[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.

ALEJANDRO MAYORKAS, Secretary of Homeland Security, *et al.*,

Defendants-Appellants.

No. 20-5357

DEFENDANTS' MOTION TO TERMINATE ABEYANCE, VACATE THE DISTRICT COURT'S PRELIMINARY INJUNCTION, AND REMAND TO THE DISTRICT COURT FOR A DETERMINATION OF WHETHER THE CASE AS A WHOLE IS MOOT

Defendants-Appellants respectfully move to terminate this Court's March 2, 2021 order holding the above-captioned matter in abeyance, to vacate the district court's preliminary injunction, and to remand this matter to the district court to determine in the first instance whether plaintiff's action as a whole is moot. This motion is submitted in lieu of

the periodic status report required under this Court's prior abeyance order.

BACKGROUND

1. CDC's Title 42 Authority and Implementing Rules and Orders.

Congress authorized 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" "a suspension of the right to introduce such persons" 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 CDC Director also issued an Order in March 2020 temporarily suspending the introduction of certain noncitizens traveling from Canada and Mexico into the United States. 85 Fed. Reg. 17,060 (Mar. 26, 2020). 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" in a port of entry or a U.S. Border Patrol station at or near the border, including "typically aliens who lack valid travel documents." *Id.* at 17,061.

In September 2020, HHS and CDC published a final rule permitting the CDC Director to "prohibit, in whole or in part, the introduction into the United States of persons from designated foreign countries" "for such period of time that the Director deems necessary to avert the danger of the introduction of a quarantinable communicable disease." 85 Fed. Reg. at 56,425 (codified at 42 C.F.R. § 71.40). In October 2020, the CDC Director issued a new Order that suspended the introduction of all covered noncitizens into the United States, subject to certain exceptions, until he determined 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 the CDC. 85 Fed. Reg. 65,806, 65,807-08 (Oct. 16, 2020).

Plaintiff and the district court refer to Section 265, and the CDC's rules and orders implementing that authority, as the "Title 42 Process." *See* 1 App. 19; 1 App. 109 n.3.

2. Plaintiffs' Complaint and the District Court's Preliminary Injunction.

Plaintiff is a minor from Guatemala who was encountered in August 2020 after illegally crossing the U.S.-Mexico border. 1 App. 100. DHS determined that plaintiff was a "covered alien" subject to expulsion under the CDC Order. Plaintiff brought a class action lawsuit on behalf of himself and other unaccompanied noncitizen children subject to the Title 42 Process, alleging that application of the Title 42 Process to class members is contrary to various statutes and the Administrative Procedure Act.

The district court granted provisional certification of a class "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 CDC Director "under the authority granted by the Interim Final Rule" or an Order issued under the Final Rule. 1 App. 98-99 (internal citations omitted).

The district court also issued a class-wide preliminary injunction. The district court concluded that Section 265 likely does not authorize

the government to expel noncitizens 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." 1 App. 125-126. 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." 1 App. 127-132.

Finally, the court concluded that the remaining preliminary injunction factors weighed in favor of plaintiff. 1 App. 138-146. The court enjoined the government from expelling class members from the United States under the CDC Order issued under the interim and final rules. 1 App. 147.

3. Appeal, Stay of Preliminary Injunction, and Abeyance.

The government appealed and moved for a stay of the preliminary injunction pending appeal, which this Court granted on January 29, 2021. Doc. 1882899. In light of the CDC's subsequent orders (described immediately below), the parties jointly moved to hold the briefing

schedule in this matter in abeyance, which this Court granted on March 2, 2021. Proceedings have remained in abeyance since that date pursuant to the periodic joint requests of the parties.

4. CDC's Temporary and Final Termination of its Title 42 Authority for Unaccompanied Noncitizen Children and for All Noncitizens.

On February 11, 2021, the CDC issued a notice of its decision to temporarily except from expulsion unaccompanied noncitizen children encountered in the United States, pending its forthcoming public-health reassessment of the Order. 86 Fed. Reg. 9,942. *See also* 86 Fed. Reg. 8,267 (directing "[t]he Secretary of HHS and the Director of CDC, in consultation with the Secretary of Homeland Security, [to] promptly review and determine whether termination, rescission, or modification of the [the CDC Order and Final Rule] is necessary and appropriate."). The CDC explained that the COVID-19 pandemic continued to be a highly dynamic public-health emergency, and that it was in the process of reassessing the overall public-health risk at the United States' borders and the Order based on the most current information regarding the COVID-19 pandemic and the situation at the Nation's borders. 86 Fed. Reg. 9,942.

On July 16, 2021, the CDC issued an order "except[ing] unaccompanied noncitizen children * * * from the [CDC's] October [2020] Order." 86 Fed. Reg. 38,717, 38,718 (July 16, 2021). The CDC explained that the July 16 Order "supersede[d]" the notice issued on February 11, 2021 excepting from expulsion unaccompanied noncitizen children encountered in the United States. *Id.* at 38,720. On August 2, 2021, the CDC issued an order that superseded the October 2020 Order. 86 Fed. Reg. 42,828 (Aug. 2, 2021). The July 16 Order was "made a part of [the August 2 Order] and incorporated by reference as if fully set forth" in the August 2 Order. *Id.* at 42,829 n.5. On March 11, 2022, the CDC issued an order terminating all prior suspension orders to the extent they apply to unaccompanied children. 87 Fed. Reg. 15,243, 15,248 (Mar. 17, 2022).

On April 1, 2022, the CDC issued an order terminating all its prior orders prohibiting the introduction of certain other noncitizens (*i.e.*, members of family units and single adults) into the United States pursuant to its authority under 42 U.S.C. § 265 and 42 C.F.R. § 71.40. *See* Centers for Disease Control and Prevention, Public Health Determination and Order Regarding Suspending the Right To

Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists, 87 Fed. Reg. 19,941 (Apr. 6, 2022). The termination, by its terms, was to take effect on May 23, 2022. *See id.* The CDC's termination order was preliminarily enjoined on May 20, 2022. *See Louisiana v. CDC*, No. 6:22-cv-00885 (W.D. La.), Preliminary Injunction Order, ECF No. 91 (May 20, 2022). The government has appealed that ruling to the Fifth Circuit. *See Louisiana v. CDC*, No. 22-30303 (5th Cir.). The preliminary injunction has no impact on the CDC's March 11, 2022 order terminating all prior suspension orders to the extent they apply to unaccompanied children.

5. Resolution for 32 Individuals Expelled in November 2020.

In November 2020, 32 unaccompanied noncitizen children were expelled under Title 42 immediately following issuance of the district court's preliminary injunction. The Department of Homeland Security committed to facilitate the return of any of those 32 noncitizen children who wished to return to the United States to be processed under Title 8. At the request of class counsel, the government worked through the Government of Guatemala to offer assistance to those individuals who wanted to return to the United States. According to the Government of

Guatemala, 22 of the 32 individuals had returned to the United States on their own. Of the remaining 10 individuals, the Government of Guatemala advised that four declined and six wished to return to the United States. However, one of those six individuals ultimately stopped responding to DHS's outreach. DHS agreed to parole the remaining five individuals, all of whom are now over the age of 18. Four of those individuals have returned to the United States, have been paroled, have arrived at their final destinations, and are currently with their families and have been issued notices to appear as adults. As to the fifth individual, DHS lost contact with him as it attempted to facilitate travel arrangements for him but learned through communications with his brother that the individual had made his own way to the United States. Accordingly, the status of the 32 individuals has been resolved. *See* Declaration of Guadalupe G. Serna (attached).

ARGUMENT

1. The Preliminary Injunction is Moot.

Where "the parties lack a legally cognizable interest in the determination of whether the preliminary injunction was properly granted," "the issue of preliminary injunctive relief [becomes] moot,"

regardless of whether "the case as a whole is [] moot," and the proper course is to "vacate the district court's order and remand the case for consideration of the remaining issues." *University of Texas v. Camenisch*, 451 U.S. 390, 393-94 (1981); *see National Kidney Patients Ass'n v. Sullivan*, 902 F.2d 51, 54 (D.C. Cir. 1990).

The issue of the preliminary injunctive relief entered by the district court is now moot. In moving for a preliminary injunction, plaintiffs asserted that they were "likely to succeed on the merits of their challenge to the government's" application of the Title 42 Process to the class members, and that "subjecting [plaintiff and class members] to the Title 42 Process" causes them irreparable harm. D. Ct. Doc. 15-1, at 12, 29 (Aug. 20, 2020) (Prelim. Inj. Motion). The district court's preliminary injunction prohibits the government from expelling the class members "under Title 42." 1 App. 147; *see also* 1 App. 99.

But the basis for the district court's preliminary injunction and the class members' asserted likelihood-of-success and harms in support of that injunction have ceased now that the CDC's March 11, 2022 order has excluded all unaccompanied noncitizen children from the Title 42 Process, and the government has resolved the status of the 32

unaccompanied noncitizen children who were expelled under Title 42 immediately following issuance of the district court's preliminary injunction. Likewise, plaintiffs have no continuing legal interest in defending the district court's preliminary injunction which, by its terms, only enjoins the government from applying a program it has already terminated as to the class members, and the preliminary injunction has no continuing legal interest for the 32 noncitizen children whose status has been resolved. *See Camenisch*, 451 U.S. at 394 (When enjoined conduct has ceased, "the correctness of the decision to grant [the] preliminary injunction * * * is moot."). Accordingly, this Court should terminate its abeyance order and take further appropriate action in light of the mootness of the appeal of the preliminary injunction.

2. <u>This Court Should Vacate the District Court's Preliminary Injunction</u>.

This Court should vacate the district court's preliminary injunction because mootness prevents appellate review of the correctness of the injunction. In addition, the preliminary injunction was intended to protect the rights of class members during the pendency of the litigation, but that injunction is no longer necessary in light of the termination of Title 42 with respect to the class members.

When "[t]he sole issue on appeal is whether the district court abused its discretion in granting appellees' motion for a preliminary injunction," and the correctness of the injunction becomes moot on appeal, "the district court's order must be vacated." *National Kidney Patients*, 902 F.2d at 54; *see Animal Legal Defense Fund v. Shalala*, 53 F.3d 363, 366-67 (D.C. Cir. 1995) (same for district court order denying preliminary injunction). The "established practice" to "vacate the judgment below," *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997), "prevent[s] a judgment, unreviewable because of mootness, from spawning any legal consequences," *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950); *see U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 22-23 (1994).

Of particular relevance here, vacatur is appropriate where the government has sought review of a lower-court decision but intervening changes in the challenged federal regulations or policy render further review of that decision moot. *See, e.g., Yellen v. United States House of Representatives*, 142 S. Ct. 332 (2021) (per curiam); *Mayorkas v. Innovation Law Lab*, 141 S. Ct. 2842 (2021) (per curiam). Indeed, *Munsingwear* itself involved a case that "became moot on appeal

because the regulations sought to be enforced by the United States were annulled by Executive Order," *U.S. Bancorp Mortgage*, 513 U.S. at 25 n.3, and the Court indicated that vacatur could have been an appropriate disposition if the United States had sought that remedy. *Munsingwear*, 340 U.S. at 40 (observing that the United States "did not avail itself of the remedy it had to preserve its rights"); *see also Humane Soc. of U.S. v. Kempthorne*, 527 F.3d 181, 187 (D.C. Cir. 2008) (questioning whether "the voluntary action exception applies to governmental action in the first place" and that it "may be limited to appeals mooted by settlement").

Vacatur of the preliminary injunction is the appropriate disposition in the circumstances of this case, where the district court's order was predicated upon its narrow construction of the government's Section 265 authority, and that construction could have important "legal consequences" in the future if the injunction were allowed to remain in place. *Munsingwear*, 340 U.S. at 41. Vacatur is also warranted to "clear[] the path for future relitigation." *Arizonans*, 520 U.S. at 71. A clear path is especially warranted here, where the district court's preliminary injunction is broader than would be permitted under

this Court's subsequent decision in *Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022), which construed the same statute with respect to a different class of plaintiffs.

Ultimately, this Court's determination whether to vacate in light of mootness "is an equitable one," *U.S. Bancorp Mortgage*, 513 U.S. at 29, that depends on what disposition would be "more consonant to justice * * * in view of the nature and character of the conditions which have caused the case to become moot," *id.* at 24. Here, that equitable inquiry supports vacatur. If there were any remaining doubt that vacatur of the preliminary injunction is the appropriate remedy for mootness in this case, this Court may order the parties to file supplemental briefs on that question.

3. <u>This Court Should Remand To The District Court With Instruction to Dismiss Plaintiff's Entire Action as Moot or To Resolve That Question in the First Instance</u>

As noted, it is evident that the district court's preliminary injunction is moot, and that the preliminary injunction accordingly should be vacated. In the government's view, the entire case also is now moot because the CDC's March 11, 2022 order has excluded all unaccompanied noncitizen children from the Title 42 process. Plaintiff's

seven causes of action all turn on the assertion that the application of the Title 42 Process to the class members was unlawful, *see* Compl. ¶¶ 110, 118, 123, 128, 134, 141, 146 (1 App. 41-46), and define the class to include "unaccompanied noncitizen children" who "are or will be subjected to the Title 42 Process," 1 App. 46. Plaintiff sought only prospective relief declaring that "the Title 42 Process" is unlawful as applied to them and an injunction prohibiting the government "from applying the Title 42 Process" to plaintiff and class members. *Id.* As noted above, however, Title 42 no longer applies to the plaintiff and class members.

This Court may conclude that the entire case is now moot, and, if so, it may remand to the district court with instructions to dismiss the entire case. If plaintiff disagrees about the mootness of the entire case and its dismissal, arguments that the case as a whole is moot can appropriately be made to the district court in the first instance.

CONCLUSION

For the foregoing reasons, this Court should terminate its prior abeyance order, vacate the district court's preliminary injunction as moot, and remand this case to the district court to decide in the first instance whether plaintiff's whole case is moot.

Respectfully submitted,

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August 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that this Motion satisfies the type-volume limitation in Rule 27(d)(2)(A) because it contains 2833 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 Century Schoolbook 14-point font, a proportionally spaced typeface.

/s/ Joshua Waldman
JOSHUA WALDMAN
Counsel for Defendants-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2022, I electronically filed the foregoing Motion 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
Counsel for Defendants-Appellants

Attachment 1

[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. ALEJANDRO MAYORKAS, Secretary of Homeland Security, et al., Defendants-Appellants.	No. 20-5357

DECLARATION OF GUADALUPE G. SERNA

I, Guadalupe G. Serna, pursuant to 28 U.S.C. § 1746, based upon personal knowledge and information made known to me in the course of my official duties as well as from various records and systems maintained by DHS and reasonably relied upon in the course of my employment, hereby declare as follows relating to the above-captioned matter.

1. I am currently employed as the Regional Deputy Attaché for Removal with the U.S. Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE) Attaché Office in Guatemala City, Guatemala. I have held this position since January 17, 2021.

2. This declaration is based upon information provided to me in my professional capacity by the Government of Guatemala, and information obtained from various records and systems maintained by DHS.

3. I have read and am familiar with the Memorandum Opinion and Order in *P.J.E.S. v. Wolf*, No. 20-2245 (D.D.C. Nov. 18, 2020), issued on November 18, 2020, preliminarily enjoining the expulsion of unaccompanied noncitizen children pursuant to Section 265 of Title 42 of the United States Code. I am also familiar with the Notice to the Court, filed on January 19, 2021, advising the district court that 32 Guatemalan class members had been returned to Guatemala by a government flight that took off minutes after the district court issued the preliminary injunction and expressing DHS commitment to facilitate the return of those individuals among the 32 expelled who wished to return to the United States to be processed until Title 8.
4. At the request of plaintiffs' counsel, the government worked through the Government of Guatemala to secure the return of those individuals.
5. In January 2022, the Government of Guatemala notified me that 10 of the 32 individuals had returned to the United States on their own. In April 2022, the Government of Guatemala updated its report to reflect a total of 22 had returned. Of the remaining 10 individuals, the Government of Guatemala advised that four had declined and six were willing to return to the United States. However, one of those six individuals ultimately stopped responding to DHS's outreach.
6. DHS agreed to parole the remaining five individuals, all of whom are over the age of 18.
7. Four of those individuals have been paroled into the United States and issued Notices to Appear before the immigration court as adults. They have reached their final destination and are currently with their family members in the United States. As to the fifth individual, DHS lost contact with him as it attempted to make travel arrangements for him but was informed by the individual's brother that the individual had decided to make his own way to the United States.

8. Based on the above, DHS has returned all individuals who desired to return to the United States with DHS's assistance and the status of the 32 individuals has been resolved.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 29 August 2022, at Guatemala City, Guatemala.

GUADALUPE G SERNA Digitally signed by GUADALUPE G SERNA Date: 2022.08.29 16:52:46 -06'00'

Guadalupe G. Serna
Regional Deputy Attaché for Removal
ICE Attaché Office
U.S. Immigration and Customs Enforcement