ORAL ARGUMENT NOT YET SCHEDULED

No. 20-5357

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,

Plaintiff-Appellee,

v.

CHAD WOLF, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Columbia
No. 20-cv-02245-EGS-GMH
Hon. Emmet G. Sullivan
Hon. G. Michael Harvey

PLAINTIFF-APPELLEE'S OPPOSITION TO MOTION TO STAY PRELIMINARY INJUNCTION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for Plaintiff-Appellee certifies as follows:

A. Parties and Amici

All parties, intervenors and amici appearing in this court and the district court are listed in the Brief of Appellants.

B. Rulings under Review

Reference to the ruling under review appears in the Brief for the Appellants.

C. Related Cases

This case has not previously been before this or any other court. Plaintiff is aware of one other pending case that raises similar legal issues as this case—*G.Y.J.P. v. Wolf*, 20-cv-01511-TNM (D.D.C.) (individual Title 42 case).

INTRODUCTION

Three judges have reviewed Defendants' policy, and all have concluded that it is likely unlawful: Judges Carl J. Nichols and Emmet G. Sullivan, and Magistrate Judge G. Michael Harvey. Add.39, 76; *J.B.B.C. v. Wolf*, No. 20-CV-01509-CJN, 2020 WL 6041870, at *2 (D.D.C. June 26, 2020). That conclusion is correct: the statute's text does not provide public health authorities with expulsion authority, and such a momentous power should not be inferred, especially where doing so would mean (as Defendants concede) that Congress had silently authorized the summary expulsion of even U.S. citizens.

Defendants do not dispute that, if expelled, children will face grave danger, but argue that the equities tip in their favor because the injunction will strain health care resources, border stations, and children's shelters. But there are readily available steps Defendants can take to safely accept any influx of children, even were such an influx to occur. The district court thus properly found that the solution cannot be to summarily expel children in disregard of their mandatory statutory obligations.

Defendants' suggestion that a stay is warranted because the Court can expedite the appeal gets things backwards. Defendants can accommodate children safely during an expedited appeal—thereby mitigating their own claimed harms—

whereas an expedited appeal would not avoid the irreparable harm that will likely befall the young children expelled during the appeal.

Notably, Defendants have not submitted an affidavit from a CDC expert to defend the Title 42 expulsion policy—perhaps because the CDC experts do not actually support the policy, which political officials reportedly imposed upon them over their objections. *See, e.g.*, *Pence Ordered Borders Closed After CDC Experts Refused*, AP News (Oct. 3, 2020), https://apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health-4ef0c6c5263815a26f8aa17f6ea490ae; *CDC Officials Objected to Order Turning Away Migrants at Border*, The Wall Street Journal (Oct. 3, 2020), https://www.wsj.com/articles/cdc-officials-objected-to-order-turning-away-migrants-at-border-11601733601.[1]

ARGUMENT

I. DEFENDANTS ARE NOT LIKELY TO SUCCEED ON THE MERITS.

Below, Plaintiff raised three independently sufficient statutory arguments. First, and most broadly, the power to prohibit "introduction" in § 265 does not authorize expulsions because it regulates *only* transportation entities, and not

[1] *Inside the Fall of the CDC*, ProPublica (Oct. 15, 2020), https://www.propublica.org/article/inside-the-fall-of-the-cdc; *How Trump officials used COVID-19 to shut U.S. borders to migrant children*, CBS News (Nov. 2, 2020), https://www.cbsnews.com/news/trump-administration-closed-borders-migrant-children-covid-19/.

individuals. Second, even if § 265 applies to both individuals and transportation, it would still not authorize expulsions, because Congress nowhere granted expulsion power, and instead prescribed only civil and criminal penalties. Third, even if § 265 applies to individuals, and authorizes *some* expulsions, it cannot override the INA's specific mandatory protections against the summary expulsion of unaccompanied children, including those with communicable diseases. The district court rested on the second and third grounds, finding it unnecessary to decide the threshold question of whether the statute applies only to transportation entities, but Defendants must show likelihood of success as to all three.

A. Section 265 Applies Only to Transportation Entities.

Section 265's text says nothing about the power to physically remove people from the United States. But when it wants to authorize physical removal from the United States, Congress knows how, and does so "plainly." Add.27, 81; *J.B.B.C.*, 2020 WL 6041870, at *2 (Nichols, J.). Instead, Congress used a term—"introduction"—with an entirely different meaning.

Congress's choice to omit any expulsion power is unsurprising: In 1893, when the statute was passed, Congress was specifically concerned with cholera coming by ships from Europe, *see* 24 Cong. Rec. 359-60, 363 (1893) (discussing "danger of cholera" arriving by ship), and sought to remedy the problem by prohibiting *transportation* companies from *introducing* individuals into the

country. The Title 42 expulsion policy is thus illegal because § 265 authorizes no direct regulation of individuals seeking to come to the country at all, much less an expulsion power.[2]

Section 7 of the Act of February 15, 1893, ch. 114, 27 Stat. 449, 452 (Dkt.15-5, Ex.A), which became § 265 without material change in 1944, was designed to regulate transportation entities that brought persons and goods to the United States. Then, as now, the statute granted the "power to prohibit, in whole or in part, the *introduction* of persons and property" into the country. 27 Stat. 452 (emphasis added). And then, as now, that term—"introduction"—meant "'the act of bringing into a country.'" *Introduction*, *Universal English Dictionary* 1067 (John Craig ed. 1861); *see also Introduction*, *Webster's Collegiate Dictionary* 453 (1st ed. 1898) ("[t]o lead, bring, or usher in"). As a matter of ordinary usage, introducing a person into a country or place is an action taken by a *third party*—here, the transportation company. *See, e.g.*, *Walsh v. Preston*, 109 U.S. 297, 298, 314-15 (1883) ("colonization" contract requiring party to "introduce" immigrant families into Texas was unsatisfied, where individuals were not "brought to Texas by [the party];" rather, "they came and settled of their own accord"). Thus, for example, nineteenth century state statutes made it unlawful "for any free . . .

[2] The argument that § 265 applies only to transportation entities is addressed more fully in a proposed historians' *amicus* brief filed in this Court, and in Plaintiff's briefs below, Dkt.15-1 at 16-22; Dkt.52 at 5-9.

person of color to migrate into this State, or be brought or introduced into its limits." 1835 Statutes at Large of South Carolina, at 470-72 (Act No. 2653) (Dkt.52-3, Ex.A); *see also* 1842 Code of Mississippi, at 538 (Art. 17) (similar) (Dkt.52-3, Ex.B). This contrast between *migrating*, and being *introduced* by someone else, reflects the ordinary meaning of the term "introduce" here.[3]

The statutory context reinforces the point. The Act's other provisions were directed at ships, *see* Act of Feb. 15, 1893, ch. 114, §§ 1-6, and imposed penalties *only* against ships, *see id*. §§ 1-3 (fines for "vessel" violating Act). It did not impose penalties on, or otherwise purport to regulate, individuals being *introduced* into the country. That silence is striking because immigration statutes in force in 1893 make plain that Congress knew how to regulate and provide for the deportation of individuals coming to our shores. *See*, *e.g.*, Act of May 6, 1882, ch. 126, §§ 2, 12, 22 Stat. 58, 59, 61 (establishing penalties for vessels, and providing for unauthorized immigrants "to be removed" "to the country whence [they] came"); Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084, 1086 (similar).[4]

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[3] Other meanings of the term "introduction," such as introducing oneself to a neighbor, are inapposite. *See* Dkt.42 at 26 (Defendants analogizing to the introduction into evidence as a witness). But Section 265 refers to introduction *into a place*. *Cf. id*. (citing counterexample from 1639, so old that Defendants repeatedly modernized spelling).

[4] Defendants invoke statements by Members of Congress that, under Section 7 of the 1893 Act, the President could "suspend immigration." Mot.15 n.3. But the *means* provided to suspend "immigration" was the same as that for halting the arrival of everyone, including U.S. citizens: "prevent[ing] the coming at all" of

The statute's historical use lends further support that it was intended to regulate only transportation entities. President Hoover, invoking Section 7 of the 1893 Act in 1929, issued an Executive Order entitled: "Restricting for the time being the *transportation of passengers* from certain ports in the Orient to a United States port." Exec. Order No. 5143 (June 21, 1929) (Dkt.15-5, Ex.B) (emphasis added). The Treasury Department also issued associated regulations "governing the embarkation of passengers and crew" at ports in those countries "and their transportation to United States ports." Dkt.15-5, Ex.C.

In short, Congress was addressing a specific problem through tailored means. The statute was designed to address a threat from Europe by ships; migration by foot through land borders was not the focus given the relative rarity of land migration at that time. That is not to say that the statute's terms are limited to seafaring vessels; the language of Section 7 was broad enough to encompass other means of introducing passengers, like trains. But the text and context—particularly the use of "introduction"—limited the statute to the power Congress envisioned and authorized, namely regulation of transportation.

"vessels, passengers, crews, and cargo, which are sailing to this country." 24 Cong. Rec. 359, 392 (1893).

B. The District Court Correctly Held That Section 265 Does Not Authorize Expulsions, Even Assuming It Applies Beyond Transportation Entities.

1. As noted, § 265's text says nothing about the power to expel. But Congress has always known how to explicitly authorize expulsion. Add.81; 8 U.S.C. § 1231 (immigration removals); *id.* § 1225(b)(2)(c). And Congress does so clearly in all contexts, not just, as Defendants suggest, in "immigration statute[s]." Mot.13; *see, e.g.*, 18 U.S.C. §§ 3185, 3186, 3196 (extradition authority).[5] Thus, even if the statute directly regulates both transportation entities and persons seeking to enter the country, the statute lacks the type of clear statement found when Congress intends to grant an expulsion power.

The statutory context reinforces the textual lack of expulsion authority. Like § 265, the rest of the Public Health Act is "shot through with references to quarantine" but "contains not a word" about expulsion power. Add.80. Indeed, a neighboring provision laying out the penalties for violation of "any regulation prescribed" under § 265 makes no mention of expulsion, instead authorizing civil fines and imprisonment. *Id.*; 42 U.S.C. § 271. Quarantine authority is also available. 42 U.S.C. § 264.

[5] Quoting *Russello v. United States*, 464 U.S. 16, 25 (1983), Defendants argue that "[l]anguage in one statute usually sheds little light upon the meaning of different language in another statute." Mot. 13; *see* Add.33. But *Russello*'s general statement is dicta, and since *Russello* the Court has "regularly" looked to different statutory contexts. Add.82 n.11; *see, e.g.*, *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003).

The implications of Defendants' position underscore that Congress did not authorize expulsions. As Magistrate Judge Harvey observed, "the power the government claims under Section 265 is breathtakingly broad," encompassing the power "to expel even U.S. citizens." Add.83. It is "unlikely" Congress would *silently* provide such authority, *id.*, which the Supreme Court has held "must be affirmatively granted" to exist. *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 11-12 (1936) (rejecting *implicit* extradition power).

Moreover, Defendants' claimed implicit power to summarily expel citizens raises grave constitutional questions. *See 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.") (internal quotation marks omitted); *Dessouki v. Attorney Gen. of United States*, 915 F.3d 964, 967 (3d Cir. 2019) ("The Executive cannot deport a citizen."). To the extent any ambiguity remains, the statute should be interpreted to avoid those questions. Add.83-84.

Defendants' only response is that their Title 42 policy exempts citizens. Mot.16 n.4. But that is no answer to the *statutory* question of what powers Congress authorized in § 265. *See Merck & Co. v. U.S. Dep't of Health & Human Servs.*, 962 F.3d 531, 541 (D.C. Cir. 2020) ("[T]he breadth of the [government's] asserted authority is measured not only by the specific application at issue, but also by the implications of the authority claimed."). And where 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. Martinez*, 543 U.S. 371, 380-81 (2005).

2. Defendants nevertheless seek to divine an expulsion power from the statute's silence. But Defendants misapprehend how the statute works and how it fits into the larger statutory landscape. Even assuming the statute directly regulates the introduction of persons (as opposed to operating solely against transportation entities bringing persons), § 265 orders are not backed by expulsions. Rather, as the statutory text provides, orders are enforceable by imprisonment and fines, in conjunction with quarantines and testing regimes. Moreover, the lack of expulsion authority in the public health laws does not mean that a person with a communicable disease cannot be removed. Since the late 1800s, the *immigration* statutes have included inadmissibility provisions specifically addressing "communicable diseases," with accompanying procedural safeguards to balance the competing goals of fairness and public safety. Add.82; 26 Stat. at 1085.

Defendants argue that the statute would make no sense if the government could physically block a person's introduction at the border, but not expel a person who managed to get "one step over the border." Mot.3. But even assuming the statute applies directly to individuals, the power to expel is far more extreme than the power to block entrance. Thus, the statute would not be illogical even if

construed to foreclose only expulsions. In any event, the premise of Defendants' argument—that the district court's opinion allowed them to physically block entrance at the border—is mistaken. The district court said no such thing. And § 265, by its terms, provides *no* authority to physically block entry into the country. Rather, under the express statutory remedy provisions, § 265 orders are enforceable by arrest, imprisonment, and fine. To the extent Defendants may block entry into the country, that power would come from other authorities, like the immigration laws.[6]

Defendants relatedly argue that the "introduction of persons" into the country is a "continuing process" that goes on even after a person passes the border. Mot.12. But neither the district court, nor Plaintiff, contended that § 265 is inapplicable when a person passes the border. For someone who violates a § 265 Order, the penalties and powers are the same whether the person is at the border or not: fines, imprisonment, and quarantine.

Citing regulations authorizing the expulsion of animals and other property, Defendants argue that they logically must also have the power under § 265 to expel

[6] The Class here consists of children who came to U.S. soil, whether at or between Ports of Entry. Thus, the district court simply stated that "[e]ven accepting" Defendants' premise that § 265 authorizes physically halting entry, it does not follow that the statute authorizes expulsions, including of citizens. Add.26-27. And that is on the further assumption that the statute applies beyond regulating transportation entities.

persons too. Mot.11 n.2. Whatever the validity of these regulations, they rely on other statutes *in addition to* § 265, including statutes providing express powers over property. *See*, *e.g.*, 42 U.S.C. § 264(a) (providing authorization of, *inter alia*, "destruction" and "other measures" to deal with dangerous "animals or articles"). In any event, redirecting goods and ejecting animals is hardly like expelling *people*.

3. Defendants argue that the statute would be "largely ineffectual" without an expulsion power. Mot.11. But § 265 still does enormous work, by authorizing such extraordinary steps as, e.g., the suspension of flights from China. And under the district court's assumption that the statute allows Defendants to issue § 265 Orders directly to individuals, Defendants would still be able to impose fines and imprisonment. In conjunction with the removal power in the immigration laws for those with communicable diseases, § 265 is thus a powerful tool.

These are the means Congress chose to effectuate public health, not summary expulsions outside the procedures in the immigration laws. "[A]gencies are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *Merck*, 962 F.3d at 536 (internal quotation marks omitted).

C. Even Assuming Section 265 Permits Expulsions of Some Persons, It Does Not Override The Mandatory Protections For Unaccompanied Children.

As the district court held, the Title 42 policy is unlawful even if it applies beyond transportation entities and allows the expulsion of some individuals. Add.33-37, 85-88; *see also J.B.B.C.*, 2020 WL 6041870, at *2 (Nichols, J.). Congress gave unaccompanied children special protections. The TVPRA and various asylum laws thus provide mandatory procedural protections for unaccompanied children. *See* Add.3-4, 36, 85. The Title 42 policy entirely disregards those protections.

Defendants argue that their interpretation will give effect to § 265 *and* the immigration statutes. Mot.14. But by overriding explicit protections, their system "tramples the work done" by the immigration laws. *Epic Sys. v. Lewis*, 138 S. Ct. 1612, 1627 (2018).

Because Defendants are thus really arguing that § 265 permits them to "override" other legislation, they "bear[] the heavy burden of showing a clearly expressed congressional intention that such a result should follow." *Id*. at 1624 (internal quotation marks omitted). "The intention must be clear and manifest." *Id*. (citation and quotation marks omitted). The district court rightly concluded that "the language of Section 265 contains no [such] 'clear intention.'" Add.36.

Defendants attempt to find a clear statement in the requirement that a

§ 265 order be predicated upon finding that "a *suspension of the right to introduce* [specified] persons and property is required in the interest of the public health." 42 U.S.C. § 265 (emphasis added); Mot.14-15. The district court rightly rejected this assertion. Add.36, 86-87. If anything, the "suspension of the right" language reinforces Plaintiff's argument that § 265 only authorizes regulation of transportation entities. It most naturally refers to suspension of such entities' *licenses* conferring "the right" to carry passengers and goods into the country. *See, e.g.*, *Barron v. Burnside*, 121 U.S. 186, 200 (1887) (discussing state license granting corporation the "right to carry on commerce"); *Hazeltine v. Miss. Valley Fire Ins. Co.*, 55 F. 743, 746 (C.C.W.D. Tenn. 1893) (statute authorized agency to "suspend the right of a licensed foreign insurance company 'to do business in the state'"). That vague phrase, tucked away in the predicate *finding* the agency must make, not the grant of substantive *authority*, falls short of the required clear and manifest intent.

Defendants are also mistaken that the specific-over-general canon favors interpreting § 265 to override immigration statutes. Add.87-88. The immigration laws "speak[] directly" to "the question before [the Court]," *Epic Sys.*, 138 S. Ct. at 1631, providing that unaccompanied children cannot be expelled without process, 8 U.S.C. § 1232(a)(2)(A), (a)(5)(D), (b)(3), and specifically addressing procedures for noncitizens with communicable diseases,

8 U.S.C. § 1182(a)(1)(A). And critically, those mandatory procedures do not allow for the *summary* expulsion of unaccompanied children or asylum seekers with communicable diseases, and instead rely on quarantines and testing to balance competing goals. By contrast, § 265 does not mention expulsion or unaccompanied children at all. Add.87-88.

Additionally, because the immigration protections are mandatory and later-enacted, they should prevail for that reason as well. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 152-54 (1976) ("mandatory" provision "focus[ed] on the particularized problems of national banks" controlled over "broad" provision of separate statute); *Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 582 n.18 (1971).

D. Deference Is Unwarranted.

The district court correctly concluded that no *Chevron* deference is owed. *See* Add.37-39, 76, 90 n.15; *see also J.B.B.C.*, 2020 WL 6041870, at *2 (Nichols, J.). First, Defendants rightly do not even claim that CDC is entitled to deference in reading § 265 to override immigration statutes. CDC "hasn't just sought to interpret [§ 265] in isolation," but rather "has sought to interpret [it] in a way that limits the work of a second statute." *Epic Sys.*, 138 S. Ct. at 1629.

Second, Defendants' claim that they are owed deference in interpreting whether § 265 authorizes expulsions fails at *Chevron*'s first step, because it is

foreclosed by "the traditional tools of statutory interpretation—including the statute's text, history, structure, and context," *Loving v. IRS*, 742 F.3d 1013, 1021-22 (D.C. Cir. 2014), and by the implications and constitutional questions their interpretation raises, *see Chamber of Commerce of U.S. v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995).

Defendants fall back on CDC's "scientific and technical expertise." Mot.17. But even if the Court reached *Chevron*'s second step, Defendants' interpretation warrants no deference "because it is unreasonable in light of the statute's text, history, structure, and context." *Loving*, 742 F.3d at 1022. CDC's judgment might impact what power it thinks is *needed*, but Defendants have "not explained how that scientific and technical expertise" meaningfully bears on the question *whether Congress granted that power*. Add.38. *Chevron* is not a "rubber stamp." *NRDC v. Daley*, 209 F.3d 747, 755 (D.C. Cir. 2000) (refusing to defer to scientific expertise where agency never explained how it informs statutory interpretation).[7]

* * *

Defendants' assertion 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

[7] As noted, CDC has not submitted an affidavit and reportedly its experts rejected the Title 42 policy.

States[,] does not change the legal question of what the statute allows." Add.89. If the Executive deems the existing laws 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).

II. THE EQUITIES WEIGH STRONGLY AGAINST A STAY.

1. Defendants do not dispute the district court's finding that Class Members will be irreparably harmed absent the injunction. Add.39-41, 90-93. Nor could they, given that Class Members are unaccompanied children (many younger than 13) who came from some of the world's most dangerous countries, who face a serious risk of harm or even death if returned, and who have bona fide claims for humanitarian relief, including asylum, trafficking-related relief, and visas available to young people who have experienced abuse, abandonment, or neglect. *See* Dkt.15-12, ¶¶ 5-20; Dkt.15-10, ¶¶ 6-13; Dkt.15-11 ¶ 6.

Defendants argue, however, that fewer children will suffer irreparable harm if the appeal is expedited. Mot.20. While that may be true for children who arrive after the appeal is decided, it does nothing for children expelled before then.

Defendants also misguidedly seek to penalize children as young as five for the way they entered the country to seek protection. Mot.20 ("any cognizable

harm" to children who "cross the border outside of a Port of Entry" "would be the result of their having violated federal law in the first place"). But the statutory protections Congress enacted for unaccompanied children and other asylum seekers expressly apply no matter the manner or location of entry. *See* 8 U.S.C. §§ 1158(a)(1), 1232; *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 771 (9th Cir. 2018).

2. Defendants nonetheless claim that a stay is necessary because of increasing migration numbers. But Defendants' *own* evidence suggest that any increased migration will be far more modest than they predict. Defendants' declarant states, for example, that before the Title 42 policy, CBP had a "daily average of 105 unaccompanied minors in CBP custody"—a figure that only declined to 84 minors after the Title 42 order. Dkt.82-2, ¶ 11. As former CBP Commissioner Gil Kerlikowske notes, "even assuming that the Court's preliminary injunction would reverse this modest decrease," such a reversal "would by no means strain CBP capabilities or resources." Dkt.84-3, ¶ 11.

Indeed, CBP's latest statistics show that the numbers appear to be stable or *decreasing*. During the six-day period following the district court's injunction (November 18-23), CBP stated that it apprehended an average of 166 children per day. Dkt.82-2, ¶ 6. Yet based on figures from a more recent CBP declaration, from November 24 through December 10, Border Patrol likely apprehended an

average of 163 children per day. *See* Dkt.91-1, ¶ 6.[8] Moreover, total children's apprehensions in the southwest declined by 4% from October to November. U.S. Customs and Border Protection (Dec. 14, 2020), https://www.cbp.gov/newsroom/stats/sw-border-migration.

Even before the recent statistics, Defendants' numbers were internally inconsistent. Defendants speculated, for example, that ORR will "in the near future" receive 300-400 daily referrals. Mot.19. Yet their declarations also state that as of mid-November, CBP was apprehending 163-66 unaccompanied children per day and that they expect a 50 percent increase within four months. Dkt.82-4, ¶¶ 19-20; Dkt.82-2, ¶ 6. Thus, even accepting their assumptions, the number of daily referrals would be roughly 240, not 300-400.

Defendants' projections also misleadingly imply that the number of CBP apprehensions will necessarily translate into a similar number of ORR referrals. Yet because few Mexican children are sent to ORR under the TVPRA's special procedures for minors from contiguous countries, and a majority of the children apprehended by CBP are Mexicans, many children apprehended at the border will never end up at ORR even under the injunction. Dkt.84-2, ¶¶ 4-10 (explaining

[8] These updated Border Patrol figures only appear to cover children apprehended *outside* ports of entry. But in the last two months, CBP has only apprehended about four children per day *at* ports. *See* https://www.cbp.gov/newsroom/stats/sw-border-migration (131 children at ports in October, 125 in November).

that, before Title 42, only about 5% of Mexican unaccompanied children sent to ORR).

Equally misleading, Defendants imply that the large increase in children referred to ORR from May to October is attributable to increased migration. Mot.19. But CBP reported a far smaller increase in *apprehensions* of children during that same period (741 apprehensions in May and 4,764 in October). Dkt.82-2, ¶ 5. This shows that the change in ORR referrals has mostly been attributable not to increased migration, but rather to Defendants' decision to place more children in ORR instead of expelling them. *See also* Dkt.84 at 10-11.[9]

3. Even assuming the validity of Defendants' predictions, Defendants have not shown why they cannot fulfill their statutory obligations to protect children fleeing danger. As the district court properly found, Defendants are capable of both protecting the public *and* discharging their statutory obligations to unaccompanied children. Add.41-47, 93-99. As former Commissioner Kerlikowske explains, CBP has the capability to respond to increased numbers of children "even in light of the unique challenges posed by the COVID-19 pandemic." Dkt.84-3, ¶ 4. Indeed, "CBP has deep experience flexibly responding

[9] Defendants argued below that the injunction would serve as a "pull factor" for increased migration. But as Mr. Kerlikowske explains, "there is no reason to expect that [the injunction] will lead to an increase in apprehensions of unaccompanied noncitizen minors at the southwest border." Dkt.84-3, ¶ 8; *see also* Dkt.84-1, ¶ 8 (expert explaining migration patterns).

to much larger increases than that [CBP] projects, and preparing to do so under difficult and emergency conditions." *Id.*, ¶¶ 4, 14 ("CBP has managed much larger influxes before" and "is better-resourced today than it was in 2014 to handle these types of scenarios.").

(a) Defendants assert that the injunction "would further strain [] local health systems." Mot.18. Yet Defendants admit that nine months into the pandemic, "*no* [child] in ORR custody has yet to require hospitalization for a COVID-19 infection," Dkt.82-4, ¶ 26 (emphasis added), despite thousands of children coming through the system during that time, *id.*, ¶ 14. That pattern is consistent with the medical consensus that children with COVID-19 are far less likely to require hospitalization. *See* Dkt.84-4, ¶ 13; *see also* Dkt.15-7, ¶ 13. Indeed, unaccompanied children—who are tested, quarantined, and monitored, Dkt.82-4, ¶ 17—are less likely to drain health care resources than the thousands of adults Defendants allow into the country every day. *See* Dkt.82-2, ¶ 24; Dkt.84-4, ¶ 15.

(b) Defendants also contend that the expulsion policy is necessary to prevent risk to border agents. Yet the expulsion policy results in children spending *more* time with DHS officers than if they were sent to ORR as required by the TVPRA. Under the TVPRA, unaccompanied children must be transferred to ORR facilities within 72 hours, and are usually transferred within 24 hours. 8 U.S.C. § 1232(b)(3). Yet expulsions frequently took far longer than

72 hours, sometimes up to a week. Dkt.52-3 at 30. Thus, as Magistrate Judge Harvey observed, Defendants' arguments are "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," increasing exposure risks to DHS officers and others. Add.97.[10]

(c) Defendants further contend that additional unaccompanied children arriving at the border will "strain ORR's already-limited capacity" because ORR can safely use only 60% of its bed capacity during COVID. Mot.19. Defendants' arguments, however, rest on their refusal to take readily available steps to increase capacity (even assuming ORR would actually exhaust its current capacity during the pendency of this appeal).

First, even if Defendants' migration predictions were to occur, and even granting Defendants' unexplained assertion that they must reduce ORR capacity to 60%, ORR has the resources to respond. Even assuming a 60% capacity level, Defendants currently have over 4,000 open beds. *See The Trump*

[10] Defendants argued below that although unaccompanied children generally must be quickly sent to ORR, *Mexican* children are screened at the border, which may take longer than expulsions, thereby increasing contact with agents. But the TVPRA gives Defendants the *option* to send Mexican children immediately to ORR, without screenings. In any event, the screenings for Mexican children often take only a matter of hours. Dkt.84-2, ¶¶ 8-9.

administration says the U.S. can't house more migrant children. Shelter officials disagree, CBS News (Dec. 14, 2020), https://www.cbsnews.com/news/migrant-children-mexico-border-trump-administration-shelter-offcials-covid-19/) (3,500 children in ORR care as of December 10).

Moreover, as Magistrate Judge Harvey found, Defendants could accommodate additional children if they undertook basic efforts to reorient their existing capacity. Add.95-99. For instance, ORR previously has responded to unexpected increases of younger children by adjusting the types of beds in its network, or by engaging additional facilities. Dkt.90-1, ¶¶ 3; Dkt.82-4, ¶¶ 5-8. Defendants can also expedite the process of releasing children to their parents or other sponsors, to free up ORR beds. Dkt.84-5, ¶¶ 8-10.

Defendants argue that even if they would have enough beds nationwide, they may run out of beds at the Southwest border. Defendants fail to explain, however, what steps they have taken, if any, to adjust and preserve capacity at the Southwest border, including employing additional facilities, Dkt.84-5; Dkt.90-1, or immediately moving children who have completed COVID-19 quarantine into interior facilities. And notably, Defendants can move children out of quarantine even faster now, given that Defendants' projections relied on a 14-day quarantine period, Dkt.82-4, ¶ 17, and CDC's recent guidance now provides for only 7 or 10

days, *see Options to Reduce Quarantine for Contacts of Persons with SARS-CoV-2 Infection Using Symptom Monitoring and Diagnostic Testing* (Dec. 2, 2020), https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-options-to-reduce-quarantine.html. In fact, Defendants' own ORR contractors report that they have the space and capacity to care for more children. *The Trump administration says the U.S. can't house more migrant children, supra*.

Defendants argue that commercial airlines could be risky to transfer children to interior facilities, but never explain why that would be so if the child has already completed quarantine at a Southwestern facility. Nor do Defendants account for the fact that children are generally less likely to spread infection. Dkt.84-4, ¶ 14. Defendants also fail to discuss alternatives to commercial flights or buses, such as ICE-chartered flights, which Defendants readily use to *expel* children. Dkt.82-3, ¶ 15.

Plaintiff does not minimize the dangers of the pandemic. However, "judicial deference in an emergency or a crisis does not mean wholesale judicial abdication." *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87, 2020 WL 6948354, at *8 (U.S. Nov. 25, 2020) (Kavanaugh, J., concurring).

CONCLUSION

The Court should deny Defendants' motion.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because this brief contains 5,198 words.

I also certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word Professional Plus 2019 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2020, I electronically filed the foregoing brief with the Clerk for the United States Court of Appeals for the DC Circuit by using the CM/ECF system. A true and correct copy of this brief has been served via the Court's CM/ECF system on all counsel of record.

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