United States District Court
Northern District of Texas
Fort Worth Division

STATE OF TEXAS, *Plaintiff,* v. JOSEPH R. BIDEN, JR., *et al.*; *Defendants.*	Case 4:21-cv-00579-P

Brief in Opposition to Defendants' Motion to Disqualify

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700

Counsel for the State of Texas

AARON F. REITZ
Lead Counsel
Deputy Attorney General for Legal Strategy
Texas Bar No. 24105704
aaron.reitz@oag.texas.gov

LEIF A. OLSON
Special Counsel
Texas Bar No. 24032801
leif.olson@oag.texas.gov

MATTHEW G. WHITAKER
Admitted *pro hac vice*
America First Legal Foundation
300 Independence Avenue SE
Washington, D.C. 20003
(202) 964-3721
info@aflegal.org

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Introduction

The State of Texas chose America First Legal Foundation to represent it in a case challenging the federal government's failure to faithfully execute the law at the border in the middle of a pandemic. After six months of litigation and extensive motion practice, the Defendants now ask this Court to disqualify America First Legal and two of its lawyers, Gene Hamilton and Matt Whitaker, from that representation. There is no factual or legal foundation for doing so, which would substantially prejudice Texas. More, the Defendants' logic would also disqualify nearly all attorneys from working on subjects in which they used their expertise while in government service, including challenges to unlawful acts by their former government employers. That would be an absurd result, and the Court should deny the Motion.

Background

This case primarily involves a group of enactments collectively referred to as Title 42: a nearly century-old statutory authority, 42 U.S.C. § 265; a regulation promulgated to implement that authority, 42 C.F.R. § 71.40; and multiple orders issued by the Director of the Centers for Disease Control and Prevention under that authority, the latest in August 2021. 85 Fed. Reg. 65,806–12 (Oct. 13, 2020); 86 Fed. Reg. 42,828 (Aug. 5, 2021) ("replacing and superseding" the October 2020 order).

Among Texas's counsel in this case are Mr. Hamilton and Mr. Whitaker, both of whom served at the U.S. Department of Justice. Mr. Hamilton served as Counselor to the Attorney General and provided legal advice and counsel for general policymaking matters related to Title 42 during that time. Some of that work related to other particular cases involving the Title 42 regime. Mr. Whitaker served as Chief of Staff and Senior Counselor to the Attorney General and, later, as Acting Attorney General. His service ended before the regulation and orders at issue in this case were

issued. There is no dispute that Mr. Hamilton signed the initial complaint, see ECF No. 1, and that Mr. Whitaker has signed all subsequent documents for America First Legal.[1]

The Defendants now seek to disqualify Mr. Hamilton, Mr. Whitaker, and America First Legal from representing Texas in this case. They assert that "Mr. Hamilton's prior work related to the government's exercise of Title 42 authority as a DOJ attorney creates a conflict of interest;" that this disqualifies him from serving as Texas's counsel; and that, because he was not screened from participating in this case, this disqualification is imputed to all lawyers at America First Legal, including Mr. Whitaker. ECF No. 87 at 8.

Summary of Argument

The Defendants' Motion does not justify the extreme remedy of denying Texas its counsel of choice. This case does not involve the inappropriate use of confidential information. This case is not the same as any "matter" in which Mr. Hamilton participated while serving in the Department of Justice—particularly as the definition of "matter" does not include regulation- or rule-making proceedings, which are at the center of this case. And even if there were a cognizable conflict, the appropriate remedy would be to screen Mr. Hamilton from America First Legal's representation. The Defendants' Motion should be denied.

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[1] *See* 18 U.S.C. § 207(c) (restricting certain employees from making communications to or appearances before certain offices for one year after leaving service); 5 C.F.R. § 2641.302. Former employees may make communications to or appearances before certain offices within one Department, but the Department of Justice considers the restriction to come into effect when offices consult with other offices—such as when, for example, the Civil Division or a U.S. Attorney's Office consults with a leadership office in the case. So, once such consultations occur, under Department of Justice policies, the restriction applies to any future communications to or appearances before the offices in question. And under that approach, that restriction prohibits Mr. Hamilton from submitting this opposition.

Standard

The Texas Disciplinary Rules of Professional Conduct primarily govern. *See* N.D. Tex. L.R. 836.8(e); *In re ProEducation Int'l, Inc.*, 587 F.3d 296, 299 (5th Cir. 2009). Parties "cannot be deprived of the right to counsel of their choice on the basis of local rules alone;" among other things, the "local rules are not the 'sole' authority governing motions to disqualify counsel." *F.D.I.C. v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1312 (5th Cir. 1995). "In light of the public interest and the litigants' rights," the Court's decision is also "governed by the ethical rules announced by the national profession," such as the ABA Model Rules of Professional Conduct. *ProEducation*, 587 F.3d at 299-300 (cleaned up).

Argument

A. This Case Does Not Involve the Use of Confidential Government Information.

The Defendants argue "Texas Disciplinary Rule 1.10 requires Mr. Hamilton's disqualification in this case because of his receipt of relevant confidential information while a government attorney." ECF No. 87 at 11-12. The Defendants are wrong. This case does not involve the use of confidential government information under Texas Rule 1.10, Texas Rule 1.05, or ABA Model Rule 1.9.

1. The Governing Rules.

A lawyer who has "confidential government information about a person or other legal entity acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person or legal entity." Tex. Disciplinary R. Prof'l Conduct 1.10(c). Information is "confidential government information" only if it satisfies a two-part test. First, it must have "been obtained under governmental authority[.]" *Id.* Second, the information must be something the government is "prohibited by law from disclosing to the public or has a legal privilege

not to disclose, and which is *not otherwise available to the public*." *Id.* 1.10(g) (emphasis added).

The ABA held that Model Rule 1.11(b)—the predecessor to current Model Rule 1.11(c), which also serves as the corollary to Texas Rule 1.10(c)—"protects adverse third parties, but does not protect the government client itself against the use of 'confidential government information' against it by its former lawyers." ABA Formal Ethics Op. 97-409 at n. 7 (1997). This is so, because "the term 'person' in [the rule] does not include the former government client, but refers only to *third parties* whom the government lawyer may *oppose* on behalf of a private party after leaving government service." *Id.* (emphasis added). As noted above, the Texas Rule contains the same prohibition, except it applies to "a person *or other legal entity*," Tex. Disciplinary R. Prof'l Conduct 1.10(c) (emphasis added), but does not describe a *government agency* as a "legal entity." *Cf.* Tex. Disciplinary R. Prof'l Conduct 1.10(a) (using the term "government agency); 1.10(f)(2) (describing the conflict-of-interest rules of "the appropriate government agency"); 1.10(h) (defining "Private Client" to include a "government agency").[2]

Texas Rule 1.05 prevents a lawyer from revealing or using "confidential information" to the disadvantage of a former client. That information can be either privileged or unprivileged. *Id.* 1.05(a). The information is "privileged" if it is "protected by the lawyer-client privilege of [Texas's rules of evidence] or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates." *Id.* "Unprivileged client information" encompasses "all information relating to a client or furnished by the

[2] Texas Rule 1.10(i) states that "[a] lawyer who serves as a public officer or employee of one body politic after having served as a public officer of another body politic shall comply with paragraphs (a) and (c) as if the second body politic were a private client and with paragraph (e) as if the first body politic were a private client." That provision, however, does not change the fact that 1.10(c) refers to information about third parties. Nor does it matter in this case, as neither Mr. Hamilton nor Mr. Whitaker are a "public officer or employee" of the State of Texas.

client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client." *Id.* As with Rule 1.10, however, the prohibition ends once "the confidential *information has become generally known*." *Id.* 1.05(b)(3) (emphasis added).

The ABA's Model Rule is similar. It bars "us[ing] information relating to the representation [of a former client] to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or *when the information has become generally known*…." Model R. of Prof'l Conduct 1.9(c) (emphasis added).

None of these rules prohibit using information "available to the public" or "generally known," as applicable. This makes sense. If the federal government willingly chooses to publish information on websites for the entire world to review, to make repeated public statements about that information, or to publish that information in the Federal Register, the information cannot be "confidential."

2. There Is No Confidential Information at Issue in This Case.

Texas filed this case to hold the Defendants to their statutory and regulatory duties under Title 42 and 8 U.S.C. § 1222. ECF Nos. 1, 22, 46, 52, 62, 67, 89. None of the statutes, regulations, or orders at issue in this case are "confidential information." The data in Texas's filings in this case were from the Defendants' websites, public statements, the Federal Register, and media sources. See ECF No. 62, at ¶¶ 34–48, 54, 57, 59, 61, 64, 67, and 73. All of this information is "generally known" and "available to the public." Indeed, the Defendants published most of it themselves. As the information is not confidential, neither Texas's disciplinary rules nor the ABA's model rules prohibit America First Legal from using it as part of their representation in this case.

The Defendants nevertheless maintain that "Mr. Hamilton was provided with, or otherwise obtained, confidential information detailing DHS's operational policies and

practices in connection with its Title 42 activities, as well as confidential information from CDC relevant to that agency's Title 42 orders and decision-making process," thereby gaining "an insider's knowledge of [government officials'] mental impressions and candid evaluations of the strengths and weaknesses of the government's legal positions in the Title 42 area, including with respect to unaccompanied children." ECF No. 87 at 13-14. But this case is obviously distinguishable from those the government cites in support of its proposition.[3]

For example, this is not a case where a former government attorney learned about the "strengths and weaknesses" of an investigation into a private entity and then went to work for that private entity. *See United States v. Villaspring Health Care Ctr., Inc.*, No. 3:11-43-DCR, 2011 WL 5330790, at *6 (E.D. Ky. Nov. 7, 2011). Nor is it a case where a former government attorney obtained information about the strengths and weaknesses of the government's evidence regarding alleged tobacco fraud and then used it in a subsequent proceeding on behalf of a tobacco company. *See United States v. Philip Morris Inc.*, 312 F. Supp. 2d 27, 39 (D.D.C. 2004).

Similarly, none of the discussion regarding Mr. Hamilton's potential participation in other cases is relevant to the information in this case. *See* ECF No. 87 at 4-5. Here, what is challenged is the federal government's failure to follow federal law, and the information to prove that failure is posted on the internet by the Defendants themselves; regularly updated by the Defendants themselves; and available for the entire world to see, courtesy of the Defendants themselves.

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[3] It is very hard to reconcile the Defendants' argument to disqualify Mr. Hamilton with the Defendants' argument that the entire applicable legal regime has changed from the one in place when he was in public service. *See* ECF No. 79 at 9 ("In August 2021, CDC issued a new Title 42 order that superseded its prior October 2020 order . . . ."). If the CDC issued a new order in August 2021, and Mr. Hamilton was clearly not a Department of Justice employee at that time, what alleged confidential government information could he possibly have about the August order?

Moreover, after at least implicitly claiming that using *publicly available information* on the Defendants' websites and in the Federal Register constitutes the use of "confidential government information," and ignoring Texas Rule 1.10(g)'s textual, temporal limitation of "at the time [the] rule is applied," the Defendants boldly assert that:

> Importantly, Texas Disciplinary Rule 1.10(c) does not require that the attorney *actually use* the confidential government information when working for a later client adverse to the government in order to be disqualified. The Texas rule requires only that the lawyer "hav[e] information about an entity, in which event the former government lawyer "may not represent a private client whose interests are adverse to" that entity.

ECF No. 82 at 15 (emphasis in original). This rigid application was never intended by the rule and predictably leads to absurd results.

The fact that Mr. Hamilton might still possess confidential government information about other homeland security, national security, justice, or immigration matters has no relevance. Every attorney who works for a government agency obtains "confidential government information," *see* Tex. Disciplinary R. of Prof'l Conduct 1.10(g), during that employment. The Defendants essentially argue that every former government attorney is precluded from challenging unlawful government action—precluded forever, if any jot of what he learned during his employment remains unavailable to the public. That would be bad for the rule of law and bad for public policy, which is why it is not at all envisioned by the governing rules, which govern not the possession of confidential information but its *use* against a former client.[4]

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[4] Indeed, contrary to the Defendants' bold assertion, the ABA noted in Formal Ethics Opinion 97-409 that "a former government lawyer will almost always have general knowledge of policies and practices of her former agency, gained through employment by or representation of that agency. Such general knowledge would ordinarily not be considered disqualifying under Rule 1.9(c)." ABA Formal Ethics Op. 97-409 at n. 17.

And the government's position is contradicted by the ABA's guidance. The confidential government information described in Texas Disciplinary Rule 1.10(c) does not include the government's own information. *See* ABA Formal Ethics Op. 97-409 at n. 7. *See also Smith v. Abbott*, 311 S.W.3d 62, 75-76 (Tex. App. 2010) (describing with approval the argument that "confidential government information" under Texas Rule 1.10(c) does not refer to the government's own information).

In sum, this case does not involve the use of "confidential government information." It challenges the Defendants' failure to follow the law, using facts, figures, and other information that the Defendants widely disseminate to the general public. The Texas Rule cited does not stand for disqualification here.

B. This Case is Not the Same "Matter" for the Purposes of the Rules.

The Defendants next argue that "the cases in which Mr. Hamilton participated as a DOJ attorney and the instant case are the same 'matter' within the meaning of the rules[,]" ECF No. 87 at 17, and therefore, prohibit Mr. Hamilton from representing the State of Texas in this case. Here, again, the Defendants are wrong. Mr. Hamilton has no conflict under Texas Rule 1.10(a) that would disqualify him from serving as counsel to the State of Texas.

1. The Governing Rules.

Under Texas Rule 1.10(a), "a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee…." *See also* Model R. Prof'l Conduct 1.11(a). A "matter," in turn, includes:

> (1) Any adjudicatory proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge accusation, arrest or other similar, particular transaction *involving a specific party or parties*; and (2) any other action or transaction covered by the conflict of interest rules of the appropriate government agency.

Tex. Disciplinary R. Prof'l Conduct 1.10(f) (emphasis added). Notably, it specifically does *not* include "*regulation-making or rule-making proceedings* or assignments[.]" *Id.* (emphasis added).

Therefore, as the ABA described Model Rule 1.11, which is similar to Texas Rule 1.10:

> A former government lawyer is . . . disqualified from representing private clients only where she "participated personally and substantially as a public officer or employee" in the same "particular matter" at issue in the subsequent representation; she is not forbidden from representing private parties in matters in which she did not so participate, or in matters that do not involve "discrete identifiable transactions or conduct involving a particular situation and specific parties[.]"

ABA Formal Ethics Op. 97-409 at 12.

Although not cited by the Defendants, federal regulations similarly prohibit a former government attorney from:

> [K]nowingly, with the intent to influence, mak[ing] any communication to or appearance before an employee of the United States on behalf of any other person in connection with a particular matter involving a specific party or parties, in which he participated personally and substantially as an employee, and in which the United States is a party or has a direct and substantial interest.

5 C.F.R. § 2641.201(a). In turn, the regulations explain that while "particular matter involving a specific party or parties" is described broadly in statute, "only those particular matters that involve a specific party or parties fall within the prohibition[.]" *Id.* at (h)(1). "Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions *between identified parties*, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or

court case." *Id.* (emphasis added). And the prohibition "applies only to communications or appearances in connection with the same particular matter involving specific parties in which the former employee participated as a Government employee." *Id.* at (h)(5).

Like the Texas Rules and the Model Rules, the federal regulations specifically exempt "matters of general applicability." Indeed, "[l]egislation or rulemaking of general applicability and the formulation of general policies, standards or objectives, or other matters of general applicability are not particular matters involving specific parties." *Id.* at (h)(2).

2. This Case is Not the Same "Matter."

None of the individual cases Mr. Hamilton previously advised on are the same "matter" for the purposes of Rule 1.10(f).

First, this is not one of the individual cases that arose during his time at the Department of Justice and cited by the Defendants. *See* ECF No. 87 at 3-4 (citing *J.B.B.C. v. Wolf*, No. 20-CV-1509 (D.D.C.); *P.J.E.S. v. Wolf*, No. 20-CV-2245 (D.D.C.); *Tex. Civil Rights Project v. Wolf*, 1:20-cv-02035 (D.D.C.); *G.Y.J.P v. Wolf*, 1:20-cv-01511 (D.D.C.); and *Flores v. Barr*, No. CV-85-4544 (C.D. Cal.)). Second, this is the first case in which a State has challenged the Defendants' compliance (or lack thereof) with their own laws and policies related to Title 42 or 8 U.S.C. § 1222. To the extent that the issues in this case overlap with those in the enumerated cases, it is not due to confidential information peculiar to each case; it is because they require applying and interpreting the same underlying legal authorities. The Defendants cite no authority for the proposition this is sufficient to disqualify—and the Texas authorities establish that it is not. *See In re Drake*, 195 S.W.3d 232, 236-237 (Tex. App. 2006, pet. denied) (interpreting parallel language in Rule 1.09).

Similarly, the Defendants did not attempt to justify their position based upon very similar federal regulations defining a "particular matter." *See generally* 5 C.F.R. § 2641.201. Nor could they: their own regulations do not define "particular matter" to encompass every single case involving the same generally applicable laws in perpetuity.

The Defendants' position is contrary to common sense. At bottom, that disputes concern the same underlying laws is not enough. That disputes involve the same government agency or agencies against different parties does not turn them into the same "matter." An attorney who formerly handled Clean Water Act issues for the Environmental Protection Agency is not generally barred from handling Clean Water Act issues for private clients. An attorney who handled voting-rights issues with DOJ's Civil Rights Division is not generally barred from handling voting-rights issues in private practice. And an attorney who advised on immigration lawsuits or the development of policies or regulations while at DOJ is not generally barred from challenging DHS's compliance with federal law.[5]

C. Even if a Conflict Existed, the Remedy Would Involve Screening Mr. Hamilton From Participation in the Case—Not Disqualification of Mr. Whitaker or America First Legal.

The Defendants assert, without any supporting legal authority, that "[a]ll America First Legal Foundation attorneys, including Mr. Whitaker, should be disqualified from representing Texas in this case." ECF No. 87 at 20-21. Here, again, the Defendants are wrong.

There is no reason for Matt Whitaker or anyone else from America First Legal to be precluded from being on this case under the plain language of the applicable rules.

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[5] This is particularly so when the applicable rules expressly foreclose their application to "*regulation-making or rule-making proceedings* or assignments[.]" *See* Tex. Disciplinary R. Prof'l Conduct 1.10(f) (emphasis added).

See Tex. Disciplinary R. of Prof'l Conduct 1.10(b) (stating, in the context involving prior work on the same matter, that lawyers from the same firm cannot "undertake or continue representation" unless the conflicted lawyer "is screened from any participation in the matter and is apportioned no part of the fee therefrom."); *id.* R. 1.10(d) (stating, in the context of a situation involving confidential government information, "a firm may undertake or continue representation in that matter only if that disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom."). As the rules indicate, even if Mr. Hamilton did have a conflict that would result in his disqualification from this case, the proper remedy would be for Mr. Hamilton to be screened from continued participation in the case under Texas Rules 1.10(b) or (d).

Conclusion

For all of the reasons provided above, the Court should deny the Defendants' Motion.

Dated October 27, 2021.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700

Respectfully submitted,

AARON F. REITZ
Lead Counsel
Deputy Attorney General for Legal Strategy
Texas Bar No. 24105704
aaron.reitz@oag.texas.gov

LEIF A. OLSON
Special Counsel
Texas Bar No. 24032801
leif.olson@oag.texas.gov

/s/ Matthew G. Whitaker
MATTHEW G. WHITAKER
Admitted *pro hac vice*
America First Legal Foundation
300 Independence Avenue SE

Washington, D.C. 20003
(202) 964-3721
info@aflegal.org

Counsel for the State of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

STATE OF TEXAS,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No. 4:21-cv-00579-P**
	§	
JOSEPH R. BIDEN, JR., in his official capacity as President of the United States et al.,	§	
	§	
Defendants.	§	

ORDER

Before the Court is Plaintiff's Motion for Preliminary Injunction (ECF No. 67), Defendants' Motion to Dismiss (ECF No. 76), and the related briefing and appendices. After reviewing the briefs and applicable law, the Court concludes that an evidentiary hearing is not necessary and that the Motions may be resolved on the papers.

Therefore, it is **ORDERED** that the Court will resolve the Motions on submission and will not conduct an evidentiary hearing. Should any party object to the Court not conducting an evidentiary hearing, the party should file a written objection and request for an evidentiary hearing **on or before Monday, November 1, 2021**.

SO ORDERED on this **26th day** of **October, 2021**.

Mark T. Pittman
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

STATE OF TEXAS, Plaintiff, v. JOSEPH R. BIDEN, JR. et al., Defendants.	Civil Action No. 4:21-CV-579-P

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Chad E. Meacham
Acting United States Attorney

Brian W. Stoltz
Assistant United States Attorney
Texas Bar No. 24060668
1100 Commerce Street, Third Floor
Dallas, Texas 75242-1699
Telephone: 214-659-8626
Facsimile: 214-659-8807
brian.stoltz@usdoj.gov

Attorneys for Defendants

The government's motion to dismiss identified a number of independent reasons that Texas's claims are subject to dismissal. As discussed herein, Texas fails to rebut these arguments and has not shown that it is entitled to proceed in this suit on any claims. The Court should grant the government's motion and dismiss this case.

I. Argument and Authorities

A. Texas's Title 42 claims (claims A and B) should be dismissed.

The government previously argued that Texas's claims challenging CDC's Title 42 orders should be dismissed for multiple reasons, including for lack of standing, because the matters at issue are committed to agency discretion, the APA's zone-of-interests requirement is not satisfied, and Texas fails to state a claim. Texas fails to (and cannot) rebut these grounds for dismissal, and its Title 42 claims should be dismissed.

Standing. As relevant to the issue of standing, it is important to note that Texas's amended complaint relies *only* on claimed pocketbook injuries attributable to an alleged increase in the number of "unlawful" noncitizens in the state. (Doc. 62, ¶¶ 5–16.) But exception from CDC's Title 42 orders does not confer any immigration status on anyone, and thus does not obligate Texas to provide benefits to anyone. This case is thus unlike the Fifth Circuit precedent that Texas has relied on in which that court found standing for Texas to challenge a new immigration program (DAPA) because it conferred "lawful presence" on 500,000 undocumented noncitizens in Texas, forcing the state to choose between spending millions of dollars to subsidize their driver's licenses or amending the state's statutes. *See Texas v. United States*, 809 F.3d 134, 148, 155–60 (5th Cir. 2015). No similar facts are shown here.

Texas's response attempts to bridge this gap by focusing on healthcare expenditures, with Texas now suggesting that it has standing based on the impact that "increased illegal

immigration, particularly by illegal immigrants with COVID-19, has on the resources, healthcare, and public-health systems of" cities and states at or near the border. (*See* Doc. 89 at 6.) But as previously noted by the government (*see* Doc. 79 at 16), the Fifth Circuit has made clear that generalized complaints that "illegal immigration" may have some effect on a state's budget or resources are insufficient to establish standing. *See Crane v. Johnson*, 783 F.3d 244, 252 (5th Cir. 2015). In addition to failing to show a cognizable injury in fact, Texas also fails to show causation. CDC's Title 42 orders are not immigration actions or policies. Instead, to the extent there are noncitizens who are not expelled under a Title 42 order, such persons remain subject to the entire body of pre-existing immigration laws. It is those laws—not anything in a Title 42 order or that CDC may do—that will determine if any specific noncitizen is admitted into the country, placed in removal proceedings, or eligible for any specific immigration benefit. And as the Supreme Court's recent decision in *California v. Texas* makes clear, the causal connection necessary to support standing is absent when "other provisions of [law], not the [challenged] provision, impose . . . other requirements" that affect the state's pocketbook. 141 S. Ct. 2104, 2119 (2021). Texas's only response is to say that "this case is not *California v. Texas*," (Doc. 89 at 8), but Texas provides no explanation for this assertion and, in fact, Texas's live complaint relies on the same kinds of "pocketbook" injuries that were the subject of the Supreme Court's ruling in *California v. Texas*. (*See* Doc. 62, ¶¶ 5–15.) It is telling that after mentioning *California v. Texas* in its brief, Texas immediately pivots to discussing alleged injuries attributable to an increased risk of COVID-19 spread, but those alleged injuries do not conform with the alleged injuries that Texas has actually pleaded. (*See* Doc. 62, ¶¶ 5–15.)

Texas's attempt to establish *parens patriae* standing based on alleged injuries to its residents (as opposed to itself) also fails. (*See* Doc. 89 at 7.) A state does not have standing as

parens patriae to bring an action against the federal government. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982).

Agency discretion. As noted in the government's opening brief, neither the statute (42 U.S.C. § 265) nor the implementing regulation (42 C.F.R. § 71.40) establishes any meaningful standards by which a court can judge the exercise of the agency's decision to end a Title 42 order for a class of persons (e.g., unaccompanied children). To the contrary, the statute states only that CDC may leave a Title 42 order in place for such period of time that CDC "may deem necessary" to avert the danger of the introduction of a communicable disease, 42 U.S.C. § 265, which under Fifth Circuit precedent is discretion-conferring language, *see Texas v. U.S. Envtl. Prot. Agency*, 983 F.3d 826, 837 (5th Cir. 2020). Texas seems to concede that the statute provides no meaningful standards (*see* Doc. 89 at 9 ("the question is not over the statute")), but suggests that the Final Rule at 42 C.F.R. § 71.40 does so, (Doc. 89 at 9). However, Texas tellingly does not identify what those purported standards are. In fact, on the issue of CDC's authority to terminate a Title 42 order, the regulation simply mirrors the statutory "deems necessary" language. *See* 42 C.F.R. § 71.40(a). Again, then, CDC's discretion in terminating a Title 42 order (in whole or in part) is in no way constrained by the regulation, nor does the regulation provide any meaningful, substantive standards by which a court can judge CDC's decisions in this regard. No APA review is available.

Zone of interests. Texas offers no argument on the APA's zone-of-interests requirement. For the reasons previously given by the government, Texas's alleged immigration-related injuries associated with an increased number of noncitizens in the country do not fall within the zone of interests of the Title 42 public health statute. By not responding to this argument, Texas concedes that the zone-of-interests requirement bars its claims about CDC's Title 42 orders.

Notice and comment. Texas's arguments for its notice-and-comment claim also fail under Rule 12(b)(6). Notice and comment was never used for any CDC order issued under 42 U.S.C. § 265. Thus, even if such a requirement were assumed to apply, Texas cannot selectively use it to resurrect a prior Title 42 order (the October 2020 order) that it prefers, when that order also was not issued with notice and comment.[1] *Friends of Animals v. Bernhardt*, 961 F.3d 1197, 1205 (D.C. Cir. 2020).

Regardless, notice-and-comment procedures were not required. Texas theorizes that CDC's July and August 2021 orders were "legislative" because they purportedly "set forth the parameters that governed when particular persons would be placed into removal proceedings and what would happen once those proceedings had commenced." (Doc. 89 at 10.) But this is not correct. CDC's Title 42 orders have never purported to govern or control what happens to persons who are not expelled under Title 42, including whether any person should be placed in removal proceedings or what happens if such proceedings are commenced. Any decisions to commence removal proceedings with respect to any particular person, and the rules and requirements for what happens in such proceedings, are entirely separate matters governed by pre-existing immigration laws and regulations. Such matters cannot serve to engraft a notice-and-comment requirement onto CDC's exercise of its public health authority under Title 42.

B. Res judicata bars Texas's detention/parole claims (claims C.1 and D).

Texas argues that the MPP case did not involve the same "claim" (under the Fifth

[1] Texas briefly suggests that notice and comment could somehow have been required for CDC's Title 42 orders in July and August 2021 but not for the order issued in October 2020, due to the "stage in the pandemic" at that time. (Doc. 89 at 10.) But Texas provides no explanation or authority for this supposed distinction. And given that the pandemic began in the United States in or around March 2020, under Texas's own theory there would have been plenty of time in advance of the October 2020 order to conduct a notice-and-comment rulemaking for that order, if that were required.

Circuit's broad nucleus-of-operative-facts test) that is presented by Texas's detention/parole claims here. (*See* Doc. 89 at 11–12.) But the record of the MPP case, including Texas's operative complaint in that action, flatly refutes this argument. In the instant case, Texas is asserting that the government has violated 8 U.S.C. § 1225 by not detaining noncitizens in removal proceedings and instead paroling what the state views as too many such noncitizens. (Doc. 62, ¶¶ 30–31, 86–88, 92–93.) Texas brought a claim under *literally* the same statute in the MPP case—a claim for "Violation of Section 1225." (*See* Doc. 80 at App. 071.) The relevant "nucleus of operative facts" for that claim was Texas's view that the government is not detaining enough noncitizens as purportedly required by section 1225. Texas is making the same claim, about the same alleged injury, in this case. The grounds for res judicata could not be clearer. And of course, the fact that the MPP case *also* "involved suspension of the Migrant Protection Protocols" (Doc. 89 at 12)—i.e., a separate claim under the APA that termination of MPP was arbitrary and capricious—does not change this analysis.

At most, Texas's argument appears to be that Texas is advancing a slightly different *theory of causation* for the claimed section 1225 violation in this case, and therefore res judicata should not apply. In the MPP case, Texas's theory was principally that the claimed section 1225 violation was caused by the rescission of the MPP program. But a different theory of causation does not permit Texas to avoid the res judicata effect of the judgment in the MPP case. When the same nucleus of operative facts is present—which is true here because Texas has complained in both cases that not enough noncitizens are being detained, in alleged violation of section 1225—res judicata applies regardless of whether different "substantive theories [are] advanced." *Hous. Prof'l Towing Ass'n v. City of Hous.*, 812 F.3d 443, 447 (5th Cir. 2016).

Texas's discussion of the relief requested (and obtained) in the MPP case further

highlights why its section-1225-related claims are barred by res judicata here. (*See* Doc. 89 at 12–13.) Texas brought and prevailed on a section 1225 claim in the MPP case. (*See* Doc. 80 at App. 118–20.) The relief it obtained was an injunction that requires the government to reimplement MPP, and this relief is specifically tied to the government's detention activities under section 1225—as Texas notes, the government is forbidden under the terms of Judge Kacsmaryk's injunction from discontinuing MPP until it has the capacity to "'detain all aliens subject to mandatory detention under Section [1225].'" (Doc. 89 at 12; *see also* Doc. 80 at App. 128.) This is further confirmation that a claimed section 1225 violation formed part of the "nucleus of operative facts" of the MPP case, and thus cannot be relitigated here. Indeed, after having expressly pleaded a claim for "Violation of Section 1225" in the MPP case *and* having obtained a ruling in its favor on that claim from Judge Kacsmaryk, Texas cannot now seek to obtain a second injunction from this Court merely by asking for different relief (i.e., relief different from what Judge Kacsmaryk ordered) when that relief is targeted at the same purported problem. Res judicata does not turn on the "type of relief requested." *Hous. Prof'l*, 812 F.3d at 447.

Finally, Texas suggests that the Court should stay rather than dismiss its claims. (Doc. 89 at 13.) But it cites no legal authority for that request, and abundant caselaw makes clear that when res judicata applies, the proper disposition is dismissal, not a stay.

C. No jurisdiction exists for Texas's claim under 8 U.S.C. § 1222 (claim C.2).

The section 1252(f)(1) bar. Under 8 U.S.C. § 1252(f)(1), district courts do not have jurisdiction to enter injunctive relief "enjoin[ing] or restrain[ing] the operation" of various immigration provisions within Title 8, including 8 U.S.C. § 1222, except with respect to the application of such provisions "to an individual alien." Texas, however, is seeking an injunction

that would dictate the terms of the government's operation of its detention authority under section 1222(a) with respect to all "aliens arriving on the southwest border." (Doc. 67-1.) Under the plain language of section 1252(f)(1), jurisdiction does not exist for such a claim. What Texas is asking for extends far beyond the case of any "individual alien" and thus is precisely the type of injunction forbidden by the statute.

Texas nonetheless argues that the section 1252(f)(1) bar should not apply because, in Texas's view, it merely seeks an injunction to have the government "comply" with what Texas believes section 1222(a) requires. (Doc. 89 at 13.) Texas argues that its position does not embody the "sophistry" that Justice Thomas criticized in *Nielsen v. Preap*, 139 S. Ct. 954, 975 (2019) (Thomas, J., concurring), because, according to Texas, Justice Thomas was merely concerned with claims that improperly sought to bypass section 1252(f)(1) to enjoin government actions that "exceeded" the relevant immigration statute, whereas Texas claims it wants the government to comply with section 1222. (Doc. 89 at 13.) But nothing in section 1252(f)(1) or Justice Thomas's *Preap* concurrence supports this hyper-limited reading of section 1252(f)(1) that would allow litigants to effectively obtain extra-statutory injunctions so long as they couch their requests in terms of "compliance" with the statute instead of a complaint that the statute was "exceeded." It would be a trivial exercise for any litigant to recharacterize its claim in this manner.

This attempted sleight of hand is highlighted by Texas's suggestion that, contrary to section 1222's plain language limiting the statute's reach to "aliens (including alien crewmen) arriving at ports of the United States," the statute should be understood as requiring the detention of certain noncitizens encountered outside Ports of Entry. (*See* Doc. 89 at 20.) Essentially, Texas urges that two "classes" of noncitizens exist under the statute, based on the statute's

reference to: (1) those noncitizens "afflicted with" a subject disease and (2) those merely "coming from a country" where a subject disease is prevalent. *See* 8 U.S.C. § 1222(a). Texas theorizes that the latter "class" of noncitizens is subject to section 1222(a) detention at any time (not just at the Ports of Entry), while the former is not. But this strained reading of the statute makes no sense. First, it would mean that the government's authority to detain the other "class" of noncitizens, consisting of those who are *actually* "afflicted" with a subject disease but do not come from a country where such a disease is prevalent or epidemic, would be *more limited* than the government's detention authority when the person is merely coming from a place where disease is prevalent. Congress surely did not intend such an absurd result. Second, the statute makes clear that it applies, in its entirety, at the Ports of Entry, and does not purport to apply elsewhere. In addition to section 1222(a)'s opening clause (referring to "aliens (including alien crewman) arriving at ports of the United States"), section 1222(b) provides for the medical examinations of "[a]liens (including alien crewman) arriving at ports of the United States" and states that medical officers "shall be detailed for duty or employed at such ports of entry." Thus, the statute's only focus is the Ports of Entry.

In short, Texas is trying to use an injunction from this Court to impose Texas's (contested and highly questionable) reading of section 1222 on an entire class of noncitizens on an across-the-board basis. But by limiting the reach of injunctive relief in any given case to "the application of [the relevant immigration statutes] to an individual alien," section 1252(f)(1) guards against the Judicial Branch taking on precisely this type of wide-ranging, vaguely defined supervisory role over the nuts and bolts of immigration processing.

Standing. Standing is also an additional bar to Texas's section 1222(a) claim. Texas is not challenging any specific immigration policy change or program (like DACA or DAPA) that

confers lawful presence on noncitizens in a manner that enables them to access state-provided benefits like driver's licenses. Instead, it is complaining of highly dispersed decisions made on an ongoing basis in individual noncitizens' cases when such persons present to border authorities. Texas identifies no legally cognizable injury arising from the effects of these decisions, either on an individual basis or in the aggregate. To the contrary, given the prosecutorial discretion the government exercises in determining whether and how to pursue grounds of inadmissibility for any given noncitizen it encounters, (*see* Doc. 79 at 46–47), it is clear that Texas has no redressable injury.

D. Texas does not provide any argument in support of its contract claim (claim E).

The government moved to dismiss Texas's claim E, which is based on an alleged agreement between Texas and DHS. Texas has not responded with any argument on this claim and thus has abandoned it. *See Arias v. Wells Fargo Bank, N.A.*, No. 3:18-CV-00418-L, 2019 WL 2770160, at *2 (N.D. Tex. July 2, 2019) ("When a plaintiff fails to defend a claim in response to a motion to dismiss . . . , the claim is deemed abandoned.").

E. Texas cannot proceed under the Take Care Clause (claim F).

Texas asserts that two court decisions from the Ninth Circuit show that the Take Care Clause creates a justiciable cause of action. (Doc. 89 at 14.) But those decisions provide Texas no help. In *Las Americas Immigrant Advocacy Center v. Trump*, 475 F. Supp. 3d 1194 (D. Or. 2020), although the court declined to dismiss a Take Care Clause claim on a Rule 12(b)(6) motion, it more recently directed the parties to submit briefing on the question of "[w]hether the Take Care Clause provides a private cause of action which a plaintiff may bring against the President of the United States or his administration." *See* Docket Entry #122, *Las Americas Immigrant Advocacy Ctr. v. Trump*, No. 3:19-CV-2051 (D. Or. Aug. 11, 2021). Thus, that case

sheds no light here.

The second case cited by Texas, *Center for Biological Diversity v. Bernhardt*, 946 F.3d 553 (9th Cir. 2019), likewise does not support a Take Care Clause claim by Texas. In that case, the plaintiff was arguing that *Congress* had violated separation-of-powers principles by enacting a joint resolution that purportedly interfered with the Executive Branch's duty under the Take Care Clause. *See id.* at 561. Because the joint resolution was a duly enacted law, the court held that Congress did not, by passing this law, somehow prevent the President from exercising his constitutional duty to faithfully execute the laws as required by the Take Care Clause. *Id.* at 562. *Center for Biological Diversity* therefore is a separation-of-powers case and it says nothing about whether Texas has a cause of action under the Take Care Clause in the circumstances of this case.

This Court need not definitely resolve whether the Take Care Clause may, under some circumstances, support a cause of action. The government does not believe it does, but the point is largely academic here because, as noted previously by the government, any claim Texas is asserting under the Take Care Clause is duplicative of its other claims under the APA and immigration statutes. For the same reasons that those claims are subject to dismissal, so too should Texas's claim under the Take Care Clause be dismissed.

II. Conclusion

The Court should grant the government's motion to dismiss.

Respectfully submitted,

Chad E. Meacham
Acting United States Attorney

/s/ Brian W. Stoltz
Brian W. Stoltz
Assistant United States Attorney
Texas Bar No. 24060668
1100 Commerce Street, Third Floor
Dallas, Texas 75242-1699
Telephone: 214-659-8626
Facsimile: 214-659-8807
brian.stoltz@usdoj.gov

Attorneys for Defendants

Certificate of Service

On October 22, 2021, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Brian W. Stoltz
Brian W. Stoltz
Assistant United States Attorney

United States District Court
Northern District of Texas
Fort Worth Division

STATE OF TEXAS, *Plaintiff,* v. JOSEPH R. BIDEN, JR., *et al.*; *Defendants.*	Case 4:21-cv-00579-P

Texas's Consolidated
Reply Supporting Its Renewed Motion for Preliminary Injunction
and Opposition to Defendants' Motion to Dismiss

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Introduction

The Defendants' opposition to Texas's preliminary-injunction motion is less notable for what it says than for what it does not: It leaves nearly every fact supporting Texas's motion for a preliminary injunction unchallenged. Its citations do not establish the points that the Defendants think they do. And its legal arguments boil down to an assertion of a right to exercise discretion that does not exist.

Texas has standing to bring every claim it has asserted, and the Court has jurisdiction to hear each of them. There are no legal barriers to the Court's considering either the claims or Texas's request for a preliminary injunction, and the Defendants cannot overcome the inferences that their own reports to the public establish about their violations of the immigration laws that mandate tasks that they are refusing to perform.

Texas is entitled to a preliminary injunction holding the Defendants to take care to faithfully enforce the laws that they have decided they would rather not. It respectfully requests that the Court issue that injunction.

Facts

The Defendants do not challenge—and indeed admit to—many of the facts Texas cited to support its request for a preliminary injunction.

A. Uncontested facts regarding the Defendants' general public-health operations.

- Legal entry of individuals from thirty-three countries across the world, including almost all of the nation's NATO allies, has been suspended based on the threat of COVID-19 (ECF No. 68 at 6);
- The Defendants, through their own orders, acknowledge "that the risk of continued transmission and spread of … COVID-19 between the

United States and Mexico poses an ongoing 'specific threat to human life or national interests'" that justifies the suspension of all non-essential legal entry into the United States from Mexico (*Id.* at 6–7);

- The Defendants, through their own regulations and orders, acknowledge a "serious danger" that COVID-19 will be spread at Border Patrol stations, at ports of entry, and "into the interior of the country as a whole" if aliens covered by the Title 42 process are introduced into the country (ECF No. 79 at 4);
- One effect of that introduction would be exhaustion, or at least reduced availability of, "local and regional healthcare resources" and "further expos[ure of] local and regional healthcare workers to COVID-19" (*Id.* at 4–5);
- The Defendants, the day after the stay preventing it from doing so was lifted, ordered the Border Patrol not to subject unaccompanied minor aliens to Title 42 (ECF No. 68 at 25);
- The Acting Commissioner of CBP, in a "significant departure from well-established practices and protocols," did not include the Chief of the Border Patrol "in detailed briefings and deliberations to facilitate informed decision-making" on "a significant policy decision such as this," nor did he explain to the Border Patrol's chief the reason for the order to stand down from applying Title 42 to those aliens (*Id.*);
- CDC guidance recommends a 14-day quarantine for unvaccinated people who "have been in close contact … with someone who has COVID-19" (*Id.* at 4);
- The Defendants do not follow that 14-day recommendation for unaccompanied minor aliens (ECF No. 79 at 11);

- The Defendants do not supervise COVID-positive illegal immigrants whom it releases into the country (*Id.* at 13); and
- The Defendants, indeed, do not detain illegal aliens until they can determine whether the aliens are COVID-positive, with DHS's assistant Secretary for Border and Immigration Policy declaring under oath not that family-unit aliens are required to test negative for COVID-19 before being released from CBP custody, but that those aliens "*are provided* testing *either* prior to" or *after* release (ECF No. 80 at 206).

B. Uncontested facts regarding the particular conditions surrounding the Defendants' release of illegal aliens.

- Through July of this fiscal year, the Defendants released into the country roughly 225,000, or 96%, of the family-unit aliens it encountered (ECF No. 68 at 12–13), a number that presumably includes the family of four COVID-positive illegal immigrants, who were sitting maskless, coughing and sneezing in a booth in a Whataburger, rather than being supervised by DHS's nongovernmental "partner" (*Id.* at 19);
- Hidalgo County declared a state of disaster due to the number of illegal immigrants, "including individuals that are positive for COVID-19," that the Defendants had released into the county, which had "overwhelmed" local governments and hospitals (*Id.* at 18–19); and
- Webb County declared a state of disaster as a result of the Defendants' "transportation of large numbers" of illegal immigrants into the county, "overwhelm[ing] local resources and services," due in part to the fact that, in the estimation of the City of Laredo, 40 to 50 percent of the aliens were COVID-positive (*Id.* at 20).

C. Facts arising since Texas renewed its motion.

- The Defendants in September released into the United States more than 12,000 Haitians who had crossed the southwest border—without first testing them for COVID-19. Interview of Secy. Alejandro Mayorkas, FOX NEWS SUNDAY (aired Sept. 26, 2021);[1] Adam Shaw, *Mayorkas Says Haitian migrants under Del Rio bridge were not tested for COVID-19*, FOX NEWS (Sept. 24, 2021).[2]
- As it was releasing those thousands of untested illegal aliens into the country, the Defendants simultaneously announced plans to ease restrictions on legal travel from the thirty-three countries that include most of the nation's NATO allies—but only for persons who are fully vaccinated against COVID-19. *See* David Shepardson and Andrea Shalal, *U.S. to relax travel restrictions for vaccinated foreign air travelers in November*, REUTERS (Sept. 20, 2021).[3]
- In August 2021, ICE's encounters with family-unit members on the southwest border climbed to 86,487, up roughly 3,500 from July. That was the month after the Court heard argument on Texas's first preliminary-injunction motion, which may account for the Defendants' increasing the number of those aliens subject to Title 42 by roughly 6,000, rapidly expelling 16,240, or 18.8% of them—the first percentage increase in Title 42 expulsions of family-unit members in this fiscal

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[1] Transcript available at http://www.foxnews.com/transcript/fox-news-sunday-on-september-26-2021.

[2] Available at http://www.foxnews.com/politics/mayorkas-migrants-del-rio-bridge-not-tested-covid-10.

[3] Available at http://www.reuters.com/world/uk/us-relax-travel-restrictions-passengers-uk-eu-november-source-2021-09-20.

year.[4] *See* ECF No. 68 at 12 (showing percentage of family-unit aliens expelled under Title 42 falling each month, from 84.6% in November 2020 to 12% in July 2021).

Texas has standing to bring each of its claims, the Court has jurisdiction to hear each of those claims, and each claim is one on which relief can be granted.

A. Texas has standing to bring its claims.

Texas has alleged facts showing that it has suffered concrete injuries, both to its own financial interests and to its interests *parens patriae*. Those injuries are fairly traceable to the Defendants' actions. And those grievances are redressable through a decree that the Court has the power to issue. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (elements of standing); *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982) (*parens patriae* standing). Especially given the "special solicitude" to which Texas is entitled when it seeks to "protect[] its quasi-sovereign interests," it has established standing to bring this suit. *See Mass. v. EPA*, 549 U.S. 497, 520 (2007).

1. Texas asserts particular financial grievances.

Texas's suit is no mere complaint that the Defendants' actions will increase the number of people in the State—a "generalized contention[] that 'illegal immigration is costing the state money,'" in their words. ECF No. 79 at 16 (quoting *Crane v. Johnson*, 783 F.3d 185, 202 (5th Cir. 2015). Rather, it attacks discrete federal-government action—the exemption of certain persons from the Title 42 process, whether by published order or *de facto* policy; the refusal to

[4] Statistics drawn from *Sw. Border Land Encounters*, U.S. CUSTOMS AND BORDER PROT., https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters (last visited Oct. 8, 2021).

comply with statutory mandates to detain certain illegal aliens. *See* ECF No. 62 at ¶¶ 75–85 (exemption of minors from Title 42); ¶¶ 83–85 (*de facto* exemption of family-unit members from Title 42); ¶¶ 86–91 (statutory detention requirements); ¶¶ 92–93 (statutory limits on parole authority); ¶¶ 96–98 (Constitutional requirement to faithfully execute statutes). Texas describes the particular costs that these actions impose on it: It is not some general increase in the number of people in Texas that imposes some general increase in the amount of money that Texas must spend. Rather, as Texas described, DHS pays for illegal aliens' medical care only while they are in DHS's custody; once DHS releases those aliens into the State, through Emergency Medicaid and other programs that reimburse healthcare providers for otherwise uncompensated services, it is Texas that pays those costs—to the estimated tune of $80 million per year. ECF No. 68 at 21–22.

While Texas also incurs costs, for example, to furnish drivers licenses, furnish education, and incarcerate illegal aliens while they are present in the United States, *see* ECF No. 68 at 22, it is the healthcare costs that are most relevant. After all, it is the Defendants themselves who point out that "Title 42 orders are not immigration actions" but are instead "public health measures…." ECF No. 79 at 16. Texas's expenditures to treat illegal aliens for COVID-19 infections address the same public-health crisis. As Texas already pointed out, one need not take the State's word for it. The Defendants themselves justify their actions by referring to the impact that increased illegal immigration, particularly by illegal immigrants with COVID-19, has on the resources, healthcare, and public-health systems of "cities and states … located at or near U.S. borders[.]" *See* ECF No. 68 at 18; *see also, e.g.*, ECF 69 at Appx. 8, 22–23, 75. And that justification is amply borne out by the emergency

disaster declarations issued by at least two Texas border counties. ECF 69 at Appx. 52–53, 63–65.

2. Texas asserts particular *parents patriae* grievances.

Just as it has alleged offenses against its financial interests, Texas has alleged offenses against its quasi-sovereign interests as *parens patriae*. One of the quasi-sovereign interests entitling a State to sue to "vindicate the rights of [its] citizens-at-large" is its "'interest in the health and well-being—both physical and economic—of its residents in general.'" *Texas v. United States*, No. 6:21-cv-16, ___ F. Supp. 3d ___, 2021 WL 3683913, at *13 (S.D. Tex. Aug. 19, 2021) (quoting *Snapp*, 458 U.S. at 607). "One helpful indication in determining whether an alleged injury to the health and welfare of its citizens" satisfies that test is whether the State, "if it could, would likely attempt to address [the injury] through its sovereign lawmaking powers." *Snapp*, 458 U.S. at 607.

If Texas has no interest in protecting its residents against infection with one of the most communicable viruses known to man, which according to the CDC itself has killed more than 700,000 Americans and nearly 70,000 Texans, it is hard to imagine when it would ever have an interest in Texans' physical health and well-being. *See* Daily Updates of Totals by Week and State, *COVID-19 Death Data and Resources*, NATL. CTR. FOR HEALTH STATISTICS (visited Oct. 8, 2021).[5] And, indeed, a State's power to "enact quarantine laws and 'health laws of every description' … as will protect the public health" was a "settled principle[]" at the turn of the 20th Century." *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (quoting *Gibbons v. Ogden*, 9 Wheat. [22 U.S.] 1, 203 (1824)). As described above, the disaster declarations of Texas counties and the Defendants' own invocations of the risk of further spread of COVID-19 due to

[5] Available at https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm.

increased illegal immigration establish both the existence of Texas's quasi-sovereign interest and the direct threat that the Defendants' actions pose to it.

3. Texas can trace its injuries to the Defendants' actions.

As described above, the Defendants' actions are directly traceable to Texas's injuries, both financial and quasi-sovereign. Contra the Defendants' argument, this case is not *California v. Texas*, 141 S. Ct. 2104 (2021). There, any potential injury depended on what third parties decided to do—if none of the affected individuals chose to enroll in Medicaid, Texas would suffer no injury. Not so here. Were the Defendants to rapidly expel all those to whom Title 42 could be applied, it would remove the risk of those persons' spreading their own COVID-19 infections to Texans or becoming vectors for the further spread of COVID-19 from some other person to Texans. Likewise, were the Defendants to detain all persons illegally arriving at the southwest border until they are determined not to carry the COVID-19 virus, that would remove the risk of those persons' spreading their own COVID-19 infections to Texans. Texas's injuries are directly traceable not to aliens' choices to cross the southwest border illegally, but to the Defendants' choice of how to respond.

4. Texas's injuries are redressable through a decree from the Court.

Finally, Texas's injuries can be redressed through an injunction that the Court is authorized to grant. Texas described immediately above how the Defendants' actions could either eliminate or ameliorate its injuries; an injunction from the Court requiring those actions would thus redress those injuries. The only question is whether the Court has the power to grant such an injunction. It does.

Neither the statutory detention requirements nor the Title 42 program itself invest so much discretion in the Defendants that the Court lacks a standard by which their actions can be judged. *See* 5 U.S.C. § 701(a)(2); *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). But to honor the APA's basic presumption of judicial review, that exception is read "quite narrowly[.]" *Dept. of Homeland Sec. v. Regents of the Univ. of Calif.*, 140 S. Ct. 1891, 1905 (2020) (quoting *Weyerhaeuser Co. v. U.S. Fish & Wildlife Svc.*, 139 S. Ct. 361, 370 (2018)). That narrow exception does not apply here.

First, the question is not over the statute, 42 U.S.C. § 265, empowering the CDC to promulgate the Final Rule, 42 C.F.R. § 71.40. Once the Final Rule was adopted, the CDC was limited not just by the statute, but by the Final Rule itself—and the Final Rule, by mandating what a Title 42 order must address, *see* 42 C.F.R. § 71.40(c), establishes the parameters for what the CDC must consider. Further, by establishing that the CDC may "consult with any State and local authorities" as deemed "appropriate in [its] discretion," it sets forth an obligation to justify why that discretion was, or was not, exercised. *See Regents*, 140 S. Ct. at 1913–1915 (secretary had discretion to determine how much weight to give reliance interests, but was required to explain her decision not to).

Second, the Final Rule and the statute each set forth sufficient criteria by which the Defendants' actions can be judged. By announcing in the Final Rule the "general policy by which its exercise of discretion will be governed," *INS v. Yang*, 519 U.S. 26, 32 (1996), the Defendants bound themselves to that policy. The Court can determine whether they adhered to that policy and, if not, whether they did so arbitrarily and capriciously. Further, the Court can determine whether the Defendants' promulgations of the July and August Orders were the result of "appli[cation] of an incorrect legal standard." *Gen.*

Land Office v. U.S. Dept. of the Interior, 947 F.3d 309, 320 (5th Cir. 2020); *Stewart v. Azar*, 313 F. Supp. 3d 237, 262 (D.D.C. 2018). And it can, of course, determine whether the Defendants considered all relevant factors or considered irrelevant factors in reaching its conclusions. *See, e.g.*, *Regents*, 140 S. Ct. at 1913–1915.

B. Texas states a notice-and-comment claim.

Contrary to the Defendants' assertion, the July Order and the August Order were required to go through the APA's standard notice-and-comment procedures. The July and August Orders were not enforcement actions; they did not select persons to be removed from the country or decide who would or would not be placed into removal proceedings. Nor did they "advise the public of the [Defendants'] construction" of the Final Rule. *Perez v. Mortg. Bankers Assn.*, 575 U.S. 92, 97 (2015). Instead, they set announced the Defendants' determinations and set forth the parameters that governed when particular persons would be placed into removal proceedings and what would happen once those proceedings had commenced. *See* ECF No. 62 at ¶¶ 77–78. They were, that is, legislative rules—rules that "impose legally binding obligations or prohibitions on regulated parties" rather than "merely interpret[ing] a prior statute or regulation[.]" *Natl. Mining Assn. v. McCarthy*, 758 F.3d 243, 251–252 (2014). And those rules require notice and comment. 5 U.S.C. § 553(b).

That the October Order was issued without notice and comment is beside the point. For one, that order is not being challenged. For two, at that stage in the pandemic, such an order, despite not including the requisite language, was arguably justified by the APA's good-cause exceptions. 5 U.S.C. § 553(b)(B), (d)(3). But there was no such justification for the Defendants' decision to put Title 42 procedures on hold for unaccompanied minor aliens. The Defendants

decided on that policy the day after the D.C. Circuit lifted a stay that would have allowed them to resume applying Title 42 to those minors, did not announce the decision for several weeks, and then took five months to announce their (retroactive) justification. *See* ECF No. 62 at ¶¶ 49–51, 79; ECF No. 68 at 25–26.

C. Texas's mandatory-detention claims are not precluded.

As Texas described in its First Amended Complaint, the Defendants are required to detain aliens claiming asylum until their claims have been adjudicated, and they are required to detain aliens for purposes of determining whether those aliens have a communicable disease of public-health significance. ECF No. 62 at ¶¶ 27–33, citing 8 U.S.C. §§ 1182, 1222(a), 1225(a)(1). Neither of those claims is subject to claim preclusion.

An assertion of claim preclusion—that a party is barred from bringing a claim because it was decided in a previous suit—requires four elements, the fourth of which is that the same claim was involved in both actions. *See Hou. Profl. Towing Assn. v. City of Houston*, 812 F.3d 443, 447 (5th Cir. 2016). Whether the same claim was involved in both actions depends on whether the two cases are based on the same nucleus of operative facts. *Hou. Profl. Towing*, 812 F.3d at 447. (cleaned up). That, in turn, depends on a pragmatic determination that weighs whether the facts are related in time, space, origin, or motivation; whether they form a convenient trial unit; and whether treating them as a unit conforms to the parties' expectations. *Id.* (quoting *Petro-Hunt LLC v. U.S.*, 365 F.3d 385, 396 (5th Cir. 2004) and RESTATEMENT (SECOND) OF JUDGMENTS § 24(2)). It is that element on which the Defendants' assertion founders, because while this case and the *Texas v. Biden* case to which the

Defendants point both involve the detention of aliens, they are not based on the same nucleus of operative facts.

In this case, Texas challenges the Defendants' failure to detain asylum applicants pending completion of their asylum proceedings and to detain aliens pending the determination of whether they are inadmissible due to carrying COVID-19. On the other hand, *Texas v. Biden*—tried by another bench of this Court—involved suspension of the Migrant Protection Protocols, a program under which many aliens attempting to cross into the United States from Mexico to claim asylum were required to remain in Mexico pending their asylum determinations. *See* ECD No. 80 at Appx. 50–58 (*Texas v. Biden* complaint describing program). The requirement to detain aliens pending their asylum determinations was relevant there only because Section 1225 also allows the Defendants to comply with it by returning asylum applicants to a neighboring country—and the Defendants, who admitted they could not comply with Section 1225's detention mandate, were therefore willfully violated Section 1225 by willfully ending their ability to return asylum applicants to Mexico. *Id.* at Appx. 70–72, 118–120.

This case does not arise out of the Defendants' cancellation of the Migrant Protection Protocols. Nor did that case concern the Defendants' failure to detain aliens arriving at the southwest border until it determines whether they are carrying COVID-19. And this case does not attempt to re-litigate a case that Texas already won in an attempt to win additional relief that Texas forgot to seek the first time. *Cf.* ECF No. 79 at 28–29 (citing *Leal v. Azar*, No. 2:20-cv-185, 2020 WL 7672177 (N.D. Tex. Dec. 23, 2020)). And, by winning relief in full in *Texas v. Biden*, Texas ensures only that the Defendants will attempt to re-establish the Migrant Protection Protocols in good faith; it cannot require Mexico to agree to reconstitute the program on the same terms as previously

existed, and even if it could do so it could not bind Mexico to those terms in perpetuity. *See Texas v. Biden*, 10 F.4th 538, 557–559 (5th Cir. 2021).

Finally, to the extent that the Court determines that there is overlap between *Texas v. Biden* and this case, *see, e.g.*, ECF No. 79 at 52 (allowing Defendants to cease implementing Migrant Protection Protocols one they have "sufficient detention capacity to detain all aliens subject to mandatory detention under Section [1225]"), the proper remedy is a stay of the overlapping claims pending completion of that case.

D. The Court has jurisdiction to hear the mandatory-detention claims.

According to the Defendants, the Court has been stripped of jurisdiction to hear Texas's mandatory-detention claims. ECF No. 79 at 31. Yet the statute it cites, 8 U.S.C. § 1252(f)(1), prohibits "enjoin[ing] or restrain[ing] the operation of" Section 1222 on a class-wide basis—that is, it "prohibits federal courts from granting classwide injunctive relief *against the operation*" of Section 1222, not mandating compliance with Section 1222's mandatory language *Reno v. Am.-Arab Anti-Discrim. Cmte.*, 525 U.S. 471, 481–482 (1999) (emphasis added). It was this exact language that Justice Thomas quoted in the passage that the Defendants cite—quoted to criticize the sophistry of an argument that would allow a class to enjoin operation of the statute by claiming it was only seeking to enjoin actions that exceeded the statute. *Nielsen v. Preap*, 139 S. Ct. 954, 975 (2019) (Thomas., J., concurring) (cited at ECF. No. 79 at 32).

As Judge Kaczmarek pithily put it, Section 1252(f)(1) "does not apply because [Texas is] not seeking to *restrain* Defendants from enforcing Section [1222]. Plaintiffs are attempting to make Defendants *comply* with Section [1222]." *Texas v. Biden*, 2021 WL 3603341, at *15. No more need be said.

E. The Court has jurisdiction to hear the Take Care claims.

The Defendants spend little time on this argument, and for good reason. Their first argument, that the President's subordinates cannot violate the Take Care Clause, *see* ECF No. 79 at 35, cannot be correct. The Constitution, after all, vests all executive power in the President, U.S. CONST. art. II, § 1, cl. 1; even the Defendants recognize that "[i]t is *his* responsibility to take care that the laws be faithfully executed." ECF No. 79 at 35 (quoting *Free Enter. Fund v. Pub. Co. Acctg. Oversight Bd.*, 561 U.S. 477, 493 (2010). "The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known," *Printz v. United States*, 521 U.S. 898, 922 (1997); the upshot of this unity is that executive officials exercise their power only through the authority of the President. They exercise their power, that is, under the same duty as the President from whom that power is delegated: a duty to take care that they are executing the laws faithfully. *See, e.g.*, *Myers v. United States*, 272 U.S. 52, 117 (1926) (Taft, C.J.); *Texas v. United States*, 2021 WL 3683913, at *40.

Their second argument, that no court has found a Take Care Clause claim justiciable, is simply wrong. *See Las Americas Immigrant Advocacy Ctr. v. Trump*, 475 F. Supp. 3d 1194, 1213 (D. Or. 2020) (Immergut, J.); *Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553, 561 (9th Cir. 2019) (Ikuta, J., joined by Tallman and R. Smith, JJ.). And their supporting citation, *Mississippi v. Johnson*, 71 U.S. 475 (1866), does not say what they think. The Supreme Court there both drew a distinction between mandatory duties and those that required the exercise of discretion, *id.* at 498–99, and held that it had no jurisdiction to accept an original petition for a writ of injunction against a sitting president, *id.* at 501.

Finally, the Defendants have no response to Texas's point that "a long history of judicial review of illegal executive action, tracing back to England," establishes that the Court's equitable jurisdiction allows it to grant injunctive relief under the Take Care Clause. *See* ECF No. 62 at ¶ 98 (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327–28 (2015). The Defendants, after all, are as bound by the law as everyone else. *Cf. Regents*, 140 S. Ct. at 1909 ("Justice Holmes famously wrote that '[m]en must turn square corners when they deal with the Government.' *Rock Island, A. & L. R. Co. v. United States*, 254 U.S. 141, 143 (1920). But it is also true, particularly when so much is at stake, that 'the Government should turn square corners in dealing with the people.' *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting).")

Texas remains entitled to a preliminary injunction.

A. The July Order was issued without required the required notice-and-comment period and states post-hoc justifications, not explanations and conclusions.

According to the Defendants, there is no basis to question its "fully explained" decision in the July Order to exempt unaccompanied minor aliens from the Title 42 process. ECF No. 79 at 37. The July Order, they say, "make[s] clear that [they] acknowledged the change in [their] position," "considered the relevant information," and "in an exercise of [their] scientific and medical judgment," determined that "changed circumstances support[ed]" their retroactive reversal. *Id.* at 38. Texas agrees that the face of the July Order makes it appear that way.

But that appearance requires leaning around the legs of the elephant-sized pretext in the room. The day after the injunction preventing the use of Title 42 procedures on unaccompanied minor aliens was lifted, the Defendants ordered

the Border Patrol not to put those procedures back into place. The Defendants skirted normal procedures to put that order into place. They did not inform the world of that order, instead announcing weeks later what appeared to the world to be a retroactive, unilateral decision to keep the now-lifted stay in place. When they did so, they announced that they were in the process of re-evaluating the procedures they had already announced they were not putting back into place. They refused to announce a formal proposal on which the public could have commented. And they waited five months—ample time for an agency acting in good faith to announce a proposal, accept comment on it, and revise the proposal to address those comments—before publishing the justifications for the stand-down they had decided on six months earlier. *See generally* ECF No. 68 at 10–11, 14–15, and 23–26.

Nor does the Court need to ignore this evidence of pretext. First, the Defendants have not asked the Court to strike that evidence; they merely complain about it in a footnote. *See* ECF No. 79 at 39–40 fn.17. Second, Rodney Scott's declaration regards specific facts and occurrences—an actual direction that was received, and actual question that was asked, and an actual practice of DHS. *See* ECF No. 69 at Appx. 34–41. He is not acting as an expert witness. *Cf.* 18 U.S.C. § 207(j)(6)(A); 6 C.F.R. § 5.49(a). He is specifically allowed to "giv[e this] testimony under oath[.]" *Id.* § 207(j)(6).

As Texas has already discussed, the July and August Orders were substantive, rights-affecting, enactments for which there was not good cause to dodge the APA's notice-and-comment requirements. *See* Opposition § B. And, again, as Texas already discussed, the foreign-affairs exception to the APA does not apply because the July and August Orders do not "involve the mechanisms through which the United States conducts relations with foreign states," nor are they the product of "an agreement between the United States

and another country[.]" *Capital Area Immigts.' Rights Coalition v. Trump*, 471 F. Supp. 3d 25, 55 (D.D.C. 2020); *see* ECF No. 68 at 26. Indeed, as the Defendants repeatedly point out, the July and August Orders involve public health, not immigration. *See, e.g.,* ECF No. 79 at 20–23, 37–41.

B. The facts published by the Defendants themselves support the existence of a *de facto* policy of excepting family-unit members from Title 42.

As Texas pointed out in its supporting brief, the sheer numbers of family-unit aliens released into the United States makes it all but impossible for the Defendants to be conducting a true case-by-case analysis of whether those aliens should be placed in the Title 42 process and whether they should be paroled into the country. ECF No. 80 at 11–14, 26–29. The Defendants' counter is that Texas simply misunderstands what is actually going on: actually, they say, Title 42 cannot be applied to many of the aliens who are being released into the country, and, actually, for each of the hundreds of aliens per day who are arriving at the southwest border, they actually are conducting an individual, case-by-case analysis of whether they qualify for an exception to Title 42 or the statutory detention requirements. ECF No. 79 at 43–48. For this counter-argument, however, the defendants offer no facts.

The Government's support for its contentions is a brief declaration from David Shahoulian, DHS's Assistant Secretary for Border and Immigration Policy. *See* ECF No. 79 at 43–44 (citing ECF. No. 80 at Appx. 203–207). This declaration, however, speaks only in gross, repeating many of the terms of the July and August Orders, *id.* Appx. 204–205 ¶¶ 3–6, before stating flatly that Title 42 simply does not apply to "[a]pproximately 80% of the non-citizen family-units currently being encountered along the southwest border," *id.*

Appx. 205 ¶ 7. That conclusory statement explains little and, given its lack of support, is unworthy of credit:

- What time period is "currently"? *Id.* Appx. 205 ¶ 7. It wasn't until May that the number of family-unit members subjected to Title 42 fell to roughly 20%; even a month before that, more than a third of those aliens were being placed into Title 42 processes. *See* ECF No. 68 at 12.
- How many aliens has Mexico refused to accept them because of their nationality? *See* ECF No. 80 at Appx. 204–205 ¶ 5.
- How many aliens has Mexico refused to accept them because of the ages of the family members? *See* ECF No. 80 at Appx. 204–205 ¶ 5.
- How many aliens are excepted because their countries require them to test negative for COVID? *Id.* at Appx. 205 ¶ 6.
- How many aliens are excepted because of "practical limitations on the acceptance of repatriation flights … that effectively prevent the[ir] timely expulsion"? *Id.*
- How many aliens have the Defendants removed from Title 42 through the totality-of-the-circumstances exception? And what was the basis for that exception? *Id.* Appx. 205 ¶ 8–9.

The Defendants no doubt had this information available. Yet they choose, instead, to rest their argument on the very statistic that Texas pointed out supports the need for the injunction: As the number of family-unit members has rocketed, the number of Title 42 expulsions of those aliens has cratered.

It is this last number that is particularly important: The Defendants have repeatedly claimed—and continue to claim—that they simply are not capable of following the mandatory-detention laws. *See, e.g.*, ECF No. 80 at Appx. 200; *State v. Biden*, 10 F.4th 538, 558–559 (5th Cir. 2021). A "class-wide parole scheme that paroled aliens into the United States simply because DHS does

not have the detention capacity would be a violation of the narrowly prescribed parole scheme in section 1182 which allows parole 'only on a *case-by-case* basis.…'" *State v. Biden*, 2021 WL 3603341, *22 fn. 11 (emphasis in original). And this is what Texas has alleged: That Defendants' *de facto* policy is simply not to apply Title 42 to family-unit members. The Defendants' only response is that they are continuing to rapidly expel *some* family-unit aliens. ECF No. 79 at 44. That establishes only that there are also exceptions to the *de facto* policy, not that there is no such *de facto* policy in place. And without knowing *why* the family-unit aliens are being removed from Title 42—that is, without the information that the Defendants pointedly did not cite—the Defendants cannot overcome the inferences that their own whopping numbers establish.

C. Section 1222(a) continues to mandate that the Defendants screen illegal aliens for COVID-19.

Neither do the Defendants' arguments against Section 1222(a) defeat Texas's entitlement to a preliminary injunction requiring them to enforce that section's mandatory requirements.

First, the Defendants are wrong that Section 1222(a)'s language is not mandatory; even the case they cite acknowledges that statutory language mandating detention does, in fact, create a mandatory obligation to detain. ECF No. 79 at 47 (citing *Texas v. United States*, No. 21:21-40618, ___ F. 4th ___, 2021 WL 4188102, at *7 (5th Cir. Sept. 15, 2021) (allowing injunction to go into effect to the extent it prevented officials from "refus[ing] to detain aliens described in [8 U.S.C. §] 1226(c)(1)," which mandates detention of certain aliens). Texas already discussed how this is both the most natural and the required reading of that language. *See* ECF No. 68 at 27–29.

Second, the Defendants' reading of Section 1222(a) to apply only to "aliens … arriving at ports of the United States" is wrong. Section 1222(a)'s operative

language, which describes what the Defendants must do, is unitary, covering all subject aliens: The Defendants must detain subject aliens "for a sufficient time to enable the immigration officers and medical officers to subject such aliens to observation and an examination sufficient to determine whether or not they belong to inadmissible classes" (in this case, carriers of COVID-19). 8 U.S.C. § 1222(a). The prefatory language describing the subject aliens, however, covers two separate classes. The first class is "aliens (including alien crewmen) arriving at ports of the United States[.]" *Id.* The second class is "*any aliens*" whenever the Defendants have "received information showing that [they] are coming from a country or have embarked at a place where" a covered disease such as COVID-19 is "prevalent or endemic[.]" *Id.* It is this second group—any aliens coming from a country (here, Mexico) where a covered disease (here, COVID-19) is prevalent or endemic—whom the Defendants are not properly detaining and inspecting before releasing them into the country.

Third, the Defendants' complaint that Texas hasn't specified how long aliens should be detained to be cleared of potential COVID-19 infection is both irrelevant and incorrect. It is irrelevant because Section 1222(b) already describes how the Defendants are to treat detained aliens: They are to be examined by "medical officers of the United States Public Health Service," who "certify, for the information of the immigration officers and the immigration judges," the aliens' medical conditions. 8 U.S.C. § 1222(b). It is incorrect because Texas specifically requested that the Defendants be ordered to detain those aliens "for a period sufficient to determine, … with the guidance of the Department of Health and Human Services, that those aliens are not carriers of" COVID-19. The Defendants, who include the Department of Health and Human Services, HHS's Secretary, the CDC, and the CDC's Director are certainly as aware of their own guidance as is Texas.

D. The harm from Texas's injuries is irreparable, and the public interest favors an injunction.

Texas has already described why the harms the Defendants' actions are causing are irreparable—it cannot un-infect those who catch COVID-19; it cannot un-spend monies spent treating those with COVID-19; it cannot un-spread a virus that is brought into the country by the aliens the Defendants aren't screening; it cannot un-enroll those ill with COVID who are sapping healthcare providers and resources that would otherwise have been available. *See* ECF 68 at 29–31. And the Defendants cannot retreat to generalized claims about an injury to the way they have chosen to run the immigration system: The detention requirements on which Texas has sued are mandatory, not discretionary. The requirement to include qualifying aliens in the Title 42 procedures is mandatory, not discretionary. Removal of qualifying aliens from Title 42 is the exception, not the rule, as Defendants have made it.

The duty to see that the laws are faithfully executed does not give the Defendants the right to decide which laws are enforced; it does not authorize them to dispense with enforcing the law when it believes the situation warrants. And "[g]iven this duty to take care that the laws are faithfully executed, the Constitution's system of separation-of-powers, and the treatment of the dispensing power in American history and tradition, [one] is hard pressed … to see how the Government can suggest that the Constitution confers upon the Executive the 'discretion' to ignore clear congressional commands contained in Sections [1182] and [1222]." *Texas v. United States*, 2021 WL 3683913, at *40. Nor does the parole power authorize a wholesale exemption of qualifying aliens from mandatory detention or expulsion. "Instead, the Executive—and thus, the [Defendants]—must exercise any discretion accorded to it by statute in the manner in which Congress has

prescribed." *Id.* (citing, among others, *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 327 (2014), and *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993)). There is simply "no public interest in the perpetuation of unlawful agency action," here, disobeying a statutory command. *League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). Rather, "'the public is served when the law is followed,' *Daniels Health Scis., LLC v. Vascular Health Scis., LLC*, 710 F.3d 579, 585 (5th Cir. 2013), and the public will be served if the Executive Branch is enjoined from implementing and enforcing a policy that instructs officials to violate a congressional command." *Texas v. United States*, 2021 WL 368913, at *60.

Prayer for Relief

Texas prays that the Court deny the Defendants' motion to dismiss. It further prays that the Court issue a preliminary injunction prohibiting the Defendants from excepting unaccompanied alien children from the Title 42 procedures solely on their status as unaccompanied alien children; prohibiting the Defendants from excepting from the Title 42 procedures those family-unit members who meet the definition of "covered aliens" given in the October Order; and requiring the Defendants to detain aliens arriving on the southwest border for a period sufficient to determine, in accordance with the requirements of 8 U.S.C. § 1182 and with the guidance of the Department of Health and Human Services, that those aliens are not carriers of the SARS-CoV-2 virus.

Dated October 11, 2021.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

/s/ *Aaron F. Reitz*
AARON F. REITZ
Lead Counsel
Deputy Attorney General for Legal Strategy
Texas Bar No. 24105704

BRENT WEBSTER
First Assistant Attorney General

aaron.reitz@oag.texas.gov

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700

LEIF A. OLSON
Special Counsel
Texas Bar No. 24032801
leif.olson@oag.texas.gov

MATTHEW G. WHITAKER
Admitted *pro hac vice*
America First Legal Foundation
300 Independence Avenue SE
Washington, D.C. 20003
(202) 964-3721
info@aflegal.org

CHRISTOPHER J. HAJEC
Admitted *pro hac vice*
MATT A. CRAPO
Admitted *pro hac vice*
Immigration Reform Law Institute
25 Massachusetts Ave., NW, Suite 335
Washington, D.C. 20001
(540) 205-7986
litigation@irli.org

Counsel for the State of Texas

Certificate of Conference

I certify that I conferred with Brian Stoltz, counsel for the Defendants, on October 11, 2021, who informed me that the Defendants do not oppose this motion.

/s/ Leif A. Olson

Certificate of Service

I certify that on October 11, 2021, I filed this motion with the Court's CM/ECF system, which will serve it on all counsel of record.

/s/ Leif A. Olson

United States District Court
Northern District of Texas
Fort Worth Division

STATE OF TEXAS, *Plaintiff,* v. JOSEPH R. BIDEN, JR., *et al.*; *Defendants.*	Case 4:21-cv-00579-P

Texas's Unopposed Motion for Leave to File Out of Time

Texas moves for leave to file its consolidated reply and opposition on October 11, 2021, an extension from its original deadline of October 8, 2021. This motion is sought not for delay, but so justice can be done.

The counsel primarily responsible for drafting and filing Texas's document was unexpectedly struck by debilitating migraine 30 minutes before filing the final documents. The migraine lasted over 48 hours. Having just recently fully recovered, counsel is now prepared to file, which the Defendants do not oppose. In consideration of that courtesy and opposing counsel's schedule, Texas does not oppose the Defendants' reply deadline being set for October 22.

Dated October 11, 2021.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700

AARON F. REITZ
Lead Counsel
Deputy Attorney General for Legal Strategy
Texas Bar No. 24105704
aaron.reitz@oag.texas.gov

/s/ Leif A. Olson
LEIF A. OLSON
Special Counsel
Texas Bar No. 24032801
leif.olson@oag.texas.gov

Counsel for the State of Texas

MATTHEW G. WHITAKER
Admitted *pro hac vice*
America First Legal Foundation
300 Independence Avenue SE
Washington, D.C. 20003
(202) 964-3721
info@aflegal.org

CHRISTOPHER J. HAJEC
Admitted *pro hac vice*
MATT A. CRAPO
Admitted *pro hac vice*
Immigration Reform Law Institute
25 Massachusetts Ave. NW, Suite 335
Washington, D.C. 20001
(540) 205-7986
litigation@irli.org

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/s/ Leif A. Olson

Certificate of Service

I certify that on October 11, 2021, I filed this motion with the Court's CM/ECF system, which will serve it on all counsel of record.

/s/ Leif A. Olson

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

STATE OF TEXAS,

Plaintiff,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, *et al.*,

Defendants.

No. 4:21-cv-00579-P

BRIEF OF *AMICI CURIAE* 29 LEGAL SERVICE AND ADVOCACY ORGANIZATIONS IN OPPOSITION TO PLAINTIFF'S RENEWED MOTION FOR PRELIMINARY INJUNCTION

Laura L. Smith
Texas Bar No. 24066039
Emma L. Persson
Texas Bar No. 24110219
O'MELVENY & MYERS LLP
2501 North Harwood Street
Suite 1700
Dallas, Texas 75201-1663
Telephone: +1 972 360 1900
Facsimile: +1 972 360 1901
lsmith@omm.com
epersson@omm.com

Daniel J. Tully*
California Bar No. 309240
JUSTICE ACTION CENTER
P.O. Box 27280
Los Angeles, California 90027
Telephone: +1 323 450 7275
daniel.tully@justiceactioncenter.org

**pro hac vice application forthcoming*

Counsel for Amici Curiae 29 Legal Service and Advocacy Organizations

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are 29 legal service and advocacy organizations who serve immigrant communities throughout the country, including many along the border in Texas, Arizona, and California.[2] *Amici* are invested in ensuring that all people, including immigrants, are treated with dignity and share a common mission of advancing and protecting the constitutional and statutory rights of individuals seeking asylum and legal status in the United States. *Amici* have worked for decades to improve immigrants' access to legal services and representation, to ensure immigrants arriving in the United States can pursue all relief they are entitled to seek under the law, and to ensure immigrants' constitutional due process and other rights are upheld.

Collectively, *amici* provide direct legal services to tens of thousands of immigrants annually. Relevant here, many of *amici*'s clients seek relief at the U.S.-Mexico border and have been subject to Defendants' policy of summarily expelling immigrants pursuant to a purported health order under 42 U.S.C. § 265 (the "Title 42 Policy"). *See* Appendix to Texas's Renewed Motion for Preliminary Injunction, Dkt. No. 69 ("App'x") at 4-11 (*Order Suspending the Right to Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists*, 85 Fed. Reg. 65806 (Oct.

[1] The parties have consented to the filing of this brief. *See* Unopposed Motion of Justice Action Center for Leave to File Brief of *Amici Curiae* 29 Legal Service and Advocacy Organizations in Opposition to Plaintiff's Renewed Motion for Preliminary Injunction at 5. No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *Cf.* Fed. R. App. Proc. 29(a)(4)(E).

[2] *Amici* are Al Otro Lado; American Immigration Council; Asylum Access; Asylum Access México (AAMX) A.C.; Catholic Legal Immigration Network, Inc.; Center for Civic Policy; Center for Gender and Refugee Studies; Comunidad Maya Pixan Ixim; Disciples Immigration Legal Counsel; First Focus on Children; Florence Immigrant and Refugee Rights Project; FWD.us; Immigrant Defenders Law Center; Innovation Law Lab; International Mayan League; Justice Action Center; Justice for Our Neighbors El Paso; Kids in Need of Defense ("KIND"); Kino Border Initiative; La Raza Centro Legal SF; La Raza Community Resource Center; Migrant Center for Human Rights; National Immigration Law Center; National Immigration Project ("NIPNLG"); Project Corazon, Lawyers for Good Government; the Refugee and Immigrant Center for Education and Legal Services ("RAICES"); Refugees International; Student Clinic for Immigrant Justice, Inc.; and Taylor Levy Law.

16, 2020)), 16-30 (*Public Health Reassessment and Order Suspending the Right to Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists*, 86 Fed. Reg. 42828-02 (Aug. 5, 2021)). Also relevant to this case, several *amici* contract with the federal government to represent unaccompanied children,[3] a particularly vulnerable population to which Congress has afforded special substantive and procedural rights in immigration proceedings.

In addition to providing direct legal services, *amici* have litigated to protect immigrants' rights to access asylum and other relief under U.S. law and have appeared as *amici* in cases like this one that impact their organizational missions and ability to serve clients. *E.g.*, *Immigrant Defenders Law Center v. U.S. Dep't of Homeland Security*, No. 2:21-cv-00395-FMO-RAO (C.D. Cal.); *J.B.B.C. v. Wolf*, No. 1:20-cv-01509 (D.D.C.); *Immigrant Defenders Law Center v. Wolf*, No. 2:20-cv-09893 (C.D. Cal.); *O.M.G. v. Wolf*, No. 1:20-cv-00786 (D.D.C.); *Innovation Law Lab v. Wolf*, No. 3:19-cv-00807 (N.D. Cal.); *CAIR v. Trump*, No. 1:19-cv-02117 (D.D.C.); *Grace v. Barr*, No. 1:18-cv-01853 (D.D.C.).

Amici have a strong interest in this case, which is a thinly veiled attempt to limit the ability of immigrants to request and access a legal process afforded to them by federal law. Indeed, Plaintiff asks the Court to enjoin Defendants to summarily expel unaccompanied children and vulnerable families under the Title 42 Policy, which is subject to pending litigation in other courts and just last week was deemed "likely unlawful" by a federal court. *Huisha-Huisha v. Mayorkas*, No. 21-CV-00100-EGS, 2021 WL 4206688, at *11-12, 18 (D.D.C. Sept. 16, 2021). Given their work representing and advocating for immigrants in general, and unaccompanied children and families in particular, *amici* have a compelling interest in the outcome of this litigation.

Amici respectfully submit this brief to assist the Court in evaluating the merits of Plaintiff's pending Renewed Motion for Preliminary Injunction. In light of their expertise and experience working with individuals subject to the Title 42 Policy, *amici* believe they will offer the Court a

[3] An "unaccompanied child" has "no lawful immigration status in the United States;" has not turned 18 years old; and has "no parent or legal guardian in the United States [] available to provide care and physical custody." 6 U.S.C. § 279(g).

unique perspective as to the public interest and why it overwhelmingly favors upholding Defendants' decisions to except unaccompanied children and families from the policy. Plaintiff's efforts to set aside Defendants' decisions jeopardize *amici*'s interests by potentially harming the tens of thousands of individuals whom *amici* represent.

INTRODUCTION

In March 2020, former President Trump issued the Title 42 Policy, ostensibly on public health grounds, to effectively prevent any immigrant arriving at the southern border from requesting and accessing the legal process afforded to them under U.S. law. For the last year and a half, the policy has been used to categorically shut the door on tens of thousands of people seeking safety, even though the policy never has had a sound public health justification. Each individual, family, and unaccompanied child has their own story of the resolve, resourcefulness, and courage that compelled them to take the perilous journey that would enable them to seek protection and the promise of a better life in the United States. Because of the Title 42 Policy, however, most of these stories share a common thread: the federal government returns these vulnerable individuals to their home countries—and the very persecution they fled from—or to Mexico, where migrants are known to be deliberately targeted by gangs and cartels for kidnappings, rape, violent attacks, and death.

Despite a growing chorus of objections to the Title 42 Policy's purported public health rationale by advocates, the international community, and the federal government's own health experts, Defendants have continued to enforce the policy. Earlier this year, however, President Biden categorically excluded unaccompanied children from the Title 42 Policy and began granting case-by-case exceptions to families on humanitarian grounds. It is these exceptions that Plaintiff takes aim at in this case. In its Renewed Motion for Preliminary Injunction, Plaintiff asks the Court to set aside these exceptions. Put another way, Plaintiff seeks an order requiring Defendants to apply the Title 42 Policy to, and summarily expel, vulnerable unaccompanied children and families without exception. The public interest—a factor that "should be given considerable

weight" in the preliminary injunction analysis, *Texas v. United States*, 328 F. Supp. 3d 662, 740-41 (S.D. Tex. 2018)—weighs heavily against Plaintiff's requested injunction for at least two reasons.

First, Defendants' Title 42 Policy is unlawful, as several federal courts have recognized. *See Huisha-Huisha*, 2021 WL 4206688, at *18 (on motion for preliminary injunction, holding that "the Title 42 Process is likely unlawful"); *accord P.J.E.S. by and through Escobar Francisco v. Wolf*, 502 F. Supp. 3d 492, 511-16 (D.D.C. 2020); *J.B.B.C. by and through Barrera Rodriguez v. Wolf*, No. 20-CV-1509-CJN, 2020 WL 6041870, at *2 (D.D.C. June 26, 2020). The public interest would not be served by expanding an unlawful policy as Plaintiff requests, *cf. Daniels Health Scis., LLC v. Vascular Health Scis., LLC*, 710 F.3d 579, 585 (5th Cir. 2013), particularly when such an order is likely to conflict with others issued in pending litigation elsewhere, *see W. Gulf Mar. Ass'n v. ILA Deep Sea Local 24, S. Atl. & Gulf Coast Dist. of ILA, AFL-CIO*, 751 F.2d 721, 728 (5th Cir. 1985).

Second, Defendants' exceptions support the public interest by ensuring that unaccompanied children and certain vulnerable families are not wrongly expelled and are permitted to access the legal process, expressly afforded to them under U.S. law, to seek protection and legal status from this country. This is not only lawful, but also moral and humane—especially given that the Title 42 Policy requires the return of these children and families to certain harm. It is squarely within the public interest to prevent individuals "from being wrongfully removed, particularly to countries where they are likely to face substantial harm." *Nken v. Holder*, 556 U.S. 418, 436 (2009).

For these reasons, set forth in greater detail below, the Court should deny Plaintiff's Renewed Motion for Preliminary Injunction.

ARGUMENT

Plaintiff asks the Court to issue a preliminary injunction prohibiting Defendants from excepting unaccompanied children and family units from the Title 42 Policy if they would otherwise be subject to expulsion under Title 42 and requiring the detention of individuals arriving at the U.S.-Mexico border for a period sufficient to ensure they do not have COVID-19. *See* Brief Supporting Renewed Motion for Preliminary Injunction, Dkt. No. 68 ("Mot.") at 32. In other words, Plaintiff asks the Court to require Defendants to apply the Title 42 Policy to most, if not all, unaccompanied children and families arriving at the border and to expel them without affording them any due process or the ability to seek protections that Congress expressly granted them in the Immigration and Nationality Act. To obtain such relief, Plaintiff must demonstrate: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that such threatened injury outweighs any damage that the injunction might cause; and (4) that the injunction will not disserve the public interest. *See Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Plaintiff cannot satisfy its burden to justify the sweeping relief it seeks from this Court. Defendants thoroughly explain why Plaintiff's claims lack merit and why the Amended Complaint's conclusory allegations similarly fail to substantiate any threat of injury absent an injunction, much less a *substantial* threat of *irreparable* harm, and *amici* will not repeat those arguments here. *See* Consolidated Brief in Support of Defendants' Motion to Dismiss and Defendants' Response to Plaintiff's Renewed Motion for Preliminary Injunction, Dkt. No. 79 ("Opp.") at 36-49. *Amici* instead address the final preliminary injunction factor relating to the public interest, which is of particular significance to them because of the effects the requested injunction would have on the tens of thousands of vulnerable immigrant children and families whom *amici* serve.

The public interest "should be given considerable weight" in the preliminary injunction analysis, and "[i]f no public interest supports granting preliminary relief, such relief should ordinarily be denied." *Texas*, 328 F. Supp. 3d at 740-41. Here, beyond repeating its allegation that

Defendants' conduct is purportedly unlawful, Plaintiff has not offered a single factual or legal argument to substantiate its otherwise bare assertion that a preliminary injunction is in the public interest. *See* Mot. at 31. This is not sufficient to carry Plaintiff's burden of persuasion. *See Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 574 (5th Cir. 2012) ("A preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements."); *see also* Opp. at 49-50. Given Plaintiff's failure of proof on this critical factor, the Court need not even consider if the requested injunction would undermine the public interest. *See Texas*, 328 F. Supp. 3d at 740-41 (factor weighs against preliminary injunction if plaintiff fails to show injunction would support the public interest "even if the public interest would not be harmed by" the injunction) (quoting 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2948.4).

In any event, the public interest would be substantially harmed by the requested relief. As *amici* illustrate in the stories below, the Title 42 Policy has caused vulnerable children and families extreme suffering, including kidnapping, rape, violent attacks, and death. Plaintiff seeks an order that would: (i) expand the Title 42 Policy, which other federal courts have concluded is likely unlawful; and (ii) subject unaccompanied children and families to summary expulsions in a manner inconsistent with statutory requirements. Such an order threatens children and families with substantial harm and trauma in Mexico or their home countries, including possible forced *refoulement* and treaty violations, and undermines the public's interest in, among other things, the consistent application of the law and the protection of statutory and constitutional rights for vulnerable individuals seeking protection in the United States.

I. THE TITLE 42 POLICY IS UNLAWFUL AND CONTRARY TO THE PUBLIC INTEREST

As a threshold matter, Defendants' policy of summarily expelling immigrants under a purported public health rationale is a misuse of Title 42 and contrary to statutes enacted by Congress requiring the executive branch to provide procedural protections to individuals seeking

asylum. Plaintiff's requested injunction asks the Court to engage in judicial overreach by forcing Defendants to expand this unlawful policy. Judicially compelling the government to broaden the Title 42 Policy against unaccompanied children and vulnerable families is directly at odds with the public interest in upholding our laws and protecting vulnerable populations.

The statutory text is clear: Section 265 of Title 42—the provision upon which the Title 42 Policy rests—provides that the Surgeon General may, in the interest of public health, "prohibit, in whole or in part, the introduction of persons and property" from locations where a communicable disease exists to prevent the spread of such illness in the United States. 42 U.S.C. § 265.[4] The statute does not, however, contain any language referencing removals or expulsions or suggesting that the federal government may summarily expel individuals from the United States. This omission is critical. Multiple federal courts have now been presented with challenges to Defendants' Title 42 Policy and have concluded that the policy is likely unlawful precisely because nothing in Section 265 of Title 42 authorizes the federal government to expel individuals from the United States. *See Huisha-Huisha*, 2021 WL 4206688, at *18 (holding that "the Title 42 Process is likely unlawful" and certifying class of all family units with a minor child and parent or legal guardian); *accord P.J.E.S.*, 502 F. Supp. 3d at 511-16 (certifying class of unaccompanied children and granting classwide preliminary injunction enjoining application of the Title 42 Policy to unaccompanied children); *J.B.B.C.*, 2020 WL 6041870, at *2 (granting preliminary injunction enjoining expulsion of unaccompanied child subject to the Title 42 Policy). Indeed, as a court explained last week when enjoining Defendants from doing exactly what Plaintiff asks this Court

[4] The full text of the statute provides:

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

to require, "the plain language of Section 265, particularly when read in conjunction with the above statutes governing immigration under Title 8 of the U.S. Code, evinces no intention to grant the Executive the authority to expel or remove persons from the United States." *Huisha-Huisha*, 2021 WL 4206688, at *11-12.

Beyond the lack of textual support for the Title 42 Policy, Defendants' expulsions of individuals under the policy contravene the specific protections that Congress has extended to vulnerable individuals seeking protection from persecution, including asylum, *see* 8 U.S.C. § 1158(a)(1), withholding of removal, *see id.* § 1231(b)(3), and protection from torture, *see* Note to 8 U.S.C. § 1231. *See, e.g.*, *P.J.E.S.*, 502 F. Supp. 3d at 514 (noting that "the Government's reading of Section 265 to include the power to expel unaccompanied minors . . . conflicts with various rights granted in the TVPRA and the INA"). Additionally, given that the border remains open to commercial and private transportation, and hundreds of thousands of people *not* subject to the Title 42 Policy cross every day, there is simply no public health justification for expelling the comparatively small number of individuals appearing at the border seeking asylum, a point Defendants' own health experts have recognized going back to the inception of the Title 42 Policy. *E.g.*, Jason Dearen & Garance Burke, *Pence Ordered Borders Closed After CDC Experts Refused*, AP News (Oct. 30, 2020), *available at* https://apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health-4ef0c6c5263815a26f8aa17f6ea490ae.

Against this backdrop, Plaintiff seeks to enjoin Defendants from excepting unaccompanied children and families from the Title 42 Policy. *See* Mot. at 32. In practical terms, Plaintiff asks to *expand* a federal policy that multiple courts have already held is likely unlawful in ways that will irreparably harm some of the most vulnerable among us. *See Huisha-Huisha*, 2021 WL 4206688, at *11-12; *P.J.E.S.*, 502 F. Supp. 3d at 511-16; *J.B.B.C.*, 2020 WL 6041870, at *2. Plaintiff's requested injunction would force Defendants to expel children and families either to their home countries, from which they fled in the first instance to avoid persecution or torture, or to Mexico, where they are at high risk of kidnapping, sexual assault, exploitation, torture, and death at the hands

of gangs and cartels. If the public interest "is served when the law is followed," then it is most certainly undermined by an order that requires unlawful—and inhumane—expulsions of individuals under the Title 42 Policy. *Daniels Health Scis., LLC*, 710 F.3d at 585.

Additionally, the injunction requested by Plaintiff would directly conflict with orders issued by other federal courts, which enjoined Defendants from applying the Title 42 Policy to unaccompanied children and families. *See Huisha-Huisha*, 2021 WL 4206688, at *18 (issuing preliminary injunction enjoining application of the Title 42 Policy to families containing a minor child and parent or legal guardian); *P.J.E.S.*, 502 F. Supp. 3d at 520 (same as to unaccompanied children).[5] As the Fifth Circuit acknowledged, "[t]he federal courts long have recognized that the principle of comity requires federal district courts—courts of coordinate jurisdiction and equal rank—to exercise care to avoid interference with each other's affairs." *W. Gulf Mar. Ass'n v. ILA Deep Sea Local 24, S. Atl. & Gulf Coast Dist. of ILA, AFL-CIO*, 751 F.2d 721, 728 (5th Cir. 1985). As discussed above, the *Huisha-Huisha* and *P.J.E.S.* courts' conclusions are consistent with not only the statute's plain language and relevant legislative materials, but also the status quo, as unaccompanied children have been excepted from the Title 42 Policy for nearly a year, and families have been allowed to seek humanitarian exceptions to the policy for four months. The public's interest in uniform construction and application of the law is likewise served by considering these rulings, which are grounded in the statutory text, and avoiding an order that would disturb the status quo and conflict with pending proceedings, and a classwide injunction, in another federal court.

[5] The D.C. Circuit subsequently stayed the *P.J.E.S.* court's preliminary injunction in a one-page, per curiam memorandum order without analysis. *See P.J.E.S. v. Pekoske*, No. 20-5357, Doc. No. 1882899 (D.C. Cir. Jan. 29, 2021) (Mem.). The appeal is currently pending. After the D.C. Circuit's stay, Defendants issued a series of notices and public health determinations in February, July, and August 2021 recognizing an exception for unaccompanied children from the Title 42 Policy. *See* App'x at 11-29.

II. THE PUBLIC INTEREST STRONGLY FAVORS DEFENDANTS' EXCEPTIONS FOR UNACCOMPANIED CHILDREN AND FAMILIES

Although several federal courts have now ruled that the Title 42 Policy is likely unlawful, Defendants have made clear that they intend to continue enforcing the policy. *See* App'x at 16-29 (*Public Health Reassessment and Order Suspending the Right to Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists*, 86 Fed. Reg. 42828-02 (Aug. 5, 2021)).[6] As long as Defendants continue to summarily expel individuals under this policy, the public interest supports—and demands—the policies and practices Defendants have adopted to except unaccompanied children and families with minor children from this cruelty.

When evaluating whether an injunction against the federal government will "disserve the public interest," *Nichols*, 532 F.3d at 372, the impact that the requested relief will have on the general public is central to a court's analysis. Both the Supreme Court and the Fifth Circuit have emphasized the importance of considering the broader consequences of an injunction on nonparties to litigation when weighing the public interest. *See Winter*, 555 U.S. at 24 ("[C]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.") (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)); *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 625-26 (5th Cir. 1985) (noting "judicial concern about the impact of legal decisions on society as a whole as opposed to the more limited interests of private litigants" and looking "beyond the immediate interests of the named litigants" when considering the public interest).[7]

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[6] Following the *Huisha-Huisha* court's order enjoining the Title 42 Policy as to most families with minor children, Defendants noticed their appeal to the D.C. Circuit and sought a stay of the district court's injunction. *See Huisha-Huisha v. Mayorkas*, No. 21-05200 (D.C. Cir.). Defendants' motion is currently pending.

[7] To be sure, the impact of Plaintiff's requested injunction on the parties is relevant to the Court's analysis. *See Nken*, 556 U.S. 435 (in the stay context, noting that the harm to the opposing party and the public interest "merge when the Government is the opposing party"). Defendants have catalogued the harms likely to occur if Plaintiff's requested injunction is granted, *see* Opp. at 49-50, and such threatened injuries tip the public interest against Plaintiff. *Cf. Pursuing America's Greatness v. Federal Election Comm'n*, 831 F.3d 500, 511 (D.C. Cir. 2016) ("[T]he FEC's harm

Here, Plaintiff seeks to displace Defendants' decisions to exclude unaccompanied children and certain vulnerable families from summary expulsion under the Title 42 Policy. The public's interest, including that of the thousands of unaccompanied children and families who *amici* represent and advocate for, weighs decidedly against Plaintiff's requested injunction.

A. The Public Interest Supports Excluding Unaccompanied Children from Summary Expulsion Under the Title 42 Policy.

Defendants' practice of excepting unaccompanied children from expulsion under the Title 42 Policy is firmly supported by the public interest in ensuring that such children are treated humanely and permitted to access unique rights expressly granted to them under U.S. law.

Because unaccompanied children are among the most vulnerable of all immigrants, Congress has taken steps to guarantee such children the right to seek asylum and other relief through a more protective process than other noncitizens receive. In 2008, Congress passed the Trafficking Victims Protection Reauthorization Act ("TVPRA") to fulfill our nation's "special obligation to ensure that these children are treated humanely and fairly." 154 Cong. Rec. S10886-01 (daily ed. Dec. 10, 2008) (Sen. Feinstein). The statute provides a robust set of substantive and procedural rights designed to give unaccompanied children multiple opportunities to seek immigration relief and to safeguard their health and welfare as they do so. Among other things, the TVPRA commands that unaccompanied children may not be removed from the country before they are placed in immigration proceedings that enable them to pursue all forms of immigration relief for which they are eligible. 8 U.S.C. § 1232(a)(5)(D). It also guarantees these children access to counsel "to the greatest extent practicable;" exemption from typical deadlines to seek asylum; and access to an asylum adjudication process, including a non-adversarial interview with a trained USCIS asylum officer, that is governed by regulations accounting for the "specialized needs" of unaccompanied children. *E.g.*, 8 U.S.C. §§ 1158(a)(2)(E), (b)(3)(C), 1232(c)(5), (d)(8). Congress unmistakably sought to provide safeguards for these children that are unavailable to similarly-situated adults—thereby avoiding to

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and the public interest are one and the same, because the government's interest *is* the public interest.") (citing *Nken*, 556 U.S. at 435).

the greatest extent possible the chance the United States would return these children to danger. *See Flores v. Sessions*, 862 F.3d 863, 880 (9th Cir. 2017) (quoting H.R. Rep. 110-430, at 57 (2007)).

When promulgating an exception from the Title 42 Policy for unaccompanied children, Defendants recognized the unique protections afforded to these children and the humanitarian challenges facing them. *See* App'x at 12, 15 (*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. 38717-01 (July 22, 2021)) (exception from the Title 42 Policy will "permit[ ] the government to better address the humanitarian challenges for these [unaccompanied] children"). Over the past months, an exception from the Title 42 Policy has been crucial to protecting thousands of unaccompanied children and promoting Congress's intent to treat these children humanely and fairly.

The story of **Nicolás**[8] is illustrative. For years as he was growing up in Honduras, Nicolás was persecuted because of his sexual orientation. As he faced increasing threats on his life and safety, he fled his home at the age of 17, embarking on a 2,000-mile journey to seek safety in the United States. As he neared the U.S. border and prepared to request asylum, however, Nicolás was kidnapped in a Mexican border city by members of an organized crime cartel. Although Nicolás was able to escape his captors and make it to the border, where he requested asylum, the federal government detained him and scheduled him for an expulsion flight back to Honduras. It was only because the flight was delayed for several days due to Hurricane Hanna that an attorney called U.S. immigration officials in time to inquire on his behalf. Through her advocacy, she persuaded the government to transfer Nicolás—as well as his cellmate, another Honduran boy booked onto the same expulsion flight—into the custody of the Office of Refugee Resettlement ("ORR"), a subagency of the U.S. Department of Health and Human Services, as unaccompanied children.

[8] *Amici* have used pseudonyms for all individuals whose stories are shared in this brief. Supporting documentation for each story is held by the individual's attorney of record.

Nicolás was later united with a sponsor in the United States who provided care for him as he pursued the child-centric process guaranteed under the TVPRA. With the help of *pro bono* legal counsel, an asylum officer found that Nicolás was indeed entitled to asylum. He is now beginning his life in the United States, free from violence and persecution.

But for the stroke of luck that allowed him to prove he qualified for asylum, Nicolás's story is not otherwise unique. Many other children have fled violence and persecution in their home countries to seek security in the United States, only to be further traumatized on their perilous journeys to the U.S. border. **Samuel** fled his hometown in Mexico at the age of 15 after being repeatedly targeted by an organized crime cartel for his refusal to join the gang. Samuel was pursued by the cartel even while on his journey to the United States, and was kidnapped by cartel members in a border city as he prepared to ask for asylum. He, like Nicolás, was fortunate to escape and ultimately made it to a port of entry where he requested asylum. **Nora** and **Alma** fled their home countries in Central America at the age of 16 after being repeatedly sexually assaulted and tortured by cartel members. Both Nora and Alma were targeted by gangs on their journeys north, and were attacked and sexually assaulted before reaching the United States.

Because of Defendants' exception for unaccompanied children, Nicolás, Samuel, Nora, Alma, and countless others were able to pursue their asylum claims in the United States with the assistance of legal counsel rather than being returned to the violence and persecution they had escaped. This is precisely what Congress intended when it passed the TVPRA and imposed a "special obligation" to protect this "most vulnerable" group. 154 Cong. Rec. S10886. The public interest is undoubtedly served by the exception for unaccompanied children here, which is consistent with Congressional intent and ensures that vulnerable children are treated fairly and afforded the protections they are guaranteed under the law. *See, e.g.*, *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937) (recognizing that constitutional amendments and statutory enactments are "declaration[s] of public interest and policy"); *Casarez v. Val Verde Cnty.*, 957 F. Supp. 847, 865 (W.D. Tex. 1997) ("'[T]he public interest always is served when public officials act within the

bounds of the law and respect the rights of the citizens they serve.'") (quoting *Nobby Lobby, Inc. v. City of Dallas*, 767 F. Supp. 801, 821 (N.D. Tex. 1991), *aff'd*, 970 F.2d 82 (5th Cir. 1992)); *see also Abdur-Rahman v. Napolitano*, 814 F. Supp. 2d 1087, 1097 (W.D. Wash. 2010) ("The public interest is best served by the orderly and fair treatment of persons subject to the laws of this land, citizens and non-citizens alike.").

Without Defendants' exception, the result for these children would have been very different. This is not speculative. Under the former Administration, before a district court required an exception for unaccompanied children, thousands of such children were turned back at the border or expelled without being given an opportunity to request asylum or to access any of the rights Congress specially created for them. *E.g.*, *P.J.E.S.*, 502 F. Supp. 3d at 509 (more than 2,000 unaccompanied children were expelled under the Title 42 Policy between April and July 2020); Hamed Aleaziz, *Border Officials Turned Away Unaccompanied Immigrant Children More Than 13,000 Times Under Trump's Pandemic Policy*, BuzzFeed News (Oct. 28, 2020), *available at* https://www.buzzfeednews.com/article/hamedaleaziz/border-officials-turned-away-unaccompanied-immigrants (reporting that more than 13,000 unaccompanied children were expelled under Title 42 Policy through October 2020). In some cases, U.S. officials returned children to the country, and persecution, from which they fled. In others, the government expelled children to Mexico where the children had already encountered violence on their journey to the United States. Whatever the outcome, however, the circumstances for these children were dire.

For example, when the Title 42 Policy was still being applied to unaccompanied children, as Plaintiff asks this Court to reinstate, **Isaías**, a fifteen-year-old from Honduras, fled his home after he received death threats from gang members who had repeatedly targeted his family. When he presented to U.S. immigration officials last summer to seek asylum, Isaías was detained and later placed on a plane. Although Isaías had been led to believe he would be traveling to New York to reunite with a family member who was to be his sponsor in the United States, he was devastated to realize upon landing that he had been flown back to the very country he had just left out of fear for

his safety. Since being returned to Honduras, Isaías has been pursued by the same gang members who had threatened to kill him.

Like Isaías, **Pablo** attempted to escape persecution in Honduras only to find himself returned to the same circumstances after being expelled under the Title 42 Policy. Pablo left Honduras at the age of 13 after his father was murdered by cartel members. After traveling by himself to the U.S. border to seek refuge, Pablo was detained for several days and then placed on a deportation flight to Honduras. **Mateo** and **Ramón** have a similar story. The sixteen- and fourteen-year-old brothers from Mexico fled their home after being repeatedly targeted by local cartels. After one particularly severe attack, which placed the boys in the hospital for over a month, the brothers presented at the U.S. border to seek asylum. But because the Title 42 Policy applied to unaccompanied children at the time, Mateo and Ramón were expelled back to Mexico.

Unfortunately, even after adopting an exception for unaccompanied children, the federal government has in some cases improperly and unlawfully applied the Title 42 Policy to these children, returning them to harm's way. **Andrés**, for example, was only thirteen when he fled gang violence in Honduras with his older brother in the fall of 2020; the two brothers were displaced in Mexico for months. Finally, after six months, Andrés's older brother attempted to cross the border with a coyote—but no one has seen or heard from him since, and Andrés fears that he either was killed by the cartels or perished in the desert. Finally, after surviving nearly a year of displacement in Mexico and the disappearance of his older brother, Andrés went to the border by himself, where he told a U.S. Customs and Border Protection ("CBP") officer that he was a fourteen-year-old boy traveling alone and wanted to enter the United States. The officer, however, told him that Hondurans could not enter the country without papers. Although Andrés appealed to a second officer who came to investigate, the second officer likewise refused Andrés entry, and threatened to call the Mexican police on him.

As these and other stories demonstrate, the Title 42 Policy has resulted in the return of children and their families to the same violence and persecution that drove them to leave their homes

and seek protections afforded under U.S. law—without ever having the chance to be considered for immigration relief by a U.S. adjudicator. This is not what Congress intended. *See* 8 U.S.C. §§ 1232(a)(5)(D), 1229a (requiring DHS to place children in immigration proceedings, where they can seek all forms of immigration relief available to them, before they can be removed from the United States). Moreover, the Supreme Court has recognized that there is a strong "public interest in preventing" children from being "wrongfully removed . . . to the countries where they are likely to face substantial harm." *Nken*, 556 U.S. at 436; *accord Leiva-Perez v. Holder*, 640 F.3d 962, 971 (9th Cir. 2011) (the public has an interest in "ensuring that we do not deliver [individuals seeking asylum] into the hands of their persecutors"). Given this interest, and the humanitarian concerns central to immigration policy, *see Arizona v. United States*, 567 U.S. 387, 395-96 (2012) (noting that "immigration policy can affect," among other things "human concerns"), the public interest supports Defendants' decision to except unaccompanied children from the Title 42 Policy. The public interest demands that this exception remain undisturbed.

B. The Public Interest Supports Defendants' Lawful Use of Humanitarian Parole to Families Subject to the Title 42 Policy.

The public interest likewise requires an exception to the Title 42 Policy for families with minor children. As noted above, the Supreme Court has recognized "a public interest in preventing [individuals] from being wrongfully removed, particularly to countries where they are likely to face substantial harm." *Nken*, 556 U.S. at 436. This public interest applies with particular force to families with minor children, whom the federal government has returned under the Title 42 Policy either to abuse in their home countries or to Mexican border cities where cartels and gangs—sometimes abetted by Mexican authorities—are known to intentionally target migrants for kidnapping, rape, extortion, and torture.[9]

[9] The Title 42 Policy has had the unplanned, but latently foreseeable, consequence of strengthening the cartels and, as a result, makes the U.S. border region more dangerous for people on both sides of the border. This includes U.S. citizens and others inside the country who may be victims of drug warfare and other crimes. These consequences make the Title 42 Policy even less in the public interest.

In operation, the Title 42 Policy has also served as another engine of government-sanctioned family separation, inflicting irreparable harm as families have been separated by gang violence, deprivation and hardship, and the federal government itself. Indeed, and as set out above, the Title 42 Policy is unlawful and should be set aside, but that issue is not before this Court. But given the trauma and dangers that families suffer upon their expulsion, as well as the statutory right of families to seek protection from persecution in the United States, it is moral, humane, and undisputedly lawful for Defendants to allow case-by-case exceptions under the Title 42 Policy for families on humanitarian grounds. Denying Plaintiff's requested injunction is overwhelmingly in the public interest.

1. The Public Interest Is Furthered by Preventing the Removal of Families to Places Where They Risk Substantial Harm.

Unfortunately, the abuse of expelled immigrants at the hands of organized crime in Mexico is all too common. Individuals expelled from the United States are easily identifiable, in many cases do not have basic access to shelter in the places where they are expelled, and lack sufficient resources to protect themselves. Denied the opportunity to seek refuge under U.S. law, they are faced with the Hobson's choice of remaining in Mexico, vulnerable to exploitation, violence, and death, or returning to their home countries, which often presents an even graver threat to their safety.

Gabriel, for example, fled his home country of Honduras with his wife and three young children after gangs killed three of his wife's siblings, tried to kill his brother, broke into Gabriel's home and robbed him, severely beat him after he reported the robbery to the police, and threatened to kill him and his family. Although Gabriel received asylum for himself and his family in Mexico, he was forced to flee yet again when the gangs from Honduras tracked him to Mexico to take revenge against Gabriel and his wife for reporting them to the police. U.S. immigration officials expelled Gabriel, his wife and children, and his brother to Mexico under the Title 42 Policy in February 2021.

Because they feared for their lives in Honduras, Gabriel's family remained in Mexico, hoping that it would be less dangerous, even though they often went hungry and repeatedly were threatened

by gangs operating along the border. In July 2021, gang members kidnapped Gabriel and his brother and held them for ransom, subjecting both men to physical abuse. Although Gabriel and his brother were able to escape, Gabriel was forced to hide from the gangs in a garbage dump. When it was finally safe for him to emerge from hiding, he found that his wife and children had disappeared. Despite searching for them for several days, he could only assume the worst—that they, too, had been kidnapped and likely abused and killed. Gabriel was on the verge of suicide over losing his family when he learned that they had somehow made it to Ciudad Juárez, and had been allowed to enter the United States through a humanitarian exception to the Title 42 Policy—an exception that Plaintiffs are now trying to eliminate. It is only through securing humanitarian exceptions of their own that Gabriel and his brother were allowed entry to the United States in August 2021, where Gabriel reunited with his wife and children and are pursuing immigration relief together.

The story of Gabriel's family is unfortunately typical of many families who have sought protection from persecution in the United States, only to be expelled to hardship and trauma in Mexico. The abuse these families experience harms the entire family, with lasting repercussions. **Sebastian**, for instance, is a seven-year-old Black Honduran boy who witnessed the violent rape of his mother by a gang after they were expelled to Mexico under the Title 42 Policy. When they finally escaped, Sebastian's mother turned to the Mexican police. But as advocates have documented, Mexican authorities are known to discriminate against migrants, especially Black migrants. *See, e.g.*, Human Rights Watch, Mexico: Abuses Against Asylum Seekers at US Border (Mar. 5, 2021), *available at* https://www.hrw.org/news/2021/03/05/mexico-abuses-against-asylum-seekers-us-border ("Nearly half of those interviewed said Mexican police, immigration agents, or criminal groups targeted them for extortion."). Rather than helping, the police taunted Sebastian's mother, asking how much she would charge to give them a turn. Although the United States eventually

allowed Sebastian and his mother to enter on a humanitarian basis, Sebastian's post-traumatic stress and depression endure, and he has repeatedly told his mother that he wants to die.[10]

The experiences of **Luz**, a sixteen-year-old girl from Honduras, are similarly agonizing. Luz and her mother fled to the United States because the head of a local gang was trying to force Luz to have a sexual relationship with him. After nearly two months of perilous travel to seek safety in the United States, U.S. border authorities expelled Luz and her mother to Mexico under the Title 42 Policy in July 2021. Because they feared what would happen to them if they returned to Honduras, the family remained in Mexico, surviving on little to eat and finding places to sleep on the street and in abandoned homes. While in Mexico, they were assaulted and robbed by Mexican officials attempting to prevent immigrants from approaching the river. A group of men also attacked them, raping Luz and attempting to rape her mother. The Mexican police refused to provide any assistance. In August 2021, they were allowed to enter and pursue asylum in the United States based on humanitarian grounds. Luz still suffers emotionally and psychologically from her rape, and both she and her mother need counseling services to cope with the trauma they experienced in Mexico.

As the stories of Gabriel, Sebastian, Luz, and their families illustrate, the Title 42 Policy results in the summary expulsion of migrants from the United States, thereby depriving them of the specific protections that Congress has extended to vulnerable individuals seeking protection from persecution.[11] It also sends families into a nightmare that no one would wish on another human being. But Plaintiff seeks an order requiring the federal government to expel families to certain harm

[10] In another instance, **Graciela**, a Honduran mother also expelled under the Title 42 Policy with her eight-year-old daughter and six-year-old son, considers herself "lucky" because although she and her children were kidnapped in Mexico after their expulsion, the kidnappers gang-raped her in a separate room so that her children did not have to watch.

[11] *E.g.*, 8 U.S.C. § 1158(a)(1) (allowing any noncitizen physically present in the United States to apply for asylum); 8 U.S.C. § 1231(b)(3) (forbidding the Attorney General from removing a noncitizen if the Attorney General decides that the noncitizen's life or freedom would be threatened in her home country because of her race, religion, nationality, membership in a particular social group, or political opinion); Note to 8 U.S.C. § 1231 (declaring a U.S. policy not to remove a person to a country where there are substantial grounds for believing the person would be in danger of being subjected to torture).

and suffering. The public interest weighs in favor of denying Plaintiff's motion and preventing that such harm be categorically imposed upon families wrongfully removed from the United States. *See Nken*, 556 U.S. at 436.

2. The Public Interest Is Furthered by Policies that Support Family Unity.

The public interest also weighs heavily in favor of humanitarian exceptions to the Title 42 Policy for families with minors, not least because the expulsion of families has all too often resulted in the traumatic separation of minor children from their only caregivers. These separations have many causes, including violence in Mexico, the desperation to survive after being expelled, and the actions of U.S. immigration officials. Regardless of the precise cruelty triggering each family separation, it is undeniable that any such separation is a result of the Title 42 Policy. These family separations—and the concomitant trauma inflicted on all family members, especially minor children—can and should be avoided through the use of humanitarian exceptions to the policy that would prevent the categorical expulsion of families from the United States. Family separation "is a highly destabilizing, traumatic experience that has long term consequences on child well-being, safety, and development." *Ms. L. v. I.C.E.*, 310 F. Supp. 3d 1133, 1147-48 (S.D. Cal. 2018). The public interest favors not only preventing such traumatic harm to families, *Nken*, 556 U.S. at 436, but also "upholding and protecting" migrants' constitutionally protected right to "family integrity and association while their immigration proceedings are underway." *Ms. L.*, 310 F. Supp. 3d at 1148; *see also Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017).

(a) The Title 42 Policy Causes Family Separation Due to Gang Violence.

Isabel, for example, was captured along with her husband by the Zetas cartel and separated from her two young daughters, ages four and nine, mere hours after she and her family were expelled from the United States. While nearly nine months pregnant, this wife and mother initially fled Honduras with her family to save the lives of her husband, daughters, and unborn child. Isabel made this impossible choice after a gang killed two of her brothers—including one who was only fourteen

years old—and violently attacked her husband because she told the gang that she could not pay them "protection" money.

When Isabel and her family attempted to seek safety in the United States in February 2021, they were expelled by U.S. border officials under the Title 42 Policy. Immediately following their expulsion, Isabel's family walked along the riverbank for four hours in search of a safe place to cross, desperate to reach safety. When they finally attempted to cross, they found that the river was quite deep—reaching up to Isabel's husband's chest—so, like any father, he carried their children across the river first. But while her husband was bringing their girls across, a black pick-up truck approached Isabel. Men jumped out of the truck, grabbed Isabel by the hair, and threw her to the ground. When Isabel's husband tried to come to her aid, the gang attacked and subdued him, capturing them both. They were held for ransom in Mexico for over two weeks, while Isabel was nine months pregnant—and with no idea what had happened to their daughters.

The cartel, which threatened constantly to kill Isabel's husband, eventually released Isabel after she broke from the stress and begged for the life of her unborn child. She eventually gave birth to her baby girl in a Mexican hospital three weeks after her family had been expelled under the Title 42 Policy. Isabel's third daughter, however, weighed only three pounds at birth and required intensive medical care because the cartel had starved Isabel for weeks before her daughter's delivery. When Isabel's husband finally escaped the Zetas and found her and their new baby at the hospital, he was so thin and malnourished that she did not recognize him.

While in the hospital, Isabel and her husband saw one of their daughters on a news program featuring interviews with children who had been "abandoned" at the U.S.-Mexico border. They were subsequently contacted by U.S. immigration officials who accused Isabel of abandoning her children at the border and stated that they could not allow Isabel and her husband to come to the United States to be with their children because of the Title 42 Policy. Eventually, Isabel and her husband were granted a humanitarian exception and were allowed to reunite with their daughters.

After thinking she would never see her two daughters again, she says that seeing her girls again was the happiest moment of her life.

(b) The Title 42 Policy Causes Family Separation Due to Hardship and Deprivation.

The hardship and danger that families face after their expulsion to Mexico also predictably cause traumatic family separation. **Javier**, for example, is a sixteen-year-old boy who was forced into labor by a gang in Honduras and, as the only means of escape, fled to the United States with his parents and older brother. In April 2021, Javier's family attempted twice to enter the United States to seek asylum through the statutorily prescribed procedures, but they were expelled both times under the Title 42 Policy. The conditions in Mexico were so dangerous that, out of desperation to protect their child, Javier's parents sent him across the border alone to keep him safe. While in Mexico, the Mexican police harassed and extorted the family. They also narrowly escaped an attempted kidnapping by the cartel in Ciudad Juárez. Fortunately, Javier crossed the border safely, where he was apprehended by U.S. immigration officials, identified as a victim of trafficking because of the labor he had been forced to provide in Honduras, and taken into custody as an unaccompanied child. In July 2021, his family was allowed to enter and reunite with Javier in the United States based on a humanitarian exception to the Title 42 Policy. While relieved to now be reunited, Javier remains severely traumatized by their separation under the policy.

(c) The Title 42 Policy Causes Family Separation by U.S. Immigration Officials.

In addition to family separations wrought by the actions of gangs or by the hardship families suffer in Mexico after being expelled, the Title 42 Policy has caused—if not sanctioned—family separation at the hands of U.S. immigration officials. U.S. CBP officers, for example, separated **Esperanza**, a thirteen-year-old girl, from her older sister, who had turned eighteen just one day before they attempted to enter the United States. After a hurricane destroyed their home in Honduras and gangs started pursuing Esperanza's sister, the girls' mother sent them to the United States with their family's entire savings. At the border, however, CBP officers took Esperanza into custody as

an unaccompanied child and expelled her sister, her only caregiver, to Mexico under the Title 42 Policy. Esperanza now has only limited contact with her sister, who has been unable to secure a humanitarian exception to the Title 42 Policy to reunite with Esperanza. Esperanza, distraught over the separation and terrified for her sister, cannot stop crying.

Beyond separating children from older siblings and other family members, CBP has also deliberately separated children from their parents under the Title 42 Policy. For instance, **Daniel** and his two-year-old daughter were separated from his wife and six-year-old stepson when they attempted to cross the border and seek asylum in August 2021. CBP admitted Daniel's wife and stepson pursuant to a humanitarian exception, but expelled him and his toddler to Mexico under the Title 42 Policy. CBP provided no explanation for why they divided the family in this way, and now Daniel and his daughter are staying in a crowded migrant shelter in a dangerous neighborhood in Tijuana while his wife and stepson have connected with extended family members in Virginia. The separation from her mother has been severely traumatic for Daniel's two-year-old daughter, who has lost five pounds in one month, suffers from diarrhea and vomiting, has contracted conjunctivitis, and displays extreme emotional swings from disconnect or withdrawal to tantrums where she cries hysterically, begging for her mother. Daniel is beside himself from seeing his daughter suffering so much and feeling powerless to alleviate her trauma.

The experience of **Marisa** and her separation from her children is equally harsh. After her husband was assassinated, Marisa fled El Salvador with her eleven- and fifteen-year-old sons to protect them. They went directly to the border, but were quickly expelled under the Title 42 Policy. After facing the conditions in Mexico, they attempted to enter the United States a second time. On this second attempt, Marissa and her children spent seven hours wading through the river, then another hour walking, as Marisa bled from a wound on her stomach from a recent surgery that had not yet healed. Along this harrowing journey, they were stopped by sheriffs, who handed the family over to CBP officials. When Marisa presented her sons' birth certificates to CBP, however, she was accused of being a coyote and trafficking her own children. She was expelled under the Title 42

Policy while her children were separated from her and taken into ORR custody. After she was expelled, Marisa was promptly taken into custody by the Mexican federal police and handed over to the cartels, who subjected her to extensive sexual, physical, and psychological abuse. The cartels tied her up and left her for dead with several other women, and she survived only because she found her way to safety after walking through the desert for multiple days with no water or food.

Although each of these families has suffered, and continues to suffer, trauma under the Title 42 Policy in their own unique way, the substantial harm of family separation is common to them all and stems directly from the use of the policy. A categorical application of the Title 42 Policy to families with minor children, as Plaintiff requests in its motion, would only amplify and multiply the harm of family separation. This contravenes not only the public interest but also Congressional intent, evinced by the Immigration and Nationality Act's longstanding legislative history regarding the United States' interest in the unity of families immigrating to this country. *See* H.R. Rep. No. 101-723, pt. 1 (1990), as reprinted in 1990 U.S.C.C.A.N. 6710 (summarizing legislative history of the Immigration and Nationality Act); *see also Ms. L.*, 310 F. Supp. 3d at 1148 (discussing interest in "upholding and protecting" migrants' constitutionally protected right to "family integrity and association"). The Court should not accept Plaintiff's invitation to subject more vulnerable families to harm and the trauma of family separation.

CONCLUSION

Plaintiff's request that this Court enjoin Defendants to summarily expel unaccompanied children and vulnerable families under the Title 42 Policy disserves the public interest. As discussed above, these individuals, *amici*, and the public at large have a compelling interest in ensuring that vulnerable children's and families' rights to access Congressionally created protections are respected and that these individuals are not unlawfully removed to countries where they are likely to be persecuted and experience extreme suffering and trauma. The Court should deny Plaintiff's Renewed Motion for Preliminary Injunction.

Dated: September 24, 2021

O'MELVENY & MYERS LLP

By: */s/ Emma L. Persson*

Laura L. Smith
Texas Bar No. 24066039
Emma L. Persson
Texas Bar No. 24110219

2501 North Harwood Street
Suite 1700
Dallas, Texas 75201-1663
Telephone: +1 972 360 1900
Facsimile: +1 972 360 1901
lsmith@omm.com
epersson@omm.com

Daniel J. Tully*
California Bar No. 309240
JUSTICE ACTION CENTER
P.O. Box 27280
Los Angeles, California 90027
Telephone: +1 323 450 7275
daniel.tully@justiceactioncenter.org

**pro hac vice application forthcoming*

Counsel for Amici Curiae 29 Legal Service Advocacy Organizations

CERTIFICATE OF SERVICE

I certify that on September 24, 2021, the foregoing motion was electronically submitted to the Clerk of Court for the U.S. District Court for the Northern District of Texas using the Court's CM/ECF system. Accordingly, notice of this filing will be sent to all counsel of record.

/s/ Emma L. Persson
Emma L. Persson

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

STATE OF TEXAS,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No. 4:21-cv-00579-P**
	§	
JOSEPH R. BIDEN, JR., in his official capacity as President of the United States et al.,	§	
	§	
Defendants.	§	

ORDER

Before the Court is Texas's unopposed motion to continue preliminary injunction deadlines. ECF No. 85. Having considered the unopposed motion, the Court finds that it should be and hereby is **GRANTED.**

Therefore, it is **ORDERED** that the deadline for Texas to file its consolidated response to Motion to Dismiss and reply in support of Motion for Preliminary Injunction is extended **up to and including October 8, 2021**, and Defendants' deadline to file a reply in support of their Motion to Dismiss is extended **up to and including October 15, 2021**.

SO ORDERED on this **28th day** of **September, 2021.**

Mark T. Pittman
UNITED STATES DISTRICT JUDGE