

[ORAL ARGUMENT NOT YET SCHEDULED]

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

P.J.E.S., a minor child, by and through his father and next friend, Mario Escobar Francisco, on behalf of himself and others similarly situated,

Plaintiffs-Appellees,

v.

CHAD F. WOLF, Acting Secretary of Homeland Security,
et al.,

Defendants-Appellants.

No. 20-5357

MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

MICHAEL R. SHERWIN
Acting United States Attorney

SOPAN JOSHI
Senior Counsel to the Assistant Attorney General

SHARON SWINGLE
JOSHUA WALDMAN
ASHLEY A. CHEUNG
*Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-0236
joshua.waldman@usdoj.gov*

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants Chad F. Wolf et al. respectfully move for a stay pending appeal of the preliminary injunction issued by the district court.

The injunction prohibits the government from implementing critical public health measures designed to protect against the uncontrolled spread of COVID-19. The Director of the U.S. Centers for Disease Control and Prevention (CDC) exercised his long-standing authority under 42 U.S.C. § 265 to temporarily suspend the introduction of certain aliens traveling from Mexico and Canada who would otherwise be held in congregate settings in Ports of Entry or Border Patrol stations at or near the U.S. border—facilities that are not designed or equipped to quarantine, isolate, or enable social distancing. The CDC Director determined in light of the public health risks that it is imperative to expel covered aliens as quickly as possible.

The injunction prohibits the U.S. Government from expelling from the United States, pursuant to the CDC Order, a putative class of all unaccompanied alien minors who are or will be in government custody. Instead of being able to expel those aliens quickly, the government now must hold them in congregate settings at or near the border—exacerbating the virus-transmission risk—until it can transfer them (including via mass transportation, such as commercial airlines) to facilities run by the Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR). That, in turn, will further increase the risk of COVID-19 transmission, not

only to U.S. Customs and Border Protection (CBP) personnel, but also to plaintiffs themselves and other aliens, officials who transport minor aliens to ORR facilities, ORR employees and those in its care, and the U.S. population at large. And it has the potential to overtax already-stressed healthcare systems in communities with ORR facilities, especially those along the border—such as El Paso, where healthcare systems already are buckling under the stress of a recent surge in infections. *See generally* Dkts. 82 through 82-4.

The district court reached its holding through an improperly cramped understanding of CDC’s public health authority that all but eviscerates the government’s Section 265 authority to contain the risk of transmission of communicable diseases at the border. The court ruled that CDC’s authority under 42 U.S.C. § 265 to “prohibit * * * the introduction of persons” from a foreign country does not include the authority to expel such persons if they manage to unlawfully skirt the prohibitions and set foot on American soil. Add.26-27. Although the court acknowledged that the authority to prohibit the introduction of persons necessarily includes the authority to intercept and return persons who (in defiance of law) attempt to enter the country, it reasoned that “[e]xpelling persons, as a matter of ordinary language, is entirely different from interrupting, intercepting, or halting the process of introduction.” *Id.* Under that reasoning, any alien who crosses into the United States over the nearly 6,000 miles of land border with Canada and Mexico is

outside the government's power under 42 U.S.C. § 265 (Section 265), even if the alien is stopped just one step over the border and regardless of the risk of transmission.

Neither the statute's text or history, nor common sense, supports that parsimonious interpretation of Section 265. The government is thus likely to prevail on appeal.

In addition to being wrong, the district court's order threatens irreparable harm to the government and the public at large. The government's declarants have explained that the risk of transmission of COVID-19 as a result of the injunction is significant, particularly in regions of the country where increasing numbers of unaccompanied minor aliens are being apprehended, COVID-19 caseloads are spiking, and medical and health resources are stretched to the brink. Congress charged CDC—not federal courts—with making public-health judgments about how best to protect the country during a pandemic; a stay pending appeal is necessary so the government can implement that expert judgment here. Any harm to the plaintiff class members resulting from a stay could be minimized if the appeal is briefed and considered by the Court on an expedited schedule. The government respectfully suggests that the balancing of equities favors a stay pending appeal.¹

¹ The district court denied the government's request for a stay pending appeal on November 18. Add.49; *see* Fed. R. App. P. 8(a)(1). The government sought reconsideration of the stay denial, Dkt. 82, which the district court denied on December 3.

Plaintiff opposes a stay pending appeal.

STATEMENT

I. Background

The federal government has long had the authority to take actions to prevent the spread of communicable diseases. In 1893, Congress authorized the Executive Branch to enact rules and regulations to prevent the introduction of contagious or infectious diseases from foreign countries into the United States. Act of Feb. 15, 1893, ch. 114, § 7, 27 Stat. 449, 452. In 1944, Congress enacted the Public Health Service Act, which authorizes the Secretary of HHS to “prohibit * * * the introduction of persons” into the United States to “avert” the “serious danger of the introduction of” a “communicable disease,” “[w]henever the [Secretary] determines that” it is “required in the interest of the public health.” 42 U.S.C. § 265.

In March 2020, in light of the unprecedented COVID-19 global pandemic, HHS and CDC issued an interim final rule under Section 265 to provide a procedure for the CDC Director to temporarily suspend the introduction of certain persons into the United States. 85 Fed. Reg. 16,559 (Mar. 24, 2020). The rule’s preamble explained that international travel increases the risk of communicable disease transmission into and through the United States, a risk that “increases when travelers are in congregate settings.” *Id.* at 16,560. The rule defined “introduction into the United States of persons” from a foreign country to mean “the movement of a person from a foreign country” into the United States “so as to bring the person into contact with persons in the United States * * * in a manner that the Director determines to

present a risk of transmission of a communicable disease to persons or property, even if the communicable disease has already been introduced, transmitted, or is spreading within the United States.” *Id.* at 16,566. CDC explained that this definition was intended to “clarify that ‘introduction’ can encompass those who have physically crossed a border of the United States and are in the process of moving into the interior in a manner the Director determines to present a risk of transmission of a communicable disease.” *Id.* at 16,563. The rule does not apply to U.S. citizens and lawful permanent residents. *Id.* at 16,567.

In March 2020, the CDC Director issued an Order temporarily suspending the introduction of certain aliens traveling from Canada and Mexico into the United States. 85 Fed. Reg. 17,060 (Mar. 26, 2020) (CDC Order). The Order applied to “covered aliens,” defined as persons “traveling from Canada or Mexico (regardless of their country of origin) who would otherwise be introduced into a congregate setting” at or near the border, “typically aliens who lack valid travel documents.” *Id.* at 17,061. The CDC Order explained that covered aliens may spend hours or days in congregate settings while undergoing immigration processing and that Ports of Entry and Border Patrol stations are “not designed for, and are not equipped to, quarantine, isolate, or enable social distancing by persons who are or may be infected with COVID-19.” *Id.* at 17,061, 17,066. The Order also explained that holding covered aliens in congregate settings risks the spread of COVID-19 to CBP personnel and further transmission of

COVID-19 to the U.S. population, with a concomitant increased strain on the U.S. healthcare system and supply chain. *Id.* at 17,061. The Order noted that conditional release would “jeopardize * * * the public health” because many covered aliens “may lack homes or other places in the United States where they can self-isolate,” and CDC “lacks the resources and personnel necessary to effectively monitor such a large number of persons.” *Id.* at 17,067.

CDC subsequently extended the duration of the Order by 30 days, 85 Fed. Reg. 22,424, 22,427 (Apr. 22, 2020) and then indefinitely subject to the CDC’s recurring 30-day review, 85 Fed. Reg. 31,503, 31,503 (May 26, 2020).

In September 2020, HHS and CDC published a final rule. 85 Fed. Reg. 56,424 (Sept. 11, 2020). The CDC Director then issued a new Order that suspends the introduction of all covered aliens into the United States, subject to certain exceptions, until he determines that “the danger of further introduction of COVID-19 into the United States has ceased to be a serious danger to the public health,” based on recurring 30-day reviews by CDC. 85 Fed. Reg. 65,806, 65,807-08 (Oct. 16, 2020).

II. Facts and District Court Proceedings

Plaintiff is a fifteen-year-old from Guatemala who was apprehended in August 2020 after illegally crossing the U.S.-Mexico border. Add.1. DHS determined that plaintiff was a “covered alien” subject to expulsion under the CDC Order.

On August 14, plaintiff brought suit on behalf of a putative class of “[a]ll unaccompanied noncitizen children who (1) are or will be detained in U.S. government custody in the United States, and (2) are or will be subjected to” the CDC Order. Dkt. 1, at 21. As relevant here, plaintiff asserted that the CDC Order exceeds the CDC’s authority under 42 U.S.C. § 265, and conflict with various provisions of the Immigration and Nationality Act (INA) and the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA). Dkt. 1, at 23-28. Plaintiff moved for class certification and a classwide preliminary injunction. Dkt. 15.

After bringing suit, plaintiff was excepted from the CDC Order, transferred to ORR custody, and processed pursuant to the immigration procedures in Title 8 of the U.S. Code. Dkt. 15-1, at 11.

On September 25, the magistrate judge issued a report recommending that the district court provisionally grant plaintiff’s motion for class certification and a preliminary injunction. Add.53.

On November 18, the district court rejected the government’s objections to the magistrate judge’s report and recommendation, Dkt. 69, and granted provisional class certification and a classwide preliminary injunction. Dkts. 79, 80.

The district court concluded that Section 265 likely does not authorize the government to expel aliens once they have crossed the border into the United States, reasoning that “[e]ven accepting that the phrase, ‘prohibit[ing] * * * the introduction

of,’ means ‘intercepting’ or ‘preventing,’” “[e]xpelling persons” “is entirely different from interrupting, intercepting, or halting the process of introduction.” Add.26-27. The court further reasoned that Section 265’s neighboring statutory provisions frequently reference “quarantine” and do not explicitly authorize expulsion, “suggesting that the CDC’s powers were limited to quarantine and containment.” Add.28-32. In an attempt to harmonize Section 265 with the INA, the court concluded that “the language of Section 265 contains no ‘clear intention’ to authorize the suspension of” provisions of Title 8 of the U.S. Code that establish procedures for general immigration processing. Add.36. The court concluded that, even assuming the term “introduction” is ambiguous, CDC’s interpretation is not entitled to *Chevron* deference because CDC’s interpretation does not implicate the agency’s scientific and technical expertise, even though the agency indisputably administers Section 265 and promulgated the Order in accordance with Administrative Procedure Act (APA) procedures. Add.37-39.

Finally, the court concluded that the remaining preliminary injunction factors weigh in favor of plaintiff. Add.39-47. The court enjoined the government from expelling class members from the United States under the CDC Order issued under the interim and final rules. Add.48.

ARGUMENT

The propriety of a stay pending appeal turns on: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 426 (2009).

That standard is met here. The district court’s opinion erroneously concluded that the CDC Order exceeds the agency’s delegated authority under Section 265. In addition, the balance of equities weighs in favor of a stay, as the injunction prohibits the government from expelling class members, in contravention of the CDC Director’s expert judgment that holding such aliens in congregate settings increases the risk of transmission of COVID-19 at a time when health-care resources are stretched to the brink. This Court should stay the preliminary injunction pending appeal.

I. The Government is Likely to Succeed on the Merits.

A. The district court’s injunction rests on the erroneous conclusion that the CDC Order exceeds the agency’s statutory authority. Section 265 authorizes CDC “to prohibit, in whole or in part, the introduction of persons and property” from a foreign country “[w]hensoever” the agency “determines” that such introduction presents a “serious danger” of introducing “any communicable disease * * * into the United States,” and the prohibition “is required in the interest of the public health.”

The court reasoned the words “prohibit * * * the introduction” authorize CDC to “stop[] something before it begins,” but not to “remedy[] it afterwards.” Add.26-27. Thus, in the court’s view, CDC has the power to stop covered aliens and property before they cross the border—but should they manage to evade those restrictions and illegally enter the country or present at a Port of Entry, the government is powerless to act under Section 265 to expel those persons and property from the United States.

The district court’s wooden construction of the statute defies common sense. A statute prohibiting dangerous persons or property from entering certain protected areas is most naturally and reasonably read to include both the power to prevent those dangers from entering in the first instance, and also the power to expel them if they mistakenly or surreptitiously enter in defiance of that prohibition. For example, the authority to “prevent [a dangerous] individual from boarding an aircraft,” 49 U.S.C. § 114(h)(3)(B), is most naturally understood to authorize the individual’s removal from the aircraft if he or she somehow manages to board it; the authority does not cease once the individual enters the plane. The same principle applies here. Section 265’s evident purpose is “to avert” the “serious danger of the introduction” into the United States of “any communicable disease in a foreign country” “in the interest of the public health.” 42 U.S.C. § 265. Such a public health emergency is in no way diminished by the fact that an alien has already arrived at a Port of Entry, or has crossed the border unlawfully, and the district court offered no sound public-health

reason why Congress would have intended for CDC's Section 265 authority to be rendered toothless in those circumstances.²

The district court apparently recognized that its interpretation would render Section 265 largely ineffectual, yet reasoned that Section 265 would not be “without effect” because it would still permit CDC to bar common carriers (such as airplanes) from arriving in the United States. Add.28, 30, 37 (citing Add.88-90). While that parsimonious reading might save the statute from being entirely superfluous, it does not come to terms with why Congress would have sensibly addressed the “serious danger” of “communicable disease” in such a cramped fashion (that would be

² Because Section 265 makes no distinction between “persons” and “property,” there is no textual basis to conclude, as the district court did, that CDC's authority regarding the former is more curtailed than its authority regarding the latter. Regulations promulgated under Section 265 reflect the understanding that the authority to prohibit the introduction of *property* presenting a serious danger of a communicable disease includes the authority to expel that property even after it arrives at a Port of Entry or crosses the border. For example, 42 C.F.R. § 71.63(a), promulgated under Section 265, authorizes CDC to “suspend the entry into the United States of animals, articles, or things from designated foreign countries” to prevent the introduction of a communicable disease. CDC has explained that if such animals or articles “do arrive at a U.S. port of entry, HHS/CDC will take measures as needed to protect the public's health” including “confinement, *re-exportation*, or destruction. Re-exportation may be considered if there is no public health risk during travel.” 82 Fed. Reg. 6890, 6929 (Jan. 19, 2017) (emphasis added). Similarly, 42 C.F.R. § 71.51(b)(1), also promulgated under Section 265, authorizes the exclusion of dogs and cats with communicable diseases when they “arrive at a U.S. port,” and specifies that such animals “shall be *exported* or destroyed,” *id.* § 71.51(g) (emphasis added). *See also* 42 C.F.R. § 71.53(a), (d)-(e) (CDC regulation “to prevent the transmission of communicable disease from nonhuman primates” includes authority to prohibit “importing” such animals as well as authority to “export” them if they pose a public health threat or are imported outside an authorized port of entry).

inapplicable for those crossing by foot across thousands of miles of land borders), or why, if Section 265 were merely a common-carrier regulation, Congress would have conferred that authority upon the Centers for Disease Control and Prevention.

Even assuming the district court's interpretation was correct—that “prohibit[ing] * * * the introduction” is limited to “stopping something before it begins, rather than remedying it afterwards,” App.26—the court's conclusion was still erroneous. As the government explained, “introduction” into the United States is a continuing process that does not stop at the border. *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020) (“an alien who is detained shortly after unlawful entry cannot be said to have ‘effected an entry’”); *Castro v. DHS*, 835 F.3d 422, 445 (3d Cir. 2016) (aliens who are “apprehended within hours of surreptitiously entering the United States” are still treated as “alien[s] seeking initial admission to the United States”); *United States v. Steinfeld*, 753 F.2d 373, 377 (5th Cir. 1985) (finding that “introduction into commerce commences upon the arrival of imported goods upon United States soil, but introduction does not necessarily end there”). The “introduction” of a person or property into the United States is not completed, and does not come to an end, merely because that person or property crosses a line on a map. The court incorrectly assumed that aliens who have crossed the border are “already introduced” into the United States merely by stepping over the border, but in fact such aliens are still “in the process of being introduced.” Add.26. Accordingly, under the court's

own reasoning, the CDC Order is authorized by Section 265 because it applies to aliens who have not yet completed their “introduction” in the United States.

The district court likewise reasoned that “[i]n view of current immigration laws” in which Congress expressly authorized removal, “one would expect the term to appear” in Section 265, Add.29, 34, and deemed its absence “significant.” Add.27; *see id.* at 29, 33-35 (citing Add.81-82). But Section 265 is not an immigration statute; rather, it “reflects Congress’s focus on the public’s health,” Add.32, and the absence of the terms “expel” or “removal” has no special significance in those circumstances even if its absence might be meaningful in the immigration context. *Russello v. United States*, 464 U.S. 16, 25 (1983) (“Language in one statute usually sheds little light upon the meaning of different language in another statute.”).

The district court similarly reasoned that the express enumeration of certain authorities in Section 265 and its neighboring provisions—such as quarantine, apprehension, and detention—implicitly forecloses CDC from taking other action not expressly listed in the statute. Add.31-32. But that approach, which would unrealistically require Congress to anticipate and expressly enumerate the precise manner in which CDC should respond to a pandemic, makes no sense for a statute meant to address “extraordinary” and “unprecedented” public health emergencies, Add.31. Rather, Section 265, and the other provisions of the Public Health Service Act, delegate flexible authority to scientific experts so they may avert the introduction

of communicable diseases, in recognition of the fact that a legislative body cannot possibly know beforehand what the most effective mitigation measures for a pandemic might be. In that context, there is no sound reason to require Congress to spell out in advance all actions that CDC may appropriately take.

The district court also opined that “the Government’s reading of Section 265 * * * conflicts with various rights granted in the TVPRA and the INA,” Add.33, and that Section 265 contains no “clear intention” to suspend those immigration provisions, Add.36 (citing *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018)). While “repeals by implication are ‘disfavored’” and courts should avoid “too easily finding irreconcilable conflicts” between statutes, those principles are not implicated where the court can easily “give effect to both” and the “two statutes can[] be harmonized.” *Epic Sys.*, 138 S. Ct. at 1624. That is the case here: the immigration provisions are of general applicability in ordinary circumstances, while Section 265 applies in specific, limited circumstances where CDC determines that the introduction of persons or property from a foreign country presents a serious danger of increasing the introduction of a communicable disease into the United States. *RadLAX Gateway Hotel v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (“To eliminate the contradiction, the specific provision is construed as an exception to the general one.”).

Indeed, Section 265 expressly refers to a “suspension of the right to introduce such persons and property,” expressing Congress’s clear intent to override any

conflicting provision providing for any right of a person to be introduced into the United States.³ The district court opined that Section 265 could have used the phrase “notwithstanding any other provision of law” if Congress had intended it to suspend future immigration provisions, Add.35, but the same is true of the immigration provisions, which also could have used such language if Congress had intended them to override the public health authority in Section 265.

The district court turned the specific-governs-the-general canon on its head, mistakenly concluding that general immigration laws take precedence over the more specific Section 265 because the latter “is a public health provision” that is not “specifically targeted to matters of immigration.” Add.36-37. But in this context, a statute limited to addressing rare and extraordinary public health dangers—and specifically including the authority to prohibit the introduction of persons into the country—necessarily is more specific and narrowly targeted than generally applicable immigration provisions. The court likewise reasoned that Section 265 “cannot be the more specific statute” for the class members “who are entitled to protections under

³ Moreover, the legislative history of Section 265’s predecessor statute demonstrates Congress’s understanding that the statute was intended to give the Executive the authority to suspend any right to introduce persons into the United States under the immigration laws. *See, e.g.*, 24 Cong. Rec. 470 (1893) (explaining that the exigency posed by “invasion of contagious disease, is sufficient * * * to justify this extraordinary power of the entire suspension of immigration”); *id.* at 393 (“power to suspend immigration altogether, either temporarily or permanently as a health device”; “this section should be added, declaring in terms whenever the health or protection of the country from infection requires the total suspension of immigration”).

the relevant” immigration laws, Add.37, but that circular reasoning simply assumes the answer that, if the statutes are irreconcilable, provisional class members *are* entitled to the protection of those immigration laws notwithstanding Section 265.⁴

B. At a minimum, Section 265 is ambiguous and thus CDC’s interpretation is entitled to deference under *Chevron v. NRDC*, 467 U.S. 837 (1984). The district court held that even assuming ambiguity, *Chevron* deference was unwarranted because CDC’s statutory interpretation does not “implicate[] its scientific and technical expertise.” Add.38. That is both irrelevant and incorrect. It is irrelevant because CDC indisputably administers Section 265, and the challenged Order indisputably carries the force of law and was promulgated in accordance with APA procedural requirements—which is sufficient to warrant *Chevron* deference. *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

It is also incorrect. CDC explained that its interpretation of “introduction” was rooted in its scientific judgment that “those who have physically crossed a border of the United States and are in the process of moving into the interior * * * present a risk of transmission of a communicable disease,” and are “potential * * * vectors” for the

⁴ The district court also suggested that its interpretation was supported by the doctrine of constitutional avoidance, Add.37-38 n.7, pointing to the Magistrate’s conclusion that if Section 265 were construed to permit CDC to “expel citizens” it would raise serious constitutional concerns, Add.82. But that argument makes little sense here, because the final rule does not apply to U.S. citizens. 85 Fed. Reg. at 56,448; Add.7.

spread of “communicable disease into the United States.” 85 Fed. Reg. at 16,563, 16,567; *see* Add.6. CDC explained that Ports of Entry and Border Patrol stations, where covered aliens might ordinarily be held in congregate settings, were “not designed for, and are not equipped to, quarantine, isolate, or enable social distancing,” presenting a risk of COVID-19 to the aliens and CBP personnel, as well as to the public at large. 85 Fed. Reg. at 17,061, 17,066. In addition, CDC found that “there is a significant uncertainty that covered aliens would be able to effectively self-quarantine, self-isolate, or otherwise comply with social distancing guidelines, if they were conditionally released.” 85 Fed. Reg. at 31,508; *see* Add.9. These are precisely the kinds of judgments based on scientific and technical expertise for which judicial deference is warranted.

II. The Remaining Factors Support A Stay.

The preliminary injunction threatens irreparable harm to the government and the public at large.

The challenged Order is intended to prevent irreparable harm to the public by reducing the risk of transmission of COVID-19 in circumstances that pose a particular risk. Congress authorized the CDC Director to make determinations concerning public health, 42 U.S.C. § 265, and he determined that the introduction of certain aliens into the United States during the pandemic is dangerous to the public health, 85 Fed. Reg. at 17,060; 85 Fed. Reg. at 65,806. Even outside the public health

context, “[a]ny time a [government] is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.”

Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). And that is especially true where the decisions of public officials entrusted with “the safety and the health of the people” in “areas fraught with medical and scientific uncertainties” are “second-guess[ed] by an unelected federal judiciary,” *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14 (2020) (Roberts, C.J., concurring), in particular, where, as here, the district court’s opinion did not rest on constitutional grounds.

Additionally, the government’s declarants make clear that the public health crisis has significantly worsened in recent months such that enjoining the CDC Order at this juncture would seriously damage efforts to combat COVID-19. Dkt. 82-1, ¶¶ 14-17. In particular, the number of COVID-19 infections has skyrocketed in the states along the southern border, and their healthcare systems are stretched to the brink. *Id.* ¶¶ 17-39. Given that ORR facilities rely on local healthcare systems, any unaccompanied minors in the care of ORR who need treatment would further strain the local healthcare systems, which will soon be overwhelmed if current trends continue. *Id.* ¶¶ 20, 22, 34; Dkt. 82-2, ¶¶ 19-21; Dkt. 82-4, ¶ 26. HHS has cautioned that “it is vitally important that every effort be made to reduce the strain on local health care systems in severely affected areas[.]” Dkt. 82-1, ¶ 58.

The injunction also risks straining ORR's already-limited capacity. ORR has seen an increase in its number of referrals in recent months, from 39 referrals in May to over 1,500 referrals in October. Dkt. 82-4, ¶ 14. Based on recent trends, ORR anticipates receiving 300 to 400 referrals per day in the near future as a result of the injunction. *Id.* ¶ 20. The injunction will require the government to hold these putative class members in congregate settings before their transfer to ORR, thus increasing the risk of transmission to putative class members themselves, DHS personnel, and the public at large. Dkt. 82-1, ¶ 57. Indeed, ORR has seen a drastic increase in the percentage of minors who test positive with COVID-19 upon entry to ORR, with 679 out of a total of 838 positive tests occurring in the last three months. Dkt. 82-4, ¶ 16; *see also* Dkt. 82-1, ¶¶ 40-46.

Due to public health measures, ORR is operating at reduced capacity and only has approximately 7,800 available beds for minors referred into its care. Dkt. 82-7, ¶ 5. If the injunction is not stayed, ORR estimates it will exhaust its total available capacity by January or February 2021. *Id.* ¶ 21. Additionally, once ORR's southwest border facilities are at capacity, which ORR projects will occur in December 2020 or January 2021, and possibly as early as December 12, ORR will need to transport minors into the interior of the country using commercial airlines, thus placing the general public at risk of exposure. Dkt. 82-3, ¶¶ 12, 14; Dkt. 82-4, ¶¶ 5, 10, 18. Indeed, ORR has already exhausted its capacity for pregnant, parenting, and tender

age minors, who cannot be housed in ORR facilities licensed to care for other demographic groups, such as teen males. Dkt. 85-1, ¶¶ 3-6. Accordingly, ORR has begun transporting minors of this demographic to facilities further inland using commercial flights or buses. *Id.* ¶¶ 4-5. Moreover, in the past week, ORR has confronted unexpectedly large groups of referrals in certain areas, which has created acute bed capacity shortages in parts of the southwest border, particularly in the El Paso and Phoenix areas. *Id.* ¶¶ 7-8.

Any harm to the plaintiff class members resulting from a stay could be minimized if the government's appeal of the preliminary injunction is briefed and considered by the Court on an expedited schedule. Moreover, even under the district court's interpretation of Section 265, it is undisputed that the government could lawfully prohibit covered aliens from entering the country before they cross the border, so any cognizable harm to covered aliens who cross the border outside of a Port of Entry would be the result of their having violated federal law in the first place. On the other side of the equitable balance, the CDC Director has determined that the challenged Order is necessary to protect the health and safety of *all* Americans. Under those circumstances, the balance of equities favors a stay pending appeal.

CONCLUSION

For the foregoing reasons, this Court should stay the district court's preliminary injunction pending appeal.

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

MICHAEL R. SHERWIN
Acting United States Attorney

SOPAN JOSHI
*Senior Counsel to the Assistant Attorney
General*

SHARON SWINGLE

/s/ Joshua Waldman

JOSHUA WALDMAN
ASHLEY A. CHEUNG

*Attorneys, Appellate Staff
Civil Division*

*U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530*

(202) 514-0236

joshua.waldman@usdoj.gov

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**CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES**

Defendants-Appellants submit the following Certificate as to Parties, Rulings, and Related Cases in the above-captioned matter pursuant to Circuit Rules 27(a)(4).

1. Parties and Amici.

The named Plaintiff is P.J.E.S., a minor child, by and through his father and Next Friend, Mario Escobar Francisco, on behalf of himself and others similarly situated.

The named Defendants in the district court are Chad F. Wolf, Acting Secretary of Homeland Security, in his official capacity; Mark A. Morgan, Chief Operating Officer and Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection, in his official capacity; Todd C. Owen, Executive Assistant Commissioner, CBP Office of Field Operations, in his official capacity; Rodney S. Scott, Chief of U.S. Border Patrol, in his official capacity; Matthew T. Albence, Deputy Director Of U.S. Immigration and Customs Enforcement, in his official capacity; Alex M. Azar II, Secretary of Health and Human Services, in his official capacity; Dr. Robert R. Redfield, Director of the Centers for Disease Control and Prevention, in his official capacity; and Heidi Stirrup, Acting Director of the Office of Refugee Resettlement, in her official capacity.

Pursuant to Federal Rule of Appellate Procedure 43(c), Tony H. Pham, Senior Official Performing the Duties of Director of U.S. Immigration and Customs

Enforcement, in his official capacity should replace Matthew T. Albence, the former Deputy Director Of U.S. Immigration and Customs Enforcement.

Appearing as amici in the district court were (1) Scholars of Refugee and Immigration Law; (2) International Refugee Assistance Project; and (3) Immigration Reform Law Institute.

2. Rulings Under Review.

The notice of appeal seeks this Court's review of the district court's order, dated November 18, 2020, granting a preliminary injunction and provisionally granting class certification.

3. Related Cases.

Defendants are aware of one related case raising the same or similar issues. *GYJP v. Wolf, et al.*, No. 20-cv-01511-TNM (D.D.C.).

/s/ Joshua Waldman
JOSHUA WALDMAN

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion satisfies the type-volume limitation in Rule 27(d)(2)(A) because it contains 5,099 words. This motion also complies with the typeface and type-style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Joshua Waldman

JOSHUA WALDMAN

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Joshua Waldman

JOSHUA WALDMAN

Addendum

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

P.J.E.S.,
a minor child, by and through
his father and next friend,
Mario Escobar Francisco,
on behalf of himself and
others similarly situated,

Plaintiffs,

v.

CHAD F. WOLF,
Acting Secretary of
Homeland Security, *et al.*,

Defendant.

Civ. Action No. 20-2245 (EGS)

MEMORANDUM OPINION

Plaintiff P.J.E.S., a 15-year-old minor from Guatemala who entered the United States as an unaccompanied minor in August 2020, brings this action against Chad F. Wolf in his official capacity as Acting Secretary of Homeland Security and various other federal government officials ("Defendants" or the "Government") for violations of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*; the Trafficking Victims Protection Reauthorization Act ("TVPRA"), 8 U.S.C. § 1232; the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*; and the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), 8 U.S.C. § 1231 NOTE.

Pending before the Court are Plaintiff's motion for class

certification ("Pl.'s Cert. Mot."), ECF No. 2¹, and motion for a classwide preliminary injunction ("Pl.'s Prelim. Inj. Mot."), ECF No. 15. Magistrate Judge Harvey's Report and Recommendation ("R. & R.") recommends that this Court provisionally grant the motion for class certification and grant the motion for preliminary injunction and . See R. & R., ECF No. 65 at 2.

The Government has objected to several of Magistrate Judge Harvey's recommendations. See Gov't's Objs., ECF No. 69. Raising no objections to the R. & R., Plaintiff asks this Court to adopt Magistrate Judge Harvey's recommendations to grant both motions. See Pl.'s Resp. to Pl.'s Objs. ("Pl.'s Resp."), ECF No. 72 at 7. Upon careful consideration of the R. & R., the Government's objections, Plaintiff's response, and the relevant law, the Court hereby **ADOPTS** the R. & R., ECF No. 65, **PROVISIONALLY GRANTS** Plaintiff's (1) Motion to Certify Class, ECF No. 2, and **GRANTS** Plaintiff's (2) Motion for Preliminary Injunction, ECF No. 15.

I. Background

The factual background and procedural history in this case are set forth in the R. & R. See R. & R., ECF No. 65 at 3-15.²

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

² The Court accepts as true the allegations in the operative complaint for purposes of deciding this motion, and construes them in Plaintiff's favor. See *Baird v. Gotbaum*, 792 F.3d 166,

A. Factual Background

1. Pre-COVID-19 Pandemic

Prior to the current COVID-19 pandemic and pursuant to the TVPRA, unaccompanied children who entered the United States and were nationals of countries that do not share a border with the United States were required to be transferred to the care and custody of the Department of Health and Human Services' ("DHH") Office of Refugee Resettlement ("ORR"), within 72 hours of their detainment, for placement in the "least restrictive setting that is in the best interest of the child." 8 U.S.C. § 1232(b).

Unaccompanied children from countries that share borders with the United States were initially screened to determine that the unaccompanied child: (1) was not a victim of trafficking; (2) did not have "a credible fear of persecution"; and (3) was "able to make an independent decision" about their admission into the United States. *Id.* § 1232(a)(2)(A). Absent these determinations, the unaccompanied child was also transferred to the care and custody of ORR. *Id.* § 1232(a)(3). These unaccompanied children also had access to "counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking," *id.* § 1232(c)(5); and some were

169 n.2 (D.C. Cir. 2015). The Government does not object to Magistrate Judge Harvey's recitation of the alleged facts. See generally, Gov't's Objs., ECF No. 69.

provided "independent child advocates . . . to effectively advocate for the[ir] best interest." *Id.* § 1232(c)(6).

In addition, all unaccompanied children retained their rights under the INA to (1) apply for asylum, *id.* § 1158(a)(1); contest their removal to a country where their "life or freedom would be threatened . . . because of [their] race, religion, nationality, membership in a particular social group, or political opinion," *id.* § 1231(b)(3) ("withholding of removal"); or, pursuant to FARRA, (3) make a case that "he or she would be tortured if removed to the proposed country of removal." *Id.* § 1231 Note.

2. COVID-19 Pandemic and CDC Orders

Since 1893, federal law has provided federal officials with the authority to stem the spread of contagious diseases from foreign countries by prohibiting, "in whole or in part, the introduction of persons and property from such countries." Act of February 15, 1893, ch. 114, § 7, 27 Stat. 449, 452, ECF No. 15-5 at 5 ("1893 Act"). Under current law,

Whenever the Surgeon General determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, and that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required in the interest of the public health, the Surgeon General, in accordance with regulations

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

42 U.S.C. § 265 ("Section 265"). In 1966, "the Surgeon General's § 265 authority was transferred" to HHS, which in turn "delegated this authority to the [Centers for Disease Control ("CDC")] in 2001 and [t]he President's functions under § 265 were assigned to the Secretary of HHS in a 2003 executive order." Compl., ECF No. 1 at 13 n.2.

On March 24, 2020, as the COVID-19 virus spread throughout the country, the CDC issued a new regulation, pursuant to Section 265, aiming to "provide[] a procedure for CDC to suspend the introduction of persons from designated countries or places, if required, in the interest of public health." Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16559-01, 2020 WL 1330968, (March 24, 2020) ("Interim Rule"). The Interim Rule created Section 71.40 to "enable the CDC Director to suspend the introduction of persons into the United States" and stated, in relevant part,

(b) For purposes of this section:

(1) Introduction into the United States

of persons from a foreign country (or one or more political subdivisions or regions thereof) or place means the movement of a person from a foreign country (or one or more political subdivisions or regions thereof) or place, or series of foreign countries or places, into the United States so as to bring the person into contact with persons in the United States, or so as to cause the contamination of property in the United States, in a manner that the Director determines to present a risk of transmission of a communicable disease to persons or property, even if the communicable disease has already been introduced, transmitted, or is spreading within the United States;

(2) Serious danger of the introduction of such communicable disease into the United States means the potential for introduction of vectors of the communicable disease into the United States, even if persons or property in the United States are already infected or contaminated with the communicable disease; and

(3) The term "Place" includes any location specified by the Director, including any carrier, as that term is defined in 42 CFR 71.1, whatever the carrier's nationality.

Id. at 16566-67. The CDC's Interim Rule was made effective immediately, "without advance notice and comment," Compl., ECF No. 1 at 13 ¶ 50; though the CDC explained that "[p]ursuant to 5 U.S.C. 553(b) (3) (B)," of the APA, HHS "conclude[d] that there [was] good cause to dispense with prior public notice and the opportunity to comment on this rule before finalizing this

rule." Interim Rule at 16564. Specifically, the CDC stated that "[g]iven the national emergency caused by COVID-19, it would be impracticable and contrary to the public health—and, by extension, the public interest—to delay these implementing regulations until a full public notice-and-comment process is completed." *Id.* at 16565. Finally, noting that Section 265 applied to "persons" in general, the CDC declared that the "interim final rule [would] not apply to U.S. citizens or lawful permanent residents . . . [because the] CDC believes that, at present, quarantine, isolation, and conditional release, in combination with other authorities, while not perfect solutions, can mitigate any transmission or spread of COVID-19 caused by the introduction of U.S. citizens or lawful permanent residents into the United States." *Id.* at 16564.

Pursuant to the Interim Rule, the CDC Director issued an order suspending the introduction of "covered aliens" which he defined as "persons traveling from Canada or Mexico (regardless of their country of origin) who would otherwise be introduced into a congregate setting in a land Port of Entry ["POE"] or Border Patrol station at or near the United States borders with Canada and Mexico" for a period of 30 days. Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060-02, 2020 WL

1445906 (March 26, 2020) ("March Order"). The CDC Director found the March Order necessary because the public health risks

include[d] transmission and spread of COVID-19 to [U.S. Customs and Border Protection ("CBP")] personnel, U.S. citizens, lawful permanent residents, and other persons in the POEs and Border Patrol stations; further transmission and spread of COVID-19 in the interior; and the increased strain that further transmission and spread of COVID-19 would put on the United States healthcare system and supply chain during the current public health emergency.

Id. at 17061. In a section titled "Determination and Implementation," the March Order declared that "[i]t is necessary for the public health to immediately suspend the introduction of covered aliens" and "require[d] the movement of all such aliens to the country from which they entered the United States, or their country of origin, or another location as practicable, as rapidly as possible." *Id.* at 17067. The CDC Director then "requested that DHS implement th[e] [March Order] because CDC does not have the capability, resources, or personnel needed to do so" and then notes that "CBP [had already] developed an operational plan for implementing the order." *Id.* In April, the March Order was extended another 30 days. See Extension of Order Under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 22424-01, 2020 WL 1923282 (April 22, 2020)

("April Order"). The March Order was extended again on May 20, 2020 and amended to "clarify that it applies to all land and coastal [POEs] and Border Patrol stations at or near the United States' border with Canada or Mexico that would otherwise hold covered aliens in a congregate setting." Amendment and Extension of Order Under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 31503-02, 31504, 2020 WL 2619696 (May 26, 2020) ("May Order"). The May Order also extended the duration of the order until the CDC Director "determine[s] that the danger of further introduction of COVID-19 into the United States has ceased to be a serious danger to the public health," though the CDC would still conduct a recurring 30-day review. *Id.* Finding that: (1) the CDC Order had "significantly mitigated the specific public health risk identified in the initial Order by significantly reducing the population of covered aliens held in congregate settings in POEs and Border Patrol stations," *id.* at 31505; and (2) "due to their lack of legal immigration status, there is significant uncertainty that covered aliens would be able to effectively self-quarantine, self-isolate, or otherwise comply with existing social distancing guidelines, if they were conditionally released," *id.* at 31508; the CDC Director requested that DHS "continue to implement the operational plan

developed to carry out the" March and April Orders, *id.* The Court will refer to the process developed by the CDC and implemented by the March, April, and May Orders as the "CDC Orders."³

As noted above, the CBP had already developed its plan to implement the March Order and issued a memorandum on April 2, 2020 establishing its procedures for implementing the order. See Compl., ECF No. 1 at 17 ¶ 65; see also COVID-19 CAPIO, ECF No. 15-5 at 15 ("CAPIO Memo"). Specifically, the CAPIO Memo instructed that when implementing the CDC Orders, agents may determine whether individuals are subject to the CDC Orders "Based on training, experience, physical observation, technology, questioning and other considerations." CAPIO Memo, ECF No. 15-5 at 15. If an individual was determined to be subject to the CDC Orders, they were to be "transported to the nearest POE and immediately returned to Mexico or Canada depending on their point of transit." *Id.* at 17. The CAPIO Memo, "provide[d] no instructions on medical screenings or other procedures for determining whether a covered noncitizen may have COVID-19," Compl., ECF No. 1 at 17 ¶ 68; and did "not exempt minors from forcible expulsion," *id.* at 18 ¶ 69.

³ Plaintiff refers to the process under 42 U.S.C. § 265 as the "Title 42 Process," see Pl.'s Prelim. Inj. Mot., ECF No. 15; while the Government refers to it as the "CDC Order." See Gov't's Combined Opp'n, ECF No. 42 at 12.

On September 11, 2020, the CDC published its final rule. See Control of Communicable Diseases; Foreign Quarantine: Suspension of the Right To Introduce and Prohibition of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 56424-01, 2020 WL 5439721, (Sept. 11, 2020) (Effective October 13, 2020) ("Final Rule"). The Final Rule, which references this case but makes no changes to its determinations and findings as relevant for this action, see *id.* at 56437, states "[i]t has long been recognized that 'where a general power is conferred or duty enjoined, every particular power necessary for the exercise of the one, or the performance of the other, is also conferred.'" *Id.* at 56445. It further states that "HHS/CDC identifies particular powers that it may exercise under [Section 265] by defining the phrase to '[p]rohibit, in whole or in part, the introduction into the United States of persons' to mean 'to prevent the introduction of persons into the United States by suspending any right to introduce into the United States, physically stopping or restricting movement into the United States, or physically expelling from the United States some or all of the persons.'" *Id.*

3. CDC Orders' Effect on Plaintiff

Plaintiff is a 16-year-old boy from Guatemala, who entered the United States in August 2020, was apprehended by CBP and

initially held in CBP custody in McAllen, Texas, before he was made subject to expulsion pursuant to the CDC Orders and CAPIO Memo. See *id.* at 19 ¶¶ 77, 81. His father lives in the United States and has a pending immigration case. See *id.* ¶ 78.

Plaintiff is from “an indigenous Mayan family” and alleges to have (1) “experienced severe persecution in Guatemala” due to his father’s political opinions; and (2) had his life threatened due to his refusal to join a gang. *Id.* ¶ 79. He states that, if he is “allowed to remain in the United States, he could live with his father . . . or another suitable sponsor.” *Id.* ¶ 84. Further, Plaintiff asserts that, “even if [he is] required to first reside for a short time in a[n] ORR children[’s] shelter, he could do so safely . . . [because] ORR facilities [] have experience with communicable diseases . . . [and] are currently well under capacity, [which would allow for] social distancing and quarantine[ing].” *Id.* at 20 ¶ 85. Plaintiff alleges that, instead of remaining in CBP custody, he “could have been transferred directly to his father or another sponsor or to an ORR shelter, [and] he would [have] pose[d] minimal, if any, additional risk to border agents.” *Id.* ¶ 88. On August 14, 2020, after Plaintiff filed this action and a motion for class certification, the Government exempted him from the CDC Orders. See Escobar Francisco Decl., ECF No. 14-1 at 2 ¶ 11.

4. CDC Orders' General Effect on Unaccompanied Children

Plaintiff alleges that unaccompanied children have "been required to remain in DHS custody longer than the time it would have taken to transfer them to their family members or to an ORR facility," Compl., ECF No. 1 at 20 ¶ 89; and that "arranging for air transport to deport individuals will generally take longer than time in which DHS must transfer children to ORR or family members." *Id.* at 21 ¶ 90. He further alleges that some unaccompanied "children are held for days or weeks in hotels [as] they await flights back to their home countries, [while] [o]thers are detained in CBP facilities near the border, reportedly held in cage-like settings with other children." *Id.* ¶ 91. Finally, Plaintiff states,

Unaccompanied children subject to the [CDC Orders] face numerous problems accessing legal representation. Because children can be expelled under Title 42 in a matter of days, the child or any family member who obtains information about the child has only a limited amount of time in which to advocate for the child. And because the [] Process [pursuant to the CDC Orders] has operated largely in secret, its rules and procedures have remained opaque to children, their parents, and any lawyers and advocates who seek to help them. Unaccompanied children are also unable, by reason of their youth, to advocate effectively for themselves, especially when detained in custodial settings by government officers. Many do not speak English, and lack even a basic comprehension of the U.S. legal system. Their relatives are similarly not well-situated to help navigate this process, especially given the time constraints; many

children are from families in which few members have had significant formal schooling, much less any fluency in English.

Id. at 21-22 ¶ 93. At the time he filed his motion for preliminary injunction, Plaintiff alleged that the DHS had “already expelled at least 2,000 unaccompanied children pursuant to the CDC Order[s],” Pl.’s Prelim. Inj. Mem., ECF No. 15-1 at 10; but Plaintiff now alleges that the number of expelled unaccompanied children had “exceeded 13,000 by the end of October.” Pl.’s Notice of November 17, 2020, ECF No. 78.⁴

B. Procedural Background

Plaintiff filed this action on August 14, 2020, see Compl., ECF No. 1; and a motion for class certification, see Pl.’s Cert. Mot., ECF No. 2, that same day. On August 20, 2020, Plaintiff filed a motion for a classwide preliminary injunction. See Pl.’s Prelim. Inj. Mot., ECF No. 15. The Government filed its Combined Opposition to Plaintiff’s Motions for Class Certification and for Classwide Preliminary Injunction (“Gov’t’s Combined Opp’n”) on September 8, 2020, see Gov’t’s Combined Opp’n, ECF No. 42; and Plaintiff filed his Combined Reply Memorandum in Support of Motions for Classwide Preliminary Injunction and Class

⁴ Citing to Hamed Aleaziz, *Border Officials Turned Away Unaccompanied Immigrant Children More Than 13,000 Times Under Trump’s Pandemic Policy*, BuzzFeed News (Oct. 28, 2020), <https://www.buzzfeednews.com/article/hamedaleaziz/border-officials-turned-away-unaccompanied-immigrants>.

Certification ("Pl.'s Combined Reply") on September 15, 2020.

Pl.'s Combined Reply, ECF No. 52.

Magistrate Judge Harvey, having been referred Plaintiff's motions and this case for full case management, issued his R. & R. on September 25, 2020. See R. & R., ECF No. 65; see also Sept. 6, 2020 Min. Order. The Government submitted objections to the R. & R. on October 2, 2020, see Gov't's Objs., ECF No. 69; Plaintiff filed his Response to the Government's Objections on October 9, 2020, see Pl.'s Resp., ECF No. 72; and the Government filed its Reply to Plaintiff's Response to the Government's Objections ("Gov't's Objs. Reply") on October 14, 2020, see Gov't's Objs. Reply, ECF No. 75. The objections are ripe and ready for the Court's adjudication.

II. Legal Standards

A. Objections to a Magistrate Judge's Report and Recommendation

Pursuant to Federal Rule of Civil Procedure 72(b), a party may file specific written objections once a magistrate judge has entered a recommended disposition. Fed. R. Civ. P. 72(b)(1)-(2). A district court "may accept, reject or modify the recommended disposition." Fed. R. Civ. P. 72(b)(3); see also 28 U.S.C. § 636(b)(1) ("A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge."). A district court "must determine de novo

any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). "If, however, the party makes only conclusory or general objections, or simply reiterates his original arguments, the Court reviews the [R. & R.] only for clear error." *Houlahan v. Brown*, 979 F. Supp. 2d 86, 88 (D.D.C. 2013) (citation omitted). "Under the clearly erroneous standard, the magistrate judge's decision is entitled to great deference" and "is clearly erroneous only if on the entire evidence the court is left with the definite and firm conviction that a mistake has been committed." *Buie v. D.C.*, No. CV 16-1920 (CKK), 2019 WL 4345712, at *3 (D.D.C. Sept. 12, 2019) (citing *Graham v. Mukasey*, 608 F. Supp. 2d 50, 52 (D.D.C. 2009)) (internal quotation marks omitted).

Objections must "specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for objection." LCvR 72.3(b). "[O]bjections which merely rehash an argument presented to and considered by the magistrate judge are not 'properly objected to' and are therefore not entitled to de novo review." *Shurtleff v. EPA*, 991 F. Supp. 2d 1, 8 (D.D.C. 2013) (quoting *Morgan v. Astrue*, No. 08-2133, 2009 WL 3541001, at *3 (E.D. Pa. Oct. 30, 2009)).

B. Preliminary Injunction

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2]

that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014) (alteration in original) (quoting *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011)). Where the federal government is the opposing party, the balance of equities and public interest factors merge. See *Nken v. Holder*, 556 U.S. 418, 435 (2009). A preliminary injunction is an “extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citation omitted). “The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). In this Circuit, the four factors have typically been evaluated on a “sliding scale,” such that if “the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor.” *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291–92 (D.C. Cir. 2009).

In the wake of the Supreme Court’s decision in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008), “the D.C. Circuit has suggested that a positive showing on all four

preliminary injunction factors may be required." *Holmes v. FEC*, 71 F. Supp. 3d 178, 183 n.4 (D.D.C. 2014); see also *Sherley*, 644 F.3d at 393 ("[W]e read *Winter* at least to suggest if not to hold that a likelihood of success is an independent, freestanding requirement for a preliminary injunction.") (citation and quotation marks omitted). Nonetheless, "the Circuit has had no occasion to decide this question because it has not yet encountered a post-*Winter* case where a preliminary injunction motion survived the less rigorous sliding-scale analysis." *ConverDyn v. Moniz*, 68 F. Supp. 3d 34, 46 n.2 (D.D.C. 2014).

III. Analysis

Before proceeding to its analysis, the Court observes that another court in this District recently examined CBP's new process pursuant to the CDC Orders, in a case with facts similar to those before this Court. In *J. B. B. C. v. WOLF, et al.*, Docket No. 20-cv-1509 (D.D.C. filed June 9, 2020), the plaintiff, a 16-year-old boy from Honduras, whose father also lives in the United States and had a pending asylum case, was apprehended by CBP when he entered the country near El Paso, Texas and made subject to expulsion pursuant to the CDC Orders and CAPIO Memo. *J. B. B. C. Compl.*, Dkt No. 20-cv-1509, ECF No. 1 at 19-20 ¶¶ 76-80. At the time he filed his complaint, the plaintiff in *J. B. B. C.*, had been in a hotel for five days as

CBP moved under the new process to place him on a flight to Honduras. *Id.* ¶¶ 83-84. Since his expulsion was imminent, he filed a motion for temporary restraining order ("T.R.O.") that same day, presenting many of the same arguments as presented in this case. *See generally, J. B. B. C. Emergency Mot. for T.R.O., ECF No. 2.* At a June 24, 2020 hearing, Judge Nichols granted the TRO, finding that the *J. B. B. C.* plaintiff was likely to succeed on the merits. *J. B. B. C. Hr'g Tr., Dkt No. 20-cv-1509, ECF No. 39 at 49-50.*

Specifically, Judge Nichols found that: (1) Section 265 does not grant the CDC Director the power to return or remove, in light of the fact that immigration statutes directly "reference the power to return or to remove," *id.* at 50; (2) Section 265 "should be harmonized, to the maximum extent possible, with immigration statutes," *id.*; and (3) the CDC Director is not entitled to deference under *Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984), because Section 265 must be "read in light of statutes that the CDC Director quite plainly has no special expertise regarding and . . . the order does very little by way of an analysis of what exactly the power to prohibit the introduction of persons and property means," *id.* at 51-50. Notably, after Judge Nichols's ruling, the Government transferred the *J. B. B. C.* plaintiff to ORR, noting that he would "no longer be subject to the challenged CDC Order" and

claimed that the case was moot. *J. B. B. C. Notice to Ct.*, Dkt No. 20-cv-1509, ECF No. 41 at 1. When the *J. B. B. C.* plaintiff filed an amended complaint, adding another plaintiff, E.Y.E., a 15-year-old boy from Guatemala, who claimed to be escaping an abusive grandfather and aunt, and who had siblings in the United States who had been granted asylum the previous year based on similar claims, the Government excepted him from the CDC Orders as well. See *J. B. B. C. Mot. to Dismiss*, Dkt No. 20-cv-1509, ECF No. 47 at 9. The *J. B. B. C.* plaintiffs then voluntarily dismissed the case. See *J. B. B. C. Notice of Voluntary Dismissal*, Dkt No. 20-cv-1509, ECF No. 48.

A. Plaintiff's Motion for Class Certification

Pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), Plaintiff has sought certification of the following class: All unaccompanied noncitizen children who (1) are or will be detained in U.S. government custody in the United States, and (2) are or will be subjected to the Title 42 Process ("Subject Class"). Pl.'s Cert. Mot., ECF No. 2 at 1.

Magistrate Judge Harvey found that Plaintiff's motion for class certification should be provisionally granted because Plaintiff met the: (1) numerosity requirement by providing evidence that almost 6,000 unaccompanied non-citizen children were apprehended at the southwest border between April and July 2020, [and] more than 2,000 unaccompanied non-citizen children

had been expelled, R. & R., ECF No. 65 at 17; (2) commonality requirement because the challenged CDC Orders are a "a uniform policy or practice that affects all class members," *id.* at 18; (3) typicality requirement since Plaintiff's claims and the claims of the putative class "stem from a unitary course of conduct—expulsion of unaccompanied non-citizen children" under the CDC Orders and "are based on the same legal theories," *id.* at 19; (4) adequacy requirement because, citing to *JD v. Azar*, 925 F.3d 1291, 1322 (D.C. Cir. 2019) (*per curiam*), the "Plaintiff is an adequate class representative who, with his counsel, will vigorously pursue the claims of the putative class," *id.* at 21; and the cohesiveness requirement because the Government allegedly applied the same illegal CDC Orders to the Plaintiff and Subject Class, and the Plaintiff and Subject Class seek the same relief, *see id.* at 22.

The Government's only objection to Magistrate Judge Harvey's recommendation is that the case upon which he relied—*J.D. v. Azar*—was wrongly decided because allowing a Plaintiff whose claims are moot to serve as a class representative "is an improper relaxation of Article III's strict requirement of a case or controversy." Gov't's Objs., ECF No. 69 at 38.

However, *J.D. v. Azar* is binding precedent on this Court. *See Hopkins v. Price Waterhouse*, 920 F.2d 967, 975 (D.C. Cir. 1990) ("[T]he trial court . . . [is] nonetheless bound by the law

of the circuit.”). Furthermore, the actions the Government has taken to avoid judicial scrutiny by mootng the claims of the unaccompanied children, Plaintiff’s counsel bring to their attention, arguably reveals an intent to make Plaintiff’s claim “so inherently transitory that the [Court] will not have [] enough time to rule on [the] motion for class certification before the proposed representative’s individual interest expires.” *J.D.*, 925 F.3d at 1309. However, the “relation back” doctrine, which allows a “motion for certification [to] ‘relate back’ to the filing of the complaint,” *id.* at 1308; was created so that a class would not be deprived of its day in court by a defendant simply exempting the class representatives in order to moot the class’ claims, see *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991); see also *Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1978) (holding that the State’s action of excepting some of the named plaintiffs “did not deprive the District Court of the power to certify the class action”). Having addressed the Government’s sole objection to this recommendation, and finding no clear error in this portion of the R. & R., the Court **ADOPTS** Magistrate Judge Harvey’s recommendation, and **PROVISIONALLY GRANTS** Plaintiff’s motion for class certification. Pl.’s Cert. Mot., ECF No. 2.

B. Plaintiff's Motion for Preliminary Injunction

1. Plaintiff is likely to Succeed on the Merits

Pursuant to Federal Rule of Civil Procedure 65 and Local Civil Rule 65.1, Plaintiff seeks a "classwide preliminary injunction enjoining the application of the [CDC Orders] to Plaintiff and Class Members." Pl.'s Prelim. Inj. Mot., ECF No. 15 at 1. Specifically, Plaintiff argues that he is likely to succeed on the merits because (1) Section 265 "does not authorize deportation"; (2) "unaccompanied children are entitled to explicit statutory procedures and protections [and those] later-enacted statutes control over whatever [Section] 265 may authorize in general"; and (3) "subjecting Class Members to the CDC Orders is arbitrary and capricious in violation of the" APA. Pl.'s Prelim. Inj. Mem., ECF No. 15-1 at 21.

Magistrate Judge Harvey found "that Plaintiff is likely to prevail in his argument that the CDC Orders instituting the Title 42 Process exceed the authority granted by Congress pursuant to Section 265," R. & R., ECF No. 65 at 24; noting that the Government's "parsing of the plain text of the statute makes an unsupported (and unwarranted) logical leap . . . by asserting that '[t]he statute's reference to prohibiting the introduction 'in whole or in part' supports the interpretation that a person may be intercepted and then quarantined in the United States or intercepted and *then expelled*,'" *id.* at 25 (emphasis in

original); see also Final Rule at 56425-26. The Government makes a number of objections, which the Court addresses below.

Chevron provides the framework for reviewing an agency's interpretation of a statute that the agency is charged with administering. See 467 U.S. at 837. The first step in this review process is for the court to determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. In determining whether the statute unambiguously expresses the intent of Congress, the court should use all the "traditional tools of statutory construction," including looking to the text and structure of the statute, as well as its legislative history, if appropriate. See *id.* at 843 n.9; see also *Bell Atlantic Tel. Co. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). If the court concludes that the statute is either silent or ambiguous with respect to the precise question at issue, the second step of the court's review process is to determine whether the interpretation proffered by the agency is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The court must defer to agency interpretations that are not "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

**a. Section 265 Likely Does Not Authorize
Expulsions**

The Court first reviews “the language of the statute itself.” *United States Ass'n of Reptile Keepers, Inc. v. Zinke*, 852 F.3d 1131, 1135 (D.C. Cir. 2017). Both Plaintiff and the Government provide various definitions for the word “introduction” and the phrase “prohibit . . . the introduction of.” See Pl.’s Prelim. Inj. Mem., ECF No. 15-1 at 25-26 (citing *Introduce, Universal English Dictionary 1067* (John Craig ed. 1861) (the “term-‘introduction’-meant then, as now, ‘the act of bringing into a country.’”)); Gov’t’s Combined Opp’n, ECF No. 42 at 29-30 (citing *Universal English Dictionary 458* (John Craig ed. 1869) (“to ‘prohibit . . . the introduction’ naturally means to intercept or prevent such a process.”)). The Government further states the meaning of the word “prohibit” is “to forbid; to interdict by authority; to hinder; to debar; to prevent; [or] to preclude.” Gov’t’s Combined Opp’n, ECF No. 42 at 30 (citing *Prohibit, Oxford English Dictionary 1441* (1933)). Based on these definitions, the Government argues that Section 265 “clearly includes the authority to intercept persons who have already crossed the border and are in the process of being introduced into the United States.” Gov’t’s Objs., ECF No. 69 at 16.

Magistrate Judge Harvey assumed without deciding that the Government’s interpretation—intercepting or preventing a process

was legally sound, finding that even if the court “accept[s] that ‘to ‘prohibit . . . the introduction’ means ‘to intercept or prevent such a process’, [it] does not lead to the conclusion that ‘prohibition,’ ‘interception,’ or ‘prevention’ includes ‘expulsion.’” R. & R., ECF No. 65 at 25. Magistrate Judge Harvey reasoned that to “prohibit” “connotes stopping something before it begins, rather than remedying it afterwards.” *Id.* at 25-26.

The Government argues that Magistrate Judge Harvey’s reasoning—that “the Government’s interpretation is wrong because the definition of ‘prohibit’ connote[s] stopping something before it begins, rather than remedying it afterwards,” R. & R., ECF No. 65 at 25-26;—“makes no sense” because he “[a]ssumed without deciding that the government’s interpretation of the ‘introduction’ and the phrase ‘prohibit . . . the introduction’ of are legally sound,” *id.* at 25; and since the CDC Order only applies to persons who are in the process of being introduced rather than already introduced, expelling them does not remedy something afterwards because they have not been introduced, see Gov’t’s Objs., ECF No. 69 at 17. The Court disagrees. Even accepting that the phrase, “prohibit[ing] . . . the introduction of,” means “intercepting” or “preventing”; the phrase does not encompass expulsion; but merely means that the process of introduction can be halted. Expelling persons, as a matter of ordinary language, is entirely different from interrupting,

intercepting, or halting the process of introduction.⁵ Put another way, interrupting, intercepting, or halting the process of introduction does inexorably lead to expulsion.

Neither Section 265 nor any of the definitions provided by the Government contain the word "expel." They do not even contain synonyms of the word expel, such as "eject" or "evict." See Synonyms for Expel, *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/expel> (last visited Oct. 27, 2020). The Court finds this to be significant, because even "broad rulemaking power must be exercised within the bounds set by Congress," *Merck & Co. v. United States Dep't of Health & Human Servs.*, 385 F. Supp. 3d 81, 92 (D.D.C. 2019), *aff'd*, 962 F.3d 531 (D.C. Cir. 2020); and the CDC "does not [have the] power to revise clear statutory terms," *Util. Air Reg. Grp.*, 573 U.S. at 327. To be sure, as Plaintiff and Magistrate Judge Harvey point out, "when Congress wants to grant the power to expel individuals out of the United States, it does so plainly." R. & R., ECF No. 65 at 29. For example, in the Chinese Exclusion Act of 1882, enacted only eleven years before the 1893 Act, Congress was very explicit in its deportation

⁵ With regard to the Government's objection to Magistrate Judge Harvey finding support for this interpretation in the title of Section 265: "Suspension of entries and imports from designated places to prevent spread of communicable diseases," 42 U.S.C. § 265; his point was that Section 265 does not address expulsion, not the meaning of entry as a matter of immigration law.

requirements, declaring "it shall not be lawful for any Chinese laborer to *come*, or, having so come . . . ninety days [after the Act], to *remain* within the United States." Chinese Exclusion Act of May 6, 1882, ch. 126, § 1 (emphasis added).

Finally, the Government objects on the grounds that Magistrate Judge Harvey's interpretation leads to an absurd, unworkable result because it results in Section 265 being without effect at land borders. Gov't's Opp'n, ECF No. 69 at 18-19. However, Magistrate Judge Harvey persuasively explained why his interpretation does not result in Section 265 being without effect at land borders. R. & R., ECF No. 65 at 36-38.

b. The Statutory Context Provides Support for Interpreting Section 265 to Likely Not Authorize Expulsions

Since "statutory language cannot be construed in a vacuum, . . . [i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) (citing *United States v. Morton*, 467 U.S. 822, 828 (1984)); see also *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). Plaintiff argues that neither Section 265 nor "a neighboring provision

laying out the 'penalties' for violation of 'any regulation prescribed' under § 265 make any mention of such expulsion authority." Pl.'s Prelim. Inj. Mem., ECF No. 15-1 at 22 (citing 42 U.S.C. § 271). The Government contends that "the explicit language in Section 265 authorizing the prohibition of persons (or property) from 'a foreign country' to protect against 'the introduction of such disease into the United States'. . . [in] context . . . clearly includes expulsion." Gov't's Combined Opp'n, ECF No. 42 at 31. Citing the CDC's additional reliance on "42 U.S.C. § 264 ('Section 264'), entitled 'Regulations to control communicable diseases'" which authorizes the CDC "to make and enforce such regulations . . . to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions," Magistrate Judge Harvey looked to that adjacent Section and found that it "does not contemplate regulations that authorize expulsion from the United States. . . . [but] only regulations that 'provide for the apprehension, detention, or conditional release of individuals.'" R. & R., ECF No. 65 at 27. Magistrate Judge Harvey observed that "in a section where one would expect the term to appear—where Congress has delineated the government's power to prevent the spread of contagious disease from individuals coming into the United States from a foreign country—it does not." *Id.* at 27-28.

The Government points to the rule of statutory construction that requires a statute to be construed in a manner such that particular construction does not render another provision superfluous to argue that Magistrate Judge Harvey's reasoning was flawed because if Section 264 authorized expulsion, Section 265 would be superfluous. Gov't's Opp'n, ECF No. 69 at 20. The Court disagrees. That "Section 264 does not contemplate regulations that authorize expulsion from the United States," R. & R., ECF No. 65 at 27; provides contextual support for interpreting Section 265 to not provide authority to expel persons. Plaintiffs have conceded that Section 265 vests the government with significant "authority to bar entry into the country, at least through the regulation of vessels (including airplanes) arriving in the United States." R. & R., ECF No. 65 at 36. Accordingly, interpreting Section 265 to not authorize expulsions does not render the provision superfluous.

In addition, the Government also argues that Magistrate Judge Harvey erred when he concluded that Congress could not have delegated the authority by silence by not expressly providing for expulsion authority in Section 265 because that section expressly delegated the power to issue regulations that accomplish its purpose. Gov't's Obj., ECF No. 69 at 20. The Government's argument is beside the point; if Section 265 does not provide the authority to expel persons; then it does not

delegate the authority to issue regulations to expel persons.

The Government further argues that just because this is the first time it has claimed that Section 265 provides it with the authority to expel persons since the provision was enacted 75 years ago does not mean that it does not have such authority. *Id.* The Government cites the historic and unprecedented nature of the pandemic and the legislative history of the Section 265 to argue that if "Section 265 authority is sparingly used only tracks the extraordinary nature of the authority and the fact that it is very rarely needed." *Id.* at 22. The Court agrees that the undisputed authority granted in Section 265 is extraordinary and that the COVID-19 pandemic is unprecedented. But that is entirely distinguishable from whether or not Section 265 authorizes the Government to expel persons. The Court also notes that the legislative history cited by the Government provides not support for its position that Section 265 authorizes it to expel persons.⁶

Beyond Section 264, Magistrate Judge Harvey noted that the "statute is shot through with references to quarantine . . . but

⁶ The Government also argues that the situation here is distinguishable from the newly discovered power at issue in *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014). Gov't's Objs., ECF No. 69 at 21-22. Magistrate Judge Harvey's invocation of this authority, however, is only one of the multitude of reasons why plaintiff is likely to succeed on the merits of his claim.

it contains not a word about the power of the [CDC] to expel anyone who has come into the country." R. & R., ECF No. 65 28 (citing 42 U.S.C., Chap. 6A, Subchap. II, Part G (entitled "Quarantine and Inspection."); 42 U.S.C. § 267 (entitled "Quarantine stations, grounds, and anchorages"); 42 U.S.C. § 268 (entitled "Quarantine duties of consular and other officers"); 42 U.S.C. § 270 (entitled "Quarantine regulations governing civil air navigation and civil aircraft"); 42 U.S.C. § 271 (entitled "Penalties for violation of quarantine laws"); 42 U.S.C. § 272 (entitled "Administration of oaths by quarantine officers")). The statutory scheme reflects Congress's focus on the public's health, authorizing the CDC to create regulations that allow for the "apprehension, detention, examination, or conditional release of individuals" entering from foreign countries to stop the spread of communicable diseases from those countries, 42 U.S.C. § 264; and then in times of serious danger, to halt the "introduction of persons" from designated foreign countries. 42 U.S.C. § 265. Notably, Congress established specific penalties for violations of any of the CDC's regulations pursuant to Sections 264, 265, 266 (entitled "Special Quarantine Powers in Time of War"), and 269 (entitled "Bills of health"). 42 U.S.C. § 271. However, not only is expulsion not mentioned in the statute, but all of these sections, including Section 265, are referred to as "quarantine

laws," suggesting that the CDC's powers were limited to quarantine and containment. *Id.*

c. Harmonizing Section 265 With Relevant Immigration Statutes Provides Support for Interpreting Section 265 to Likely Not Authorize Expulsions

In conducting his contextual analysis and in harmonizing Section 265 with immigration statutes, Magistrate Judge Harvey: (1) notes that several immigration statutes under Title 8 use words such as "remove" or "return," whereas none of these words are found in Section 265, see R. & R., ECF No. 65 at 30; and (2) finds the Government's reading of Section 265 to include the power to expel "unaccompanied minors like Plaintiff and the putative class members, . . . conflicts with various rights granted in the TVPRA and the INA," *id.* at 32. Citing to dicta *Russello v. United States*, 464 U.S. 16, 25 (1983), the Government objects to this by arguing that "'language in one statute usually sheds little light upon the meaning of different language in another statute.'" Gov't's Objs., ECF No. 69 at 22 (internal brackets omitted). In that vein, the Government argues that (1) statutes such as Section 265 which is "designed to prohibit the introduction of persons into the United States to avoid the spread of a communicable disease into the country" should not be compared to immigration statutes which are "designed to confer immigration benefits based on an alien's

individual circumstances” because the statutes have different aims, *id.* at 22-23; and (2) “statutes are already in harmony—the immigration provisions are of general applicability, and Section 265 temporarily suspends their effects in limited circumstances” such as a national emergency, *id.* at 24-25. The Government’s arguments are unpersuasive.

“It is a fundamental principle of statutory interpretation that absent provision[s] cannot be supplied by the courts.” *Rotkiske v. Klemm*, 140 S. Ct. 355, 360-61 (2019) (internal citations and quotation marks omitted). First, as Plaintiff points out and Magistrate Judge Harvey agrees, “the Supreme Court routinely points to other statutes as evidence that Congress knows how to legislate in particular ways.” Pl.’s Combined Reply, ECF No. 52 at 15 (collecting cases); *see also* R. & R., ECF No. 65 at 30 n.11. In view of current immigration laws, which speak to deportation by using words such as “remove” and “return,” *see* 8 U.S.C. § 1182(d)(3A) (“[t]he Attorney General shall prescribe conditions . . . to . . . *return* . . . inadmissible aliens”); § 1182(h)(2) (“No waiver shall be granted . . . for a period of not less than 7 years immediately preceding the date of initiation of proceedings to *remove* the alien from the United States.”) (emphasis added); the Court recognizes, as did Judge Nichols, that “[t]here’s a serious question about whether [Section 265’s] power includes the power

. . . to remove or exclude persons who are already present in the United States” and the “fact that Congress did not use [words such as ‘return’ or ‘remove’] . . . suggests at a minimum that the power to remove is not granted by [S]ection 265,” *J. B. B. C. Hr’g Tr.*, Dkt No. 20-cv-1509, ECF No. 39 at 50.

The Government contends that Section 265 contains a “clearly expressed congressional intention” to suspend the effect of Title 8 because Section 265 authorizes the suspension of other laws that provide for the right to introduce persons into the country. *Gov’t’s Objs.*, ECF No. 69 at 25. The Government argues that Magistrate Judge Harvey was wrong to rely on the absence of the phrase “[n]otwithstanding any other provision of law” in Section 265 for the proposition that it was not meant to suspend the effect of relevant Title 8 provisions because that phrase would logically appear in a subsequently enacted statute, but the relevant Title 8 provisions were enacted subsequent to Section 265. *Id.* However, the phrase “[n]otwithstanding any other provision of law” is not used to supersede only earlier-enacted statutes, but is properly read as “Congress’s indication that the statute containing that language is intended to take precedence over any pre-existing or subsequently-enacted legislation on the same subject.” *U.S. v. Puentes*, 803 F.3d 597, 606 (11th Cir. 2015) (internal citation

omitted). Further, the Government's contention that Section 265 and the relevant provisions of Title 8 are not on the "same subject" is unavailing since the Government intends to use Section 265 to expel persons from the United States just as Title 8 provides for the removal of persons.

The Government also argues that Magistrate Judge Harvey had no "sound reason" to conclude that the phrase "suspension of the right to introduce" in Section 265 is not a "clearly expressed congressional intention" to suspend the effect of Title 8 provisions. Gov't's Objs., ECF No. 69 at 26. Rather, according to the Government, the legislative history of the predecessor statute shows that Congress intended to authorize the temporary suspension of the immigration laws. *Id.* at 26-27. However, the language of Section 265 contains no "clear intention" to authorize the suspension of the relevant provisions of Title 8. *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018).

The Government further argues that Magistrate Judge Harvey improperly invoked the canon of "the specific governs the general" to find that the relevant provisions of Title 8 take precedence over Section 265 because his reasoning—that "[i]t is not clear how Section 265 . . . could be considered more specifically targeted to matters of immigration or as providing more specific solutions," R. & R., ECF No. 65 at 36;—is flawed because "Section 265 is not designed to target immigration at

all . . . it is a public health provision designed only to address the specific and rare instance of a public health crisis presented by the outbreak of a communicable disease.” Gov’t’s Objs., ECF No. 69 at 28. Since the Government concedes that “Section 265 is not designed to target immigration at all” it clearly cannot be the more specific statute when it is being relied upon to expel unaccompanied children who are entitled to protections under the relevant provisions of Title 8. *Id.*

Finally, the Government argues that Magistrate Judge Harvey erred in dismissing its “argument that Section 265 would be rendered a nullity if it must be applied in conjunction with immigration provisions.” *Id.* at 28-29. However, as explained *supra*, Magistrate Judge Harvey persuasively explained why his interpretation does not result in Section 265 rendered a nullity. R. & R., ECF No. 65 at 36-38.

d. The Government’s Interpretation of Section 265 is Likely Not Entitled to Chevron Deference

Magistrate Judge Harvey found that because the statute is not ambiguous using traditional tools of statutory interpretation, there was no need to reach step two of the *Chevron* analysis.⁷ R. & R., ECF No. 65 at 38 n.15. He stated,

⁷ Because he found the statute to be unambiguous, Magistrate Judge Harvey improperly invoked the constitutional avoidance doctrine. *See McFadden v. United States*, 576 U.S. 186, 197 (2015) (noting that the “canon of constitutional avoidance . . .

however, that even if there were ambiguity, he would find, as did Judge Nichols, that deference would not be justified because the question for the claim is purely legal and does not depend upon the CDC's scientific and technical expertise. *See id.*

The Government argues that, pursuant to *Chevron*, "simply because a question is purely legal says nothing about whether the Court should defer to an agency's reasonable interpretation of the statute it administers." Gov't's Objs., ECF No. 69 at 30. The Government contends that it is within CDC's delegated authority and expertise to interpret the word "introduction" because in interpreting the word, the CDC "utilized [its] scientific and technical knowledge and experience regarding communicable diseases generally and applied it to the specific public health threat here." *Id.* at 31. Assuming for the purpose of responding to the Government's objections that the term is ambiguous, the Court disagrees that the CDC's interpretation implicates its scientific and technical expertise because the Government has not explained how that scientific and technical expertise lead it to interpreting "introduction" to encompass "expulsion." *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019)

has no application in the interpretation of an unambiguous statute . . .") (internal quotation marks omitted). Magistrate Judge Harvey's invocation of this canon, however, is only one of the multitude of reasons why plaintiff is likely to succeed on the merits of his claim.

(noting that “[a] court must make an independent inquiry into whether the character and context of the agency interpretation entitled it to controlling weight”). Accordingly, CDC is not entitled to deference with respect to its interpretation.

For the reasons above, the Court **ADOPTS** Magistrate Judge Harvey’s finding that Plaintiff is likely to succeed on the merits of his claim.

2. Irreparable Injury

Plaintiff contends that, at the time he filed his complaint, he was likely to suffer an irreparable injury if he was expelled under Section 265 because he would have been “sent summarily back to Guatemala without any meaningful opportunity to assert his claims for relief, and where he would have faced grave harm from those he sought to escape.” Pl.’s Prelim. Inj. Mem., ECF No. 15-1 at 39. Further, Plaintiff provided declarations demonstrating that returned children are “frequently trafficked from rural to urban areas and across borders or to border areas, where they are often sexually exploited or subject to exploitative labor.” Lisa Frydman Decl., ECF No. 15-12 ¶ 6.

Magistrate Judge Harvey found that Plaintiff “adequately established a likelihood of irreparable injury should a preliminary injunction not issue,” R. & R., ECF No. 65 at 41; because “Plaintiff has presented declarations from attorneys

representing numerous unaccompanied children who have crossed the border and have bona fide claims for humanitarian relief, including fear of persecution on the basis of protected characteristics, but have been subjected to the [CDC Orders] and threatened with deportation prior to receiving any of the protections the immigration laws provide," *id.* at 39.

The Government's sole objection is that Magistrate Judge Harvey "improperly collapse[d] independent requirements such that Plaintiff's purported likelihood of success on the merits apparently establishes irreparable harm." Gov't's Objs., ECF No. 69 at 32.

Magistrate Judge Harvey was persuaded that Plaintiff and members of the Provisional Class demonstrated that in the absence of injunctive relief they were likely to suffer irreparable harm because they could be subject to "sexual and other violence and face the possibility of torture and death." R. & R., ECF No. 65 at 39; see also Lisa Frydman Decl., ECF No. 15-12 ¶ 6. (averring that returned children are "frequently trafficked from rural to urban areas and across borders or to border areas, where they are often sexually exploited or subject to exploitative labor."). Furthermore, Magistrate Judge Harvey recognized that "the burden of removal alone cannot constitute the requisite irreparable injury." R. & R., ECF No. 65 at 40 (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)). Magistrate

Judge Harvey appropriately distinguished the facts upon which that holding rested from this situation because here, “the putative class members are being returned without any opportunity to apply for asylum or withholding of removal. Once expelled from the United States and outside the jurisdiction of the Court, it is not clear that a remedy can be provided.” R. & R., ECF No. 65 at 40. The Government’s objections do not address Magistrate Judge Harvey’s reasoning on this point. See *generally*, Gov’t’s Objs., ECF No. 69; Reply, ECF No. 75.

For the reasons above, the Court **ADOPTS** Magistrate Judge Harvey’s finding that Plaintiff adequately established a likelihood of irreparable injury should a preliminary injunction not issue.

3. Balance of the Equities and Public Interest

Plaintiff contends that “[p]reventing [the Government] from removing unaccompanied children until final disposition of this case would not substantially injure the government” because: (1) “unaccompanied children referred to ORR care are typically released to sponsors under the TVPRA, which in most cases will be a parent or close relative who can ensure the child will self-quarantine,” Pl.’s Prelim. Inj. Mem., ECF No. 15-1 at 41; (2) the CDC Orders do “not make DHS officers safer, and in fact, likely increases any potential exposure” because expelling unaccompanied children takes longer than transferring them to

the ORR, *id.* at 42; and (3) “public health officials have overwhelmingly noted there are numerous safety measures that can be taken to avoid the spread of COVID-19, including quarantines,” *id.*

Magistrate Judge Harvey found that the [p]ublic interest in enjoining unlawful government action, protecting non-citizen children from being wrongfully removed, and preventing risks to “public health caused by the [CDC Orders] weighed in Plaintiff’s favor,” R. & R., ECF No. 65 at 41-42; and while “a preliminary injunction will impose some hardships on [the Government], the public interest and immitigable hardships to Plaintiff outweigh the mitigable hardships to [the Government],” *id.* at 42.

The Government objects on two grounds. First, that Magistrate Judge Harvey erred in his evaluation of the public interest because the children would be held in “congregate settings in border settings ill-equipped” to deal with the public health issues posed by the pandemic, resulting in an increased risk of COVID-19 transmission and infection among the children, others being held, DHS personnel, and the United States population at large.⁸ Gov’t’s Objs., ECF No. 69 at 33.

⁸ The Government makes similar objections by arguing that Magistrate Judge Harvey “erred in disregarding the ways in which the CDC Order and its enforcement” protect persons other than DHS personnel at the border; specifically “aliens, DHS personnel and the American public, as well as the vital healthcare resources of this Nation,” Gov’t’s Objs., ECF No. 69 at 34; and

However, Magistrate Judge Harvey did consider but ultimately rejected the Government's position, noting that the Government's "argument is suspect given that the alternative to quarantine that they propose—expulsion pursuant to the [CDC Order]—results in unaccompanied minors often being detained longer while awaiting expulsion than they would otherwise be, and the concomitant lengthened exposure of class members to other non-citizens, Customs and Border Patrol officers, and local medical personnel." R. & R., ECF No. 65 at 45.

Second, the Government objects on the grounds that Magistrate Judge Harvey failed to consider Deputy Director Jallyn Sualog's declaration as to why the use of hotels are justified—specifically that the children can be placed in individual rooms with doors that close and private facilities for sleeping, eating and bathing. Gov't's Objs., ECF No. 69 at 34. Although Magistrate Judge Harvey did not specifically reference Ms. Sualog's declaration on this specific point, he rejected the justification she provided, relying on persuasive authority for the proposition that the Government "had failed to

that he "failed to consider the CDC Director's conclusion that conditional release is not a viable option here due to significant uncertainty that covered aliens could effectively self-quarantine, self-isolate, or otherwise comply with social distancing guidelines, particularly in light of the CDC's inability to effectively monitor such a large number of people so released," *id.* at 34-35.

demonstrate how hotels, which are otherwise open to the public and have unlicensed staff coming in and out, located in areas with high incidence of COVID-19, are any better for protecting public health than licensed facilities would be” and that “[e]ven if the infection control protocols at [the Office of Refugee Resettlement] come under stress, or are forced to make some adjustments,” the program’s facilities are likely to “remain far safer than unregulated hotel stays for both detained minors and the general public.” R. & R., ECF No. 65 at 44 (quoting In Chambers Order at 4, *Flores v. Barr*, CV 85-4544 (DMG) (AGRx) (C.D. Cal. Sept. 21, 2020), ECF No. 990 (“In Chambers *Flores* Order”) (quoting *Flores*, 2020 WL 5491445, at *6).

Next, the Government argues that Magistrate Judge Harvey’s “conclusion regarding the public health implications of transferring putative class members to the [ORR] is . . . fraught with errors” for three reasons. Gov’t’s Objs., ECF No. 69 at 35. First, the Government argues that he erred by focusing on the number of available beds rather than the rationale articulated by Deputy Director Sualog—specifically that “the increased rate of referrals to ORR of minors with higher rates of exposure would create operational difficulties and make it more difficult to implement sufficient containment protocols.” Gov’t’s Objs., ECF No 69 at 35. Second, he “failed to take into

account the judgment of Deputy Director Sualog that ORR had already reached the threshold that puts ORR in significant stress.” *Id.* Third, he was wrong to give weight to the rationale articulated in *Flores*—specifically that Deputy Director Sualog’s declaration lacked support from a “public health official” because she attested that the COVID-19 infection control measures were developed in consultation with the CDC. *Id.* at 36. Along these lines, the Government contends that it was error for Magistrate Judge Harvey to give no weight to Deputy Director Sualog’s opinion given that she oversees the operations of the agency. *Id.*

The Court is not persuaded by the Government’s objections. Magistrate Judge Harvey directly addressed Deputy Director Sualog’s rationale, but rejected it on the same grounds as did the court in *Flores*—specifically noting that “there are sufficient numbers of currently under-utilized [ORR] facilities such that transfers can be allocated among facilities to avoid over-concentration or bottlenecking,” R. & R., ECF No. 65 at 46 (citing In Chambers Order at 4, *Flores*, No. CV 85-4544 DMG, ECF No. 990, (AGR_x) (C.D. Cal Sept. 21, 2020)). Magistrate Judge Harvey also correctly pointed out that there was good reason to not credit Deputy Director Sualog’s assertions because they were “highly speculative” and not supported by “scientific or empirical analysis.” R. & R., ECF No. 65at 46 (quoting In

Chambers *Flores* Order at 3). The Court also finds it persuasive that following the issuance of Magistrate Judge Harvey's R. & R., the United States Court of Appeals for the Ninth Circuit agreed with the court's relevant determination in *Flores*:

[T]he government has not established that the additional referrals would actually overwhelm the ORR system. The same ORR official determined in March 2020, when the system was operating at 30 percent capacity overall, that the population of minors was sufficiently low to allow ORR to implement COVID-19 safety protocols effectively. She now urges us not to rely on that determination and points out that the population was "practically static" at that time, so the system's intake capacity was not burdened. Since March, however, the population of minors in ORR care has dropped tenfold; as of August 24, 2020, the system was operating at 3 percent capacity, with 10,000 vacant beds. See Sept. 4 Order, 2020 WL 5491445, at *8. The government has not satisfactorily explained why ORR's largely empty shelters are not capable of absorbing even as many as 140 additional minors a week for short-term stays before those minors are expelled under Title 42. Nor has the government offered testimony from any public health official explaining why holding minors in hotels, which are open to the public, presents less risk of COVID-19 exposure and spread, both to the minors and to the public, than holding them in licensed facilities.

Flores v. Barr, No. 20-55951, 2020 WL 5883905, *5-*6 (9th Cir. Oct. 4, 2020).

The Government concludes that Magistrate Judge Harvey "erroneously minimized the public health exigency posed by the pandemic, which requires the Government to utilize its broad

powers under Section 265 to effectively address the public health dangers to aliens, DHS personnel and the American public” noting that the Court should not “substitute its judgment for that of Government officials tasked with ensuring the public health and safety of our Nation.” Gov’t’s Objs., ECF No. 69 at 36-37. Magistrate Judge Harvey recognized that “a preliminary injunction will impose hardships on the government and may force it . . . to make difficult decisions about allocation of resources to mitigate the risks caused by COVID-19.” R. & R., ECF No. 65 at 46. Rather than this being a situation where the Court is substituting its judgment for that of government officials; however, here the government officials are not acting within the bounds set by Congress. Accordingly, the Court finds that Magistrate Judge Harvey correctly weighed the public interest in favor of “the general importance of [the CDC and DHS’s] faithful adherence to its statutory mandate,” which does not permit expulsion. *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977).

For the reasons above, the Court therefore **ADOPTS** Magistrate Judge Harvey’s finding that Plaintiff adequately established that the public interest and immitigable hardships to Plaintiff outweigh the mitigable hardships to the Government.

Having found no clear error in this portion of the R. & R., the Court therefore **ADOPTS** Magistrate Judge Harvey’s

recommendation, and **GRANTS** Plaintiff's motion for preliminary injunction. Mot., ECF No. 15.

4. The Injunction Applies to the Final Rule

Magistrate Judge Harvey recommends that "the preliminary injunction . . . be crafted to . . . prohibit[] expulsion from the United States under the Title 42 process whether that conduct has been permitted in orders issued by the CDC Director pursuant to the authority of the Interim Final Rule or the Final Rule" because "there is no relevant material difference between the CDC Director's authority under the Final Rule and the authority that the government here has argued he enjoys under the Interim Final Rule." R. & R., ECF No. 65 at 47-48. The Government objects to this relief but has not identified any meaningful way in which the Final Rule differs from the Interim Final Rule. See Gov't's Objs., ECF No. 69 at 37. Accordingly, the Court will enjoin expulsion from the United States under Title 42 for CDC Orders issued pursuant to the Interim Final Rule or the Final Rule. See *Ne. Fla. Chapter of Associated Gen. Contractors of Am. V. City of Jacksonville*, 508 U.S. 656, 662 (1993).

5. The Court Will Not Require Plaintiff to Post a Bond

Federal Rule of Civil Procedure 65(c) provides that "[t]he court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers

proper to pay the costs and damages sustained by any party found to have been wrongly enjoined." Fed. R. Civ. P. 65(c). "Courts in this Circuit have found the Rule 'vest[s] broad discretion in the district court to determine the appropriate amount of an injunction bond,' including the discretion to require no bond at all." *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 107 (D.D.C. 2012) (Sullivan, J.) (quoting *DSE, Inc. v. United States*, 169 F.3d 21, 33 (D.C. Cir. 1999) (internal citation omitted)). Here, Plaintiff is a child allegedly fleeing prosecution in his home country and does not have the ability to post a bond. Additionally, he is seeking to vindicate important rights under the immigration laws. Accordingly, the Court will waive the requirement for an injunction bond. See *id.*

IV. Conclusion

For the foregoing reasons the court **ADOPTS** the Report and Recommendation, ECF No. 65 and **PROVISIONALLY GRANTS** Plaintiff's Motion to Certify Class, ECF No. 2, and **GRANTS** Plaintiff's Motion for Preliminary Injunction, ECF No. 15. The Government's request to stay the Court's Order while it decides whether to appeal and/or pending appeal is **DENIED** for substantially the same reasons as those articulated in this Opinion. An appropriate Order accompanies this Memorandum Opinion.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
November 18, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

P.J.E.S.,
a minor child, by and through
his father and next friend,
Mario Escobar Francisco,
on behalf of himself and
others similarly situated,

Plaintiffs,

v.

CHAD F. WOLF,
Acting Secretary of
Homeland Security, *et al.*,

Defendant.

Civ. Action No. 20-2245 (EGS)

ORDER

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

ORDERED that Magistrate Judge G. Michael Harvey's Report and Recommendation, ECF No. 65, is **ADOPTED**; and it is further

ORDERED that Plaintiffs' Motion to Certify Class, ECF No. 2, is **PROVISIONALLY GRANTED**, and it is further

ORDERED that the Court provisionally certifies a class pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure consisting of all unaccompanied noncitizen children who (1) are or will be detained in U.S. government custody in the United States, and (2) are or will be subjected to expulsion from the United States under the CDC Order Process,

whether pursuant to an Order issued by the Director of the Centers for Disease Control and Prevention under the authority granted by the Interim Final Rule, 85 Fed. Reg. 16559-01, or the Final Rule, 85 Fed. Reg. 56,424-01; it is further

ORDERED that Plaintiff is appointed as Class Representative and that Plaintiff's counsel from the ACLU Immigrants' Right Project be appointed as Lead Class Counsel and his other counsel be appointed as Class Counsel; and it is further

ORDERED that plaintiffs' Motion for Preliminary Injunction, ECF No. 15, is **GRANTED**; and it is further

ORDERED that Defendants, their agents, and any person acting in concert with them are enjoined from expelling the Class Members from the United States under the CDC Order Process, whether pursuant to an Order issued by the Director of the Centers for Disease Control and Prevention under the authority granted by the Interim Final Rule, 85 Fed. Reg. 16559-01, or the Final Rule, 85 Fed. Reg. 56,424-01; and it is further

ORDERED that Government's request to stay this Order while it decides whether to appeal and/or pending appeal is **DENIED**.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
November 18, 2020

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**P.J.E.S., a minor child by and through
his father and next friend, Mario
Escobar Francisco, on behalf of himself
and others similarly situated,**

Plaintiff,

v.

**CHAD F. WOLF, Acting Secretary of
Homeland Security, in his official
capacity, *et al.*,**

Defendants.

Case No. 1:20-cv-2245 (EGS/GMH)

**MAGISTRATE JUDGE’S
REPORT AND RECOMMENDATION**

Plaintiff is a 15-year-old minor from Guatemala who crossed into the United States from Mexico in August 2020 unaccompanied by a responsible adult and was apprehended by Customs and Border Patrol shortly thereafter. Recent agency action in response to the COVID-19 pandemic—specifically, an interim final rule promulgated by the Department of Health and Human Services and a series of orders issued by Defendant Robert R. Redfield, Director of the Centers for Disease Control and Prevention (“CDC”), pursuant to Section 362 of the Public Health Service Act, 42 U.S.C. § 265 (“Section 265”)—allowed the government to detain Plaintiff pending expulsion from the United States without many of the legal protections that he would otherwise have enjoyed under various immigration laws. In his present action against various federal officials (“Defendants” or the “government”), Plaintiff seeks an injunction prohibiting enforcement of those procedures, which Plaintiff collectively calls the “Title 42 Process,” against those situated similarly to Plaintiff—that is, unaccompanied non-citizen children detained in the United States by the

government after entering the country. He argues that the Title 42 Process violates the Administrative Procedure Act, 5 U.S.C. §§ 706(1), 706(2)(A), because the expulsion of non-citizens from the United States in the manner contemplated and practiced exceeds the authority granted by Section 265; conflicts with certain immigration laws—specifically, the Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”), 8 U.S.C. § 1232, various provisions of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101 *et seq.*, and the Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”), 8 U.S.C. § 1231 Note; and constitutes arbitrary and capricious agency action because the agency did not offer a reasoned explanation for applying the Title 42 Process to unaccompanied children.

Currently before the Court are (1) Plaintiff’s request for provisional certification of a class defined as all unaccompanied non-citizen children who are or will be detained in U.S. government custody in the United States and who are or will be subjected to the Title 42 Process and (2) his request for a preliminary injunction prohibiting enforcement of that process against members of the putative class.¹ For the reasons that follow, Plaintiff’s motion for class certification should be provisionally granted and his motion for a preliminary injunction should be granted.

¹ Judge Sullivan referred this case to the undersigned for full case management. The docket entries relevant to this Report and Recommendation are (1) Plaintiff’s Complaint (ECF No. 1), (2) his motion for class certification and its exhibits (ECF Nos. 2 through 2-4), (3) his motion for preliminary injunction and its exhibits (ECF No. 14-1 (sealed exhibit); ECF Nos. 15 through 15-12 (redacted opening brief and non-sealed exhibits)), (4) the government’s combined opposition to both motions and its exhibits (ECF Nos. 42 through 42-5 (redacted opposition brief and non-sealed exhibits); ECF Nos. 44-2, 44-3 (sealed, unredacted brief and sealed exhibit)), (5) Plaintiff’s combined reply and its exhibits (ECF No. 51-1 (sealed, unredacted reply); ECF Nos. 52 through 52-4 (redacted reply and non-sealed exhibits)), (6) the government’s motion to strike or, in the alternative, motion for leave to file an additional declaration and its exhibits (ECF No. 58), (7) Plaintiff’s response to the government’s motion to strike/motion for leave to file (ECF No. 61), and (8) the government’s reply in further support of its motion to strike/motion for leave to file (ECF No. 63). In addition, the undersigned has considered the briefs of *amici curiae* Scholars of Refugee and Immigration Law (ECF No. 36), the International Refugee Assistance Project (ECF No. 37), and the Immigration Reform Law Institute (“IRLI”) (ECF No.57). Page numbers cited herein are those assigned by the Court’s CM/ECF system.

I. BACKGROUND

Because resolution of Plaintiff’s preliminary injunction motion hinges, at least in part, on the legal question of whether the agency regulations, orders, and guidance implementing the Title 42 Process conflict with various federal statutes, this section begins with an outline of the statutory and regulatory enactments comprising the Title 42 Process, then discusses a similar prior case in this District brought by an unaccompanied minor who had been subjected to the Title 42 Process, and concludes with Plaintiff’s participation in that process.

A. Statutory and Regulatory Background

Section 265 states:

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.

42 U.S.C. § 265. The parties agree that this provision passed in 1944 as part of the Public Health Service Act, Pub. L. 78-410, § 362, 58 Stat. 682, 704 (1944), is based on and substantially similar to a provision in a statute enacted in 1893 (the “1893 Act”) that gave the President “the power to prohibit, in whole or in part, the introduction of persons or property” from foreign countries that, “by reason of the existence of cholera or contagious diseases” in those countries, “posed a serious danger of introduction of the same into the United States.” ECF No. 5-5 at 5 (attaching Act of February 15, 1893, ch. 114, § 7, 27 Stat. 449, 452). Since the enactment of Section 265, the authority of the Surgeon General passed to the Secretary of the Department of Health and Human

Services, who then delegated it to the Director of the CDC. *See* Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons into United States from Designated Foreign Countries or Places for Public Health Purposes [hereinafter, “Interim Final Rule”], 85 Fed. Reg. 16,559-01, 16560 & n.1 (Mar. 24, 2020) (effective Mar. 20, 2020) (codified at 42 C.F.R. § 71.40).

Relying on that authority, and in light of the COVID-19 pandemic, on March 24, 2020, the CDC published the Interim Final Rule to implement Section 265 “and other applicable provisions of the [Public Health Service] Act” to provide a “robust, efficient mechanism for exercising the authority . . . to suspend the introduction of persons into the United States, should the public health require it.” Interim Final Rule, 85 Fed. Reg. 16,559-01, 16,562. The rule enabled the CDC Director to

prohibit the introduction into the United States of persons from designated foreign countries (or one or more political subdivisions and regions thereof) or places . . . by issuing an order in which the Director determines that:

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

Interim Final Rule, 85 Fed. Reg. 16,559-01, 16,563. It further defined

“introduction into the United States of persons” from a foreign country . . . to clarify that “introduction” can encompass those who have physically crossed a border of the United States and are in the process of moving into the interior in a manner the Director determines to present a risk of transmission of a communicable disease. This additional mechanism to halt the travel of such persons and rapidly moving them outside the United States constitutes preventing their “introduction” into the United States.

Interim Final Rule, 85 Fed. Reg. 16,559-01, 16,563.

Two days later, the CDC Director issued the first of a series of three orders (the “CDC Orders”) directed to preventing the “introduction” of certain persons into the United States in the interest of public health. The order asserts that

a serious danger of the introduction of COVID-19 into the land [ports of entry] and Border Patrol stations at or near the United States borders with Canada and Mexico, and into the interior of the country as a whole, because COVID-19 exists in Canada, Mexico, and the other countries of origin of persons who migrate to the United States across the land borders with Canada and Mexico.

Notice of Order Under Sections 362 and 365^[2] of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists [hereinafter, “March 20 Order”], 85 Fed. Reg. 17,060-02, 17,061 (Mar. 26, 2020) (effective Mar. 20, 2020). The CDC Director found that “persons travelling from Canada or Mexico (regardless of their country of origin)” who must be held for significant periods of time in “congregate settings” at land ports of entry and Border Patrol stations as they undergo immigration processing “would typically be aliens seeking to enter the United States at [ports of entry] who do not have proper travel documents, aliens whose entry is otherwise contrary to law, and aliens who are apprehended near the border seeking to unlawfully enter the United States.” March 20 Order, 85 Fed. Reg. at 17,061. The order further states that land Ports of Entry and Border Patrol stations “are not equipped to [] quarantine, isolate, or enable social distancing by persons who are or may be infected with COVID-19” and that the “public health tool called conditional release, which involves the release of potentially infected individuals from federal custody subject to conditions calculated to mitigate the risk of disease transmission, such as mandatory self-isolation and CDC monitoring at home”

² Section 365 of the Public Health Act, codified at 42 U.S.C. § 268, assigns to customs and Coast Guard officers the “duty . . . to aid in the enforcement of quarantine rules and regulations.”

is “not a viable solution” because many such aliens “may lack homes or other places in the United States where they can self-isolate, and CDC lacks the resources and personnel necessary to effectively monitor such a large number of persons.” March 20 Order, 85 Fed. Reg. at 17,061, 17,067. Therefore, as “[t]he introduction into [those] congregate settings” of these “covered aliens”—defined as “persons travelling from Canada or Mexico (regardless of their country of origin) who would otherwise be introduced into a congregate setting in a land Port of Entry or Border patrol station at or near the United States border with Canada and Mexico”—increased the public health risk posed by the pandemic, the CDC Director “suspend[ed] the introduction of all covered aliens into the United States for a period of 30 days,” noting that “[t]he faster a covered alien is returned to the country from which they entered the United States, to their country of origin, or another location as practicable, the lower the risk the alien poses of introducing, transmitting, or spreading COVID-19” in the United States.³ March 20 Order, 85 Fed. Reg. at 17,061, 17,067.

The duration of the March 20 Order was extended for another 30 days on April 22, 2020. Extension of Order Under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 22,424-01 (Apr. 22, 2020) (effective date Apr. 20, 2020). And, in an order known as the “May 20 Order,” the CDC Director amended the March 20 Order (as extended) to “clarify that it applies to land and coastal Ports of Entry and Border Patrol stations that would otherwise hold aliens in a congregate setting”⁴ and extended its duration “until he determines the risk of further

³ The March 20 Order exempts from its coverage U.S. citizens, lawful permanent residents, and military personnel; the spouses and children of those individuals; individuals from foreign countries who hold valid travel documents; and individuals from foreign countries in the visa waiver program not otherwise subject to travel restrictions. March 20 Order, 85 Fed. Reg. at 17,061. It also allows customs officers to make individualized exceptions on a case-by-case basis under a totality of the circumstances, “including consideration of significant law enforcement, officer and public safety, humanitarian, and public health interests.” March 20 Order, 85 Fed. Reg. at 17,061.

⁴ The May 20 Order “recognizes that in certain limited instances, a fact-based inquiry may be required to determine whether individuals are covered aliens within the meaning of the [May 20 Order]. For example, it may be unclear

COVID-19 into the United States from covered aliens has ceased to be a serious danger to the public health.” Amendment and Extension of Order Under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists [hereinafter, “May 20 Order”], 85 Fed. Reg. 31,503-02, 31,504 (May 26, 2020) (effective May 21, 2020).

On September 11, 2020, the CDC published a final rule with an effective date of October 13, 2020, unless the Interim Final Rule “is vacated or enjoined by a court, in which case the Secretary [of Health and Human Services] will publish a document in the Federal Register announcing an updated effective date for th[e] [final] rule.” Control of Communicable Diseases; Foreign Quarantine: Suspension of the Right to Introduce and Prohibition of Introduction of Persons into United States from Designated Foreign Countries or Places for Public Health Purposes [hereinafter, “Final Rule”], 85 Fed. Reg. 56,424-01, 56,424 (Sept. 11, 2020) (effective Oct. 13, 2020) (to be codified at 42 C.F.R. 71.40). The Final Rule makes some changes to the Interim Final Rule: the title is changed to replace the term “communicable disease” with the term “quarantinable communicable disease,” it adds a requirement that the CDC Director include in any order issued under the regulation a statement about the danger of introduction of the disease in the places from which people are being prohibited, and it no longer uses the word “vector” to refer to humans. Final Rule, 85 Fed. Reg. at 56,443–56,444. However, the material provisions remain the same and are “clarified” by explanations of the agency’s interpretations of the language of Section 265. For example, the Final Rule states that the term “introduction” includes the situation “when a person on U.S. soil moves further into the United States”; that the phrase “prohibit, in whole or in part, the introduction

whether individuals who arrive at a coastal border by boat departed from Mexico, or another country, such as Haiti.” May 20 Order, 85 Fed. Reg. at 31,507 n.28. The CDC “defer[red]” to the Department of Homeland Security “regarding the operational considerations necessary to address such scenarios.” May 20 Order, 85 Fed. Reg. at 31,507 n.28.

into the United States of persons” includes the power of “physically expelling from the United States some or all of the persons”; and that the phrase “suspension of the right to introduce” means “to cause the temporary cessation of the effect of any law, rule, decree, or order pursuant to which a person might otherwise have the right to be introduced or seek introduction into the United States.” Final Rule, 85 Fed. Reg. at 56,425–56,426. Further, the Final Rule declares that “[n]o action can or will be taken under this final rule absent an administrative Order issued by the [CDC] Director.”⁵ Final Rule, 85 Fed. Reg. at 56,425.

⁵ Pursuant to the Final Rule, 42 C.F.R. § 71.40 will read:

Suspension of the right to introduce and prohibition of the introduction of persons into the United States from designated foreign countries or places for public health purposes.

- (a) The Director may prohibit, in whole or in part, the introduction into the United States of persons from designated foreign countries (or one or more political subdivisions or regions thereof) or places, only for such period of time that the Director deems necessary to avert the serious danger of the introduction of a quarantinable communicable disease, by issuing an order in which the Director determines that:
 - (1) By reason of the existence of any quarantinable communicable disease in a foreign country (or one or more political subdivisions or regions thereof) or place there is serious danger of the introduction of such quarantinable communicable disease into the United States; and
 - (2) This danger is so increased by the introduction of persons from such country (or one or more political subdivisions or regions thereof) or place that a suspension of the right to introduce such persons into the United States is required in the interest of public health.
- (b) For purposes of this section:
 - (1) Introduction into the United States means the movement of a person from a foreign country (or one or more political subdivisions or regions thereof) or place, or series of foreign countries or places, into the United States so as to bring the person into contact with persons or property in the United States, in a manner that the Director determines to present a risk of transmission of a quarantinable communicable disease to persons, or a risk of contamination of property with a quarantinable communicable disease, even if the quarantinable communicable disease has already been introduced, transmitted, or is spreading within the United States;
 - (2) Prohibit, in whole or in part, the introduction into the United States of persons means to prevent the introduction of persons into the United States by suspending any right to introduce into the United States, physically stopping or restricting movement into the United States, or physically expelling from the United States some or all of the persons;
 - (3) Serious danger of the introduction of such quarantinable communicable disease into the United States means the probable introduction of one or more persons capable of transmitting the quarantinable communicable disease into the United States, even if persons or property in the United States are already infected or contaminated with the quarantinable communicable disease;
 - (4) The term Place includes any location specified by the Director, including any carrier, as that term is defined in 42 C.F.R. 71.1, whatever the carrier's flag, registry, or country of origin; and
 - (5) Suspension of the right to introduce means to cause the temporary cessation of the effect of any law, rule, decree, or order pursuant to which a person might otherwise have the right to be introduced or seek introduction into the United States.
- (c) Any order issued by the Director under this section shall include a statement of the following:

Meanwhile, on April 2, 2020, Customs and Border Protection issued a memorandum regarding its implementation of the Title 42 Process. ECF No. 15-4, ¶ 6; ECF No. 15-5 at 15–18.

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- (1) The foreign countries (or one or more political subdivisions or regions thereof) or places from which the introduction of persons shall be prohibited;
 - (2) The period of time or circumstances under which the introduction of any persons or class of persons into the United States shall be prohibited;
 - (3) The conditions under which that prohibition on introduction shall be effective in whole or in part, including any relevant exceptions that the Director determines are appropriate;
 - (4) The means by which the prohibition shall be implemented; and
 - (5) The serious danger posed by the introduction of the quarantinable communicable disease in the foreign country or countries (or one or more political subdivisions or regions thereof) or places from which the introduction of persons is being prohibited.
- (d) When issuing any order under this section, the Director shall, as practicable under the circumstances, consult with all Federal departments or agencies whose interests would be impacted by the order. The Director shall, as practicable under the circumstances, provide the Federal departments or agencies with a copy of the order before issuing it. In circumstances when it is impracticable to engage in such consultation before taking action to protect the public health, the Director shall consult with the Federal departments or agencies as soon as practicable after issuing his or her order, and may then modify the order as he or she determines appropriate. In addition, the Director may, as practicable under the circumstances, consult with any State or local authorities that he or she deems appropriate in his or her discretion.
- (1) If the order will be implemented in whole or in part by State and local authorities who have agreed to do so under 42 U.S.C. 243(a), then the Director shall explain in the order the procedures and standards by which those authorities are expected to aid in the enforcement of the order.
 - (2) If the order will be implemented in whole or in part by designated customs officers (including any individual designated by the Department of Homeland Security to perform the duties of a customs officer) or Coast Guard officers under 42 U.S.C. 268(b), or another Federal department or agency, then the Director shall, in coordination with the Secretary of Homeland Security or other applicable Federal department or agency head, explain in the order the procedures and standards by which any authorities or officers or agents are expected to aid in the enforcement of the order, to the extent that they are permitted to do so under their existing legal authorities.
- (e) This section does not apply to:
- (1) Members of the armed forces of the United States and associated personnel if the Secretary of Defense provides assurance to the Director that the Secretary of Defense has taken or will take measures such as quarantine or isolation, or other measures maintaining control over such individuals, to prevent the risk of transmission of the quarantinable communicable disease into the United States; or
 - (2) Other United States government employees or contractors on orders abroad, or their accompanying family members who are on their orders or are members of their household, if the Director receives assurances from the relevant head of agency and determines that the head of the agency or department has taken or will take, measures such as quarantine or isolation, to prevent the risk of transmission of a quarantinable communicable disease into the United States.
- (f) This section shall not apply to U.S. citizens, U.S. nationals, and lawful permanent residents.
- (g) Any provision of this section held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this section and shall not affect the remainder thereof or the application of the provision to persons not similarly situated or to dissimilar circumstances.

85 Fed. Reg. at 56,459–56,460.

The memorandum directs agents to determine whether a non-citizen who has been intercepted near the border is a “covered alien” as defined in the CDC Orders “[b]ased on training, experience, physical observation, technology, questioning[,] and other considerations.” ECF No. 15-5 at 15. If an individual is determined to be a “covered alien” and therefore “amenable to expulsion under [the CDC Orders],” the individual is to be “transported to the nearest [port of entry] and immediately returned to Mexico or Canada, depending on their point of transit”; those who “are not amenable to immediate expulsion to Mexico or Canada” are to be “transported to a dedicated facility”—“a tent, soft-sided facility[,] or predesignated [Customs and Border Protection/Border Patrol] facility with dedicated space”—“for limited holding prior to expulsions to the alien’s country of citizenship.” *Id.* at 16–17. “Covered aliens” who make “an affirmative, spontaneous[,] and reasonably believable claim that they fear being tortured in the country they are being sent back to” are to be referred to Citizenship and Immigration Services to determine if they should be provided an asylum hearing. *Id.* at 18. Those who are not “covered aliens” are to be “process[ed] under existing statutory authorities found in Title 8 of the U.S. Code,” which includes the TVPRA, the INA, and the FARRA, among other immigration statutes. ECF No. 15-5 at 16.

B. *JBBC v. Wolf*

In an action filed on June 9, 2020, a minor from Honduras proceeding pseudonymously as J.B.B.C, who was apprehended by Customs and Border patrol agents after he crossed unaccompanied into the United States from Mexico, challenged the Title 42 Process, making substantially similar allegations as those made by Plaintiff here, with the exception of the class allegations. *Compare* ECF No. 1, with Complaint, *JBBC v. Wolf*, No. 20-cv-1509 (D.D.C. June 9, 2020), ECF No. 1. J.B.B.C. also filed a motion for a temporary restraining order seeking to enjoin his expulsion from the United States, arguing, as Plaintiff does here, that Section 265 does not authorize

expulsion of non-citizens; that the Title 42 Process violates mandatory protections for unaccompanied non-citizen children included in the TVPRA as well as rights under the asylum and withholding of removal provisions of the INA; and that the Title 42 Process constitutes arbitrary and capricious agency action because it lacks a reasoned explanation as to why the agency failed to exempt unaccompanied children from its purview. Memorandum of Law in Support of Emergency Motion for Temporary Restraining Order at 8–16, *JBBC*, No. 20-cv-1509 (D.D.C. June 9, 2020), ECF No. 2-1. The government agreed not to return J.B.B.C. to Honduras pending resolution of that motion, and Judge Nichols entered an order temporarily staying his removal. Scheduling Order, *JBBC*, No. 20-cv-1509 (D.D.C. June 11, 2020), ECF No. 9; Hearing Transcript at 47, *JBBC*, No. 20-cv-1509 (D.D.C. June 26, 2020), ECF No. 39 [hereinafter, “*JBBC* Transcript”].

Judge Nichols held a hearing on June 24, 2020, on Plaintiff’s motion for a temporary restraining order and announced his ruling from the bench. He found that J.B.B.C. was likely to succeed on the merits of his claim. He stated, first, that there was a “serious question” about whether Section 265’s grant of the power “to prohibit the introduction of persons and property” could be read to “include[] the power also to remove or exclude persons who are already present in the United States,” noting that, while immigration statutes “reference the power to return or to remove,” Section 265 does not include those terms. *JBBC* Transcript at 50. Second, he found that, even if Section 265 were read to include the power to remove, it would still have to be harmonized with immigration statutes, including those that “grant special protection to minors” and that “deal with communicable diseases and quarantines.” *JBBC* Transcript at 50. He further found that the CDC Director’s definition of “introduction” to include the power to expel from the United States was likely not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), because Section 265 “needs to be read in light of [immigration]

statutes that the CDC director quite plainly has no special expertise reading” and because the CDC Director provided “little by way of analysis of what the power to prohibit the introduction of persons and property means.” *JBBC* Transcript at 50–51. Judge Nichols did not reach the question of whether the Title 42 Process is arbitrary and capricious, but indicated that he would “likely conclude that [it] . . . was not” because the steps the government has taken were “appropriate to ensure . . . the reduced communication of the disease.” *Id.* at 51. In addition, Judge Nichols ruled that J.B.B.C. had established that he was likely to suffer irreparable harm in the absence of a temporary restraining order and that the balance of harms and public interest weighed in favor of granting the motion in light of the fact that only a single individual was at issue and he had no symptoms of COVID-19. *Id.* at 51–52.

Although at the hearing, the parties in *JBBC* anticipated an expedited schedule for summary judgment briefing (*id.* at 53–54 (“I will stress that I would like the merits briefing to move quickly.”); Order, *JBBC*, No. 20-cv-1509 (D.D.C. June 24, 2020), ECF No. 38 (giving the parties five days to propose a summary judgment briefing schedule)), such briefing was ultimately unnecessary. On June 29, 2020, the parties filed a document stating that the government had “transferred the custody of [J.B.B.C.] to the Office of Refugee Resettlement”—presumably pursuant to the TVPRA, which directs that “unaccompanied alien child[ren]” from non-contiguous countries who are in the custody of the federal government must be transferred to the custody of that office “not later than 72 hours after determining that such child is an unaccompanied alien child,” 8 U.S.C. § 1232(b)(3); *see also* 6 U.S.C. § 279(b)(1)(A) (describing the functions of the Office of Refugee Resettlement)—“for immigration processing under Title 8 of the U.S. Code.” Notice to the Court at 1, *JBBC*, No. 20-cv-1509 (D.D.C. June 29, 2020). The government therefore planned to file a motion to dismiss the case as moot. *Id.* On July 2, 2020, an amended complaint was filed, adding

E.Y., an unaccompanied non-citizen minor from Guatemala, as a plaintiff. Amended Complaint, *JBBC*, No. 20-cv-1509 (D.D.C. July 2, 2020), ECF No. 42. Declarations filed in connection with the government’s motion to dismiss the amended complaint represented that both J.B.B.C. and E.Y. had been excepted from the Title 42 Process and transferred to the custody of the Office of Refugee Resettlement in order that their cases could proceed in immigration court. Second Declaration of Robert Danley, ¶ 4, *JBBC*, No. 20-cv-1509 (D.D.C. July 23, 2020), ECF No. 47-1; Second Declaration of Danielle Hernandez, ¶ 4, *JBBC*, No. 20-cv-1509 (D.D.C. July 23, 2020), ECF No. 47-2. Thereafter, the plaintiffs filed a notice of voluntary dismissal on August 6, 2020. Plaintiffs’ Notice of Voluntary Dismissal Without Prejudice, *JBBC*, No. 20-cv-1509 (D.D.C. Aug. 6, 2020), ECF No. 48.

C. Plaintiff’s Complaint and Subsequent Developments

According to the Complaint, Plaintiff is a 15-year-old boy from an indigenous Mayan family in Guatemala. ECF No. 1, ¶¶ 77, 79. His father resides in the United States and has a pending immigration case. *Id.*, ¶ 78. Plaintiff alleges that he fled Guatemala after being threatened with death due to his father’s political opinions and also because he refused to join a gang. *Id.*, ¶ 79. He entered the United States from Mexico and was apprehended by Border Patrol agents on or around August 11, 2020. *Id.* He was placed in custody in McAllen, Texas, and subjected to the Title 42 Process. *Id.*

The Complaint further alleges that, according to Congressional testimony by the Acting Commissioner of Customs and Border Protection, as of June 25, 2020, “over 2,000 unaccompanied children had been deported under the Title 42 Process.” *Id.*, ¶ 70. Correspondingly, the total number of children in the custody of the Office of Refugee Resettlement has plummeted: whereas

in April, the office had 12,500 children in its custody, in May it had approximately 1,600 and in June, approximately 975. *Id.*, ¶ 73.

The Complaint pleads seven causes of action:

- (1) The Title 42 Process violates mandatory provisions in the TVPRA relating to the processing, custody, release, and removal of unaccompanied children;
- (2) The Title 42 Process was not authorized by Section 265, the provision under which it was purportedly established;
- (3) The Title 42 Process violates provisions in the INA governing the processes by which a non-citizen can be granted withholding of removal;
- (4) The Title 42 Process violates provisions in the INA governing the granting of asylum;
- (5) The Title 42 Process violates the provision in the FARRA governing the determination of whether a non-citizen minor can be returned to a country where he is likely to face torture;
- (6) The Title 42 Process violates provisions in the INA establishing the procedure by which the government may determine whether a non-citizen minor should be removed; and
- (7) Applying the Title 42 Process to unaccompanied minors constitutes arbitrary and capricious agency action because the government failed to articulate a reasoned explanation and to consider relevant factors in making the decision to do so.

ECF No. 1, ¶¶ 108–146. In the Complaint and in his simultaneously-filed motion for class certification, Plaintiff seeks certification of a class comprising “[a]ll unaccompanied noncitizen children who (1) are or will be detained in U.S. government custody in the United States, and (2) are or will be subjected to the Title 42 Process”; he also requests appointment of class counsel. *Id.* at 30; *see generally* ECF No. 2-1. He further seeks a declaration that the Title 42 Process is unlawful as applied to Plaintiff and the putative class and an order requiring Defendants to stay their expulsion from the United States under the Title 42 Process and afford the protections of the TVPRA, INA, and FARRA. ECF No. 1 at 30.

On August 14, 2020, after Plaintiff filed this action and his counsel met and conferred with counsel for the government, Defendants agreed not to subject Plaintiff to the Title 42 Process and to transfer him to the custody of the Office of Refugee Resettlement—a program of the Department of Health and Human Services responsible for the care of unaccompanied non-citizen children in the United States—to be processed pursuant to normal immigration procedures under Title 8 of the U.S. Code. ECF No. 15-1 at 20; ECF No. 44-2 at 28; *see also* ECF No. 14-1, ¶ 11. Plaintiff is currently residing in a shelter run by the Office of Refugee Resettlement. ECF No. 52-1, ¶ 3. Thereafter, on August 20, 2020, Plaintiff filed a motion for a preliminary injunction seeking an order enjoining Defendants from applying the Title 42 Process to the putative class members. ECF No. 15-2 at 1.

II. DISCUSSION

A. Motion for Class Certification

A party seeking class certification must show that it meets the “four threshold requirements” of Rule 23(a) of the Federal Rules of Civil Procedure: “(1) numerosity (a ‘class [so large] that joinder of all members is impracticable’); (2) commonality (‘questions of law or fact common to the class’); (3) typicality (named parties’ claims or defenses ‘are typical . . . of the class’); and (4) adequacy of representation (representatives ‘will fairly and adequately protect the interests of the class’).” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (alterations in original) (quoting Fed. R. Civ. P. 23(a)). Where, as here, the plaintiff seeks certification of a class under Rule 23(b)(2), he must also show that “the party opposing the class has acted or refused to act on grounds generally applicable to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2).

Plaintiff has clarified that, at this point, he seeks only *provisional* class certification. ECF No. 15-1 at 2, 10 n.1. Although a plaintiff requesting provisional certification must still demonstrate that Rule 23’s requirements are met, the court’s normally “rigorous analysis” is “tempered [] by the understanding that such certifications ‘may be altered or amended before the decision on the merits.’” *Damus v. Nielsen*, 313 F. Supp. 3d 317, 329 (D.D.C. 2018) (first quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982), then quoting *Bame v. Dillard*, No. 05-cv-1833, 2008 WL 2168393, at *5 (D.D.C. May 22, 2008)); accord *Kirwa v. Dep’t of Def.*, 285 F. Supp. 3d 21, 44 (D.D.C. 2017); see also, e.g., *Afghan and Iraqi Allies Under Serious Threat Because of their Faithful Service to the U.S. v. Pompeo*, No. 18-cv-1388 (TSC), 2019 WL 367841, at *1 n.1 (D.D.C. Jan. 30, 2019) (granting provisional class certification “for the sole purpose of resolving” a motion for preliminary injunction, a motion for partial dismissal, and a motion for expedited discovery).

As noted, Plaintiff seeks to certify a class of “[a]ll unaccompanied noncitizen children who (1) are or will be detained in U.S. government custody in the United States, and (2) are or will be subjected to the Title 42 Process.” ECF No. 1 at 30; ECF No. 2-1 at 7. Defendants do not address whether Plaintiff has made the required showing as to the first three Rule 23(a) requirements—numerosity, commonality, and typicality—or the Rule 23(b) cohesiveness requirement, that the government has acted or refused to act on grounds generally applicable to the class. Rather, the government argues only that Plaintiff is not an adequate class representative because he has “already effectively received the individual relief he sought in this lawsuit: to be processed pursuant to Title 8’s immigration procedures as opposed to being expelled under the CDC Order[s].” ECF

No. 44-2 at 28. Nevertheless, the discussion below addresses each of the pertinent Rule 23 requirements. *See, e.g., Damus*, 313 F. Supp. 3d at 329 (addressing each of the Rule 23 requirements but only “briefly analyz[ing]” those that were uncontested).

1. Numerosity

A putative class is sufficiently numerous to justify class action treatment when there are enough members that joinder would be impractical. *See, e.g., Amchem*, 521 U.S. at 613. “Generally speaking, courts have found that a proposed class of at least forty members will satisfy” this requirement. *Bynum v. District of Columbia*, 214 F.R.D. 27, 32 (D.D.C. 2003) (collecting cases). Moreover, “classes including future claimants generally meet the numerosity requirement due to the ‘impracticality of counting such class members, much less joining them.’” *JD v. Azar*, 925 F.3d 1291, 1322 (D.C. Cir. 2019) (per curiam) (quoting 1 Rubenstein, *Newberg on Class Actions* § 3.15). “[P]recise quantification of the class members is not necessary because the court may make common sense assumptions to support a finding of numerosity.” *Bynum*, 214 F.R.D. at 32 (quoting *Civic Ass’n of Deaf of N.Y.C. v. Giuliani*, 915 F. Supp. 622, 632 (S.D.N.Y. 1996)). Thus, the plaintiff must only provide a “reasonable basis for the estimate provided.” *Damus*, 313 F. Supp. 3d at 330 (quoting *Kifafi v. Hilton Hotels Retirement Plan*, 189 F.R.D. 174, 176 (D.D.C. 1999)).

Here, Plaintiff has provided evidence, including government and news reports, that in the period between April and July 2020, almost 6,000 unaccompanied non-citizen children were apprehended at the southwest border; that more than 2,000 unaccompanied non-citizen children had been expelled from the United States pursuant to the Title 42 Process as of late June 2020; and that, between June 24, 2020 (when Judge Nichols issued his ruling in *JBBC*) and August 14, 2020 (when the motion for class certification in this case was filed) counsel for Plaintiff have themselves

identified dozens of unaccompanied non-citizen children subject to the Title 42 Process. ECF No. 2-2 at 1–2, 11–29. The undersigned thus finds that the numerosity requirement is met.

2. Commonality

“The commonality requirement asks whether ‘there are questions of law or fact common to the class.’” *JD*, 925 F.3d at 1321. A class’ claims depend on a “common contention” such that this requirement is met where “determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Id.* (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). “[E]ven a single common question will do.” *Wal-Mart*, 564 U.S. at 359.

This case challenges expulsion under the Title 42 Process, which is “a uniform policy or practice that affects all class members.” *RIL-R v. Johnson*, 80 F. Supp. 3d 164, 181 (D.D.C. 2015) (quoting *DL v. District of Columbia*, 713 F.3d 120, 128 (D.C. Cir. 2013)). Determination that the Title 42 Process is not permitted by existing law because Section 265 does not provide authority for expulsion of unaccompanied non-citizen children from the United States will resolve the core issue in this action “in one stroke.” *JD*, 925 F.3d at 1321. And “there [] is no evident variation among [the putative class members] concerning their ultimate entitlement to relief: if any person in the class has a meritorious claim, they all do.” *Id.* Therefore, the commonality requirement is met.

3. Typicality

“[T]ypicality concerns the relationship between the representative’s individual claims and the class’ claims rather than the relatedness of the entire class’ claims.” *Id.* at 1322. That is, “the typicality requirement focuses on whether the *representatives* of the class suffered a similar injury from the same course of conduct” that injured the putative class members. *Bynum*, 214 F.R.D. at

34. Where “the claims or defenses of the representatives and the members of the class stem from a single event or unitary course of conduct, or if they are based on the same legal or remedial theory,” typicality is satisfied. *JD*, 925 F.3d at 1322 (quoting 7A Mary Kay Kane, *Federal Practice and Procedure* § 1764). The claim Plaintiff has pleaded in the Complaint is on all fours with the claims of the putative class. They stem from a unitary course of conduct—expulsion of unaccompanied non-citizen children from the United States under the Title 42 Process—and are based on the same legal theories. Hence, this requirement is also met.

4. Adequacy

“Adequacy of representation imposes two criteria on plaintiffs seeking to represent a class: ‘(1) the named representative must not have antagonistic or conflicting interests with the unnamed members of the class, and (2) the representative must appear able to vigorously prosecute the interests of the class through qualified counsel.’” *Ramirez v. ICE*, 338 F. Supp. 3d 1, 47 (quoting *Twelve John Does v. District of Columbia*, 117 F.3d 571, 575 (D.C. Cir. 1997)).

Defendants have not identified any interest that Plaintiff has that is antagonistic to or conflicts with the putative class members and none are apparent. Indeed, courts have found that where, as here, the plaintiff “seek[s] identical relief for all class members, [] there are no conflicting interests that might derail certification on this prong.” *Coleman ex rel. Bunn v. District of Columbia*, 306 F.R.D. 68, 84 (D.D.C. 2015) (Sullivan, J.). The government instead argues that, it having voluntarily excepted Plaintiff from expulsion under the Title 42 Process—as the government has apparently done with all other unaccompanied non-citizen minors that Plaintiff’s counsel has brought to its attention, including the two plaintiffs in *JBBC* (ECF No. 2-2 at 2–3)—Plaintiff is no longer motivated to prosecute the interests of the class. For that reason, the government contends

that “[t]here is no evidence that Plaintiff would vigorously pursue class claims, and his interest is presumably now focused on his own Title 8 immigration proceeding.” ECF No. 44-2 at 28–29.

First, as Defendants recognize, “the D.C. Circuit has held that the fact that a putative class representative’s case is moot at the time of certification does not alone moot the case or otherwise render the putative class representative inadequate.” *Id.* at 29 (citing *JD*, 925 F.3d at 1313). Indeed, “the Supreme Court has specifically recognized that a plaintiff with a moot claim may serve as a class representative.” *JD*, 925 F.3d at 1313 (citing *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 404 (1980), and *Sosna v. Iowa*, 419 U.S. 393, 402–03 (1980)). As Plaintiff points out, the “short-lived duration” of a putative class representative’s claim “only reinforces [the claim’s] inherently transitory nature,” and makes certifying a class more appropriate, not less. *JD*, 925 F.3d at 1313 (noting further that “the ephemerality of individual claims makes class-action treatment ‘particularly important’ so as to ‘ensur[e] that a justiciable claim is before the Court.’” (alteration in original) (quoting *Gratz v. Bollinger*, 539 U.S. 244, 268 (2003))). That is precisely what happened in *JD*—the D.C. Circuit allowed two named plaintiffs to serve as class representatives notwithstanding the fact that their claims were moot.⁶ *JD*, 925 F.3d at 1313. And, in a declaration filed with his Reply, Plaintiff has reaffirmed his willingness to act as class representative and to “vigorously pursue this case.” ECF No. 52-1 at 1 (Declaration of P.J.E.S.). Defendants’ speculation that Plaintiff’s attention is “presumably” focused elsewhere does not undermine that evidence. *See, e.g.*, *JD*, 925 F.3d at 1313 (rejecting the government’s objection that the named plaintiffs with moot claims were inadequate to represent the class where “beyond noting the mootness of [their] claims, [it] identifie[d] no reason to doubt their ability to vigorously press the action”); *Ramirez*,

⁶ Defendants do not claim that the entire action is moot because Plaintiff’s claim is moot. Therefore, there is no need to address whether the exceptions to mootness for practices that are capable of repetition yet evading review or those that the defendant has voluntarily ceased to engage in apply here.

338 F. Supp. 3d at 47 (finding that the plaintiffs had met their burden to show that the proposed class representatives were adequate based on “declarations attesting their willingness and abilities to take an active role in th[e] litigation and to protect the interests of absent plaintiffs”).

Finally, the government has not suggested that counsel here is unqualified to act as class counsel. *See, e.g., In re Rail Freight Fuel Surcharge Antitrust Litig.*, 292 F. Supp. 3d 14, 94–95 (D.D.C. 2017) (noting that a proposed representative is adequate if his interests do not conflict with the interests of other class members and “he will vigorously prosecute the interests of the class through qualified counsel” (quoting *Lindsay v. Gov’t Emps. Ins. Co.*, 251 F.R.D. 51, 55 (D.D.C. 2008)). Plaintiff is represented by attorneys from the American Civil Liberties Union and the American Civil Liberties Union of the District of Columbia, who have submitted declarations detailing their extensive experience in complex class actions, including class actions involving immigration rights. ECF No. 2-2, ¶¶ 13–33; ECF No. 2-3, ¶¶ 2–4. The undersigned thus finds that Plaintiff is an adequate class representative who, with his counsel, will vigorously pursue the claims of the putative class. *See, e.g., Damus*, 313 F. Supp. 3d at 331 (finding the adequacy requirement met where “[n]o trace of a conflict exist[ed] [], and Plaintiffs [were] represented by very capable counsel from the American Civil Liberties Union . . .”).

5. Cohesiveness

Plaintiff seeks certification under Rule 23(b)(2), which, as noted, requires that (1) “the party opposing the class has acted or refused to act on grounds that apply generally to the class,” and (2) “final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). “A principal purpose of Rule 23(b)(2) class actions is to enable class resolution of civil-rights claims alleging classwide deprivations of protected

rights.” *JD*, 925 F.3d at 1314. Both of the Rule’s requirements are met here—a conclusion that the government again does not contest.

First, the Complaint alleges that the government “has acted or refused to act on grounds that apply generally to the class.” Fed. R. Civ. P. 23(b)(2); *see* ECF No. 1 at 25. The gravamen of the claims here is that the government applied the allegedly illegal Title 42 Process to the putative class members—indeed, the class definition makes clear that the class includes only unaccompanied non-citizen minors who are or will be “subjected” to that process. ECF No. 1 at 25, 30; ECF No. 2-1 at 7. That is sufficient. *See, e.g., Nio v. Dep’t of Homeland Sec.*, 323 F.R.D. 28, 34–35 (D.D.C. 2017) (finding that Rule 23(b)(2)’s requirements were satisfied where the plaintiffs “challeng[ed] the application of standardized [immigration] policies that generally appl[ied] to the class”). Second, the Complaint seeks the same injunctive and declaratory relief for the entire class—*i.e.*, an injunction enjoining enforcement of the Title 42 Process against Plaintiff and the putative class members, an order requiring the government to remove Plaintiff and the putative class members from that process, and a declaration that the Title 42 Process is unlawful as applied to Plaintiff and the putative class members. ECF No. 1 at 30. That, too, is sufficient. *See, e.g., Ramirez*, 338 F. Supp. 3d at 48 (finding that Rule 23(b)(2)’s requirements were met where the plaintiffs sought “injunctive relief requiring only [] compliance” with the TVPRA and not “a court order mandating any particular outcome with respect to any particular former unaccompanied minor” under the statute).

For these reasons, Plaintiff’s motion for class certification should be provisionally granted.

B. Preliminary Injunction

A preliminary injunction is an “extraordinary remedy” that “should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion.” *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004). To be entitled to a preliminary injunction, a plaintiff “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). “The first two factors of the [] standard are the most critical.” *Nken v. Holder*, 556 U.S. 418, 434 (2009). The last two factors—the balance of hardships and public interest—merge when the government is the party opposing the preliminary injunction. *Ctr. for Pub. Integrity v. Dep’t of Def.*, 411 F. Supp. 3d 5, 14 (D.D.C. 2019) (citing *Nken*, 556 U.S. at 435).

1. Likelihood of Success on the Merits

Plaintiff contends that Section 265, the provision upon which the CDC primarily relied to promulgate the Interim Final Rule and, by extension, the CDC Orders, does not authorize the government to expel him or the putative class members from the United States outside of the removal process of the INA and without other safeguards included in Title 8 of the U.S. Code, including special protection for unaccompanied minors mandated in the TVPRA and the ability to make an asylum claim.⁷ ECF No. 15-1 at 10–11; ECF No. 55-1 at 9. He relies on interpretations of the vocabulary of Section 265, its context within the subsection of the Public Health Service Act it occupies, its relationship to other relevant statutes, and its legislative and enforcement history.

⁷ Plaintiff has requested that the Court defer ruling on its claim that the Interim Final Rule and the CDC Orders constitute arbitrary and capricious agency action in light of the promulgation of the Final Rule, which will shortly become effective, and also because the Court does not have a full administrative record. ECF No. 51-1 at 25. Because the undersigned finds that Plaintiff has demonstrated that he is likely to succeed on the merits of his claims that the statute at issue—Section 265—did not authorize expulsion from the United States under the Title 42 Process, the undersigned will not address that claim, consideration of which will benefit from access to the administrative record.

Application of these traditional tools of statutory interpretation establish that Plaintiff is likely to prevail in his argument that the CDC Orders instituting the Title 42 Process exceed the authority granted by Congress pursuant to Section 265. *See Chevron*, 467 U.S. at 842–43 & n.9 (stating that, when a court “employing traditional tools of statutory construction” determines that a statute is unambiguous, it must “give effect to the unambiguously expressed intent of Congress” and “reject administrative constructions which are contrary” to that intent).

The “interpretation of [Section 265] ‘begins where all such inquiries must begin: with the language of the statute.’” *U.S. Ass’n of Reptile Keepers, Inc. v. Zinke*, 852 F.3d 1131, 1135 (D.C. Cir. 2017) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). The provision states that, when the CDC Director determines that a serious danger of the introduction of a communicable disease that exists in a foreign country into the United States 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 public health,” then the CDC Director shall, in accordance with valid regulations, “have the power to prohibit, in whole or in part, the introduction of persons and property” from such countries for the amount of time he deems necessary to protect the public health. 42 U.S.C. § 265.

The government has made clear, both in its briefing here and in the Final Rule, that it interprets the word “introduction” to “suggest[] a continuing process that is most naturally read to extend beyond a person’s immediate physical crossing of the border” and that “to ‘prohibit . . . the introduction’ naturally means to intercept or prevent such a process.” ECF No. 44-2 at 31; *see also* Final Rule, 85 Fed. Reg. at 56,425–56,426 (stating that the term “introduction” includes the situation “when a person on U.S. soil moves further into the United States”).

Assuming without deciding that the government’s interpretations of the word “introduction” and the phrase “prohibit . . . the introduction” are legally sound,⁸ Defendants parsing of the plain text of the statute makes an unsupported (and unwarranted) logical leap at that point by asserting that “[t]he statute’s reference to prohibiting the introduction ‘in whole or in part’ supports the interpretation that a person may be intercepted and then quarantined in the United States or intercepted *and then expelled*.” ECF No. 44-2 at 31(emphasis added); *see also* Final Rule, 85 Fed. Reg. at 56,425–56,426 (stating that the phrase “prohibit, in whole or in part, the introduction into the United States of persons” includes the power of “physically expelling from the United States some or all of the persons”). Put simply, accepting that “to ‘prohibit . . . the introduction’” means “to intercept or prevent such a process” does not lead to the conclusion that “prohibition,” “interception,” or “prevention” includes “expulsion.” Indeed, the primary definition of “prohibit” is “to forbid by authority or command,” to “enjoin” or “interdict,” *Prohibit*, Merriam-Webster Unabridged Dictionary; of “intercept” is “to take, seize, or stop by the way or before arrival at the destined place: stop or interrupt the progress or course of,” *Intercept*, Merriam-Webster Unabridged Dictionary; of “prevent” is “to deprive of power or hope of acting, operating, or succeeding in a purpose,” *Prevent*, Merriam-Webster Unabridged Dictionary. These each connote stopping

⁸ Plaintiff has not conceded that they are so. Rather, he has constructed an intricate argument contending that, because “[a]s a matter of ordinary language and usage,” relying on dictionary definitions of the word, “introducing a person into a country or place is an action taken by a *third party*,” the use of the word “introduction” in the statute must be “directed not at individuals seeking to *come to* the United States, but rather those proposing to *bring* such individuals here.” ECF No. 15-1 at 25–26. That interpretation is, according to Plaintiff, reinforced by the statutory context of the 1893 Act, which was “shot through with provisions specifically directed at the regulation of ships”—that is, vessels that were bringing “persons and property” into the country—whereas statutes authorizing deportations of people at the time explicitly authorized the removal or return of the person. *Id.* at 27. Moreover, examining the remarks of proponents of the 1893 Act in the Senate, Plaintiff finds evidence that they, too, were focused on the ships arriving in the United States, rather than those arriving on their own steam at land borders. *Id.* at 28. Finally, Plaintiff notes that, “to [his] knowledge, the only time the [1893 Act] has been invoked to prohibit the introduction of persons was in 1929, and it did not authorize deportations.” *Id.* at 28–29 & n.10. Thus, Plaintiff argues, Section 265 reflects that Congress designed the statute “as a means to stop travel from countries experiencing an outbreak of disease by regulating the *transportation* companies that bring people to the United States.” *Id.* at 25. The undersigned does not pass on the soundness of that argument because there is a more direct route to determine the statute’s meaning, which is discussed below.

something before it begins, rather than remedying it afterwards. That is reinforced by the title of the Section 265: “Suspension of *entries* and imports from designated places to prevent spread of communicable diseases.” 42 U.S.C. § 265 (emphasis added); see *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (“[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.” (quoting *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 528–29 (1947))).

The government purports to find support for its interpretation that the statute encompasses the authority to expel individuals from the United States in the phrase “in whole or in part”: “[t]he statute’s reference to prohibiting the introduction ‘in whole or in part’ supports the interpretation that a person may be intercepted and then quarantined in the United States or intercepted and then expelled.” ECF No. 44-2 at 31. The government stretches the syntax of that clause well past its breaking point. Its argument works only if one believes that Congress, through the statutory language, intended “prohibit[ion] . . . in part” to mean “apprehension and quarantine” and “prohibit[ion][] in whole” to mean “apprehension and expulsion.” But regular English usage does not consider “prohibition”—or “introduction,” for that matter—to be a quantity that can be divided into pieces. There is a far more natural reading of the clause in its context: that the CDC Director “shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate,” 42 U.S.C. § 265, means that he may prohibit the introduction of some persons or property from those places or all persons or property from them. That is, “in whole or in part” relates to the proportion of persons or property from designated places to be intercepted and denied entry; it does not purport to define the type of actions that the CDC Director may take in order to intercept and deny entry. Surely, then, the most natural reading

of the provision is that it contemplates interception to prevent an individual from arriving in the United States, rather than to expel him once he has arrived.

Indeed, that interpretation is further supported by the statutory context. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) (“It is a ‘fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.’” (quoting *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989))). Adjacent to Section 265 of the Public Health Service Act, 42 U.S.C. § 264 (“Section 264”), entitled “Regulations to control communicable diseases,” is one of the provisions on which the CDC relied in promulgating both the Interim Final Rule and the Final Rule. *See* Interim Final Rule, 85 Fed. Reg. at 16,563 (“In addition to section 362”—that is, 42 U.S.C. § 265—“other sections of the [Public Health Service] Act are relevant to this rulemaking, including . . . 42 U.S.C. section 264”); Final Rule, 85 Fed. Reg. at 56,443 (same). That provision addresses regulations that the government is “authorized to make and enforce . . . to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the United States or possessions,” 42 U.S.C. § 264(a), that is, regulations governing situations similar to those addressed by Section 265. Tellingly, Section 264 does not contemplate regulations that authorize expulsion from the United States. Rather, the provision mentions only regulations that “provide for the apprehension, detention, or conditional release of individuals.”⁹ 42 U.S.C. § 264(b). More, those regulations allow for the “apprehension, detention, examination, or conditional release of individuals” but only if the individual is “coming into a State or possession from a foreign country or

⁹ As noted, conditional release is a public health tool that “involves the release of potentially infected individuals from federal custody subject to conditions calculated to mitigate the risk of disease transmission, such as mandatory self-isolation and CDC monitoring at home.” March 20 Order, 85 Fed. Reg. at 17,061.

possession.”¹⁰ 42 U.S.C. § 264(c). Importantly, the power to expel such individuals from the United States is not mentioned. That is, in a section where one would expect the term to appear—where Congress has delineated the government’s power to prevent the spread of contagious disease from individuals coming into the United States from a foreign country—it does not.

Indeed, expulsion from the United States is nowhere mentioned in the statute. The statute is shot through with references to quarantine—unsurprising given the provisions at issue are part of the Public Health Act and address the power of the Surgeon General to mitigate the risk of contagious disease—but it contains not a word about the power of the Surgeon General to expel anyone who has come into the country. *See, e.g.*, 42 U.S.C., Chap. 6A, Subchap. II, Part G (entitled “Quarantine and Inspection.”); 42 U.S.C. § 267 (entitled “Quarantine stations, grounds, and anchorages”); 42 U.S.C. § 268 (entitled “Quarantine duties of consular and other officers”); 42 U.S.C. § 270 (entitled “Quarantine regulations governing civil air navigation and civil aircraft”); 42 U.S.C. § 271 (entitled “Penalties for violation of quarantine laws”); 42 U.S.C. § 272 (entitled “Administration of oaths by quarantine officers”). Even the provision governing “[s]pecial quarantine powers in time of war” provides for only examination and detention—arguably the opposite of expulsion. 42 U.S.C. § 266. The statute also prescribes the penalty for violating “any regulation prescribed under section 264 to 266” as punishment by fine or imprisonment of up to one year. 28 U.S.C. § 271(a). Again, there is no mention of expulsion.

It is unlikely then that, having repeatedly identified the tools the government can use to prevent the introduction and spread of communicable diseases—none of which expressly include

¹⁰ There is an exception allowing apprehension and examination of individuals already in the country but only if they are “reasonably believed” to be (1) “infected with a communicable disease in a qualifying stage” and either (2) “moving or about to move from a State to another State” or (3) “a probable source of infection to individuals who . . . will be moving from a State to another State.” 42 U.S.C. § 264(d)(1). Upon a finding that such an individual is infected, regulations may also provide for detention “for such time and in such manner as may be reasonably necessary.” 42 U.S.C. § 264(d)(1).

expulsion of individuals from the United States—Congress intended by that silence, and the language it chose for Section 265, to give the government that power. A power which, as the Plaintiff points out without contradiction from the Defendant, the government has not claimed in the more than 75 years Section 265 was enacted. ECF No. 15-1 at 28–29 & n.10. “When an agency claims to discover in a long-extant statute an unheralded power,” courts should “greet its announcement with a measure of skepticism.” *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (rejecting an agency’s interpretation of its governing statute when it claimed a significant expansion of regulatory authority “without clear congressional authorization”).

That interpretation is buttressed by the fact that, as Plaintiff points out, when Congress wants to grant the power to expel individuals out of the United States, it does so plainly. Plaintiff cites statutes from as early as 1882 that explicitly authorize removal of individuals from the country. The statute known as the Chinese Exclusion Act stated that “any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came” after a court had found that the individual was “not lawfully entitled to be or remain in the United States.” An Act to Execute Certain Treaty Stipulations Relating to the Chinese, ch. 126, § 12, 22 Stat. 58, 61 (May 6, 1882). A 1891 statute concerning the importation of aliens under contract to perform labor provided that “all aliens who may unlawfully come to the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in” and that “any alien who shall come into the United States in violation of law may be returned as by law provided.” An Act in Amendment to the Various Acts Relative to Immigration and the Importation of Aliens Under Contract or Agreement to Perform Labor, ch.551, §§ 10–11, 26 Stat. 1084, 1086 (Mar. 3, 1891). The same is true of modern statutes. *See, e.g.*, 8 U.S.C. § 1225(b)(2)(A), (C) (allowing an alien who has arrived on land from a contiguous country and who

is “not clearly and beyond a doubt entitled to be admitted” to be “return[ed] . . . to that territory pending a proceeding”); 8 U.S.C. § 1231(a)(1)(A) (“Except as otherwise provide in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days”); 8 U.S.C. § 1232(a)(2)(B) (allowing “an immigration officer who finds an unaccompanied alien child” who is a national or habitual resident of a contiguous country “at a land border or port of entry of the United States and determines that such child is inadmissible” to “return such child to the child’s country of nationality or country of last habitual residence”); 18 U.S.C. § 3186 (authorizing a fugitive from another country found in the United States to be “take[n] [] to the territory of such foreign government” by an agent of that government). Moreover, as Plaintiff emphasizes, Congress has made clear when public health concerns merit disallowing a non-citizen to remain in the United States. Section 1182 of Title 8 makes inadmissible “[a]ny alien . . . who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance.” 8 U.S.C. § 1182(a)(1)(A)(i). But Section 265 contains no such clear language, which indicates that Congress did not intend to grant that power.¹¹ See *JBBC* Transcript at 49–50 (finding that Section 265 does not “permit[] the return of individuals” to their home countries in part because Congress did not use terms like “return” or “remove,” which are used in immigration statutes); cf. *Epic Sys.*, ___ U.S. at ___, 138 S. Ct. at 1626 (noting other statutes in which Congress had

¹¹ Relying on a single statement in dicta from a 1983 Supreme Court case, the government argues that an “interpretative approach” that looks to the language used in one statute to interpret the meaning of another has been “rejected.” ECF No. 44-2 at 15 (citing *Russello v. United States*, 464 U.S. 16, 25 (1983)). Not so. As Plaintiff points out, the Supreme Court regularly uses that “interpretive approach.” ECF No. 51-1 at 15 (citing *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020) (“History shows that Congress knows how to withdraw a reservation”); *Rotkiske v. Klemm*, ___ U.S. ___, ___, 140 S. Ct. 355, 361 (2019) (“A textual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision. Congress has enacted statutes that expressly include the language [the petitioner] asks us to read in”); *Epic Sys. Corp. v. Lewis*, ___ U.S. ___, ___, 138 S. Ct. 1612, 1626 (2018) (explaining that “when Congress wants to mandate [certain] procedures[,], it knows exactly how to do so,” and “Congress has spoken often and clearly” to the issue in other statutes)).

mandated particular dispute resolution procedures to find that Section 7 of the National Labor Relations Act does not confer a right to class or collective actions because “[w]hen Congress wants to mandate particular dispute resolution procedures it knows exactly how to do so”); *Merck & Co. v. Dep’t of Health and Human Servs.*, 385 F. Supp. 3d 81, 96 (D.D.C. 2019) (stating that the fact that Congress “precisely legislated” in an area in one statute indicates that such power was not granted by a different statute because “Congress knows how to speak on that subject when it wants to”), *aff’d*, 962 F.3d 531 (D.C. Cir. 2020).

Indeed, the power the government claims under Section 265 is breathtakingly broad. The Interim Final Rule notes that, by speaking of “persons,” rather than “non-citizens” or “aliens,” Section 265 also applies to citizens. Interim Final Rule, 85 Fed. Reg. at 16,564. The Final Rule also indicates that Section 265 covers citizens. Final Rule, 85 Fed. Reg. at 56,448. The government consequently admitted before Judge Nichols that the section authorizes the government to expel even U.S. citizens who arrive from a foreign country during a pandemic. *JBBC* Transcript at 26–27. Yet, it is unlikely that Congress would grant the CDC Director the power to expel citizens from the United States without making a clear statement to that effect. Indeed, as Plaintiff points out (ECF No. 15-1 at 23; ECF No. 51-1 at 12), the Supreme Court has stated that the power to remove a citizen from the country “must be affirmatively granted” in order to exist. *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 12 (1936). Section 265 includes no such affirmative grant. And if Section 265 were read to include that power, it would raise serious constitutional issues. *See, e.g., Doe v. Mattis*, 928 F.3d 1, 8 (D.C. Cir. 2019) (“A fundamental attribute of United States citizenship is a ‘right to . . . remain in this country’”) (first alteration in original) (quoting *Mandoli v. Acheson*, 344 U.S. 133, 139 (1952)); *Dessouki v. Att’y Gen. of U.S.*, 915 F.3d 964, 967 (3d Cir. 2019) (“The Executive cannot deport a citizen.”). The government has acknowledged

the “complex and important legal and policy questions presented by the potential application of [Section 265] to U.S. citizens, U.S. nationals, and [legal permanent residents].” Final Rule, 85 Fed. Reg. 56,424-01, 56,448; *see also* Interim Final Rule 85 Fed. Reg. 16,559-01, 16,564 (“Determining the appropriate protections for U.S. citizens and lawful permanent aliens requires complex balancing of numerous interests and would benefit from additional consideration and public comment.”). As the Supreme Court has instructed, “[i]f one [proposed statutory construction] would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court.” *Clark v. Suarez Martinez*, 543 U.S. 371, 380-81 (2005).

Furthermore, as Judge Nichols also found, Section 265 must be read in conjunction with statutes governing immigration under Title 8 of the U.S. Code. *JBBC* Transcript at 50 (“Even if the power to remove were read [into] [S]ection 265, the plaintiff has [a] likelihood of success because the provision . . . should be harmonized, to the maximum extent possible, with immigration statutes, including those . . . that grant special protections to minors and also those . . . that deal with communicable diseases and quarantines.”). The Supreme Court has recently reaffirmed that “[i]t is [a] [c]ourt’s duty to interpret Congress’ statutes as a harmonious whole rather than at war with one another.” *Epic Sys.*, ___ U.S. at ___, 138 S. Ct. at 1619. Here, if Section 265 is read to allow expulsion from the United States of unaccompanied minors like Plaintiff and the putative class members, it conflicts with various rights granted in the TVPRA and the INA.¹²

¹² The Complaint also claims that the Title 42 Process conflicts with provisions in FARRA, which implements Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”). ECF No. 1, ¶¶ 130–136 (citing the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681 (codified at 8 U.S.C. § 1231 note)). Defendants point out that the implementation of the CDC Orders allows CAT screenings and, moreover, that because the CAT is not self-executing, domestic statutes implementing the obligations under the treaty are controlling. ECF No. 44-2 at 43 n.15 (citing *Medellin v. Texas*, 552 U.S. 491, 504–05 & n.2 (2008), and *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 957 (9th Cir. 2012) (en banc)). In its Reply, Plaintiff focuses on asylum screenings under the TVPRA rather than the CAT or FARRA. ECF No. 55-1 at

First, the TVPRA. The statute was passed “to enhance the efforts of the United States to prevent trafficking in persons,” specifically unaccompanied alien children in the United States. 8 U.S.C. § 1232(a)(1). It imposes certain mandatory obligations on the government and provides certain rights to unaccompanied alien minors, including that an unaccompanied alien child (other than one from a contiguous country, to whom special rules apply) must be placed in removal proceedings under the INA and must be provided access to counsel. 8 U.S.C. § 1232(a)(5)(D). They must also be transferred into the custody of the Office of Refugee Resettlement within 72 hours after it has been determined that the individual is an unaccompanied alien child. 8 U.S.C. § 1232(b)(3); 6 U.S.C. § 279(a), (b)(1)(A); *see also JD*, 925 F.3d at 1300–02 (describing the TVPRA’s statutory scheme). Second, the INA provides additional protections for non-citizens, including unaccompanied children. Section 1231(b)(3) prohibits the removal of a non-citizen to a country where he is likely to face persecution because of his race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1231(b)(3). The decision regarding whether “the exclusion, deportation, or removal of an alien” to such country shall be withheld must be made by an immigration judge. 8 C.F.R. § 1208.16(a). Similarly, the INA provides that “[a]ny alien who is physically present in the United States or who arrives in the United States . . . may apply for asylum,” 8 U.S.C. § 1158(a)(1), with certain exceptions not relevant here. Unaccompanied alien children are excepted from the one-year deadline that normally applies to asylum applications and from the option to be removed to a third country where the asylee would not be subject to persecution and would have access to a fair asylum procedure. 8 U.S.C. § 1158(a)(2)(A), (B), (E). It is undisputed that the summary expulsions of the Title 42 Process render these protections and procedures unavailable. ECF No. 44-2 at 41–48.

25. Because the question of whether the Title 42 Process likely violates FARRA is unnecessary to the determination here, the undersigned does not address it.

The government contends that Section 265 “takes precedence over the identified immigration provisions.” ECF No. 44-2 at 41. But “[a] party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing ‘a clearly expressed congressional intention’ that such a result should follow.” *Epic Sys.*, ___ U.S. at ___, 138 S. Ct. at 1624 (some internal quotation marks omitted) (quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995)). The conventional way to signal that one statutory provision is intended to override conflicting provisions is the construction, “Notwithstanding any other provision of law.” *See, e.g., Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993) (“As we have noted previously in construing statutes, the use of such a ‘notwithstanding’ clause clearly signals the drafter’s intention that the provisions of the ‘notwithstanding’ section override conflicting provisions of any other section. Likewise, the Courts of Appeal generally have ‘interpreted similar “notwithstanding” language . . . to supersede all other laws, stating that “[a] clearer statement is difficult to imagine.”’” (alterations in original) (internal citation omitted) (some internal quotation marks omitted) (quoting *Liberty Mar. Corp. v. United States*, 928 F.2d 413, 416 (D.C. Cir. 1991))); *see also, e.g., Epic Sys.*, ___ U.S. at ___, 138 S. Ct. at 1626 (“Congress has [] shown that it knows how to override the Arbitration Act when it wishes—by explaining, for example, that, ‘[n]otwithstanding any other provision of law, . . . arbitration may be used . . . only if’ certain conditions are met” (some alterations in original) (quoting 15 U.S.C. § 1226(a)(2))).

Here, the government attempts to find such a clear statement of congressional intent to override the provisions of Title 8 of the U.S. Code in the statement Section 265’s language referring to a “suspension of the right to introduce such persons and property,” asserting that “[t]he phrase ‘suspension of the right to introduce’ [] naturally means the temporary cessation of the

effect of any laws, including immigration laws, pursuant to which a person might otherwise claim a right to be introduced into the United States.” ECF No. 44-2 at 42.

Defendants’ argument is not likely to succeed. The phrase in Section 265 is not “a clearly expressed congressional intention,” *Epic Sys.*, ___ U.S. at ___, 138 S. Ct. at 1624, that an order promulgated under that section can override conflicting provisions of Title 8 of the U.S. Code. Unlike the “notwithstanding” clause that the Supreme Court has approved as sufficiently clear, the phrase contains no reference to the suspension of laws or specific rights. Indeed, the examples the government provides to support its notion that the term “suspension” overrides the operation of conflicting laws help to prove the opposite. For example, Defendants cite 10 U.S.C. § 123(a), which allows—during wartime or national emergency—the President to “suspend the operation of any provision of law relating to the promotion, involuntary retirement, or separation of commissioner officers.” ECF No. 44-2 at 42. But that statute explicitly suspends the “operation of any provision of law,” much like a “notwithstanding” clause explicitly identifies “any other provision of law.” Similarly, the Suspension Clause of the Constitution specifically identifies the right suspended by stating that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. Const. art I, § 9, cl. 2, *quoted in* ECF No. 44-2 at 42. In short, Defendants have not shown that the vague language of Section 265 evinces congressional intention to allow an order by the CDC Director to suspend the operation of all immigration laws.

Defendants’ remaining contentions are no more successful. They cite the canon of statutory construction that a more specific provision targeting a particular issue will generally trump a provision more generally covering the issue, arguing that Section 265 is more specific than the immigration laws Plaintiff cites “because it applies only in a rare and specific circumstance.” ECF

No. 44-2 at 46. That canon is most often applied when the two provisions “are interrelated and closely positioned, both in fact being parts of [the same statutory scheme].” *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (alterations in original) (quoting *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) (per curiam)). That is not the case here. Moreover, the immigration laws cited are clearly part of a “comprehensive scheme [that] has deliberately targeted specific problems with specific solutions.” *RadLAX*, 566 U.S. at 645 (quoting *Varsity Corp. v. Howe*, 516 U.S. 489, 519 (1996) (Thomas, J., dissenting)). It is not clear how Section 265—which Defendants suggest is a broad grant of discretion to the CDC Director to regulate the introduction of communicable diseases into the United States (*see, e.g.*, ECF No. 44-2 at 14–15 (describing the “broad power” granted by Section 265))—could be considered more specifically targeted to matters of immigration or as providing more specific solutions.

Finally, Defendants suggest that a reading of Section 265 that does not authorize the CDC Director to issue orders allowing expulsion from the United States of unaccompanied non-citizen children outside the processes mandated by Title 8 of the U.S. Code renders the statute a nullity. That point requires little discussion. Plaintiff’s concede that the CDC Director has authority to bar entry into the country, at least through the regulation of vessels (including airplanes) arriving in the United States. ECF No. 15-1 at 28–30 & n.9 (citing Criteria for Requesting Federal Travel Restrictions for Public Health Purposes, 80 Fed. Reg. 16,400 (Mar. 27, 2015), which addresses the “Do Not Board” list, “enabling domestic and international public health officials to request that individuals with communicable diseases who meet specific criteria . . . be restricted from boarding commercial aircraft arriving into, departing from, or traveling within the United States.”); ECF No. 51-1 at 16; ECF No. 15-5 at 7 (attaching Executive Order No. 5143, which reads, “[I]n order to prevent the further introduction of epidemic cerebrospinal meningitis from foreign ports into

the United States, by virtue of the authority vested in me by Section 7 of the Act of Congress approved February 15, 1893 [now 42 U.S.C. § 265] . . . it is ordered that no persons may be introduced directly or indirectly by transshipment or otherwise into the United States or any of its possessions or dependencies from any port in China (including Hong Kong) or the Philippine Islands . . .”). Again, those violating a barring order may be prosecuted and face up to one year of imprisonment. 42 U.S.C. § 271(a). The CDC Director can also, pursuant to valid regulations, apprehend, examine, quarantine, or conditionally release persons traveling into the United States from a foreign country.¹³ 42 U.S.C. § 264(a), (c). What the statute has not authorized him to do, however, is to summarily expel members of the class from the United States in derogation of its immigration laws. But as Plaintiff points out, that Section 265 “does not authorize *this particular invocation*—an order singling out particular noncitizens, including unaccompanied children, and overriding protections for those individuals—does not [] make the statute meaningless.”¹⁴ ECF No. 51-1 at 23.

The fact that the government may believe that, without the power to summarily expel unaccompanied non-citizen children, Section 265 is not up to the task of preventing the introduction or spread of a communicable disease in the United States does not change the legal question of what the statute allows. “[A]gencies are ‘bound, not only by the ultimate purposes Congress has

¹³ And presumably, while quarantined, the immigration process can go forward, including medical examination under 8 U.S.C. § 1222(a) (authorizing examination and detention of aliens to determine whether they have a communicable disease) and application of 8 U.S.C. § 1182(a)(1)(i) (making inadmissible any alien who is determined to have a communicable disease of public health significance).

¹⁴ For this reason, IRLI’s *amicus* brief misses the mark. The organization argues that immigration statutes governing asylum, removal of non-citizens, and the trafficking of children in the INA and TVPRA do not implicitly repeal Section 265. *See generally* ECF No. 48-1. But there is no question of implicit repeal here because neither is Section 265 “in irreconcilable conflict” with those immigration provisions—they can co-exist—nor were those immigration provisions “clearly intended as a substitute” for Section 265. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (identifying the “two well-settled categories of repeals by implication—(1) where provisions in the two acts are in irreconcilable conflict . . . ; and (2) [where] the later act covers the whole subject of the earlier one and is clearly intended as a substitute” (quoting *Posadas v. Nat’l City Bank of N.Y.*, 296 U.S. 497, 503 (1936))).

selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.” *Merck*, 962 F.3d at 536 (quoting *Colo. River Indian Tribes v. Nat’l Indian Gaming Comm’n*, 466 F.3d 134, 139–40 (D.C. Cir. 2006)). To the extent those means seem insufficient, “the proper approach under our system of separation of powers is for Congress to amend the statute, not for the Executive Branch and the courts to rewrite the statute beyond what the statute’s terms can reasonably bear.” *District of Columbia v. Dep’t of Labor*, 819 F.3d 444, 450 (D.C. Cir. 2016).

For these reasons, Plaintiff is likely to succeed on the merits of his claim.¹⁵

2. Irreparable Injury

To show irreparable injury sufficient to merit a preliminary injunction, the plaintiff must establish that the injury is “certain and great” and “of such imminence that there is a ‘clear and present need for equitable relief.’” *Chaplaincy of Full Gospel Churches v. England*, 454 F. 3d 290, 297 (D.C. Cir. 2006) (emphasis omitted) (quoting *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). That said, “a preliminary injunction requires only a likelihood of irreparable injury[;] Damocles’ sword does not have to actually fall on all [plaintiffs] before the court will issue an injunction.” *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 8–9 (D.C. Cir. 2016) (internal citation omitted). Plaintiff has met his burden on this requirement.

¹⁵ Because the undersigned finds, “using the traditional tools of statutory construction,” that the statute is not ambiguous, “that is the end of the matter” and there is no need to determine whether it is appropriate to defer to the agency’s interpretation. *Chevron*, 467 U.S. at 842–43 & n.9. However, even if there were ambiguity, the undersigned would find, as did Judge Nichols, that deference to the government’s interpretation of the statute would not be justified. *JBBC* Transcript at 50–51. The question for this claim is purely legal: does Section 265 authorize expulsions from the United States, or does it not? The CDC’s “scientific and technical knowledge” (ECF No. 33 & n.14) has no bearing on that question of statutory interpretation. *Cf. FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1128 (D.C. Cir. 2017) (no deference where agency has “no special administrative expertise that a court does not possess” (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 260 (1968))); *Kisor v. Wilkie*, ___ U.S. ___, ___, 139 S. Ct. 2400, 2417 (2019) (“When the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority.”). “[T]he ‘reconciliation’ of distinct statutory regimes ‘is a matter for the courts,’ not agencies.” *Epic Sys.*, ___ U.S. at ___, 138 S. Ct. at 1629 (quoting *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 685–86 (1975)).

Plaintiff has presented declarations from attorneys representing numerous unaccompanied children who have crossed the border and have bona fide claims for humanitarian relief, including fear of persecution on the basis of protected characteristics, but have been subjected to the Title 42 Process and threatened with deportation prior to receiving any of the protections the immigration laws provide. *See, e.g.*, ECF No. 15-10, ¶¶ 5–14 (declaration of attorney Linda Corchado); ECF No. 15-11, ¶¶ 3–6 (declaration of attorney Taylor Levy); *see also, e.g.*, ECF No. 15-12, ¶¶ 26–32 (declaration of Lisa Frydman, Vice President of International Programs at Kids in Need of Defense, an advocacy and legal services organization). Many come from El Salvador, Guatemala, and Honduras, dangerous countries in which children are often targeted for sexual and other violence and face the possibility of torture and death. ECF No. 15-12, ¶¶ 5–11. Similar showings have been held sufficient to demonstrate irreparable injury. *See, e.g., Grace v. Whitaker*, 344 F. Supp. 3d 96, 146 (D.D.C. 2018) (finding that declarations asserting fear of “rape, domestic violence, beating, shootings, and death” in the plaintiffs’ countries of origin sufficed to establish likelihood of irreparable injury), *aff’d in part, rev’d in part on other grounds sub nom. Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020); *Devitri v. Cronen*, 289 F. Supp. 3d 287, 296–97 (D. Mass. 2018) (declaration asserting likelihood of persecution if removed sufficient); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1504–05 (C.D. Cal. 1988) (finding that plaintiffs would suffer irreparable harm if they were summarily removed without being afforded the opportunity to exercise their right to apply for asylum). Indeed, Judge Nichols found a likelihood that a plaintiff similarly-situated to Plaintiff here would likely suffer irreparable harm in the absence of injunctive relief. *JBBC* Transcript at 51 (“It is certainly the case that plaintiff has not established that those harms are certain to occur, but there is at a minimum the risk that those harms, which are specified in

some detail, could occur. And so the Court concludes that the plaintiff has established . . . that he is likely to suffer irreparable harm in the absence of an order here.”).

There is the additional risk that, once expelled from the United States, Plaintiff’s harm will no longer be remediable. In other contexts, courts have found that the movement of a minor beyond the jurisdiction of the court can constitute irreparable harm when it interferes with the ability of the court to provide relief. *See, e.g., Mendoza v. Pascual*, No. CV 615-40, 2015 WL 1880309, at *5 (S.D. Ga. Apr. 24, 2015) (applying the Hague Convention on the Civil Aspects of International Child Abduction); *Velasquez v. Velasquez*, No. 14-cv-1688, 2014 WL 7272934, at *5 (E.D. Va. Dec. 15, 2014) (finding that petitioner had shown irreparable harm from the possibility that his children would be removed from the jurisdiction because that would “frustrate the effort of th[e] Court in resolving the [dispute]”). To be sure, in *Nken*, the Supreme Court held that “the burden of removal alone cannot constitute the requisite irreparable injury.” 556 U.S. at 435. But that holding rested on the ability of a removed alien to “continue to pursue [a] petition[] for review [of the removal order],” which afforded the opportunity to return to the United States “with a restoration of the immigration status” the alien had enjoyed upon removal. *Id.* Here, however, the putative class members are being returned without any opportunity to apply for asylum or withholding of removal. Once expelled from the United States and outside the jurisdiction of the Court, it is not clear that a remedy can be provided.¹⁶ *Cf. Doe*, 928 F.3d at 22 (finding irreparable harm likely to flow from the transfer of a dual citizen detained in Iraq to an unidentified third

¹⁶ That is precisely the argument the government has made in a different case in this jurisdiction challenging the Title 42 Process. In *GYJP v. Wolf*, the plaintiff, an unaccompanied 13-year-old girl from El Salvador, crossed into the United States and was apprehended by Customs and Border Patrol officers. Complaint, ¶¶ 76–80, *GYJP*, No. 20-cv-1511 (TNM) (D.D.C. June 9, 2020), ECF No. 3. Approximately six days later, she was expelled from the United States pursuant to the Title 42 Process and flown back to El Salvador. *Id.*, ¶¶ 80–85. In that litigation, the government has taken the position that the court is without jurisdiction to hear the case because the plaintiff lacks constitutional standing. *See generally* Motion to Dismiss, *GYJP*, No. 20-cv-1511 (TNM) (D.D.C. Aug. 17, 2020), ECF No. 38.

country because he would then be in the custody of that third country “without continuing oversight by—or recourse to—the United States”).

Lastly, “[i]t is well-established that acts by [g]overnment agencies in derogation of statutory rights of the public or certain individual members of the public can constitute irreparable injury.” *Kirwa*, 285 F. Supp. 3d at 42 n.22 (quoting *Gates v. Schlesinger*, 366 F. Supp. 797, 800 (D.D.C. 1973)); *see also* *JL v. Cissna*, 341 F. Supp. 3d 1048, 1068 (N.D. Cal. 2018) (identifying multiple common harms resulting from deprivation of right to seek humanitarian benefits for abused, abandoned, and neglected juveniles); *Tefel v. Reno*, 972 F. Supp. 608, 619–20 (S.D. Fla. 1997) (“[T]he Court finds . . . that Plaintiffs and class members would suffer irreparable harm if they are deported to their native countries after having been denied an opportunity to have a hearing on their claims for suspension of deportation.”). In light of the finding above in Section II.B.1 that the claim that expulsion under the Title 42 Process exceeds the authority granted by Section 265 is likely to succeed, this is a clear harm that each member of the putative class has suffered or will suffer. Therefore, the undersigned finds that Plaintiff has adequately established a likelihood of irreparable injury should a preliminary injunction not issue.

3. Balance of the Equities and Public Interest

Beyond the irreparable harm that Plaintiff and members of the putative class will suffer without an injunction, the balance of the equities also favors Plaintiff. *See Costa v. Bazron*, No. 19-3185 (RDM), 2020 WL 2025701, at *8 (D.D.C. Apr. 25, 2020) (“[W]here the government is a party to the suit, the harm to defendants and the public interest merge and ‘are one and the same, because the government’s interest *is* the public interest.” (quoting *Pursuing America’s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016))). Public interest in enjoining unlawful government action, protecting non-citizen children from being wrongfully removed, and preventing risks to

public health caused by the Title 42 Process weigh in Plaintiff's favor; while a preliminary injunction will impose some hardships on Defendants, the public interest and immitigable hardships to Plaintiff outweigh the mitigable hardships to Defendants.

As discussed above, Defendants' actions are likely to be found unlawful, and "[t]here is generally no public interest in the perpetuation of an unlawful agency action." *League of Women Voters*, 838 F.3d at 12; *see also Banks v. Booth*, No. 20-849 (CKK), 2020 WL 1914896, at *12 (D.D.C. Apr. 19, 2020) (Kollar-Kotelly, J.) ("There is no harm to the [g]overnment when a court prevents unlawful practices."). Rather, "the public interest is harmed when the [g]overnment ham-handedly exercises its responsibilities." *Minney v. U.S. Off. of Pers. Mgmt.*, 130 F. Supp. 3d 225, 236 (D.D.C. 2015) (Leon, J.). Conversely, "there is a substantial public interest 'in having governmental agencies abide by the federal laws that govern their existence and operations.'" *League of Women Voters*, 838 F.3d at 12 (quoting *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994); *see also Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977) ("[T]here is an overriding public interest . . . in the general importance of an agency's faithful adherence to its statutory mandate."); *Louis v. Meissner*, 530 F. Supp. 924, 929 (S.D. Fla. 1981) ("The public's interest is not served by continued acts violative of the law.").

Plaintiff's position is supported not only by the somewhat abstract public interest in faithful execution of federal law but also by more concrete public interests in preventing aliens from wrongful removal from the United States to countries where they are likely to be persecuted. "[T]he public has an interest in 'ensuring that we do not deliver aliens into the hands of their persecutors' and 'preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm.'" *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1281 (9th Cir. 2020) (citations omitted) (first quoting *Leiva-Perez v. Holder*, 640 F.3d 962,

971 (9th Cir. 2011), then quoting *Nken*, 556 U.S. at 436); *see also, e.g., AB-B v. Morgan*, No. 20-cv-846 (RJL), 2020 WL 5107548, at *9 (D.D.C. Aug. 31, 2020) (“[P]roceeding to the merits of this litigation without preliminary injunctive relief risks plaintiffs being returned to home countries where they face significant risk of physical harm. These life-or-death consequences weigh heavily in favor of preliminary injunctive relief.”); *Chaudhry v. Barr*, No. 2:19-cv-00682-TLN-DMC, 2019 WL 2009307, at *4 (E.D. Cal. May 7, 2019) (“[T]here is [] ‘a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm.’” (quoting *Sied v. Nielsen*, No. 17-cv-06785-LB, 2018 WL 1142202, at *27 (N.D. Cal. Mar. 2, 2018))). It is also, of course, in “the interests of society to protect the welfare of children.” *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

Additionally, the government has failed to take into account the harm to the public interest in continuing its current practice of housing unaccompanied non-citizen minors in hotels while they await expulsion from the United States under the Title 42 Process—a practice that would end if an injunction issued requiring Plaintiff and the putative class to be excepted from expulsion from the United States under the Title 42 Process. In a case in the U.S. District Court for the Central District of California concerning the government’s practice of placing such children in hotels rather than transferring them to the custody of the Office of Refugee Resettlement, *see Flores v. Barr*, __ F. Supp. 3d __, __, 2020 WL 5491445, at *1, 3 (C.D. Cal. 2020) (noting that the question before that court is the practice of holding minors detained pursuant to the Title 42 Process in hotels prior to expulsion and “*not . . . the validity of Title 42 expulsions*”), *appeal docketed*, No. 20-55951 (9th Cir. Sept. 10, 2020), the court found that the government had “failed to demonstrate how hotels, which are otherwise open to the public and have unlicensed staff coming in and out, located in areas with high incidence of COVID-19, are any better for protecting public health than

licensed facilities would be” and that “[e]ven if the infection control protocols at [the Office of Refugee Resettlement] come under some stress, or are forced to make some adjustments,” the program’s facilities are likely to “remain far safer than unregulated hotel stays for both detained minors and the general public,” In Chambers Order at 4, *Flores*, No. CV 85-4544 DMG (AGRx) (C.D. Cal Sept. 21, 2020), ECF No. 990 (quoting *Flores*, ___ F. Supp. 3d at ___, 2020 WL 5491445, at *6).

Against these arguments, Defendants first assert that an injunction against the Title 42 Process would make officers at the border less safe, noting that many such officers have contracted COVID-19 and several have died. To be sure, “[i]t goes almost without saying . . . that promoting public health—especially during a pandemic—is in the public interest,” and the premature loss of any life is tragic. *Nat’l Immigr. Project of Nat’l Lawyers Guild v. Exec. Off. of Immigr. Rev.*, No. 1:20-cv-00852 (CJN), ___ F. Supp. 3d ___, ___, 2020 WL 2026971, at *12 (D.D.C. 2020). But the government’s proof that the preliminary injunction Plaintiff seeks would endanger Customs and Border Patrol officers more than the Title 42 Process is, ultimately, unavailing. The measure of the public interest and hardship to the government depends on the injunction proposed. Here, denying the government the power to expel unaccompanied minors does not leave the government powerless to address the pandemic. As discussed above in Section II.B.1, the government has many options available to it. It has tools at its disposal to limit entry into the country and can apprehend, examine, quarantine, or conditionally release unaccompanied minors. The real issues are potential exposure to the virus at congregation points and operational costs—as the government admits—of mitigating that risk through effective quarantine and/or conditional release and monitoring of putative class members who enter the country unlawfully. *See, e.g.*, ECF No. 44-2 at 24, 57; March 20 Order, 85 Fed. Reg. at 17,066–17,067; May 20 Order, 85 Fed. Reg. at 31,508, n.32.

But the government’s argument is suspect given that the alternative to quarantine that they propose—expulsion pursuant to the Title 42 Process—results in unaccompanied minors often being detained longer while awaiting expulsion than they would otherwise be, and the concomitant lengthened exposure of class members to other non-citizens, Customs and Border Patrol officers, and local medical personnel. Plaintiff has provided a report from an independent monitor filed in the *Flores* litigation that found expelling children from the United States under the Title 42 Process takes an average of five days, “with a substantial number of children experiencing extended stays of more than 10 days,” (ECF No. 52-3 at 30), as opposed to the 72 hours mandated under the TVPRA for transfer to the Office of Refugee Resettlement, *see* 8 U.S.C. § 1232(b)(3) (under normal process, Homeland Security must transfer children within 72 hours to the custody of the Office of Refugee Resettlement). This longer period would appear to subject Customs and Border Patrol officers to greater risk from unaccompanied non-citizen children—and, indeed, vice-versa—than the prior process.

Next, Defendants rely on a declaration from Jallyn Sualog, the Deputy Director of the Office of Refugee Resettlement, submitted with the government’s opposition to the current motions. Ms. Sualog attests to particular concern about the number of unaccompanied non-citizen children that the Office of Refugee Resettlement “can safely absorb into the system at one time,” asserting that the program “would likely come under significant stress if [it] were to begin to receive on a regular basis approximately 75 to 100 referrals of [unaccompanied minor children] per week, with approximately 30% of [them] having tested positive or been exposed to COVID-19.” ECF No. 42-5 at 4; ECF No. 44-2 at 56. In *Flores*, Judge Gee recently addressed whether the very same assertions by the very same declarant made out a likelihood of harm to the government and found

them wanting. She found that the underlying factual contentions—that there would be an additional 75 to 100 referrals per week, of whom 30 percent would need to be isolated or quarantined—were “highly speculative,” noting that the government failed to support its assumptions with a declaration from a public health official providing “scientific or empirical analysis” to support the statements. In Chambers Order at 3, *Flores*, No. CV 85-4544 DMG (AGRx) (C.D. Cal Sept. 21, 2020), ECF No. 990. In a supplemental declaration, Ms. Sualog asserts that between September 1, 2020, and September 16, 2020, the Office of Refugee Resettlement received 568 referrals of unaccompanied non-citizen children, 2 of whom were COVID-19 positive and 170 of whom were COVID-19 exposed, which works out to 30 percent.¹⁷ ECF No. 58-1 at 6. It is not disputed, however, that, at the present time, the Office of Refugee Resettlement’s care-provider facilities are operating at well below capacity and they have thousands of beds available. ECF No. 42-5, ¶ 31–32. Judge Gee specifically found that “there are sufficient numbers of currently under-utilized [Office of Refugee Resettlement] facilities such that transfers can be allocated among facilities to avoid over-concentration or bottlenecking.” In Chambers Order at 4, *Flores*, No. CV 85-4544 DMG (AGRx) (C.D. Cal Sept. 21, 2020), ECF No. 990.

The undersigned appreciates that, in light of the pandemic, a preliminary injunction will impose hardships on the government and may force it, as it has all Americans, to make difficult decisions about allocation of resources to mitigate the risks caused by COVID-19. Federal courts are not empowered to reorganize agencies’ priorities when those agencies are acting within the bounds prescribed by Congress. Here, however, the public’s interest in ensuring that those bounds are honored—the “overriding public interest” in the “importance of an agency’s faithful adherence to its statutory mandate,” *Jacksonville Port Auth.*, 556 F.2d at 59—coupled with its interest in

¹⁷ Ms. Sualog indicates that the government measures “exposure” based on the unaccompanied minors’ self-report concerning their travel history. ECF No. 42-5, ¶ 20; ECF No. 58-1 at 21.

protecting children from being “deliver[ed] [] into the hands of their persecutors,” *E. Bay Sanctuary Covenant*, 950 F.3d at 1281, weigh in favor of issuing a preliminary injunction in this case.

4. Breadth of Injunction and Bond

The undersigned has found that all four factors to be considered when deciding a motion for a preliminary injunction weigh in favor of granting the motion. The question then becomes the breadth of that preliminary injunction. In his Reply, Plaintiff notes that the Interim Final Rule, under which the CDC Orders here were issued, will be superseded by the Final Rule on the earlier of two dates: October 11, 2013, or the date that the Interim Final Rule “ceases to be in effect,” because it has been “vacated or enjoined by a court.” ECF No. 51-1 at 32 (citing 85 Fed. Reg. at 56,424). He therefore asks that, if the Court issues a preliminary injunction, it “specify that [the injunction] encompass the Final Rule and any substantially similar CDC Order granted under its terms.” ECF No. 51-1 at 32.

As should be clear from the discussion above, there is no relevant material difference between the CDC Director’s authority under the Final Rule and the authority that the government has here argued he enjoys under the Interim Final Rule. The Final Rule interprets “[p]rohibit, in whole or in part, the introduction into the United States of persons’ to mean ‘to prevent the introduction of persons into the United States by suspending any right to introduce into the United States, physically stopping or restricting movement into the United States, or *physically expelling* from the United States some or all of the persons.’” 85 Fed. Reg. at 56,425 (alteration in original) (emphasis added). That is precisely the interpretation the government urged here in connection with the Interim Final Rule and the CDC Orders. ECF No. 44-2 at 14–15 (“The statute grants the Executive Branch ‘the power to prohibit, in whole or in part, the introduction of persons’ into the United States during an outbreak of a communicable disease in order to avert the danger of the

disease spreading into the United States. By granting that broad power, Congress necessarily gave the Executive Branch the authority to take actions needed to exercise that power. That includes . . . the power to *promptly expel* persons who managed to surreptitiously cross over the U.S. border from a designated foreign country in violation of a Section 265 order and then are halted while in the process of moving into the interior.” (internal citation omitted) (quoting 42 U.S.C. § 265) (emphasis added). The undersigned agrees with Plaintiff that the preliminary injunction should be crafted to make clear that it prohibits expulsion from the United States under the Title 42 Process whether that conduct has been permitted in orders issued by the CDC Director pursuant to the authority of the Interim Final Rule or the Final Rule.

Plaintiff also asks the Court not to require him to post a bond pursuant to Rule 65(c) of the Federal Rules of Civil Procedure. That rule states that “[t]he court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined.” Fed. R. Civ. P. 65(c). “Courts in this Circuit have found the Rule ‘vest[s] broad discretion in the district court to determine the appropriate amount of an injunction bond,’ including the discretion to require no bond at all.” *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 107 (D.D.C. 2012) (Sullivan, J.) (internal citation omitted) (quoting *DSE, Inc. v. United States*, 169 F.3d 21, 33 (D.C. Cir. 1999)); see also *Council on Am.-Islamic Relations v. Gaubatz*, 667 F. Supp. 2d 67, 81 (D.D.C. 2009) (same). In determining the appropriateness or amount of a bond, courts take into account the financial wherewithal of the party seeking the preliminary injunction and whether the action seeks to enforce important federal rights or public interests. See, e.g., *Carranza v. Reams*, No. 20-CV-00977, 2020 WL 2320174, at *14 (D. Colo. May 11, 2020); *Booth v. Galveston Cty.*, No. 3:18-CV-00104, 2019 WL 4305457, at *2 (S.D. Tex. Sept. 11, 2019); *Flack v. Wis. Dep’t of Health*

Servs., 328 F. Supp. 3d 931, 955 (W.D. Wis. 2018); *Simms*, 872 F. Supp. 2d at 107. Here, Plaintiff, a 15-year-old boy from Guatemala allegedly fleeing persecution in his home country and seeking to represent a class including similarly-situated children, does not have the ability to post a bond. Additionally, this action seeks to vindicate important rights granted under immigration laws. The undersigned therefore recommends that the Court waive the requirement for an injunction bond or require a nominal amount. *See, e.g., Page Commc'ns Eng'rs, Inc. v. Froehlke*, 475 F.2d 994, 997 (D.C. Cir. 1973) (recognizing the court's "discretion to fix bond in a nominal amount"); *cf. Laster v. District of Columbia*, 439 F. Supp. 2d 93, 99 (D.D.C. 2006) (suggesting that where, as here, the defendant did not request a bond, none is required).

III. CONCLUSION

For the foregoing reasons, the undersigned **RECOMMENDS** that Plaintiff's Motion for Class Certification (ECF No. 2) be **PROVISIONALLY GRANTED** and the Court provisionally certify a class pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure consisting of all unaccompanied noncitizen children who (1) are or will be detained in U.S. government custody in the United States, and (2) are or will be subjected to expulsion from the United States under the Title 42 Process, whether pursuant to an Order issued by the Director of the Centers for Disease Control and Prevention under the authority granted by the Interim Final Rule, 85 Fed. Reg. 16559-01, or the Final Rule, 85 Fed. Reg. 56,424-01. The undersigned **FURTHER RECOMMENDS** that Plaintiff be appointed as Class Representative and that Plaintiff's counsel from the ACLU Immigrants' Rights Project be appointed as Lead Class Counsel and his other counsel be appointed as Class Counsel.

The undersigned **FURTHER RECOMMENDS** that Plaintiff's motion for a preliminary injunction (ECF No. 15-2) be **GRANTED** and that the Court order that Defendants, their agents,

and any person acting in concert with them are enjoined from expelling the Class Members from the United States under the Title 42 Process, whether pursuant to an Order issued by the Director of the Centers for Disease Control and Prevention under the authority granted by the Interim Final Rule, 85 Fed. Reg. 16559-01, or the Final Rule, 85 Fed. Reg. 56,424-01.

* * * * *

The parties are hereby advised that under the provisions of Local Rule 72.3(b) of the United States District Court for the District of Columbia and the Minute Order of Judge Sullivan entered in this case on September 6, 2020, any party who objects to the Report and Recommendation must file a written objection thereto with the Clerk of this Court within 7 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the report and/or recommendation to which objection is made, and the basis for such objections. Any oppositions shall be due no later than 7 days after being served with a copy of the objections; and replies shall be due no later than 5 days after being served with a copy of the opposition. The parties are further advised that failure to file timely objections to the findings and recommendations set forth in this report may waive their right of appeal from an order of the District Court that adopts such findings and recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985).

Date: September 25, 2020

G. MICHAEL HARVEY
UNITED STATES MAGISTRATE JUDGE