[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

REPLY IN SUPPORT OF MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

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INTRODUCTION

The CDC Order is critical to protect against the risk of transmission of COVID-19 resulting from aliens' being held in Ports of Entry or Border Patrol stations at or near the U.S. Border—congregate settings that are not designed or equipped to quarantine, isolate, or enable social distancing. The need for the Order is only heightened as the pandemic continues, and imposes extraordinary strains on health-care resources in the border states and elsewhere. This Court should stay the preliminary injunction to protect against the risk of transmission of this contagious disease to U.S. Customs and Border Protection (CBP) personnel, aliens who would be held in those congregate settings, officials who transport minor aliens to Office of Refugee Resettlement (ORR) facilities, ORR employees and those in its care, and the U.S. population at large.

Plaintiff's opposition fails to undermine the government's arguments for a stay. On the merits, plaintiff's interpretation of 42 U.S.C. § 265 as applying only to common carriers ignores its plain text and would leave the government powerless to prevent contagious aliens from entering the United States by foot. Plaintiff's assertion of a conflict between Section 265 and the immigration laws confuses the rare and extraordinary circumstance of a public health emergency resulting from a contagious disease, and the normal circumstances in which the immigration laws would otherwise apply, as they generally have for decades. Plaintiff's own competing interpretations of

Section 265 demonstrate the need to defer to the expert judgment of the CDC Director under *Chevron*. And their arguments that the harms imposed by the preliminary injunction can be mitigated are based on speculation by a former official with no experience addressing the COVID-19 pandemic or protecting against risks of its transmission. For all these reasons, the preliminary injunction should be stayed pending appeal.

ARGUMENT

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

A. Plaintiff erroneously contends that the CDC Order exceeds the CDC's authority under 42 U.S.C. § 265 because, in his view, that statute is limited to prohibiting common carriers from transporting passengers over the border. Opp. 3-4. Plaintiff's argument would mean that a common carrier could transport passengers just up to the border, after which infected individuals could disembark and travel by foot into the United States—and the government would lack any authority under Section 265 to stop them.

That nonsensical outcome finds no support in the statutory text. Unlike the neighboring provisions of the Public Health Service Act, which explicitly refer to the regulation of "vessels," or "aircraft," *see* 42 U.S.C. §§ 267(b), 269, 270, 271(b), Section 265 refers (twice) to "the introduction of persons" without any textual limitation on the means of introduction. Plaintiff's argument that the statute's reference to "persons" was designed to target transportation entities rather than individuals gets

matters exactly backward. Plaintiff mistakenly contends that nineteenth-century statutes would have used the phrase "introduction of persons" to refer to transportation companies, and not to the passengers themselves. Opp. 4-5. To the contrary, in construing similar language in a state statute authorizing officials to "prohibit the introduction [of] persons" into certain areas of the State in light of a contagious or infectious disease, the statute was understood to authorize the "exclu[sion of] persons from a locality" in order "to keep down, as far as possible, the number of persons to be brought within danger of contagion or infection," and not merely to regulate third-party transportation companies. *Compagnie Francaise de Navigation a Vapeur v. Louisiana*, 186 U.S. 380, 385 (1902). Nor is plaintiff correct in contending that the Act "did not impose penalties on * * * individuals being *introduced* into the country." Opp. 5. 42 U.S.C. § 271(a) expressly provides "[p]enalties for" "any person who violates any regulation prescribed" under Section 265.

Plaintiff likewise argues that Congress, in enacting Section 265's predecessor statute, was "specifically concerned with cholera coming by ships from Europe," Opp. 3, and "migration by foot through land borders was not [its] focus," Opp. 6. But Congress was hardly unaware that the "terrible ravages the cholera was going to bring to this country" also could "come from Mexico." 24 Cong. Rec. 359, 370 (1893).

B. Plaintiff argues that even if Section 265 is not limited to transportation entities, it still confers no power to expel persons from the United States. As the Government previously argued (*see* Mot. 9-11), that wooden interpretation, adopted by the district court, would illogically mean that once an individual sets foot over the border – by mistake or surreptitiously – the Government lacks any Section 265 authority to expel that person from the United States, notwithstanding the evident serious danger of the introduction of a communicable disease into the United States.[1]

Plaintiff does not dispute that point, but argues that it "would not be illogical" for Congress to have wanted that result. Opp. 9. Indeed, plaintiff goes even further, arguing that *even before* individuals cross the border, the Government remains powerless under Section 265 to prevent anyone who shows up at the border from entering the United States, Opp. 10 (unless, perhaps, if they arrive by train, Opp. 6). Rather, plaintiff argues, the Government may only arrest and imprison those persons, Opp. 10, thereby bringing those potentially contagious persons into the interior of the country and housing them in congregate settings. Plaintiff's view would thus

[1] Even accepting the district court's view that "prohibit[ing] * * * the introduction" is limited to "stopping something before it begins, rather than remedying it afterwards," App.26, an "introduction" into the United States is a continuing process that does not stop at the border, and thus the CDC Order is authorized by Section 265 because it applies to aliens who have not yet completed their "introduction" in the United States. Mot. 11-12. Plaintiff does not respond to this argument.

perversely result in the very introduction of communicable disease into the United States that Section 265 was designed to prevent.

Plaintiff also argues that Section 265 does not include the power to expel because the statute does not expressly mention the word "removal." Opp. 5, 7, 9. But Section 265 is a public-health statute, not an immigration law, and thus the lack of the word "removal" is not especially significant or surprising. Plaintiff also relies on extradition statutes, Opp. 7, but none of those statutes uses the words "introduction of persons" or sheds any light on what those words might mean in the context of statutory authority to prevent the introduction of communicable disease into the United States. Plaintiff errs in suggesting (Opp. 7, 9) that the express statutory authorization for fines, imprisonment, and quarantine implicitly forecloses expulsion. As the government explained (Mot. 13), that view would unrealistically and illogically require Congress to anticipate and expressly enumerate the precise manner in which CDC should respond to a future extraordinary public health emergency. And in any event, expulsion is a necessary incident to—and a reasonable means of—prohibiting "the introduction" of persons.

Finally, citing *Clark v. Martinez*, 543 U.S. 371 (2005), plaintiff asserts (Opp. 8-9) that Section 265 cannot include the power to expel, because doing so would raise grave constitutional questions if applied to U.S. citizens. But the CDC Order does not apply to U.S. citizens. And even on plaintiff's construction of Section 265, similar

grave constitutional concerns that plaintiff alleges would be raised if CDC prohibited the re-entry of U.S. citizens on a common carrier. In any event, *Clark* provides no basis to misconstrue a statutory text contrary to its plain meaning; if CDC were to invoke Section 265 to expel citizens, a court could—at that time and in an appropriate case—address whether that invocation is unconstitutional *as applied* to citizens, *cf. Reno v. Flores*, 507 U.S. 292, 305-306 (1993), or whether the Constitution creates an implicit exception for citizens to the otherwise valid expulsion authority, *cf. Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).

C. Plaintiff erroneously contends that CDC's interpretation of Section 265 would conflict with various provisions of immigration law without any clear indication from Congress of that intent. Opp. 12-14. As the government has explained, however, there is no unavoidable conflict. Mot. 14. Section 265 is an emergency public health provision that applies only when the CDC "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." 42 U.S.C. § 265. Immigration provisions, by contrast, apply generally in normally prevailing conditions and in the absence of such extraordinary and rare crises. Recognizing that immigration laws apply fully outside

such public health emergencies hardly "tramples" those provisions (Opp. 12), which have been applied uninterrupted in the ordinary course for decades notwithstanding Section 265's earlier enactment.

Even if there were an unavoidable conflict between the statutes, moreover, Section 265 would plainly govern. First, Section 265 provides for the "suspension of the right to introduce persons," indicating Congress's clear intent to override any conflicting provision providing for any right of a person to be introduced into the United States. Plaintiff's only response is to repeat his meritless argument that Section 265 is a common-carrier regulation. Opp. 13. Second, the more specific provision of Section 265 would govern over the more general immigration provisions. As noted above, the entire point of Section 265 is that it applies only in public health emergencies arising from communicable diseases, whereas the general immigration laws on which plaintiff relies (Opp. 13-14) enumerate procedures to be invoked in ordinary circumstances absent a pandemic. The very fact that such immigration procedures apply in the ordinary case and in normal circumstances only underscores the point that Section 265's provisions, which respond to rare and emergency circumstances, address the more specific situation. *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018).

D. Plaintiff also argues that CDC's interpretation of Section 265 is not entitled to *Chevron* deference, either because the statutory language is unambiguous, or because

CDC's interpretation is unreasonable. Opp. 14-15. The arguments above and in the government's motion make it clear that Section 265 is ambiguous at a minimum – a point only underscored by the fact that plaintiff's own response proffers two competing interpretations of the text. Nor, for the reasons already set forth, is CDC's interpretation unreasonable. To the contrary, it is plaintiff's construction that is unreasonable, as it posits that Congress intended for the government to have no authority under Section 265, in the face of a pandemic, to expel anyone who takes a single step over the border (or even, on plaintiff's view, to stop him from crossing the border on foot in the first instance).

II. The Remaining Factors Support A Stay.

As the government explained in its motion, the preliminary injunction threatens irreparable harm to the government and the public at large. Mot. 17-20.

Plaintiff does not dispute that the public-health crisis has significantly worsened in recent months, particularly in the southwest border states, Dkt. 82-1, ¶¶ 14-17, where healthcare systems are stretched to the brink, *id.* ¶¶ 17-39. For example, New Mexico suspended all nonessential surgeries, and healthcare providers will be permitted to begin rationing care in response to overwhelmed hospitals and an acute shortage of intensive-care-unit beds.[2] California is also facing a recent surge in

[2] The Washington Post, New Mexico activates 'crisis care' standards for hospitals overwhelmed by covid (Dec. 10, 2020), https://www.washingtonpost.com/national/new-mexico-activates-crisis-care-

infections, with the highest numbers of cases, hospitalizations, and deaths being reported since the beginning of the pandemic, and some communities resorting to mobile field hospitals.[3] Under these circumstances, the balance of harms does not favor the judicial dismantling of a public-health measure that helps prevent border facilities from becoming an additional source of spreading infection.

Plaintiff disputes that an influx of unaccompanied minors has the potential to burden overtaxed healthcare systems, arguing that minors are infrequently hospitalized for COVID-19. Opp. 20. But even if many of the minors themselves do not require hospitalization, they may infect others who are more likely to require hospitalization. As the CDC Order explained, holding potentially infected people (whether minors or adults) in congregate settings that are not designed or equipped to quarantine, isolate, or enable social distancing increases the risk of infection not only for detainees, but also for others present in the same facilities, including DHS

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standards-for-hospitals-overwhelmed-by-covid/2020/12/10/77300c20-3b36-11eb-98c4-25dc9f4987e8_story.html.

[3] Los Angeles Times, California shatters single-day COVID-19 death record, with 295 (Dec. 16, 2020), https://www.latimes.com/california/story/2020-12-16/california-shatters-single-day-covid-19-death-record; Politico, Newsom will issue California stay-home orders based on regional hospital capacity (Dec. 3, 2020), https://www.politico.com/states/california/story/2020/12/03/newsom-will-apply-regional-stay-home-orders-in-california-based-on-hospital-capacity-1340904; Los Angeles Times, Orange County deploys field hospitals as COVID-19 cases soar (Dec. 16, 2020), https://www.latimes.com/california/story/2020-12-16/orange-county-deploys-field-hospitals-as-covid-19-cases-soar.

personnel, and, if the detainees must be transported, members of the public. 85 Fed. Reg. 17, 060, 17,061, 17,066 (Mar. 26, 2020).

Additionally, the injunction risks straining ORR's already-limited capacity. Plaintiff questions the government's prediction that the number of unaccompanied minors traveling from Mexico and the number of minors referred to ORR will increase in the near future. Opp. 17-19. But his claim that any increase in migration will be "modest" is belied by the government's declarations, which explained that CBP saw a 543% increase from April to October 2020 in the number of unaccompanied minors that CBP apprehended along the southwest border. Dkt. 82-2, ¶ 5.[4] ORR has similarly experienced an increase in monthly referrals, from 39 in May to over 1,500 in October 2020, Dkt. 82-4, ¶ 14, and plaintiff essentially concedes that there would be an increase in ORR referrals if the injunction remains in effect, Opp. 19. The government declarants predict that these numbers will continue to increase. Dkt. 82-4 ¶ 20; Dkt. 82-2, ¶¶ 6-7. The predictions of the agencies directly responsible for managing incoming aliens—which plaintiff does not even attempt to rebut—are entitled to deference. *BNSF Ry. Co. v. Surface Transp. Bd.*, 526 F.3d 770, 781 (D.C. Cir. 2008) ("It is well established that an agency's predictive judgments

[4] *See also, e.g.*, New York Times, As Biden Prepares to Take Office, a New Rush at the Border (Dec. 13, 2020), https://www.nytimes.com/2020/12/13/us/border-crossing-migrants-biden.html.

about areas that are within the agency's field of discretion and expertise are entitled to particularly deferential review, so long as they are reasonable.").

Plaintiff speculates that CBP and ORR can somehow expand their existing capacity to accommodate an influx of unaccompanied minors. Opp. 19-23. But ORR has already exhausted its capacity at the southwest border for certain demographic groups. Dkt. 85-1, ¶¶ 3-6. This Court should reject plaintiff's attempt to second-guess the determinations of the government officials who are uniquely qualified to determine the government's ability to safely accommodate an influx of unaccompanied minors. In contrast, plaintiff's declarant, former Commissioner Kerlikowske, does not claim to have had *any* experience dealing with a pandemic at the border (or elsewhere), and thus has no basis to opine about how the government could manage to handle the influx while maintaining adequate social distancing and public-health protections.

Finally, plaintiff does not dispute that "[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). The balance of equities favors a stay pending appeal.

CONCLUSION

For the foregoing reasons and those stated in the government's motion, this Court should stay the district court's preliminary injunction pending appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion satisfies the type-volume limitation in Rule 27(d)(2)(A) because it contains 2593 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 17, 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