Sept. 22, 2021) (remarks of Rep. Clyde); 167 Cong. Rec. H5129-30 (Sept. 23, 2021) (remarks of Rep. Roy); 167 Cong. Rec. S8848-49 (Dec. 1, 2021) (remarks of Sen. R. Scott); 167 Cong. Rec. H7562 (Dec. 9, 2021) (remarks of Rep. Meuser).

146. Presidential Proclamation 10294, 86 Fed. Reg. 59603, 59603 (2021) (Oct. 25, 2021).

147. *See, e.g.*, Fact Sheet: Guidance for Travelers to Enter the U.S. at Land Ports of Entry and Ferry Terminals (Oct. 29, 2021), https://web.archive.org/web/2021103021609/https://www.dhs.gov/news/2021/10/29/fact-sheet-guidance-travelers-enter-us-land-ports-entry-and-ferry-terminals; CBP, *Notification of the Lifting of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico for Certain Individuals Who Are Fully Vaccinated Against COVID-19 and Can Present Proof of COVID-19 Vaccination States*, 86 Fed. Reg. 72843 (2022) (later announcement of the prior decision).

148. *See, e.g.*, CBP, *Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico*, 87 Fed. Reg. 3425, 3428 (2022).

In March 2022, the CDC issued a new order, immediately terminating all the previous orders so far as they included unaccompanied children within the "Title 42" process.[149] A week earlier, the district judge in the Texas litigation against the CDC exception for unaccompanied children had issued a preliminary injunction, finding the July and August 2021 orders in the children's favor likely to be arbitrary and capricious.[150] The new termination order was based in part on updated information, and also countered the district judge's criticism of the reasoning in the CDC's July 2021 order. In addition, it expressed a narrower understanding of the CDC's power under Section 265:

> CDC is committed to using the least restrictive means necessary and 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. 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.[151]

The order determined that

> the numerous tools for disease prevention, mitigation, and treatment which have been implemented over the past two years (including those specific to UC in the custody of the federal government) are sufficient at this point in time to protect public health, such that an order suspending the right to introduce UC under 42 U.S.C. 265 is no longer required in the interest of public health.[152]

In explaining why the new order should be effective immediately rather than wait for the next periodic review, the CDC, for the first time, explicitly took into account the harms facing noncitizens after expulsion. It wrote,

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149. CDC, *Public Health Reassessment and Immediate Termination of Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists with Respect to Unaccompanied Noncitizen Children*, 87 Fed. Reg. 15243 (2022) (issued Mar. 11, 2022).

150. Texas v. Biden, 589 F. Supp. 3d. 595 (ND Tex. Mar. 4, 2022). As explained *infra*, the litigation was renewed after the August 2021 order. Texas was also challenging an alleged "de facto policy" of the DHS which made exceptions for families, but the judge found insufficient evidence that such a policy existed. *Id.* at 620 n.16.

151. 87 Fed. Reg. at 15252 (emphasis omitted, citations deleted).

152. 87 Fed. Reg. at 15252.

> Because the CDC has in its expert judgment determined again that, based on current circumstances, the expulsion of UC under Section 265 is not necessary to protect the public health, there is no justification for subjecting UC to the potentially significant harms they could suffer if the CDC orders were to be applied to them.[153]

The accompanying footnote cited the D.C. Circuit's decision limiting expulsion of families in *Huisha-Huisha v. Mayorkas*,[154] issued two days after the Texas injunction, and described it as "noting that some migrants who are expelled could be subject to persecution and victimization." [155]

On April 1, the CDC decreed the full termination of the "Title 42" process, concluding that the suspension of entry was no longer necessary for the protection of public health in the United States.[156] The CDC set a delayed implementation date of May 23, 2022 to give DHS time to organize the return to normal immigration procedures and to strengthen the accompanying mitigation measures, but as things turned out, actual termination was postponed almost a year by litigation.[157] The CDC analysis continued the March 11 order's emphasis on less restrictive means. For example, "CDC has determined that the extraordinary measure of an order under 42 USC 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."[158] The order reviewed the five waves of the pandemic up to the then-recent subsiding of the Omicron variant, and the range of measures taken to control travel, while developing testing, vaccines and boosters, and therapeutic treatments.[159] Given the advances in available mitigation measures and their increasing deployment by DHS, the remaining risk of transmission "does not present a sufficiently serious danger to public health to necessitate maintaining the August Order."[160] Since the legal basis for a Section 265 order was no longer present, it should not be kept in force for

153. 87 Fed. Reg. at 15252.

154. 27 F.4th 718 (D.C. Cir. 2022), discussed *infra* subsection II.B.1. The CDC did not mention, however, that the D.C. Circuit had affirmed a preliminary injunction against expelling families to countries where they were likely to be persecuted or tortured.

155. 87 Fed. Reg. at 15252 n.97.

156. 87 Fed. Reg. 19941 (2022) (Apr. 1, 2022).

157. *Id.*

158. 87 Fed. Reg. at 19944.

159. 87 Fed. Reg. at 19944-48. These responses were described as if a consistent public health policy had existed throughout the pandemic, basically ignoring the change in administrations and priorities.

160. 87 Fed. Reg. at 19952.

ulterior purposes or out of deference to the financial interests of states; "relying on an order under 42 U.S.C. 265 as a means of controlling immigration . . . would not be reasonable or legitimate."[161] Accordingly, the CDC terminated the orders, on the understanding that DHS would expand appropriate mitigation measures. The CDC would continue to monitor the situation and, if future developments such as new variants later required action, it could issue a new order.[162]

Even before the CDC announced the termination of the "Title 42" process, knowledge that it was under consideration produced strong objection among Republicans in Congress. On March 16, 2022 Senator James Lankford of Oklahoma argued that it was indispensable to maintain "Title 42" for control of illegal migration at the southern border until there was a satisfactory plan to replace it.[163] Ohio Senator Robert Portman admitted that terminating the order was "probably right. Title 42 shouldn't be used in this way because it is a public health authority, not an immigration law. The problem is that if that happens—remember, we already have an unprecedented number of people coming into the country."[164] As a result, he said, "we have to keep title 42 in place for now, but I also agree this is not a long-term solution to the crisis at the southern border."[165] As the termination order became definite, it resulted in vivid denunciations pointing to the dangers of illegal migration, drug smuggling, and crime that "Title 42" should be kept to prevent, with repeated emphasis on the flow of fentanyl from Mexico.[166] A flurry of bills were introduced to overturn the termination and retain "Title 42" for other purposes by statute. Some would prohibit the CDC from terminating its orders until HHS had terminated the public health emergency for all purposes, or for 60, 120, or 180 days thereafter.[167] Another version would

161. 87 Fed. Reg. at 19954.

162. 87 Fed. Reg. at 19955, 19956.

163. *See* 168 Cong. Rec. S1202-1203 (2022) (remarks of Sen. Lankford).

164. *See* 168 Cong. Rec. S1850-1851 (2022) (March 30, 2022) (remarks of Sen. Portman).

165. *See* 168 Cong. Rec. S1850-1851 (March 30, 2022) (remarks of Sen. Portman); *see* also 167 Cong. Rec. S2236 (May 2, 2022) (remarks of Sen. Cornyn) (describing the Border Patrol's "use of title 42 as a means to control immigration—admittedly not something it was designed for but something they were able to use it for").

166. *See, e.g.*, 168 Cong. Rec. H4066 (Mar. 31, 2022) (remarks of Rep. Roy);168 Cong. Rec. S2206-2207 (Apr. 28, 2022) (remarks of Sen. Barrasso); 168 Cong. Rec. S2238-2239 (May 2, 2022) (remarks of Sen. Blackburn).

167. *See, e.g.*, S. 4036, 117th Cong., 2d Sess. (introduced Apr. 7, 2022 by Sen. Lankford) (termination procedure with sixty-day window which required a report on replacement measures); 168 Cong. Rec. S4334 (Aug. 6, 2022) (amendment proposed by Sen. Lankford for appropriations rider in budget reconciliation bill, with 120-day period); H.R. 8257, 117th Cong., 2d Sess. § 238 (introduced July 1, 2022) (appropriations rider in DHS appropriations bill with 180-day period).

keep the order in force until February 1, 2025—that is, the beginning of the next administration.[168] Senator Ted Cruz introduced a bill that would prohibit termination until the federal government *and* all states had ended their public health declarations.[169] A different approach would expand the CDC's statutory authority beyond contagious disease to include suspension of the introduction of persons whenever necessary to prevent drug smuggling[170]: the exercise of the additional power would be authorized and not required, but if used it could make the "Title 42" process permanent. None of these provisions were enacted, and broader ones would follow later.

The CDC's termination order, however, never took effect. A group of states led by Louisiana, Arizona, and Missouri sued before a judge in the Fifth Circuit making the usual claims about irreparable injury from a wide range of costs that would result from increased immigration if the federal government returned to normal immigration procedures.[171] The judge issued a temporary restraining order, and then a nationwide preliminary injunction against implementation of the order on the ground that it had been issued without notice and comment under the APA.[172] The government appealed but did not seek a stay; an intervening NGO also appealed, and the Fifth Circuit denied its request to stay the nationwide scope of the injunction.[173] Ultimately, the injunction was vacated as moot after the May 2023 termination of the HHS-declared public health emergency.[174]

Later the same year, a proposed rider for the Consolidated Appropriations Act, 2023, would have prohibited HHS from expending funds to terminate "Title 42" during the fiscal year, regardless of when the emergency ended. *See* 168 Cong. Rec. S10058 (Dec. 21, 2022).

168. *See, e.g.*, S. 4022, 117th Cong., 2d Sess. (introduced Apr. 6, 2022 by Sen. Rubio).

169. S. 4088, 117th Cong., 2d Sess. (introduced Apr. 7, 2022).

170. H.R. 7586, 117th Cong., 2d Sess. (introduced Apr. 26, 2022 by Rep. Lasko).

171. Louisiana v. Centers for Disease Control & Prevention, 603 F. Supp. 3d. 406, 418-23 (W.D. La. 2022). Twenty-one more states subsequently joined as plaintiffs, including Texas. *Id.* at 415. *See infra* for further discussion of the case.

172. 603 F. Supp. 3d. at 439, 441 (issuing nationwide preliminary injunction on May 20, 2022); State of Arizona v. Centers for Disease Control & Prevention, 2022 U.S. Dist. LEXIS 80434, 2022 WL 1276141 (W.D. La. 2022) (issuing a nationwide temporary restraining order on Apr. 27, 2022). The judge also suggested that the termination order was arbitrary and capricious, but did not reach that issue. 603 F. Supp. 3d. at 439.

173. State of Louisiana v. Centers for Disease Control and Prevention, 2022 U.S. Dist. Ct. Motions LEXIS 141366 (5th Cir. June 16, 2022) (denying motion of Innovation Law Lab for stay).

174. State of Louisiana v. Centers for Disease Control and Prevention, Unpublished Order (5th Cir. June 13, 2023) (No. 22-30303) (in LEXIS). As mentioned, the August 2021 CDC order would cease by its own terms when the underlying HHS public health emergency expired.

The political conflict over immigration enforcement, and over "Title 42" in particular, deepened after control of the House of Representatives shifted to the Republicans in the 2022 elections. In 2023, with the emergency declarations ending and the "Title 42" process expiring, Republicans in Congress dropped the pretense of a public health rationale and proposed a substitute explicitly within Title 8. It would give the Secretary of Homeland Security discretion to prohibit the introduction of aliens if the Secretary considered it necessary "to achieve operational control" of a land or maritime border.[175] This provision was included in an omnibus border security bill passed by the House, in larger and small immigration bills, and inserted in a proposed continuing resolution designed to avoid government shutdown.[176] The proponents rejected as insufficient the new arrangements that the Biden administration was making to deal with the anticipated volume of asylum applicants after the end of Title 42.[177] House members also repeatedly introduced impeachment resolutions against DHS Secretary Alejandro Mayorkas, some of which mentioned the failure to use "Title 42" to achieve

175. The provision read:

> (e) Authority To Prohibit Introduction of Certain Aliens.—If the Secretary of Homeland Security determines, in his discretion, that the prohibition of the introduction of aliens who are inadmissible under subparagraph (A) or (C) of section 212(a)(6) or under section 212(a)(7) at an international land or maritime border of the United States is necessary to achieve operational control (as defined in section 2 of the Secure Fence Act of 2006 (8 U.S.C. note)) of such border, the Secretary may prohibit, in whole or in part, the introduction of such aliens at such border for such period of time as the Secretary determines is necessary for such purpose.

See, e.g., H.R. 2, 118th Cong., 2d Sess., § 201(2) (2023). The references to inadmissibility grounds relate to noncitizens unlawfully present, inadmissible for fraud, or lacking required documentation such as valid visas.

176. *See* H.R. 2640, 118th Cong., 2d Sess., § 202(2) (introduced Apr. 17, 2023); H.R. 2, 118th Cong., 2d Sess., § 201(2) (passed by House, May 5, 2023); S. 2824, 118th Cong., 2d Sess., § 201(2) (introduced Sept. 14, 2023); H.R. 5525, 118th Cong., 2d Sess., § 202(2) (continuing resolution introduced Sept. 18, 2023); H.R. 6477, 118th Cong., 2d Sess., § 101(2) (introduced Nov. 21, 2023).

177. Building on the cell phone app CBP One that the DHS had piloted during the "Title 42" period, the new regulation sought to channel asylum seekers into a limited set of numerically controlled options, making applicants presumptively ineligible for asylum if they did not use the "lawful pathways," with certain narrow exceptions. *See* Circumvention of Lawful Pathways, 88 Fed. Reg. 31314 (2023); *Contemporary Practice of the United States Relating to International Law: Biden Administration Takes Action to Restructure Migration to the U.S. Mexico Border*, 117 AJIL 528 (2023). The Lawful Pathways regulation was challenged as violating the asylum provisions and arbitrary and capricious, and a district court ordered it vacated, but the Ninth Circuit stayed the order pending appeal and the regulation took effect. *See* East Bay Sanctuary Covenant v. Biden, 683 F. Supp. 3d. 1025 (ND Cal 2023), stayed, 2023 WL 11662094 (9th Cir. 2023).

operational control of the border among the specifications of alleged high crimes and misdemeanors.[178]

Although Democrats long opposed conferring such broad authority, by the end of the year Biden expressed willingness to accept stricter border laws in exchange for increased aid to Ukraine and Israel. In early 2024, Senate negotiators arrived at a package including "border emergency authority" for summary removal that would be triggered by an elevated rate of migrant arrivals, and would be mandatory at a particular threshold.[179] Its effect on the right to apply for asylum at or near the southern border would be generally similar to how "Title 42" had been implemented under Biden, but without any public health pretext.[180] The deal collapsed, however, once Donald Trump announced his opposition to this package, or indeed to any compromise that would allow the Biden administration to improve its image on migration control in view of the impending election. The Senate refused to let the bill come to a vote on the merits in February, and similarly rejected a renewed attempt in May.[181]

In order to exercise a version of that "border emergency" power, Biden unilaterally issued a proclamation in June 2024, invoking presidential authority under 8 USC § 1182(f) to suspend uninvited entry across the southern border and directing the DHS secretary and the attorney general to limit access to asylum there, using an even lower numerical threshold than the Senate negotiators had set.[182] The

178. *See* H.R. Res. 8, 118th Cong., 1st Sess. (2023); H.R. Res. 411, 118th Cong., 1st Sess. (2023); H.R. Res. 470, 118th Cong., 1st Sess. (2023); H.R. Res. 863, 118th Cong., 1st Sess. (2023) (as introduced). The last of these, H.R. Res. 863, ultimately became the basis for the House's actual impeachment of Mayorkas, but the House Judiciary Committee omitted the charge of "being complicit in ending title 42" from the final version. *See* H.R. Res. 863, 118th Cong., 2nd Sess. (2024) (as reported); 170 Cong. Rec. H449-51 (Feb 6, 2024). The Senate dismissed all charges on a point of order as not amounting to high crimes and misdemeanors within the meaning of the Constitution. 170 Cong. Rec. S2803-2807 (Apr. 17, 2024).

179. *See* H.R. 815, § 3301 (proposed Senate amendment 1386), 170 Cong. Rec. S362, S384-86 (Feb. 5, 2024). The triggering threshold for mandatory implementation was 5,000 or more encounters averaged across five days, or 8,500 encounters on a single day. *See id.* (proposed INA § 244B(b)(3)).

180. The bill contained an exception for unaccompanied children and contemplated limited prearranged access to apply for asylum at ports of entry and some restricted opportunities for non-refoulement and torture claims. *See id.* (proposed INA § 244B(a)(2)(C, F(iv)), 244B(c)(1), 244B(b)(2)(B)).

181. *See* 170 Cong. Rec. S438 (Feb. 7, 2024); 170 Cong. Rec. S3878 (May 23, 2024); *Senate GOP Blocks Border Deal*, WASH. POST, Feb. 7, 2024; *Border Deal Fails Again in Senate as Democrats Seek Political Edge*, N.Y. TIMES, May 23, 2024.

182. *See* Proclamation 10773, *Securing the Border*, 89 Fed. Reg. 48487 (2024) (June 3, 2024). The triggering threshold under the proclamation was 2,500 encounters averaged over seven days, to continue until the encounters fell below a level of 1,500 encounters averaged over seven

proclamation did not rely on any public health rationale, but rather asserted that the immigration authorities could not manage increased levels of international migration at the southern border without policy changes and additional funding that Congress had refused to enact.[183] A second, somewhat more restrictive, version of the proclamation followed in September.[184] DHS and Department of Justice jointly issued implementing regulations in the form of an interim rule for the first and final version of the second proclamation.[185]

The regulatory analyses accompanying the new "Securing the Border" rules expressed the understanding that the suspension proclamations operated within the framework of Title 8, as did the agencies' implementation authority.[186] The rules purported to be consistent with statutory grants of discretion to shape the asylum process, as well as with U.S. obligations under the Refugee Convention and the Convention Against Torture, while they increased the difficulty of obtaining those protections. Litigation challenged the validity of the regulations,[187] and their long-term significance is uncertain, particularly given the election of Donald Trump to a second term in office.

For present purposes, however, two facts about the "Securing the Border" regulations should be emphasized. First, their arrangements rested on an immigration enforcement rationale and not on a public health emergency, and they admitted the need to comply with the immigration laws.[188] Second, a footnote in each regulatory analysis nonetheless

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days. *Id.* § 2. Unaccompanied minors protected under 8 U.S.C. § 1232 and asylum applicants with prearranged appointments at a port of entry were excluded from the suspension. *Id.* The implementing regulations also allowed an opportunity to affirmatively raise torture or non-refoulement claims that was narrower than the Senate compromise bill and that imposed an even higher screening standard than the "lawful pathways" regulation had done. *See* DHS and EOIR, *Securing the Border*, 89 Fed. Reg. 48710, 48769-70 (2024) (interim final rule). The interim and final versions of the new rule applied in addition to the "lawful pathways" rule, and did not repeal it.

183. *See* Proclamation 10773, preamble, 89 Fed. Reg. at 48488-90. The lengthy analysis in the regulations did, however, make a few references to unelaborated health and safety concerns arising from overcrowding in border patrol facilities; *See*, *e.g*. 89 Fed. Reg. at 48742.

184. Proclamation 10817, *Securing the Border*, 89 Fed. Reg. 80351 (2024) (Sept. 27, 2024).

185. 89 Fed. Reg. 48710 (interim final rule); DHS and EOIR, *Securing the Border*, 89 Fed. Reg. 81156 (2024) (final rule). The regulations recognized that suspension of entry under § 1182 affects only entry, and does not directly affect eligibility for asylum and related protections. *See* 89 Fed. Reg. at 48717 & nn. 40-41; 89 Fed. Reg. at 81163-64 & nn. 53-54.

186. DHS and EOIR, *Securing the Border*, *supra* note 185.

187. *Id.*

188. *See Las Americas Immigration Advocacy Center v. Biden*, 1:24-cv-01702 (D.D.C.); "Immigration Orgs Ask DC Judge to Ax New Asylum Limits," LAW360, July 29, 2024. This

continued to claim that Section 265, when invoked for public health purposes, would allow the CDC to override the restrictions contained in Title 8.[189]

Thus, the "Title 42" regulatory regime originated in a pretextual effort to circumvent guarantees for refugees and children in the immigration laws, and the Trump administration fortified the regime with a Final Rule that made sweeping claims of authority for the CDC to set aside substantive or procedural constraints on swift removal of "covered" noncitizens by the usual immigration officials. The incoming Biden administration kept the "Title 42" regime and attempted to moderate it as a matter of policy but faced immediate criticism accusing it of abandoning immigration enforcement. The pretextual nature of the process became increasingly open as other public health controls were dropped, and the CDC denied the need for the process to continue. Ultimately, the CDC orders were terminated as part of a general shutdown of the COVID-19 emergency declaration. Nonetheless, the CDC Final Rule remains in force. After "Title 42" ended, the Biden administration sought to channel and limit refugee flows, relying on Title 8 authority, rather than to choke them off. Perhaps these efforts will be upheld, and the results will be deemed satisfactory. If not, a later administration may attempt to revive the "Title 42" pretext.

B. Judicial Interventions[190]

Revisiting the years 2020 to 2023 in a litigation framework brings different perspectives to the foreground, and highlights issues of statutory interpretation and administrative procedure that the regulatory narrative abbreviated. Although most of the cases were mooted by the end of "Title 42," the decisions offer resources for considering what a future revival or reform of the "Title 42" process might involve.

The litigation over the "Title 42" system took two forms in two different venues. First, starting in June 2020, a series of cases brought in federal district court in the District of Columbia challenged expulsions of children and refugees, and produced judicial criticism of the system's legality. Second, after the change in administration, Republican-led states sued in district courts within the Fifth Circuit to attack reductions in the

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Article is not the place to evaluate the legality of either the *Securing the Border* rule or the *Lawful Pathways* rule; *see* DHS and EOIR, *Securing the Border*, 89 Fed. Reg. 81156 (2024) (final rule) *supra* note 185.

189. 89 Fed. Reg. at 48717, n.42; 89 Fed. Reg. at 81164 n.55; *id.*

190. The author was peripherally involved as an amicus in the *JBBC*, *PJES*, and *Huisha-Huisha* cases discussed in this section.

exercise of expulsion authority and to prevent the CDC's termination of the "Title 42" system. The states achieved initial success on administrative law grounds, relying on their claimed interest in having the federal government control illegal migration.

1. Litigation for Individuals in the D.C. Circuit

A series of cases in the District of Columbia federal courts challenged expulsions under the authority of the "Title 42" regime in its various phases. District judges questioned the CDC's power to authorize expulsions, the failure to reconcile CDC authority with other legal constraints, and the reasonableness of the CDC's justification of its rules and orders. A panel of the D.C. Circuit shared some of these criticisms in a decision upholding in part a preliminary injunction. Much of this litigation, however, became moot when the COVID emergency expired in May 2023.

The initial challenges to "Title 42" addressed its application to unaccompanied minors.[191] The first decision involved J.B.B.C., a sixteen-year-old boy who had fled Honduras and was being held in CBP custody pending arrangements to return him under authority of the March 2020 interim final rule.[192] The district judge, Carl J. Nichols, granted a temporary restraining order against removal of J.B.B.C. to Honduras or any other country.[193] The judge viewed the challenge as likely to prevail on the grounds that Section 265 did not authorize removal from within the United States, and that even if it did, the statute would need to be harmonized with provisions of the immigration laws, including the special protections for unaccompanied minors added by the TVPRA.[194] The fact that a judge appointed by Donald Trump responded so

191. Brief mention should also be made here of litigation on a separate issue, the housing arrangements for unaccompanied children expelled under "Title 42." The longstanding *Flores* Settlement Agreement addresses custody conditions for minors held by the INS and its successor agencies, and the district court for the Central District of California oversees enforcement of the Agreement. When class members challenged the detention of children in hotels pending expulsion under "Title 42" as inconsistent with the Agreement, the district court held that DHS custody for "Title 42" purposes was still DHS custody within the Agreement, and ordered compliance. Flores v. Barr, 2020 WL 5491445 (CD Cal Sept. 4, 2020), aff'd sub nom. Flores v. Garland, 3 F.4th 1145 (9th Cir. 2021). Judge Gee emphasized that the validity of "Title 42" expulsions was outside the scope of her authority to enforce the Agreement, *id.* at *3, but concluded that "DHS cannot evade its obligations under the *Flores* Agreement by hiding behind a different statute while exercising unfettered discretion over the minors within its care." *Id.* at *1. The Ninth Circuit agreed.

192. JBBC v. Wolf, 2020 WL 6041870 (D.D.C. June 26, 2020) (transcript of telephonic motion hearing), at *1; Complaint ¶ 12.

193. JBBC v. Wolf, 2020 WL 6041879 (D.D.C. June 26, 2020) at *1.

194. *Id.* at *2.

skeptically to the administration's newly asserted claims of power may have motivated DHS to keep cases of this kind away from the courts. Rather than continue to defend its treatment of J.B.B.C., DHS transferred him to ordinary immigration proceedings, effectively ending the case.[195] Attempts at litigation on behalf of other individual children led to similar transfers, while thousands of unrepresented children were expelled without hearing under the CDC orders.[196]

To avoid the mooting-out of individual cases, a class action was brought, named for a teenager who had fled Guatemala, P.J.E.S.[197] The district judge, Emmet G. Sullivan, provisionally certified a class of unaccompanied children, and granted a preliminary injunction against application of the expulsion process under the September 2020 Final Rule to the class.[198] Judge Sullivan found the plaintiffs likely to succeed on their claims that application of the "Title 42 Process" to the class was unlawful, because Section 265 does not authorize expulsions, and because such an interpretation would conflict with the specific protections provided under the immigration laws. He specifically rejected the Final Rule's argument that the reference in Section 265 to "suspension of the right to introduce" clearly expressed a power to override all these protections.[199]

The *PJES* decision came in mid-November 2020, and the Trump administration appealed the preliminary injunction to the D.C. Circuit during the contentious transition period. A D.C. Circuit panel issued a stay of the injunction pending appeal on January 29, 2021,[200] but the newly installed Biden administration did not take advantage of the stay. As explained (in subsection II.A), the CDC provisionally excepted

195. *See* PJES v. Wolf, 502 F. Supp. 3d. 492, 509 (D.D.C. 2020), discussing the later proceedings in *JBBC*.

196. Cf PJES v. Wolf, at 509 (taking into account "the actions the Government has taken to avoid judicial scrutiny by mooting the claims of the unaccompanied children [whom] Plaintiff's counsel bring to their attention."); DHS Office of Immigration Statistics, Annual Flow Report, Immigration Enforcement Actions: 2020, at 9 (2022) (reporting 11,000 expulsions of unaccompanied children between March 2020 and the end of the fiscal year on September 30, 2020). For more on numbers of expulsions, *see* Part III *infra*.

197. PJES v. Wolf, 502 F. Supp. 3d. 492 (D.D.C. 2020) (Nov. 18, 2020), remanded, 2022 WL 17246563 (D.C. Cir. 2022).

198. PJES v. Wolf, 502 F. Supp. 3d. 492 (D.D.C. 2020) (Nov. 18, 2020), remanded, 2022 WL 17246563 (D.C. Cir. 2022). The judge's opinion reviewed and adopted the report and recommendation of a magistrate judge; PJES v. Wolf, (Report and Recommendation of US magistrate judge G. Michael Harvey, Sept. 25, 2020), (in LEXIS).

199. 502 F. Supp. 3d. at 515.

200. PJES v. Pekoske, 2021 WL 9100552 (D.C. Cir. Jan. 29, 2021). The D.C. Circuit panel said that "Appellants have satisfied the stringent requirements for a stay pending appeal," but did not elaborate.

unaccompanied children from the "Title 42" process while it reassessed the policy, and reaffirmed the exception in July 2021.[201] Nonetheless, the Department of Justice filed a brief on appeal defending the "Title 42" process as lawful and opposing the *PJES* injunction.[202] The appeal proceedings were held in abeyance at the parties' request, and ultimately the *PJES* case was voluntarily dismissed after "Title 42" expired.[203] In the meantime, Texas had sued in the Fifth Circuit to challenge the exception for unaccompanied children.[204]

Another set of challenges, brought by families, led to the most significant judicial evaluations of "Title 42." The *Huisha-Huisha* case involved a class of family units—that is, groups including a parent and their minor child[205] and therefore not covered by the special protections for unaccompanied children. It was originally filed in the waning days of the Trump administration, and accepted by Judge Sullivan as a case related to *PJES*.[206] After some stays of removal of particular families, the parties agreed to hold the litigation in abeyance while the Biden administration reassessed its policy. Once it became clear that the new administration would not extend an exception to families with children, the plaintiffs revived the litigation. In September 2021, Judge Sullivan granted class certification and issued a preliminary injunction in favor of the class. He held once more that Section 265 did not authorize expulsion, viewed in light of its language, its particular statutory context, and the contrasting provisions of the immigration laws.[207] Even if Section 265 were ambiguous, the court would not owe *Chevron* deference to the CDC's interpretation of how it should be reconciled with another statute

201. *See supra* text accompanying notes 113-125.

202. Corrected Brief for Appellants, PJES v. Mayorkas, D.C. Cir., (No. 20-5357) (Feb 22, 2021) (in LEXIS).

203. *See PJES v. Wolf*, 2023 U.S. Dist. Ct. Motions LEXIS 247456 (Nov. 6, 2023) (joint stipulation to dismiss the action without prejudice in light of subsequent developments eliminating the need for an injunction). The D.C. Circuit had remanded the appeal of the preliminary injunction for a determination of whether all or part of the case had become moot, PJES v. Mayorkas, 2022 WL 17246563 (D.C. Cir. 2022).

204. *See supra* text accompanying notes 118-119 and *infra* notes 243-256.

205. *See* Huisha-Huisha v. Mayorkas, 560 F. Supp. 3d. 146, 161(D.D.C. 2021), aff'd in part, 27 F.4th 718 (D.C. Cir. 2022) ("a family unit composed of at least one child under 18 years old and that child's parent or legal guardian").

206. *See* D.D.C. Local Civil Rule 40.5 (specifying which related cases may be exceptions to random assignment of new cases to judges); Haitian Bridge Alliance v. Biden, 2022 WL 2132439 (D.D.C. 2022) (Sullivan, J.) (explaining why *PJES* and *Huisha-Huisha* were related cases and *Haitian Bridge Alliance* was not related to them both).

207. 560 F. Supp. 3d. at 167-71.

administered by a different agency.[208] The government appealed from the preliminary injunction, and the D.C. Circuit granted a stay pending appeal.[209]

The D.C. Circuit gave a mixed response to the government's appeal in March 2022, affirming and narrowing the preliminary injunction.[210] The court considered it likely that a Section 265 "suspension" could be enforced through expulsion, but agreed that the CDC's power needed to be reconciled with provisions of the immigration laws.[211] The panel drew a distinction between the discretionary benefit of asylum and the mandatory obligation not to return individuals to countries where they would be persecuted or tortured.[212] The plaintiffs were likely to succeed on their claim that expelling them to persecution or torture would be unlawful, but they had not shown that they were likely to succeed on their claim that barring them from applying for asylum violated the asylum statute, although that issue was close and deserved further attention.[213] As will be discussed further later (in subsection art. IV.A.1), the court's opinion envisioned enforcement of Section 265 *within* an immigration law framework, rather than by means of an ad hoc, freely designed "Title 42" process. The executive had discretion to categorically deny asylum to the class of persons designated in the Section 265 order. The opinion emphasized that its interpretation was not definitive, being based on the provisional analysis of the merits that befitted the review of a preliminary injunction. In agreeing that the balance of equities favored the plaintiffs, the court called attention to the changed situation since the outset of the pandemic: "The CDC's § 265 order looks in certain respects like a relic from an era with no vaccines, scarce testing, few therapeutics, and little certainty."[214] The court partly affirmed the injunction and remanded for

208. 560 F. Supp. 3d. at 170 (citing Epic Systems Corp. v. Lewis, 139 S. Ct. 1712 (2018)).

209. Huisha-Huisha v. Mayorkas, D.C. Cir. (Sept. 30, 2021). As in *PJES*, the D.C. Circuit panel said that "Appellants have satisfied the stringent requirements for a stay pending appeal," but did not elaborate.

210. Huisha-Huisha v. Mayorkas, 27 F.4th 718 (D.C. Cir. Mar. 4, 2022). Judge Justin Walker wrote the opinion for the panel, which also included Chief Judge Sri Srinavasan and Judge Robert Wilkins.

211. 27 F.4th at 729-30.

212. 27 F.4th at 731.

213. 27 F.4th at 730-32. On the asylum provision, 8 U.S.C. § 1158(a)(1), the panel wrote, "That argument deserves attention from the District Court when it considers the merits. It may be the closest question in this case. But on its merits, at this stage of the litigation, the Plaintiffs have not shown they are likely to succeed." *Id.* at 730.

214. 27 F.4th at 734.

further proceedings, including, pointedly, the question of whether the Section 265 order was arbitrary and capricious.[215]

The Biden administration did not seek to preserve the full scope of the CDC order by petitioning for certiorari. Indeed, the CDC issued a new determination on April 1, 2022, finding that the continuation of the Section 265 orders was no longer necessary to protect the public health, and directing the termination of the procedure on May 23, after a transition period for DHS to make substitutive arrangements. As discussed above, that notice of termination prompted a strong political reaction for reasons unrelated to public health,[216] and litigation by certain state governments seeking to keep the "Title 42" process in place as an immigration control device. Suing in the Western District of Louisiana, the states obtained a preliminary injunction barring the termination order, on the ground that the CDC had violated the notice and comment procedure of the Administrative Procedure Act.[217]

DHS gave directions for minimal compliance with the narrow version of the *Huisha-Huisha* preliminary injunction as modified by the D.C. Circuit. In May 2022, the CBP instructed officers in the Border Patrol and at ports of entry that they could not expel families who had affirmatively "manifested fear" of return to a particular country without referring them for further screening that would determine whether it was more likely than not that they would be persecuted or tortured there.[218] The procedure described was more rudimentary than that for expedited removal under Title 8,[219] and it was available only to the class protected by the injunction, members of family units that crossed into the United States, not family units stopped at the international border and not adults traveling without children.

After remand from the D.C. Circuit, proceedings in *Huisha-Huisha* resumed in the district court. With administrative termination of the

215. 27 F.4th at 735.

216. *See supra* subsection II.A.4, text accompanying notes 164-170.

217. Louisiana et al. v. CDC, 603 F. Supp. 3d. 406 (W.D. La. 2022), discussed further *infra*.

218. *See* Kenny Blanchard, Acting Deputy, Operations Directorate, Border Patrol, "Guidance Regarding Family Units Moving Forward Under Title 42," May 21, 2022; Executive Director, Office of Field Operations, CBP, *Memorandum: Processing of Noncitizens Manifesting Fear of Expulsion Under Title 42*, May 21, 2022 (both memos available at https://border oversight.org/files/2022-05-21_t42_guidance.pdf). The subsequent screening could involve either transfer to the Title 8 process, or a screening by USCIS (a different component of the DHS that includes asylum officers).

219. *See Human Rights First, The Nightmare Continues* (June 2022), at 13-14 (contrasting the features of expedited removal, which are already quite limited, with the CBP instructions, and also noting reports of failure to comply with the instructions).

expulsion process blocked by the Louisiana injunction, Judge Sullivan turned to the issue of whether the adoption of the process itself was arbitrary and capricious under the Administrative Procedure Act. Sullivan used the phrase "Title 42 policy" to refer to "the process developed by the CDC and implemented by the August 2021 order."[220] Portions of his analysis related to the September 2020 Final Rule that provided the general framework for expulsion orders under Section 265, but most of the analysis addressed the August 2021 CDC order that gave an updated justification for continued implementation of the expulsion process as the COVID-19 pandemic progressed. He issued partial summary judgment for the plaintiff class, finding the "Title 42 policy" arbitrary and capricious in several respects. First, he found the August 2021 order arbitrary and capricious because it departed without explanation from the prior CDC practice, recognized and codified in a 2017 regulation, of selecting the least restrictive alternative when applying quarantine, isolation, or other public health measures.[221] Second, he found the CDC's "Title 42" orders arbitrary and capricious because they wholly failed to consider the harms that the orders would impose on expelled migrants.[222] Third, he found the "Title 42 policy" arbitrary and capricious because the August 2021 order failed to consider several alternatives that had become available by that time,[223] because the CDC did not consider requiring the DHS to alter its facilities to address its claimed public health concerns,[224] and because the public health need for the policy was not demonstrated at a time when COVID-19 was already widespread in the United States and millions of

220. Huisha-Huisha v. Mayorkas, 642 F. Supp. 3d. 1, 12 (D.D.C. 2022), vacated as moot, 2023 WL 5921335 (D.C. Cir. 2023).

221. 642 F. Supp. 3d. at 19. The regulation *Control of Communicable Diseases*, 82 Fed. Reg. 6890 (Jan. 19, 2017), had been adopted in the final year of the Obama administration, drawing lessons from the CDC's experiences with prior epidemics such as SARS, MERS and Ebola viruses. *See* 82 Fed. Reg. at 6892, 6936; Michael R. Ulrich & Wendy Mariner, *Quarantine and the Federal Role in Epidemics*, 71 SMU L. REV. 391, 394-96 (2018); Lawrence O. Gostin & James G. Hodge, Jr., *Reforming Federal Health Powers: Responding to National and Global Threats*, 317(12) JAMA 1211 (2017).

222. 642 F. Supp. 3d. at 20-21.

223. 642 F. Supp. 3d. at 21-24. The court viewed outdoor processing, testing, vaccination, and therapeutics as obvious alternatives that the CDC should have considered in its August 2021 order. The court found that the CDC had adequately considered (and rejected) reliance on self-quarantine or self-isolation.

224. 642 F. Supp. 3d. at 23 ("The Court agrees with Plaintiffs that the Defendants cannot rest on the 'operational reality' when Defendants themselves had the power to change that reality.").

other travelers were permitted to cross the border.[225] As remedy, Sullivan vacated the "Title 42 policy"—both the Final Rule and the CDC orders—and issued a permanent injunction against applying it to members of the class.[226] His choice of remedies was influenced by the fact that the CDC itself had already recognized in its April 2022 termination order that the policy was no longer justified by public health considerations.[227]

The district court's injunction never went into effect. At the government's request, Judge Sullivan stayed his order for five weeks, to give DHS time to transition to border enforcement procedures that complied with the immigration laws.[228] The government appealed the judgment to the D.C. Circuit, but did not request a longer stay.[229] At this late stage, a group of nineteen states attempted to intervene in the *Huisha-Huisha* case, asserting that they had legitimate interests that the federal government would not protect.[230] After the D.C. Circuit denied the intervention as untimely,[231] the states sought an emergency stay from the Supreme Court in view of the imminent expiration of the district court's five-week stay.[232] The states alleged irreparable harm from the economic effects of increased illegal immigration, not any risk of contagion.[233] Chief Justice Roberts issued an administrative stay for rapid briefing,[234] and the following week the full Supreme Court issued an indefinite stay of the district court's order, accompanying a grant of certiorari limited solely to

225. 642 F. Supp. 3d. at 24. However, Judge Sullivan wrote that he did not find the definition of "serious danger of introduction" given in the September 2020 final rule to be unreasonable and deferred to it. *Id.*

226. 642 F. Supp. 3d. at 28.

227. 642 F. Supp. 3d. at 25, 27.

228. *See* Minute Order, Nov. 16, 2022 (granting unopposed motion for temporary stay), in Docket *for* Huisha-Huisha v. Gaynor, No. 1:21-cv-100 (D.D.C.) (available in LEXIS).

229. As the solicitor general later explained to the Supreme Court, the government could not plausibly seek a stay pending appeal, because the CDC itself had determined that the "Title 42" orders were no longer needed. Federal Respondents' Opposition to the Application for a Stay Pending Certiorari, Arizona et al. v. Mayorkas et al., No, 22A544, Dec. 20, 2022, 2022 WL 17834191.

230. *See* Huisha-Huisha v. Mayorkas, 2022 WL 19653946 (D.C. Cir. Dec. 16, 2022), vacated sub nom. Arizona v. Mayorkas, 143 S. Ct. 1312 (2023). All nineteen states were parties to the litigation in the Western District of Louisiana challenging the CDC's termination of the "Title 42" process.

231. Huisha-Huisha v. Mayorkas, 2022 WL 19653946 (D.C. Cir. Dec. 16, 2022), vacated sub nom. Arizona v. Mayorkas, 143 S. Ct. 1312 (2023).

232. Arizona v. Mayorkas, Application for a Stay Pending Certiorari, 2022 WL 17834185, at 40 ("the termination of the Title 42 System is set to take effect only 36 hours after this filing.").

233. *Id.* (2022 WL 17834185) at 37-39.

234. Arizona v. Mayorkas, 2022 WL 17750015 (Dec. 19, 2022).

the question of the states' right to intervene.[235] Four Justices dissented from this prolongation, including Justice Neil Gorsuch, who wrote:

> The States contend that they face an immigration crisis at the border and policymakers have failed to agree on adequate measures to address it. The only means left to mitigate the crisis, the States suggest, is an order from this Court directing the federal government to continue its COVID-era Title 42 policies as long as possible—at the very least during the pendency of our review. . . . But the current border crisis is not a COVID crisis. And courts should not be in the business of perpetuating administrative edicts designed for one emergency only because elected officials have failed to address a different emergency.[236]

The majority gave no reasons for the stay, and did not respond to this criticism. It did observe that the stay applied to the district court's orders, and not to executive action regarding "Title 42" policies.[237] The Supreme Court left its stay in place until the official end of the COVID emergency declaration in May 2023, and then sent the case back to the D.C. Circuit with instructions to dismiss the intervention motion as moot.[238]

Once the Section 265 orders expired, other pending proceedings also became moot. Judge Sullivan's injunction in *Huisha-Huisha*, and his orders vacating CDC orders and the September 2020 Final Rule were themselves vacated as moot, as was the Louisiana injunction.[239] The preliminary injunction in *PJES* had been stayed pending appeal, then remanded to determine mootness, and after the "Title 42 policy" had ended, the case was dismissed without prejudice by joint stipulation, terminating the injunction.[240] The D.C. Circuit decision affirming in part

235. Arizona v. Mayorkas, 143 S. Ct. 478 (Dec. 27, 2022).

236. 143 S. Ct. at 479 (Gorsuch, J., joined by Jackson, J.).

237. 143 S. Ct. at 478.

238. Arizona v. Mayorkas, 143 S. Ct. 1312 (May 16, 2023). The public health emergency declaration ended on May 11, 2023. *See End of the Federal COVID-19 Public Health Emergency (PHE) Declaration*, https://www.cdc.gov/coronavirus/2019-ncov/your-health/end-of-phe.html.

239. Louisiana v. Centers for Disease Control and Prevention, W.D. La., Judgment dismissing case as moot, June 14, 2023 (in docket in WL), on remand from Louisiana v. Centers for Disease Control and Prevention, 5th Cir., 22-30303, Unpublished Order, June 13, 2023 (remanding with instructions to vacate preliminary injunction and dismiss case as moot) (in docket in WL); Huisha-Huisha v. Mayorkas, 2023 U.S. App. LEXIS 23873 (D.C. Cir. Sept. 7, 2023) (remanding with instruction to dismiss the case as moot).

240. *See* PJES v. Wolf, 2023 U.S. Dist. Ct. Motions LEXIS 247456 (D.D.C. Nov. 6, 2023) (joint stipulation of dismissal); PJES v. Wolf, 2022 WL 17246563 (D.C. Cir. Oct .17, 2022) (remand order).

As of this writing, one class action that includes challenges to the "Title 42" process, along with other claims, is still pending. *See* Haitian Bridge Alliance v. Biden, 2024 U.S. Dist. Ct. Motions LEXIS 121037 (D.D.C. Case No. 1-21-cv-03317 (JMC)) (Plaintiffs' Opposition to

the *Huisha-Huisha* injunction was not vacated, but its analysis had been expressly tentative.

Thus, the cases brought by individuals produced serious judicial criticism of the lawfulness of the "Title 42" regime, and of the 2020 Final Rule, coupled with a series of stays pending appeal. As the pandemic emergency faded, the judicial orders restricting or invalidating the regime have largely been vacated on mootness grounds, and the Final Rule is still in force. The reasoning of these courts regarding Section 265 and the Final Rule remains important and will be examined further in Part IV below.

2. Litigation by States in the Fifth Circuit

In contrast to the noncitizens seeking protection from expulsion under "Title 42," the states that championed maximum expulsion turned to courts in the Fifth Circuit. The states received preliminary relief against their asserted injuries, creating what was essentially a circuit split based in underlying assumptions about the legality and necessity of "Title 42." Ultimately, these cases also became moot after the termination of the HHS emergency declaration.

Texas filed its first lawsuit against "Title 42" exceptions in April 2021, as mentioned earlier. The litigation challenged both the CDC's categorical exception for unaccompanied children and DHS policies regarding families, most centrally for violation of the APA.[241] After the CDC issued further orders in July and August 2021, Texas reformulated its attack to include them.[242] Judge Mark Pittman issued a preliminary injunction against the exception for children in March 2022, but found that Texas had not yet proven its claims of a "de facto policy" in favor of families.[243] With respect to children, Pittman found the CDC orders of July and August 2021 arbitrary and capricious, for lack of reasoned decision-making and for failure to consider the full range of Texas's reliance interests.[244] Pittman absurdly claimed that "[t]he record before

Defendants' Motion to Dismiss). The complaint alleged ongoing harm to plaintiffs from the enforcement of "Title 42" against Haitians during the notorious Del Rio incident of September 2021.

241. *See* Texas v. Biden, 589 F. Supp. 3d. 595, 605 (ND Tex. 2022). The litigation also raised claims under detention mandates of the immigration laws, under a purported contract between Texas and an outgoing Trump DHS official, and under the "Take Care" clause of the Constitution. Texas revised its complaint after the August 2021 order replaced earlier orders.

242. *See supra* note 101; 589 F. Supp. 3d. at 606-07.

243. 589 F. Supp. 3d. at 623, 620 n.16.

244. 589 F. Supp. 3d. 595 (ND Tex. 2022). The opinion appeared to conclude definitively that the orders *were* arbitrary and capricious, although it sometimes used the phrasing of "likelihood of success" appropriate to a preliminary injunction analysis.

the Court demonstrates that nothing changed between the October 2020 order [and the July and August 2021 orders]."[245] He asserted that the CDC focused too narrowly on the spread of COVID-19 between children in DHS custody, and provided "[n]othing" about protecting against the spread of infection into the U.S. community.[246] He also objected that the 2021 orders "failed to fully explore Texas's reliance interests," which extended beyond harm to the local health care systems, and included other consequences of unlawful immigration, as he had stated in detailing the irreparable injuries to Texas.[247] Those included financial costs for Medicaid services for undocumented immigrants, feeding them, housing them, educating them, issuing driver's licenses to them, and incarcerating them if they are convicted of crimes.[248]

As previously mentioned, the CDC issued an updated assessment on March 11, 2022, that responded to the preliminary injunction, and to the current public health data, by ordering the termination of the "suspension" with regard to unaccompanied children.[249] The CDC not only explained in greater detail why the mitigation measures it had previously identified reduced the risk of community spread from unaccompanied children, but also described more recent improvements in mitigation and in the incidence of disease.[250] The CDC also denied that states could have any legitimate reliance on the October 2020 order, which was expressly a temporary measure limited to the period of a public health emergency, lasting only so long as the CDC deemed it necessary for that purpose, and not a policy decision about controlling immigration.[251] The government informed the court of the new order, which provided a superseding basis for the non-expulsion of unaccompanied children.[252] A few weeks later, the CDC issued its April 2022 order for the termination of the "Title 42" process altogether.[253] Ultimately, Texas joined the Louisiana challenge to

245. 589 F. Supp. 3d. at 618. This inflated rhetoric is consistent with the polemical opening and closing paragraphs of his opinion, *id.* at 600, 623.

246. 589 F. Supp. 3d. 619.

247. 589 F. Supp. at 620.

248. 589 F. Supp. at 611-612.

249. CDC, *Public Health Reassessment and Immediate Termination of Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists with Respect to Unaccompanied Noncitizen Children*, 87 Fed. Reg. 15243 (2022) (issued Mar. 11, 2022).

250. 87 Fed. Reg. at 15249-50.

251. 87 Fed. Reg. at 15250-51.

252. Notice of New CDC Order, Texas v. Biden, (in LEXIS).

253. *See supra* subsection II.A.4.

the full termination order, and the separate lawsuit about children was dismissed without prejudice by stipulation in October 2022.[254]

That Louisiana case was filed on April 3, 2022, almost immediately after the termination order, by Arizona, Louisiana, and Missouri in the Western District of Louisiana.[255] Twenty-one more states subsequently joined as plaintiffs. The states challenged the termination order under the APA, for having been issued without notice and comment, and as arbitrary and capricious. The complaint began, "This suit challenges an imminent, man-made, self-inflicted calamity: the abrupt elimination of the only safety valve preventing the Administration's disastrous border policies from devolving into an unmitigated chaos and catastrophe."[256] Although the complaint included some reference to health-related issues, the main thrust of the argument concerned the claimed costs to the states resulting from illegal immigration, and the financial effects they anticipated if summary expulsions under "Title 42" were replaced by return to the immigration procedures authorized under Title 8, including expedited removal.[257] The states challenged the CDC's failure to consider alternative immigration measures that would address their concerns, and failure to give adequate weight to their alleged reliance on the rapid expulsions. To paraphrase critically, if the "Title 42" process was adopted for pretextual reasons of public health, it should be continued for ulterior purposes, and if the "Title 42" process was adopted for public health reasons that no longer existed, it should be continued as a pretext. The government replied that the states' arguments fundamentally misconceived the limits of the CDC's authority.[258]

The judge, Robert Summerhays, sided with the states. He first issued a temporary restraining order against implementation of the termination order and reductions in the use of "Title 42," ambiguously grounded on a

254. See Stipulation of Dismissal without Prejudice, Texas v. Biden, (N.D. Tex. Oct. 18, 2022) (No. 4:21-cv-00579-P) (in Bloomberg Law). The Louisiana litigation did not focus on the March 2022 termination order regarding unaccompanied children, and the Louisiana injunction aimed at a return to the status quo as it existed just before the April order fully terminating the "Title 42" process. *See* Louisiana v. CDC, W.D. La., Preliminary Injunction, May 20, 2022 (in LEXIS).

255. Complaint, State of Arizona et al. v. Centers for Disease Control & Prevention et al., 2022 WL 1003703 (W.D. La. Apr. 3, 2022).

256. *Id.* ¶ 1 (emphasis omitted).

257. *See generally* Complaint, State of Arizona et al. v. Centers for Disease Control & Prevention et al., 2022 WL 1003703 (W.D. La. Apr. 3, 2022).

258. Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction, Arizona et al. v. Centers for Disease Control & Prevention et al., 2022 WL 18108139 (W.D. La. Apr. 29, 2022), at 42.

likely APA violation,[259] then a lengthy decision granting a preliminary injunction. The decision discussed both of the APA claims, but based the preliminary injunction on the lack of a notice and comment period. Summerhays rejected the two exceptions to the notice and comment requirement that the CDC had invoked in all of its "Title 42" orders. "Good cause" for dispensing with notice and comment had not been shown despite the shifting course of the pandemic and the temporary nature of the orders. Moreover, he considered an order to terminate the extraordinary expulsion regime when it was no longer required as less urgent than an order to initiate an extraordinary expulsion regime to protect public health.[260] He also dismissed the concise invocation of the foreign affairs exception to provide for both notice and comment for processes that involved ongoing discussions with foreign states over cross-border COVID-19 control as insufficiently detailed to provide justification.[261]

Summerhays briefly addressed the arbitrary-and-capricious claim without ruling on its likelihood of success. He considered that the adequacy of the CDC's consideration of the states' reliance claim was impaired by the fact that the CDC lacked the information that would have been submitted through notice and comment.[262] He also wrote that the CDC was obliged to consider intermediate alternatives other than keeping or terminating its "Title 42" orders, and had not done so. It is not clear what kind of alternatives he had in mind, given the CDC's conclusion that the expulsions were no longer justified by public health considerations. The alternatives mentioned in the states' complaint—"rigorous enforcement of immigration laws to deter immigration, or implementing in good faith the Migrant Protection Protocols ("MPP") and withdrawing [defendants'] challenge to the Fifth Circuit's invalidation of it [*sic*]"[263]—are clearly beyond the power of the CDC to impose.

Having found the states likely to succeed on one ground, Summerhays turned to other factors favoring a preliminary injunction and found them all satisfied. The states faced immediate irreparable harm in terms of increased border crossing, overcrowded DHS facilities, and

259. Temporary Restraining Order, State of Arizona et al. v. Centers for Disease Control & Prevention et al., 603 F. Supp. 3d. 406 (W.D La. 2022) (No. 6:22-CV-00885), 2022 WL 1276141. The phrasing "not issued in compliance with the Administrative Procedure Act," *id.* at *1, could refer either to a notice and comment violation or to the alleged failures in reasoning making the order arbitrary and capricious.

260. *Arizona et al*., 603 F. Supp. 3d. at 437.

261. *Id.* at 438.

262. *Id.* at 439.

263. Complaint at 39, *Arizona et al.*, 603 F. Supp. 3d. 406, 2022 WL 1003703.

unrecoverable costs for health care reimbursements and education services.[264] These harms outweighed the harms to the government, and the public interest favored the states. Summerhays preliminarily enjoined the defendants from enforcing the April 1 termination order anywhere in the United States.[265] To ensure compliance with this command he required monthly reports of the numbers of single adults from each country processed under "Title 42" and Title 8 respectively, the number of migrants excepted from "Title 42" under the NGO-supported process, and any material changes to DHS policy regarding "Title 42." He also required separate monthly numbers of repeat border crossers who were processed under Title 8 to increase the criminal punishment they would face if they returned, a practice of which he evidently approved.[266] The monthly reports actually provide valuable official data, which was not otherwise published, on certain aspects of the operation of "Title 42" in its last year.

The government appealed but did not seek a stay; an intervening NGO also appealed, and the Fifth Circuit denied its request to stay the nationwide scope of the injunction.[267] The appeal proceedings inched forward, and the states rushed the *Huisha-Huisha* case into the Supreme Court.[268] Ultimately, the *Louisiana* injunction was vacated as moot after the May 2023 termination of the HHS-declared public health emergency.[269]

Thus, while courts in the D.C. Circuit were questioning the legality of the "Title 42" regime, courts in the Fifth Circuit were insisting on the strict enforcement of a policy that both the litigating states and the federal government considered lawful. The court orders effectively added a year

264. *Arizona et al*., 603 F. Supp. 3d. at 440, 429-30.

265. *Id.* at 441; Preliminary Injunction Order at 2, Louisiana v. CDC, 603 F. Supp. 3d. 406 (W.D. La. 2022) (NO. 6:22-CV-00885), 2022 U.S. Dist. LEXIS 90439.

266. Preliminary Injunction order at 2, Louisiana v. CDC, 603 F. Supp. 3d. 406; *see* Temporary Restraining Order, *supra* note 260. As was widely noticed, noncitizens expelled under the "Title 42" process were not regarded as "removed" within the meaning of Title 8, and therefore were not subject to the criminal penalties on those who return after removal.

267. *State of Louisiana v. Centers for Disease Control and Prevention*, 2022 U.S. Dist. Ct. Motions LEXIS 141366 (5th Cir. 2022) (denying motion of Innovation Law Lab for stay).

268. *See id.* As the Fifth Circuit docket shows, briefing progressed over the fall of 2022, and oral argument was initially scheduled, but the court placed the appeal in abeyance in light of the anticipated end of the public health emergency, as requested by the federal government.

269. State of Louisiana v. Centers for Disease Control and Prevention, 603 F. Supp. 3d. 406, Unpublished Order (5th Cir. 2023) (No. 22-30303) (in LEXIS). As mentioned *supra* note 241, the August 2021 CDC order would cease by its own terms when the underlying HHS public health emergency expired.

to the length of the regime, largely because the states "relied" on it for purposes of general immigration control.

III. FROM LAW TO FACT, WITH NUMBERS

The foregoing descriptions of laws and regulations have been largely abstract, with a few references to the magnitude of the expulsion policy. This part attempts to sketch what the policy amounted to in practice, especially as reflected in various official statistics. It then briefly describes reported harms inflicted by the practice, which were not the focus of the government's attention.

Expulsions. Official statistics are partial, and may vary, and can be difficult to interpret.[270] Overall, the "Title 42" system reported almost 3 million expulsions between March 2020 and May 2023. Broken out by DHS fiscal year (which runs from October 1 to September 30), there were more than 206,000 expulsions in FY2020, slightly more than 1,070,000 expulsions in FY2021, slightly more than 1,100,000 expulsions in FY2022, and almost 580,000 expulsions in FY2023.[271] Broken out another way, there were more than 463,000 expulsions during the Trump administration, and almost 2,500,000 expulsions during the Biden administration.[272]

These figures represent acts of expulsion, not necessarily distinct individuals, as many noncitizens who were expelled later returned and were expelled again; these repetitions occurred at a greater rate under "Title 42" than under the normal immigration laws.[273] From another perspective, these figures are underinclusive, because they do not include

270. Some of the variations resulted from use of updated figures at a later date, given the uneven flow of information within DHS; some result from varying terminology and categorizations in different reports and from various human errors.

271. The numbers for FY2021-FY2023 come from the CBP website Nationwide Encounters, https://www.cbp.gov/newsroom/stats/nationwide-encounters. The FY2020 numbers, not included there, are calculated from the separate page for Nationwide Enforcement Encounters for FY2020 https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy2020.

272. These numbers, calculated using monthly statistics for FY2021 (*see supra* note 271) are necessarily approximate because Biden took office on January 20, 2021; DHS does not report the statistics by administration.

273. *See* Office of Homeland Security Statistics, Annual Flow Report: Immigration Enforcement Actions: 2022 (2023), at 9. In part this phenomenon reflects the fact that most expulsions sent the noncitizens back to the border region in Mexico. *Id.* It has also been attributed to the fact that returning after being "excluded, deported, or removed" under Title 8 is a criminal offense, *see* 8 U.S.C. § 1326, but there is no corresponding crime of return after expulsion under "Title 42." *See, e.g.*, Congressional Research Service, Immigration Apprehensions and Expulsions at the Southwest Border 3 (2021) (CRS Report R46999).

noncitizens who were prevented on the basis of "Title 42" from crossing the international boundary to access a port of entry; the CBP did not report the numbers of such actions, which did not amount to expulsion from U.S. territory.[274]

The vast majority of expulsions were by land to Mexico, with relatively few to Canada,[275] and the system depended greatly on the cooperation of Mexico. It began with Mexico's agreement to accept returns of migrants from the northern Central America (NCA) countries Guatemala, Honduras, and El Salvador, in addition to its own nationals; this was a general policy that had certain limits and variations over time among Mexican states.[276] Conversely, Mexico had a general policy against accepting non-NCA nationals, with certain exceptions and variations.[277] New agreements announced in October 2022 and January 2023 expanded Mexico's willingness to accept expulsions of Venezuelans, and later of Cubans, Haitians, and Nicaraguans as well.[278]

Fewer expulsions took place by air. DHS reports refer briefly to ICE involvement in implementing "Title 42" expulsions by air of over 17,000 noncitizens in FY2020, over 36,000 in FY2021, over 117,000 in FY2022, and over 60,000 in FY2023.[279] Expulsions by air were not necessarily to the noncitizen's home country, and some went to southern Mexico.[280]

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274. *See, e.g.*, DHS Office of Immigration Statistics, Annual Flow Report, Immigration Enforcement Actions: 2021 (2022) at 10 n.19.

275. Total expulsions for the Northern Border for 2020-2023 amounted to less than 49,000, or less than 1.7% of the total.

276. *See, e.g.*, CDC August 2021 order, 86 Fed. Reg. at 42836 ("[A]long some sections of the border, Mexican officials refuse to accept the return of any non-Mexican family with children under the age of seven . . . .").

277. Annual Flow Report 2022 at 12; Government Accountability Office, Border Security: CBP's Response to COVID-19, at 41 (June 2021) (GAO-21-431).

278. These agreements were conditioned on the Biden administration's creation of a limited parole process for orderly reception of migrants from those countries. *See* 87 Fed. Reg. 63507 (2022) (re Venezuelans); 88 Fed. Reg. 1243-1282 (re Cubans, Haitians, Nicaraguans, and Venezuelans).

279. These numbers come from U.S. Immigration and Customs Enforcement, Fiscal Year 2020 Enforcement and Removal Operations Report [n.d.], at 20-21, ICE FY2021 Annual Report at 11 (2022); ICE FY2022 Annual Report at 19 (2022); and ICE FY2023 Annual Report at 26, 31 (2024). The ICE reports do not always include flights arranged by all ICE components, and may not count less frequently expelled nationalities. A recently created interactive dashboard giving data on ICE expulsion flights under "Title 42" also does not include flights arranged by all ICE components, and it omits fiscal year 2020 data and less frequently expelled nationalities. *See* ICE Enforcement and Removal Statistics, https://www.ice.gov/spotlight/statistics (under heading Title 42 Expulsion Statistics).

280. *See, e.g.*, UNHCR Alarmed over US 'Expulsion Flights' to Southern Mexico, U.N. NEWS, https://news.un.org/en/story/2021/08/1097612 (2021).

Among the countries that entered repatriation agreements permitting "Title 42" expulsions were Brazil, Colombia, Dominican Republic, Haiti, Ecuador, El Salvador, Guatemala, Honduras, and Nicaragua.[281] These countries, plus Peru, also represent the primary nationalities listed in ICE's partial statistics for expulsion flights.[282] DHS has not generally publicized the destinations for expulsions by air, but it did announce some, like returns of Haitians to Haiti (notwithstanding the violent conditions there since the assassination of President Jovenel Moïse), after a large number of Haitians crossed to Del Rio, Texas.[283] Other expulsion flights became known in other ways, including via press reports of individuals sent back to Guatemala, Nicaragua, Haiti, and Colombia.[284]

Official statistics shed more light on the nationalities of noncitizens expelled. Over the period, the largest numbers were from Mexico (more than 1.7 million), Guatemala (more than 400,000), Honduras (more than 370,000), and El Salvador (more than 140,000), facilitated by the fact that Mexico had agreed generally to receive nationals of the three NCA countries.[285] A majority of expulsions in all years involved Mexicans.

281. GAO Report 2021 at 41 n.41; Fourth Declaration of Blas Nuñez-Neto, Arizona v. CDC, (W.D. La.) (Nov 10, 2022) (description by DHS official of agreements with various countries to receive expelled noncitizens).

282. *See* I.C.E. Dashboard, https://dashboard.theice.com/data/login.dodestination=%2Fdata%2Fcd%2F, The dashboard does not specify destinations of flights, only nationalities of persons expelled on them.

283. *See, e.g.*, Press Briefing by Press Secretary Jen Psaki and Secretary of Homeland Security Alejandro Mayorkas, Sept. 24, 2021, https://www.whitehouse.gov/briefing-room/press-briefings/2021/09/24/press-briefing-by-press-secretary-jen-psaki-and-secretary-of-homeland-security-alejandro-mayorkas-september-24-2021/. Reports of brutality by the Border Patrol against Haitians in Del Rio prompted calls to end the "Title 42" process, *see, e.g.*, 167 Cong. Rec. S6558-59 (Sept. 21, 2021) (remarks of Sen. Schumer), but also led to condemnations of the administration for failing to use stricter enforcement to prevent a surge of illegal immigrants, *see, e.g.*, 167 Cong. Rec. S6616 (Sept. 22, 2021) (remarks of Sen. Cruz), and later to criticism of the administration for its criticism of the Border Patrol, *see, e.g.*, 168 Cong. Rec. H7138-H7139 (July 26, 2022) (remarks of Reps. Burgess, Guest, and Katko). As of this writing, a lawsuit based on claims of violations against Haitians at Del Rio is still pending. Haitian Bridge Alliance v. Biden, (D.D.C.) (1:21CV03317).

284. *See, e.g.*, *Migration Crisis: First Deportation Flight of 2023 Arrives in Guatemala Carrying 87 Migrants*, CE NOTICIAS FINANCIERAS ENGLISH (Jan. 4, 2023) (reporting arrival of expulsion flight); Human Rights First, Humanitarian Disgrace (December 2020), at 5 (discussing expulsions of activists to Nicaragua); *U.S. Accelerated Expulsions of Haitian Migrants in May*, N.Y. TIMES, June 9, 2022 (discussing expulsion flights from September 2021 to May 2022); *U.S. Launches Deportation Operation to Colombia Using Title 42 Border Rule*, CBS NEWS (Mar. 24, 2022), https://www.cbsnews.com/news/immigration-title-42-colombia-deportations-us-mexico-border/.

285. Recall again that these are expulsions, not distinct individuals, and that they do not include migrants who were blocked before reaching the border.

Over the fiscal years 2021-2023 (where more details were reported[286]), these four countries of origin were followed by Ecuador (more than 70,000), Venezuela (more than 40,000), Colombia (more than 26,000), Haiti (more than 22,000), Cuba (more than 16,000), Nicaragua (more than 10,000), India (more than 10,000), Brazil (more than 8000), Canada (more than 5000), Peru (more than 4000), and China (more than 2000) in number of expulsions. For some of these countries, including Canada, China, and India, the encounters were primarily near the northern rather than the southern border.[287] The monthly reports filed under the preliminary injunction in *Louisiana v. CDC* show that, in its southwest border operations, CBP expelled nationals of more than eighty-five countries from all regions of the globe between May 2022 and March 2023. But these data sources do not specify where the individuals were sent.

Official statistics provide various comparisons between individuals expelled under "Title 42" and those processed under Title 8. During the portion of FY2020 after "Title 42" was created, roughly ninety percent of encounters led to expulsions rather than Title 8 proceedings.[288] The corresponding numbers for FY2021 and FY2022 were sixty-two percent and forty-six percent,[289] and thirty-six percent for FY2023.[290] In part the decrease reflected policy changes such as the exclusion of unaccompanied children from "Title 42," but the DHS statistical report explains:

> As a share of encounters, CBP's use of Title 42 authority peaked in the first months of the pandemic and declined steadily thereafter, largely driven by the growing numbers of extra-regional nationals encountered, as the United States had limited agreements in place to permit expulsions directly to non-Mexican, non-NCA countries and as Mexico permitted limited Title 42 expulsions of extra-regional nationals to its territory.[291]

286. The numbers here are calculated from the CBP's interactive website Nationwide Encounters, *supra* note 272, which does not include FY2020. It gives separate figures for 21 nationalities, combining the rest under "other," and totaled 26,000 expulsions, of which roughly 5,000 were at the southern border.

287. *See* Nationwide Encounters website, *supra* note 272.

288. Office of Immigration Statistics, DHS, Annual Flow Report: Immigration Enforcement Actions: 2022, at 10-12 (2023).

289. *Id.*

290. Using a different document given the absence of the FY2023 DHS Annual Flow report, the corresponding figure for FY2023 was roughly thirty-six.

291. Immigration Enforcement Actions: 2022, at 10-12.

DHS also employed Title 8 rather than "Title 42" for other reasons, including to enhance the consequences of future reentry for expellees who had previously been expelled or who had criminal convictions.[292] The CDC orders had contemplated considering "law enforcement" purposes as a basis for discretionary exceptions.[293]

In terms of DHS demographic categories, the vast majority of persons expelled were "single adults," referring to adults without accompanying minor children rather than unmarried adults; they constituted between eighty-seven and eighty-nine percent of the noncitizens expelled in each of the fiscal years when "Title 42" applied.[294] Members of family units supplied the remaining eleven to thirteen percent during the Biden period,[295] as the third category, unaccompanied children, were not legally subject to "Title 42."[296] The Trump administration had been aggressive in expelling unaccompanied children before the practice was enjoined, and the FY2020 expulsion figures include 5.4% for unaccompanied children (more than 11,000) and 4.8% for family units.[297]

Harms. There are no official statistics on the deaths, torture, persecution, or other harm resulting from expulsions under "Title 42." NGOs critical of the policy have collected partial numbers and anecdotal evidence; news media have reported particular incidents. One prominent example involved Valeska Alemán Sandoval, a political activist in Nicaragua, who had been tortured by the Ortega regime. When she fled to the United States in July 2020, the CBP refused to consider her evidence and returned her directly to Nicaragua under "Title 42," where she was detained, released, and subsequently detained again and

292. Official data on such uses of discretion are rare, but the monthly reports produced in the *Louisiana v. CDC* litigation show more than 10,000 "recidivist border crossers" being transferred from "Title 42" to Title 8.

293. *See supra* note 61, and text accompanying note 267.

294. They numbered 185,000, or eighty-nine percent, in FY2020; 937,000, or eighty-seven percent, in FY2021; and 983,000, or eighty-nine percent, in FY2022; using numbers on the interactive website given the absence of an Annual Flow Report for FY2023, they numbered eighty-eight percent in FY2023.

295. Members of family units amounted to 10,000, or 4.8% in FY2020; 127,000, or twelve percent, in FY2021; and 116,000, or eleven percent, in FY2022; using numbers on the interactive website given the absence of an Annual Flow Report for FY2023, they numbered 69,000, or twelve percent, in FY2023.

296. However, DHS has reported that thirty-seven unaccompanied children were "inadvertently processed under Title 42 authority" between December 2020 and September 2022, FY2022 Annual Flow Report at 12 n.28, and 10 more in FY2023, *see* interactive website Nationwide Encounters, *supra* note 272.

297. *See* FY2020 Annual Flow Report at 9.

tortured.[298] But generally it was difficult for outsiders to distinguish people who had been expelled from people who had been deported under Title 8, and no records were kept of people who were turned away before reaching a port of entry under "Title 42."

Most expulsions were to northern Mexico, and the dangers faced by asylum seekers and other migrants there are notorious. In June 2022, Human Rights First wrote that it had "tracked more than 10,318 reports of murder, kidnapping, rape, torture, and other violent attacks against people blocked in or expelled to Mexico due to Title 42 since January 2021."[299] The federal government has recognized these dangers in other contexts. The U.S. State Department's human rights reports on Mexico from 2018 to 2022 have consistently highlighted violence against migrants and refugees by officials and criminal groups, separately or in collusion.[300] Former DHS Secretary Mayorkas invoked the dangers in support of his October 2021 decision terminating the "Remain in Mexico" policy (or "Migrant Protection Protocol").[301] In the short notice and comment process on the CDC rule in the spring of 2020, NGOs called attention to the dangers of violence against migrants returned to Mexico, and risks of chain refoulement by Mexico, with data from the preceding period.[302] The preamble to the Final Rule acknowledged these comments but brushed them aside.[303]

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298. *See* Human Rights First*, Humanitarian Disgrace: U.S. Continues to Illegally Block, Expel Refugees to Danger* (Dec. 2020), at 5; Human Rights Watch, *Critics Under Attack: Harassment and Detention of Opponents, Rights Defenders, and Journalists Ahead of Election in Nicaragua* (2021), at 25-26.

299. Human Rights First, *The Nightmare Continues: Title 42 Court Order Prolongs Human Rights Abuses, Extends Disorder at U.S. Borders* (June 2022), at 3-4.

300. Country report Mexico 2022 at 19-20; Country report Mexico 2021 at 21-22; Country report Mexico 2020 at 22-23; Country report Mexico 2019 at 18; Country report Mexico 2018 at 19-20.

301. *See* DHS, *Explanation of the Decision to Terminate the Migrant Protection Protocols* (Oct. 29, 2021), at 12-14, https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-justification-memo.pdf*;* Memorandum from Alejandro N. Mayorkas, Secretary of Homeland Security, *Termination of Migrant Protection Protocols* (Oct. 29, 2021), at 4, https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-memo.pdf (*adopting and incorporating the reasons given in the Explanation memorandum*).

302. *See* CEJIL submission in Appendix of Relevant Administrative Record, Huisha-Huisha v. Mayorkas (D.D.C.) (filed Sept. 20, 2022), 32, 36-37; Oasis Legal Services submission, *Id.* at 26, 28-30.

303. CDC Final Rule, 85 Fed. Reg. at 56449-52. In part, the analysis dismissed the comments as relevant to the specific orders and not to the rule, because the rule merely authorized and did not mandate expulsion; in part the analysis insisted that the CDC's public health authority prevailed over non-refoulement obligations under the Refugee Convention.

NGOs have also reported dangerous practices in the implementation of expulsions to Mexico, with migrants being forced across the border in the middle of the night, inadequately clothed, in medical distress, or deprived of their possessions (including their medicines).[304] In August 2021, the CBP issued a revised policy encouraging "serious consideration" on a case-by-case basis of humanitarian exceptions from expulsion for women who have just given birth in CBP custody (along with their newborns).[305]

These reported figures and facts give some indication of what was at stake and what would be at stake in a future revival of the "Title 42" process.

IV. EVALUATION AND REFORMS

Having recounted the invention, career, and expiration of the "Title 42" process, it is time to examine more closely its lawfulness and what should be done about it. Section A considers in further detail the two principal judicial opinions from 2022, and independently analyzes their critiques of the "Title 42" process. Given that the 2020 Final Rule is still in force despite its invalidity, even if no Section 265 orders currently operate, Section B addresses the need to repeal, replace, or amend the Final Rule before it is abused again.

A. The Judicial Opinions

The D.C. Circuit's decision affirming in part the *Huisha-Huisha* preliminary injunction was the only appellate decision that addressed the merits of the "Title 42" policy. Although it did so provisionally, and although the underlying litigation later became moot, its basic reasoning deserves close attention.[306] The D.C. district court's judgment vacating the Final Rule also provides an important starting point for future review, should the occasion arise, though the judgment itself became moot on appeal.

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304. *See, e.g.*, Human Rights First, *Humanitarian Disgrace: U.S. Continues to Illegally Block, Expel Refugees to Danger* (December 2020); Adam Isaacson & Zoe Martens, *Abuses at the U.S.-Mexico Border: How to Address Failures and Protect Rights* (2023).

305. *Pregnancy and Childbirth Guidance*, Memorandum from Troy A. Miller, Acting Commissioner, August 18, 2021, https://www.lexisnexis.com/community/insights/legal/immigration/b/insidenews/posts/cbp-title-42-pregnancy-and-childbirth-guidance-aug-18-2021. The newborn citizens were not technically subject to expulsion themselves; U.S. immigration law traditionally considers the decision of deported parents to bring their citizen children with them as voluntary. *See, e.g.*, Acosta v. Gaffney, 558 F.3d. 1153, 1157-58 (3d. Cir. 1977).

306. The opinion also includes some speculative dicta that will not be discussed here.

1. The D.C. Circuit's Opinion

The D.C. Circuit upheld the government's argument that the CDC could prohibit entry to the United States under Section 265, and that the prohibition could be enforced by a form of removal. However, the D.C. Circuit rejected the Trump administration's project of making Section 265 the foundation for a parallel deportation system, wholly divorced from the immigration laws but enforced by the same agents, overriding all statutory constraints, and free to invent its own procedures and rules. Instead, a CDC order could render a person's entry and presence unlawful, and could provide a basis for removal under immigration law. The panel opinion placed the dispute within a broader context of executive and congressional authority over immigration.

The *Huisha-Huisha* plaintiffs had argued that the power to "prohibit, in whole or in part, the introduction of persons and property from such countries or places"[307] would place obligations on the shipping companies and others who were transporting passengers to the United States, and that the statute did not support sanctions against the persons who had been wrongfully "introduce[d]." The D.C. Circuit disagreed with this claim, and accepted the government's contention that "introduction" included self-introduction, and so was "most naturally read to include entry of individuals."[308] This interpretation is debatable, and bears substantial resemblance to recent efforts at the state level to prosecute noncitizens for "smuggling" themselves.[309] Nonetheless, assuming that the statute contemplated penalties on those who had been "introduced" by themselves or others in violation of the rules, the more interesting question is whether the statute itself authorizes expulsion from the country. The only sanction provided by the Public Health Service Act for violation of regulations under Section 265 is punishment by fine or imprisonment.[310]

The D.C. Circuit argued somewhat ambiguously that Section 265, or Section 265 in conjunction with the deportability grounds in Title 8, gave the authority to expel noncitizens. First, with regard to Section 265, the opinion suggested that the "statutory power could be rendered largely nugatory if the Executive could not take any action against a covered alien

307. 42 U.S.C. § 265. The same language appeared in the 1893 statute that was the predecessor to the 1944 version, *see supra* note 4.

308. *Huisha-Huisha*, 27 F.4th at 727.

309. *See* Ingrid Eagly, *Local Immigration Prosecution: A Study of Arizona before SB 1070*, 58 UCLA L. REV. 1749 (2011).

310. *See* 42 U.S.C. § 271(a) (making violation of regulations "under sections 264 to 266 of this title" punishable by a fine of up to $1,000 or imprisonment for up to one year, or both).

who disregarded the prohibition and managed to set foot on U.S. soil."[311] The argument is overstated: The power might be nugatory if the executive could not take *any* action, but that does not mean that Section 265 itself authorizes expulsion, in view of the other available options. And it should be recalled that, as experience under the "Title 42" system demonstrated, even if expelling a noncitizen is regarded as permissible, it may often not be feasible for practical reasons, because nearby states have no obligation to receive someone who is not their national, and because returning the noncitizen to a distant country of nationality may be too expensive to be worthwhile or too difficult or dangerous to accomplish. Thus, the evidence for a freestanding expulsion power within Section 265 is not strong.

Next, the panel gave greater attention to the interaction between the public health law and the immigration laws as a source of authority to expel. On that view, the substantive regulation under the public health laws in Title 42 could be supplemented by the removal authority granted in Title 8. In particular, the opinion argued that noncitizens covered by a CDC order under Section 265 were deportable under 8 USC § 1227(a)(1)(B) for being "present in the United States in violation of [the INA] or any other law of the United States."[312] On first glance, that is a more reasonable analysis, but unfortunately it proceeded by misinterpreting the content of Section 1227(a), which was probably the wrong provision of the immigration laws to invoke.[313] It overlooks the actual wording of Section 1227(a), and the basic structure of current immigration law. Some technical explanation may be needed to make clear to the reader why 8 USC § 1182(a) should have been the focus instead.

Since 1996, the immigration laws have drawn a fundamental distinction between noncitizens who have not yet been "admitted" to the United States, and who face removal for being "inadmissible," and noncitizens who have already been "admitted" to the United States, and face removal for being "deportable." This distinction replaced the previously governing distinction between noncitizens who had not yet

311. *Huisha-Huisha*, 27 F.4th at 729. The D.C. Circuit opinion preferred the term "alien" over the term "noncitizen" used in the later CDC orders, including the one under review.

312. *Id.*

313. Charles Roth called attention to this error in a discussion among teachers of immigration law the day the decision was issued. The opinion's author may have been misled by selective quotation in the amicus brief of the state of Texas. *See* Brief for Amicus Curiae the State of Texas in Support of Defendants-Appellants and Reversal*,* Huisha-Huisha v. Mayorkas, 27 F.4th 718 (D.C. Cir. 2022), at 12.

"entered" the United States and faced "exclusion" (for being "excludable"), and noncitizens who had already "entered" the United States and faced "deportation" (for being "deportable"). The change was intended to take individuals who cross the border illegally between ports of entry, and so "enter without inspection," out of the category of deportation proceedings, which afford more safeguards for the noncitizen. Correspondingly, the opening words of Section 1227(a) specify that the deportability grounds it lists apply only to a person who is "in and admitted to the United States."[314] Therefore, the current deportability ground in Section 1227(a)(1)(B) does not apply to people encountered by the Border Patrol after they have crossed the border from Mexico unlawfully. They are subject to removal, but not for being "deportable." The D.C. Circuit opinion skipped over the opening words and went directly to the listed grounds.

Thus, under current immigration law, the vast numbers of people who were expelled by the Border Patrol under CDC orders were not within the definition of deportability, and Section 1227(a)(1)(B) seems not to provide the correct basis for reconciling Section 265 with the immigration laws. Rather, under 8 USC § 1182(a), they were inadmissible and ineligible to be admitted to the United States,[315] under both of the overlapping inadmissibility grounds in 8 USC § 1182(a). The first of these parallels Section 1227(a)(1)(B) by targeting an "alien present in the United States without being admitted or paroled," and the second emphasizes arrival or entry without a "valid entry document."[316] The second ground is especially important because it can be enforced in expedited removal proceedings under 8 USC § 1225(b)(1)(A).[317]

Prior to 1996, the predecessor provision to Section 1227 might have provided a basis for making noncitizens covered by a Section 265 order deportable. Section 241 of the INA, then codified at 8 USC § 1251, made deportable

314. 8 U.S.C. § 1227(a) (2025).

315. The opening words of section 1182(a) are: "Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States."

316. *See* 8 U.S.C. § 1182(a)(6)(A)(i) ("present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General"), 1182(a)(7)(A)(i)(I) ("any immigrant at the time of application for admission . . . not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, . . ."). The term "immigrant" is broadly defined to include those who lack specific "nonimmigrant" qualifications, and thus includes entrants without inspection and asylum seekers.

317. *See infra* Part I (explaining expedited removal).

> Any alien in the United States . . . who . . . (2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States.[318]

A person who had recently entered the United States between ports of entry would already be deportable under the first phrase of paragraph (2), without resort to the final phrase referring to being in the United States "in violation of any other law of the United States." The latter phrase was used for deportations based on violations of preceding versions of the immigration laws and on violations of related statutes that had not been incorporated in the INA.[319]

But Congress limited the reach of the deportability ground in 1996 by restricting Section 1227(a) to persons who had been admitted, and not merely found, in the United States. There is no reason to believe that Congress intended to preserve deportability for noncitizens who enter in violation of a Section 265 order, and in fact no one would have been thinking about Section 265 in 1996, since it had never been used at all, and its predecessor provision from 1893 had never been used for deportation. Moreover, in this age of purportedly textual statutory interpretation, statutes are supposed to be judged by what Congress said, and not by what it silently wanted to do. Thus, the proper basis for removal power in relation to Section 265 orders is presumably the inadmissibility grounds, 8 USC § 1182(a).

The D.C. Circuit correctly observed that under then-existing doctrine, it did not owe *Chevron* deference to the executive interpretation of the interaction between the public health laws administered by the CDC and the provisions of the immigration laws providing protection against persecution and torture.[320] Reconciling the two statutes was for the court to decide. In so doing, the panel distinguished between discretionary

318. Act of June 27, 1952, Pub. L. 414, 66 Stat. 204, § 241(a). The corresponding provision of the 1917 immigration act, still operative in 1944, similarly included "any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States." Act of February 4, 1917, ch. 29, 39 Stat. 889, § 19.

319. *See, e.g.*, United States ex rel. Pierropoulos v. Shaughnessy, 239 F.2d 784 (2d Cir. 1957) (basing deportability on entry in violation of the Passport Act of 1918); *Matter of Rios-Carrillo*, 10 I & N Dec. 380 (BIA 1963) (basing deportability on presence in violation of the Agricultural Act); *Matter of B—*, 7 I & N Dec. 400 (1957) (basing deportability on presence in violation of a preceding immigration act).

320. *Huisha-Huisha*, 27 F.4th at 730 (citing Epic Systems Corp v. Lewis, 138 S. Ct. 1612 (2018)). More recently, the Supreme Court overruled *Chevron* in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). Given that *Chevron* was not germane anyway, there is no need to discuss how *Loper Bright* will apply in immigration law.

asylum and mandatory withholding of removal. Given that asylum was discretionary under 8 USC § 1158, the panel concluded that "the Executive" could categorically foreclose asylum for the "specific subset" of noncitizens covered by the Section 265 order, and could deny them access to the statutorily mandated asylum application procedures, which then "would be futile."[321] Formally speaking, this description conflates the actions of two separate departments and blurs their respective authorities; in more realistic terms, the conflation expresses how the CDC was being used by other agencies.

The persuasiveness of this reconciliation as achieving respect for both statutes may depend on how large a hole it punches in the asylum statute.[322] Section 1158 (b)(2)(C) and section 1158(d)(5)(B) empower immigration authorities to impose additional limitations on asylum eligibility "not inconsistent with [Section 1158]," and limitations on consideration of asylum applications "not inconsistent with [the INA]." From one perspective, the court's acceptance of foreclosing discretionary asylum involved a narrow, time-limited emergency exception that the asylum statute did not specifically foresee (and that the Refugee Convention did not authorize). From another perspective, the exception the CDC actually ordered was deliberately and grossly overbroad, and it would remain in force indefinitely, until relevant officials decided otherwise[323]—the D.C. Circuit appeared to recognize that reality in finding that the weighing of harms favored the preliminary injunction, and in reminding the district court on remand to turn to the question of whether the CDC order was arbitrary and capricious.[324] Nonetheless, a more genuine and calibrated use of Section 265 might fit within the discretionary authority.

In contrast, the D.C. Circuit found the CDC order likely to violate the mandatory statutory protections against sending people to a country

321. *Huisha-Huisha,* 27 F.4th at 731. Strictly speaking, the description as "futile" was an overstatement, because the CDC order left open some quantum of "humanitarian" discretion for DHS, and DHS used its discretion to transfer some individuals from the "Title 42 process" to the "Title 8 process."

322. Some would say that because asylum is discretionary, DHS can suspend it altogether wherever and whenever it chooses. The Ninth Circuit rejected this interpretation of § 1158 in *East Bay Sanctuary Covenant v. Biden*, 993 F.3d. 640, 669-73 (9th Cir. 2021) (amended opinion on denial of rehearing en banc).

323. The May 2020 and October 2020 CDC orders had no expiration date, and would remain in effect until the CDC director determined they were unnecessary. 85 Fed. Reg. at 31509; 85 Fed. Reg. at 65812. The August 2021 CDC order would remain in effect until the CDC director determined that it was unnecessary *or* until the termination of the HHS declaration of public health emergency, whichever came first. 86 Fed. Reg. at 42841.

324. *Huisha-Huisha*, 27 F.4th at 734-35 ("This is March 2022, not March 2020.").

where they would probably be persecuted or tortured. Unlike the asylum provision, the non-refoulement statutes contained no exception or discretion that would accommodate a public health order.[325] (Indeed, the Convention Against Torture permits no exceptions whatsoever.) Moreover, the court added, nothing in Section 265 addressed the destination to which an individual could be expelled, and the non-refoulement prohibitions left the government free to expel the individual to safer destinations.[326] The prohibitions did not guarantee entry or lawful status, or give people a right to be "introduced."[327] Thus the mandatory protections restricted the implementation of removal under the CDC order.

The opinion effectively rejected the CDC Final Rule's broad understanding of "suspension of the right to introduce." A concise paragraph in the opinion described the limitation on destinations for removal as "far afield" from the "right to introduce" oneself addressed by Section 265.[328] In contrast, from the perspective expressed by the Final Rule, adjudicating non-refoulement claims would involve increased time and movement within the United States, and that would amount to a continuation of the process of "introduction" begun by crossing the border;[329] even the risk of contact with additional CBP employees could meet the definition of further introduction.[330] Preventing such introduction by rapid expulsion would therefore be within the power claimed by the rule, including the ability to override any right "to be introduced or to seek introduction."[331]

Although the opinion's conclusion regarding non-refoulement is persuasive, some of the abstract and conceptual reasons that the opinion provided may not be the most convincing. The assumption that refugees protected by the non-refoulement guarantee will not enter or be introduced is often false, because there is nowhere else to send them. Once more, the government cannot expel migrants to Mexico or to any other country without its cooperation. Perhaps a better basis for the reconciliation among the statutes should be the joint strength of the

325. *Id.* at 731-732.

326. *Id.*

327. *Id.*

328. *Id.*

329. *See, e.g.*, 85 Fed. Reg. at 56425 ("The introduction of a person into the United States can occur not only when a person first steps onto U.S. soil, but also when a person on U.S. soil moves further into the United States . . . .").

330. *See, e.g.*, 85 Fed. Reg. at 56427 ("there is serious danger that persons traveling from those countries will introduce COVID-19 into CBP facilities . . . .").

331. Final Rule, 42 CFR § 71.40(b)(5) (defining "suspension of the right to introduce").

international and statutory prohibitions of refoulement. These mandatory protections are part of a human rights regime that the United States was still fighting to create when Section 265 was enacted in 1944.[332]

In addition, correcting the opinion's mistake regarding the category of removal might have other implications for the reconciliation of the statutes. Unlike deportability, which normally requires standard immigration judge proceedings,[333] the inadmissibility of recently arrived noncitizens already comes with accelerated removal procedures, namely expedited removal, which applied generally to the target population of the covered noncitizens under the CDC order because they lacked valid entry documents.[334] That summary procedure applies broadly, both to noncitizens who have no entry documents at all, and to those whose entry documents are treated as invalid for a variety of legal reasons.[335] The statutory proceeding would seem entirely adequate for enforcement of CDC orders with regard to noncitizens who do not seek special protection, and to that extent there would be no justification for improvising a novel procedure outside Title 8 in order to give effect to both statutes. On the other hand, Congress saw the need to specially protect unaccompanied children, and in 2008 it prohibited application of expedited removal to those from noncontiguous countries, and imposed additional procedures for those from Mexico and Canada.[336] And Congress insisted in 1996 when it created expedited removal that a limited procedural avenue be preserved for protection against persecution.[337] If the court had taken these features into account it might have affirmed more of the preliminary

332. *See, e.g.*, Elizabeth Borgwardt, *"When You State a Moral Principle You Are Stuck With It": The 1941 Atlantic Charter as a Human Rights Instrument*, 46 VA. J. INT'L L. 501 (2006).

333. There are some exceptions to normal immigration court proceedings under 8 U.S.C. § 1229(a) for deportability, but they do not apply to presence in violation of "any other law," and they are not germane to Section 265. The government can reinstate a previous removal order against a noncitizen who reenters unlawfully, *see* 8 U.S.C. § 1231(a)(5), and it may conduct accelerated "administrative removal" proceedings against non-permanent residents who have been convicted of an aggravated felony, *see* INA § 1228(b).

334. *See* 8 U.S.C. § 1225(b). The D.C. Circuit observed that expedited removal would be available in the absence of Section 265, but did so in its weighing of harms as a factor supporting a preliminary injunction, and not in its reconciliation of the two statutes. *See Huisha-Huisha*, 27 F.4th at 735.

335. *See* American Immigration Lawyers Association v. Reno, 18 F. Supp. 2d. 38, 56-57 (D.D.C. 1998), aff'd, 199 F.3d. 1352 (D.C. Cir. 2000).

336. *See* 8 U.S.C. § 1232(a)(5)(D), 1232(a)(2) (added in 2008); *see* above (discussing JBBC v. Wolf and PJES v. Wolf). These protections were not at issue in *Huisha-Huisha* because the Biden administration had stopped expelling unaccompanied children.

337. *See* 8 U.S.C. § 1225(b)(1)(A)(ii), 1225(b)(1)(B).

injunction. At any rate, its analysis was expressly tentative, and it characterized the issue of foreclosing discretionary asylum as close.[338]

2. The District Court's Permanent Injunction

The D.C. Circuit also encouraged the district court to reach the plaintiffs' challenges to the "Title 42 policy" as arbitrary and capricious. Judge Sullivan decided that issue on remand, and his opinion, though later vacated as moot, contains some useful lessons for future evaluation or reform. As mentioned earlier, he examined the August 2021 CDC order and the September 2020 Final Rule. Some of his criticisms clearly applied to both, while others primarily dealt with the particular CDC orders, including their failure to keep up with the improving public health situation. Admittedly, it can be difficult to separate problems with the orders from problems with the interim and final rules, given that the rules were openly designed for the purpose of authorizing the restrictions contained in the orders.

For purposes of the "arbitrary and capricious" inquiry, two of the main defects common to the rule and the order were the unexplained departure of CDC's new approach to regulating under Section 265 from its own former public health methodology, and the complete absence of consideration of the effects of the "Title 42" expulsions on the individuals who were expelled. On the first issue, the court examined Section 265 within the public health context of surrounding sections of Title 42, also derived from the 1944 Public Health Service Act, and rejected the government's effort to view it in isolation. The normal approach of the CDC, as explained and clarified in its January 2017 regulation, employed the "least restrictive means" in "all situations involving quarantine, isolation, or other public health measures."[339] Moreover, the CDC had returned to this criterion when it attempted to terminate "Title 42" in April 2022.[340] Discarding this approach without discussion in order to broadly impose measures more extreme than quarantine made the CDC order arbitrary and capricious under APA principles.[341]

338. *See supra* note 215 and accompanying text.

339. Huisha-Huisha v. Mayorkas, 642 F. Supp. 3d. 1, 17 (D.D.C 2022) (quoting from the 2017 Final Rule, 82 Fed. Reg. at 6912). The court also invoked the testimony of Dr. Anne Schuchat, formerly principal deputy director of CDC, before the House of Representatives on this point. *Id.*

340. *Id.* at 18. Also in the March 2022 order terminating the "Title 42" process with regard to unaccompanied minors. *See* 87 Fed. Reg. at 15252.

341. *Id.* at 19.

The second issue, failure to consider effects on people being expelled,[342] is a particularly glaring defect given the D.C. Circuit's analysis. The issue is relevant not only to the effort to override mandatory protections but also to the decision to preclude discretionary asylum. Even if the CDC and DHS had the discretion to make covered noncitizens per se ineligible for asylum, they had an obligation to explain more fully in the rulemaking why the discretion was being exercised so broadly.

One might assume that the original designers of the "Title 42 policy" assigned zero value to the lives and well-being of noncitizens who seek protection, and chose not to say it openly in a document that was attributed to a public health agency and intended to withstand judicial review. The dismissiveness was rendered particularly visible by the failure to restrict transporters of goods and the concern expressed for speeding cargo across the border.[343] For APA purposes, however, the silence of the regulators on this important point was a sufficient defect without exploring the motive.

Judge Sullivan's further findings that the CDC failed to adequately consider obvious alternatives to expulsion related mainly to the August 2021 order rather than the September 2020 Final Rule.[344] Outdoor processing might always have been an option, but vaccines and therapeutics were not yet available to the public when the rule was issued, and the findings focused on the need for the CDC orders to keep up with progress in the response to the pandemic.

He also found that the CDC had not shown that the arrival of covered noncitizens presented "a real problem" for public health in light of the information available in August 2021 or thereafter.[345] COVID-19 was widespread within the United States, few of the migrants tested positive, and vastly more travelers were permitted to cross the southern border, often in congregate settings such as cars, buses, and trains.[346]

This defect in the support for the August 2021 order might actually be associated with a very loose threshold for action written into the 2020 Final Rule. As mentioned earlier, the rule defined "serious danger" of introduction of a disease as "the probable introduction of one or more persons capable of transmitting [the disease]," even if the disease was

342. *Id.*

343. *See supra* text accompanying notes 70 and 103-104; Final Rule, 85 Fed. Reg. at 56434 n.71.

344. *See* 642 F. Supp. 3d. at 21-24; *supra* text accompanying notes 222-227.

345. *Id.* at 24 (citing National Fuel Gas Supply Corp. v. FERC, 468 F.3d. 831 (D.C. Cir. 2006), and District of Columbia v. U.S. Dept of Agriculture, 444 F. Supp. 3d. 1 (D.D.C. 2020)).

346. *Id.* at 24.

already present.[347] The district court deferred to this definition as not "unreasonable," in light of "CDC's scientific and technical expertise."[348] The invocation of reasonableness suggests *Chevron* deference, although the court did not expressly cite that case. The fact that *Chevron* has now been overruled gives additional reason to reconsider the Final Rule's interpretation of Section 265.

The defects of the rule, and of some of the orders, can presumably be traced to the fact that the "Title 42" process was adopted as a pretext for restricting asylum by circumventing the protections included even in the expedited removal statute. Nonetheless, the *Huisha-Huisha* plaintiffs did not press their claim of pretext in their motion for partial summary judgment and the district court did not rule on it.[349] APA review usually makes it difficult for those challenging administrative action to present direct evidence of pretext, and relies on the inadequacy of asserted reasons rather than their insincerity.[350] At least the official administrative record contained expressions of CDC's frustration with DHS foot-dragging about instituting alternative protections, and the reasons for DHS's reluctance were widely publicized.

B. What Is to Be Done

The "Title 42" process was never a public health policy. From the outset, it was an immigration policy disguised as a public health policy, and one violating immigration law. The pretextual purpose distorted the content of the regulation. It should never have been adopted, and it was properly vacated by the district court in *Huisha-Huisha*, albeit on grounds of its objective invalidity and not for its subjective motivation.

Unfortunately, but perhaps inevitably, the judgment vacating the regulation was mooted by the passage of time, the fading of the public

347. 42 CFR § 71.40(b)(3).

348. *Huisha-Huisha*, 642 F. Supp. 3d. at 24 ("Although Plaintiffs contend that CDC's definition 'simply cannot be a rational public health rule,' they otherwise do not provide any arguments regarding why the Court should not defer to CDC's interpretation of the term 'serious danger.' . . . In view of CDC's scientific and technical expertise, the Court does not find the definition to be unreasonable.") (citation to plaintiffs' brief omitted).

349. *See* Huisha-Huisha v. Mayorkas, Second amended class action complaint for declaratory and injunctive relief, paras 108-109 (Feb. 14, 2022) (claiming that "Title 42" originated and continued on a pretextual basis); Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment (Aug. 15, 2022), at 1 n.1 (reserving claim of pretext); *Huisha-Huisha*, 642 F. Supp. 3d. at 14 (listing plaintiffs' arguments for motion).

350. *See, e.g.*, Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 27-39 (2020) (discussing Department of Commerce v. New York, 139 S. Ct. 2551 (2019)).

health emergency, and the termination of the "Title 42" orders. The Final Rule remains in force, directly affecting no one, but ready to be reactivated. Until that happens, no one has recourse to the judiciary to reaffirm legal constraints. Knowing what we know, what should be done?

The rule is pernicious and invites abuse. Ideally, the Biden administration should have repealed the rule in timely fashion and initiated an honest rulemaking from scratch. Unlike the 2020 rulemaking, it could have complied with legal obligations and given due weight to public health expertise. Ideally, it could have been informed by the experience of the "Title 42" debacle, including insiders' candid knowledge of what went so badly wrong and outsiders' descriptions of its effects. The notice and comment period for the Final Rule closed in April 2020. The politics, however, did not permit that solution. Moreover, the Department of Justice is slow to admit its mistakes, and has continued to defend the power that it claimed for the executive from 2020 onward.[351]

As the events of the past few years demonstrate, the 2020 Final Rule gives too much freedom of action to a government that is inclined to abuse the power it purports to grant. And it does not give enough protection to agencies that are inclined to use that power responsibly, but which face political pressure and litigation from forces that would prefer that the power be abused.

The rule also does not provide an adequate foundation for handling a future pandemic. It does not point the executive to the appropriate factors it should consider and would not facilitate the adoption of a lawful policy. Moreover, the rule does not provide a sufficient basis for responding to an emergency that would be more extreme than the COVID-19 pandemic was. In such a catastrophic situation it may become necessary to postpone (suspend) the return of some U.S. citizens or some lawful permanent residents. The 2020 rule does not apply to them at all, and its regulatory structure is not adapted to their legal rights and circumstances.[352]

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351. DHS and EOIR, Securing the Border, 89 Fed. Reg. at 81164 n.55, discussed *supra* subsection II.A.4 and text accompanying notes 183-190.

352. *See* 8 CFR § 71.40(f) (exempting U.S. citizens, U.S. nationals, and lawful permanent residents from the scope of the rule); 85 CFR at 56448, 56455. This Article is not the place to explore the difficulties of applying Section 265 to citizens and LPRs, although they are clearly persons subject to that statute, as well as to its neighboring provisions on quarantine. Suffice it to say that the arrangements in immigration law for the return of LPRs from temporary trips abroad are quite different than those for other noncitizens, *see* 8 U.S.C. § 1101(a)(13)(C); Landon v. Plasencia, 459 U.S. 21 (1982), and that the idea of *expelling* US citizens who have "introduced" themselves in violation of a Section 265 order is preposterous. Cf Huisha-Huisha v. Mayorkas, 27 F.4th 711, 728 (D.C. Cir. 2022) (calling the possibility of applying Section 265 to U.S. citizens

The proper design of a full substitute for the rule could only emerge from wide consultation that includes a range of experts and interests. Given the multiple defects, and the illegality of part of the rule's text, the revision might best proceed in stages. The following considerations are meant to contribute to that process, and to further motivate the needed reforms.

The vices of the 2020 rule lie both in the regulation 8 CFR § 71.40 and in the regulatory preamble. Some of the defects of § 71.40 are apparent in unambiguous language, like the plainly unlawful claim of authority to override all other statutes. Other defects result from ambiguous provisions of § 71.40 and the preamble's explication of their meaning, or from gaps in § 71.40 and the preamble's explanation of how it would operate. Even if not strictly binding, descriptions in the regulatory preamble could receive significant deference from the courts in interpreting the ambiguities and effects of the regulation under *Kisor v. Wilkie*.[353]

Thus, the Final Rule should be repealed or amended, and the 2020 preamble should be repudiated. In the meantime, some of their vices could be avoided by administrative reinterpretation and restraint. The CDC tried to do that in the spring of 2022, returning to its methodology of less restrictive means in terminating the "Title 42" process. However, it faced a year of litigation by states before the termination was able to take effect. A more durable solution is needed.

The definition of "suspension of the right to introduce" in Section 71.40(b)(5) is clearly unlawful, for reasons including those given by the D.C. Circuit in *Huisha-Huisha*. Section 265 does not grant the superpower to override all conflicting laws. The reconciliation of Section 265 with other statutes must be analyzed statute by statute. Moreover, the claim in the preamble to the Final Rule that a suspension order automatically ousts all conflicting laws, regardless of whether the order mentions them,[354] and presumably regardless of whether they were specifically considered in its adoption, is a recipe for arbitrary and capricious administrative action. Even where the CDC does have the

"breathtaking," while declining to apply the constitutional avoidance doctrine to the case at hand). In fact, the predecessor provision *was* applied to U.S. citizens in 1929, but not to expel them. *See supra* subsection II.A.2.

353. Kisor v. Wilke, 139 S. Ct. 2400 (2019); *see* Duke Energy Progress LLC v. FERC, 106 F.4th 1145, 1154 (D.C. Cir. 2024) (discussing deference to regulatory preamble after Kisor); GMS Mine Repair v. Federal Mine Safety and Health Review Comm'n, 72 F.4th 1314, 1323-24 (D.C. Cir. 2023).

354. 85 Fed. Reg. at 56447.

power to suspend the effect of another norm, it should know what it is doing, and give reasons for why and to what extent the other norm should yield.

The mandatory protections against refoulement to torture (which has no exceptions), against refoulement to persecution (which has few exceptions, not including public health[355]), and for unaccompanied children should all be preserved within their scope and in their mandatory character. The preamble's excuse that they might at times be respected in the form of discretionary humanitarian grace is totally insufficient to comply with the laws and treaties.

Under U.S. law, the fuller protection afforded by asylum, which opens an avenue to lawful permanent residence and later to citizenship, involves a lesser probabilistic showing of persecution and is configured as discretionary. The D.C. Circuit suggested that it may therefore be consistent with existing statutes to categorically preclude asylum in a Section 265 order. Nonetheless, as the D.C. district court concluded, it is arbitrary to preclude asylum without considering the harms that could follow for the persons being expelled. The 2020 rule allows and indeed legitimates that unconsidered rejection, and the CDC orders of 2020 and August 2021 contained no consideration of these harms, while purporting to override both discretionary and mandatory forms of protection. (That was, of course, the whole purpose for creating the "Title 42" expulsion regime.)

The rule must be reformed to reflect the requirement to ensure mandatory protections. It should also guarantee careful consideration of the harms resulting from expulsion in designing other aspects of a Section 265 order. Those harms include both risks of persecution and risks of bodily injury and damage to health that do not meet the U.S. legal definition of persecution.

The rule's definition of "serious danger of the introduction" of the disease, Section 71.40(b)(3), raises problems that must be seen in the light of the conditions for issuing a Section 265 order and the *absence* of a definition of the other elements. The opening clause of Section 265 calls for two determinations by the CDC, first "that by reason of the existence

355. The preamble attempted to stretch a statutory exception of "reasonable grounds to believe that the alien is a danger to the security of the United States" to justify overriding the prohibition of refoulement to persecution, *see* 8 U.S.C. § 241(b)(3)(B)(iii); 85 Fed. Reg. at 56542. The idea that an individual refugee represents a personal threat to national security by virtue of being covered by a broad Section 265 suspension has no basis in law. If ever there is a pandemic so extreme that protecting an individual noncitizen would endanger national security, it would already be necessary to close the border to trade as well as migration.

of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States," and second, "that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required in the interest of the public health." Section 71.40(b)(3) gives a minimal definition of the first "serious danger"—the likelihood that there will be at least one person coming from that country who can transmit the disease, regardless of how prevalent it already is in the United States.[356] The preamble emphasizes that this definition "does not require the Director to make any numerical finding or a quantitative or empirical showing of probability in order to prohibit the introduction of persons."[357] That standard is set so low, despite the characterization as "serious danger," that the burden of limiting the occasions for the exercise of Section 265 power is shifted entirely to the second element, "that this danger is so increased . . . that a suspension . . . is required in the interest of the public health." The rule itself, however, does nothing to address the stringency of this second element, and the preamble describes it as a discretionary determination made in the expertise of "HHS/CDC" that may depend on a "wide array of facts and circumstances," listing some possible factors relating to the effects of the disease, but not the effects of a proposed suspension.[358] As a result, the rule does not require any kind of proportionality between the risk averted by the suspension and the harm imposed by the suspension. Furthermore, the rule does not require a CDC order to include any explanation of why the second element is satisfied.

The preamble to the rule also asserted that the CDC could exercise the power to prohibit introduction "regardless of whether the government is exercising its quarantine powers, and regardless of the adequacy of any

356. 85 Fed. Reg. at 56459 (" . . . the probable introduction of one or more persons capable of transmitting the quarantinable communicable disease into the United States, even if persons or property in the United States are already infected or contaminated with the quarantinable communicable disease.").

357. 85 Fed. Reg. at 56446.

358. 85 Fed. Reg. at 56444, 56449.

> Those facts and circumstances may include the same ones that HHS/CDC considers when issuing travel health notices: 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 health care systems; and the effectiveness of state and local public health systems and control measures.

Id. at 56444.

quarantine measures."[359] That assertion seems to reinforce the looseness of the Final Rule's notion of when suspension "is required." Apparently, the government may resort to expulsion of asylum seekers because it prefers to, even where quarantine would be feasible and sufficient.

Instead, the rule should incorporate the CDC's own public health methodology. As the D.C. district court found, the "Title 42" process departed from the CDC's own practice of using the least restrictive means necessary, reflected in both the 2017 regulation on quarantine and related measures and in the accompanying regulatory analysis.[360] Moreover, the 2017 preamble included a cost/benefit analysis of the various measures proposed and their alternatives, which took into account monetary estimates of the burdens imposed on individuals subjected to the measures.[361]

The rule should also recognize that expulsion by DHS of noncitizens who violate suspension orders is to be accomplished under the immigration laws. Section 265 provides the substance, and Title 8 provides the removal process, as on other occasions in immigration law where removal grounds such as "unlawful activity" or "crime involving moral turpitude" incorporate other portions of federal or state law.[362] Section 265 is not a vehicle to liberate DHS from legal constraint, and "Title 42" expulsions are not an independent category from "Title 8" removals.

V. CONCLUSION

The "Title 42" episode was a legal disaster with lasting consequences. The CDC orders have been terminated, but the regulation that purportedly authorized them remains in force, and it makes sweeping claims of legal authority. The judicial decisions that rejected these claims have mostly become moot. The Final Rule could be revivified on a convenient pretext, or it might distort the response to a genuine emergency. It is too dangerous to just put that period behind us and move on. The rule must be repealed or reformed.

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359. 85 Fed. Reg. at 56442.

360. *See, e.g.*, CDC, Control of Communicable Diseases, 82 Fed. Reg. 6890, 6912 (2017) (preamble); *id.* at 6972-73 (regulations on interstate travel); *id.* at 6977 (regulations on foreign travel).

361. 82 Fed. Reg. at 6930-68. As previously mentioned, in 2020 the CDC avoided publishing a cost/benefit analysis of the "Title 42" expulsion policy.

362. *See, e.g.*, 8 U.S.C. § 1182(a)(3)(A)(ii) (unlawful activity), 1182(a)(2)(A)(i)(I) (crime involving moral turpitude).