UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

THE STATE OF ARIZONA, By and through its Attorney General, MARK BRNOVICH;

THE STATE OF LOUISIANA, By and through its Attorney General, JEFF LANDRY;

THE STATE OF MISSOURI, By and through its Attorney General, ERIC S. SCHMITT;

THE STATE OF ALABAMA, By and through its Attorney General, STEVE MARSHALL;

THE STATE OF ALASKA, By and through its Attorney General, TREG R. TAYLOR;

THE STATE OF ARKANSAS, By and through its Attorney General, LESLIE RUTLEDGE;

THE STATE OF FLORIDA, By and through its Attorney General, ASHLEY MOODY;

THE STATE OF GEORGIA, By and through its Attorney General, CHRISTOPHER M. CARR;

THE STATE OF IDAHO, By and through its Attorney General, LAWRENCE G. WASDEN;

THE STATE OF KANSAS, By and through its Attorney General, DEREK SCHMIDT;

THE COMMONWEALTH OF KENTUCKY, By and through its Attorney General, DANIEL CAMERON;

CIVIL ACTION NO. 6:22-cv-00885-RRS-CBW

THE STATE OF MISSISSIPPI,
By and through its Attorney General,
LYNN FITCH;

THE STATE OF MONTANA,
By and through its Attorney General,
AUSTIN KNUDSEN;

THE STATE OF NEBRASKA,
By and through its Attorney General,
DOUGLAS J. PETERSON;

THE STATE OF OHIO,
By and through its Attorney General,
DAVE YOST;

THE STATE OF OKLAHOMA,
By and through its Attorney General,
JOHN M. O'CONNOR;

THE STATE OF SOUTH CAROLINA,
By and through its Attorney General,
ALAN WILSON;

THE STATE OF TENNESSEE
By and through its Attorney General,
HERBERT H. SLATERY III;

THE STATE OF UTAH,
By and through its Attorney General,
SEAN D. REYES;

THE STATE OF WEST VIRGINIA,
By and through its Attorney General,
PATRICK MORRISEY;

THE STATE OF WYOMING,
By and through its Attorney General,
BRIDGET HILL;

PLAINTIFFS,

v.

CENTERS FOR DISEASE CONTROL & PREVENTION;

ROCHELLE WALENSKY , in her official capacity as Director of the Centers for Disease Control & Prevention;

U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES;

XAVIER BECERRA , in his official capacity as Secretary of Health and Human Services;

the UNITED STATES DEPARTMENT OF HOMELAND SECURITY;

ALEJANDRO MAYORKAS in his official capacity as Secretary of Homeland Security;

U.S CUSTOMS AND BORDER PROTECTION;

CHRISTOPHER MAGNUS in his official capacity Commissioner of U.S. Customs and Border Protection;

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT;

TAE JOHNSON in his official capacity as Senior Official Performing the Duties of Director of U.S. Immigration and Customs Enforcement;

U.S. CITIZENSHIP AND IMMIGRATION SERVICES;

UR M. JADDOU in her official capacity as Director of U.S. Citizenship and Immigration Services;

U.S. BORDER PATROL;

RAUL ORTIZ in his official capacity as Chief of the U.S. Border Patrol;

The UNITED STATES DEPARTMENT OF JUSTICE;

MERRICK GARLAND in his official capacity as Attorney General of the United States of America;

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW;

DAVID NEAL in his official capacity as Director of the Executive Office for Immigration Review;

JOSEPH R. BIDEN, J R., in his official capacity as President of the United States; and

the UNITED STATES OF AMERICA;

DEFENDANTS.

FIRST AMENDED COMPLAINT

The States of Arizona, Louisiana, Missouri, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Mississippi, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, Utah, West Virginia, and Wyoming bring this civil action against the above-listed Defendants for declaratory and injunctive relief and allege as follows:

INTRODUCTION

1. This suit challenges an imminent, man-made, self-inflicted calamity: the abrupt elimination of the *only* safety valve preventing this Administration's disastrous border policies from devolving into unmitigated chaos and catastrophe. Specifically, this action challenges the Biden Administration's revocation of Title 42 border control measures, which will, absent judicial relief, become effective May 23, 2022.

2. This is not merely the opinion of the Plaintiff States, but also that of some of the Administration's otherwise-most-ardent supporters. Indeed, to date *seven* Democratic Senators have come out unambiguously in opposition to the challenged actions here. For example, one Democratic

Senator observed: "This is the wrong decision…. [I]t's clear that this administration's lack of a plan to deal with this crisis will further strain our border communities."

3. Similarly, Senator Kyrsten Sinema explained that the "decision to announce an end to Title 42 despite not yet having a comprehensive plan ready shows a lack of understanding about the crisis at our border."

4. Eight days prior, these two Democratic Senators wrote a letter to President Biden telling him: "To date, we have not yet seen evidence that DHS has developed and implemented a sufficient plan to maintain a humane and orderly process in the event of an end to Title 42."

5. A third Democratic Senator, Joe Manchin, described the Title 42 revocation as an outright "*frightening* decision."[1] He further explained that "[w]e are *nowhere near prepared to deal with that influx*. Until we have comprehensive, bipartisan immigration reform that commits to securing our borders and providing a pathway to citizenship for qualified immigrants, *Title 42 must stay in place*."[2] In addition, "Title 42 has been an essential tool in combatting the spread of COVID-19 and controlling the influx of migrants at our southern border," said Senator Manchin.[3] "We are already facing an unprecedented increase in migrants this year, and that will only get worse if the Administration ends the Title 42 policy."[4]

6. And a fourth Democratic Senator, Maggie Hassan, similarly declared that: "Ending Title 42 prematurely will likely lead to a migrant surge that the administration does not appear to be ready for."[5] Senator Jon Tester has similarly observed (correctly) that "[e]nding Title 42 is expected to

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[1] Joe Manchin, *Title 42 Must Stay In Place Until We Have Major Immigration Reforms* (April 1, 2022) https://bit.ly/37azEI0 (emphasis added).

[2] *Id.* (emphasis added).

[3] *Id.*

[4] *Id.*

[5] https://twitter.com/SenatorHassan/status/1509936999267983364

cause a *significant increase* of migration to the United States and put more pressure on an already broken system."[6] And Senator Raphael Warnock has likewise declared that "I think this is the wrong time and I haven't seen a plan that gives me comfort."[7] And Senator Catherine Cortez Masto has opined that: "This is the wrong way to do this and it will leave the administration unprepared *for a surge at the border*."[8]

7. And these are just the opinions of Senators of President Biden's *own party*—hardly disinterested, neutral observers. To be fair, these views appear to be widely shared—though in more-circumspect/less-candid statements—by many members of the Biden Administration itself, even at the highest levels. For example, the White House's own Communications Director, Kate Bedingfield, outright admitted that the Administration "ha[s] every expectation that when the CDC ultimately decides it's appropriate to lift Title 42, *there will be an influx* of people to the border."[9]

8. Senator Bill Cassidy of Louisiana similarly criticized the Biden Administration's plans, stating "Removing Title 42 is a mistake that will encourage another wave of illegal migration and drug trafficking to overwhelm the Southern border. There is no justification for this." See Press Release, Cassidy Reacts to Rescinding Trump-Era Policy to Stop Mass Migration, www.cassidy.senate.gov.

9. The National Border Patrol Council President, Brandon Judd, similarly declared: "We know this is going to *cause chaos of epic proportions*."[10] He also noted the obvious incongruity of

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[6] *See* Jon Tester, Statement (Apr. 5, 2022) *available at* https://www.tester.senate.gov/?p=press_release&id=9018 (emphasis added).

[7] Tim Mitchell, *The Jolt: Immigrant groups unhappy with Warnock criticism of new border policy*, Atlanta Journal-Constitution (Apr. 7, 2022) *available at* https://www.ajc.com/politics/politics-blog/the-jolt-immigrant-groups-unhappy-with-warnock-criticism-of-new-border-policy/A4R3Q3N62VHPZBHWTCYYKNYD3Q/.

[8] *See* https://kesq.com/news/2022/04/12/democrats-intensify-fight-against-biden-immigration-policy/ (Apr. 12, 2022).

[9] Catherine E. Shoichet, *We're expecting a big increase in migrants at the US-Mexico border. But this time is different*, CNN, (April 1, 2022) (emphasis added), https://cnn.it/3LrtLoC.

[10] Adam Shaw, *Border Patrol agents bracing for new migrant wave if Title 42 lifts: 'We are expecting to get wrecked*,

Administration policy: "We can't even fly on airplanes without masks, but we're going to end Title 42 which is going to cause the single largest [in]flux of illegal immigration in our history?"[11] "It's impossible for me to overstate how demoralized the average agent is," Judd said. "They're asking themselves, 'Why am I putting on this uniform?' every day. This administration is responsible for the single largest crisis on the border and they're about to make it worse."[12]

10. Similarly, DHS put out an official "fact sheet" in anticipation of the Title 42 revocation declaring that "There is broad agreement that our immigration system is *fundamentally broken*."[13] But the Administration's "answer" to that problem is to break it further.

11. Other DHS officials, shielded by anonymity, have been even more candid, explaining that "ending Title 42 would lead to what one DHS agent described as a 'surge on top of a surge.'"[14]

12. One anonymous agent succinctly explained the sentiment at the Border Patrol: "We are expecting to get wrecked."[15]

13. The Center for Disease Control's ("CDC's") April 1, 2022 order revoking its prior Title 42 policy is also plainly at war with other policies of the Biden Administration. The Title 42 Termination is expressly premised on the "rapid[] decrease" of COVID-19 cases following the recent wave of the Omicron variant of the virus. Ex. A at 12. But the Administration has not seen fit elsewhere to act upon these improvements by, for example, lifting the mask mandate on airline travel,[16]

Fox News, (Mar, 31, 2022), https://fxn.ws/3uKEx2B

[11] *Id.*

[12] Callie Patteson and MaryAnn Martinez, *Immigration authority Title 42 to be terminated on May 23, CDC says*, NY Post (Apr. 1, 2022), https://nypost.com/2022/04/01/title-42-to-be-terminated-on-may-23-cdc-says/.

[13] DHS, *Fact Sheet: DHS Preparations for a Potential Increase in Migration* (Mar. 30, 2022), https://bit.ly/3j3LEgR.

[14] Adam Shaw and Peter Hasson, *Border Patrol agents bracing for new migrant wave if Title 42 lifts: "We are expecting to get wrecked"*, Fox News (Mar. 31, 2022), https://fxn.ws/3IZjApt.

[15] *Id.*

[16] Jonathan Franklin, *U.S. airline CEOs call on President Biden to end the federal mask mandate on planes*, NPR

or loosening or repealing its vaccination mandates,[17] or ending its relentless campaign to discharge members of our military who have applied for religious exemptions for vaccination requirements—which have been almost uniformly denied.[18] The Title 42 Revocation thus stands as a radical outlier—seemingly the only COVID-19-based restriction the Administration sees fit to end.

14. But the CDC's Termination Order is not merely unfathomably bad public policy. It is also profoundly illegal. That is principally so for two reasons: (1) Defendants unlawfully flouted the notice-and-comment requirements for rulemaking under the Administrative Procedure Act ("APA") and (2) Defendants' Termination Order is arbitrary and capricious, thus violating the APA, because it has numerous omissions that each independently render it illegal.

15. First, the notice-and-comment violation: Defendants do not deny that the Termination Order would ordinarily be subject to the requirement of providing notice of a proposed rule, taking comment upon it, and responding to those comments. They seek to excuse their flouting of that requirement for two reasons: they invoke the "good cause" and "foreign affairs" exceptions of 5 U.S.C. § 553(a)(1) and (b)(3)(B). But neither applies.

(Mar. 24, 2022), https://www.npr.org/2022/03/24/1088669929/airlines-federal-travel-mask-mandate (noting request from airline CEOs to the Biden Administration that the air travel mask mandate be lifted, and noting that "the White House has not yet commented on the group's request).

[17] *E.g.*, *Georgia v. Biden*, --- F.Supp.3d ----, 2021 WL 5779939 (S.D. Ga. Dec. 7, 2021) (granting nationwide preliminary injunction of federal contractor vaccine mandate); *Georgia v. Biden*, 21-cv-00163, ECF No. 96 (S.D. Ga. Dec 9, 2021) (federal government's notice of appeal of nationwide injunction of federal contractor vaccine mandate); *Feds for Med. Freedom v. Biden*, --- F.Supp.3d ----, 2022 WL 188329, at *8 (S.D. Tex. Jan. 21, 2022) (granting nationwide preliminary injunction of federal employee vaccine mandate); *Feds for Med. Freedom v. Biden*, 21-cv-00356, ECF No. 37 (S.D. Tex. Jan. 21, 2022) (federal government's notice of appeal of nationwide injunction of federal employee vaccine mandate).

[18] *E.g.*, *U.S. Navy SEALs 1-26 v. Biden*, --- F.Supp.3d ----, 2022 WL 34443, at *1, *13, and *14 (N.D. Tex. Jan. 3, 2022) ("[t]he Navy has not granted a religious exemption to any vaccine in recent memory"; noting punitive measures taken against Navy SEALS who refused to take vaccine, including threat of discharge from military; and enjoining military vaccine mandate); *U.S. Navy SEALs 1-26 v. Biden*, 21-cv-01236, ECF No. 82 (N.D. Tex. Jan. 21, 2022) (federal government's notice of appeal). .

16. As to the good cause exception, CDC argues that "it would be impracticable and contrary to the public interest" to take public comments on the Title 42 Revocation, and that DHS "need[s] time to implement an orderly and safe termination of the order." Order at 29. These skeletal assertions fail to satisfy the good cause exception for four reasons.

17. *First*, CDC had *ample* time to take public comment on revoking Title 42 and lacks any pressing need or minimally persuasive excuse for failing to do so. President Biden issued an executive order on February 2, 2021, directing CDC and DHS to *consider* rescinding Title 42. Defendants thus had one day short of *fourteen months* to take public comment on potentially rescinding Title 42. They simply refused to do so. That willful failure to take public comments in that time is not "good cause" under the APA.

18. *Second*, Defendants ignore that while the initial promulgation of Title 42 invoked the good cause exception—because its issuance was during the rapidly unfolding beginning of the Covid-19 pandemic—the same is not true here. This Order arises two full years into the pandemic, where it is waning in some areas while a new variant threatens others. The exigency of the initial order simply does not exist here. There is no "pandemic exception" to notice-and-comment requirements, particularly two years into that pandemic.

19. *Third*, the CDC ignores that it *did take* public comment in connection with the issuance of the Title 42 system under the Trump Administration, from March 24 to April 24, 2022, and then issued a final rule less than five months after the comment period closed. 85 Fed. Reg. 56424, 56488 (Sept. 11, 2020). There is no reason that the CDC could not have taken the same approach again here—and the CDC certainly does not supply any. The CDC is thus simply wrong in contending that the "extraordinary nature" of Title 42 orders necessarily eliminates the APA's requirement for taking public comment, as its own actions demonstrate.

20. *Fourth*, the CDC's rationale is self-refuting: if Defendants "need time" to implement the Title 42 revocation, which the Order effectively concedes will be extraordinarily challenging, that is a reason to *take* comments so the agency can have the benefit of public input and can use the needed time to obtain it. Moreover, the disaster that the Administration correctly predicts could easily be less calamitous if they take suggestions from the public and states and incorporate those suggestions. But the CDC's arrogant assertion that there is *no value to be had* from public commenting does not constitute "good cause."

21. As to the foreign affairs exception, the CDC offers only a single unspecific sentence contending that "this Order concerns ongoing discussions with Canada, Mexico, and other countries regarding immigration and how best to control COVID-19 transmission over shared borders." Order at 29. That is patently insufficient.

22. The "foreign affairs exception applies in the immigration context only when ordinary application of the public rulemaking provisions [*i.e.*, taking public comment] *will provoke definitely undesirable international consequences*." *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 775–76 (9th Cir. 2018) (cleaned up) (emphasis added). But the CDC does not identify *any* potential "undesirable international consequences," let alone establish with certainty that such consequences will occur. Instead, the CDC's order merely alludes to the fact that the Administration is engaged in unspecified talks with Canada and Mexico about Covid-19. That is woefully insufficient. The Administration cannot evade notice-and-comment requirements by the expedient of simply talking with its neighboring countries about the same subject in lieu of seeking comment from its own citizens. But that is all Defendants offer here.

23. For these reasons, neither the good cause nor foreign affairs exceptions apply here. The CDC's refusal to take public comment thus violates the APA and alone requires invalidation of the Termination Order.

24. That conclusion is perhaps unsurprising. The Biden Administration's violation of notice-and-comment requirements in the immigration context is by now notorious with federal courts. *See*, *e.g.*, *Texas v. United States*, __ F. Supp. 3d ___, 2021 WL 3683913, at *51-58 (S.D. Tex. Aug. 19, 2021) (holding that DHS's issuance of Interim Guidance, which similarly and severely reduced removals of aliens with criminal convictions, violated notice-and-comment requirements); *Texas v United States*, 524 F. Supp. 3d 598, 656-62 (S.D. Tex. 2021) (holding same for 100-day moratorium on immigration removals). Indeed, at oral argument Justice Kagan recently observed another potential violation by DHS, explaining that "[t]he real issue to me is [DHS's] evasion of notice-and-comment."[19]

25. The Termination Order also violates the APA as arbitrary and capricious decision-making. "[A]gency action is lawful only if it rests on a consideration of the relevant factors" and considers all "important aspects of the problem." *Michigan v. EPA*, 576 U.S. 743, 750-52 (2015) (requiring "reasoned decisionmaking"). This means agencies must "examine all relevant factors and record evidence." *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017).

26. The CDC's Order is arbitrary and capricious most obviously because it expressly refuses to analyze the impacts it will have upon the States. That is, after all, an "important aspect of the problem." *Michigan*, 576 U.S. at 752. Indeed, the Supreme Court has repeatedly recognized "the importance of immigration policy to the States," particularly as the States "bear[] many of the consequences of unlawful immigration. *Arizona v. United States*, 567 U.S. 387, 397 (2012)

27. The CDC does not even attempt to deny that its Title 42 Termination Order will impose enormous costs upon the States. Nor did it make *any* attempt to analyze those substantial harms—even though it was legally required to do so under the APA. *See*, *e.g.*, *Arizona v. Biden*, 2022 WL 839672, at *30 (holding that DHS violated APA by providing "no explanation of how its policy—

[19] Transcript at 47-48, *Arizona v. San Francisco*, No. 20-1775 (Feb. 23, 2022) available at https://bit.ly/3itwfq7

that relaxes mandatory detention standards set by Congress—might increase state criminal justice expenses"); *Texas v. United States*, 2021 WL 3683913, at *49 (explicitly rejecting "the Government's argument that it need not consider the States' costs and expenses stemming from the new [immigration] guidelines" under the APA). Defendants thus violated the APA by failing to consider the impacts of their Order on the States, which is manifestly an "important aspect of the problem." *Michigan*, 576 U.S. at 752.

28. Rather than attempting to analyze the costs that its Order will impose on the States *whatsoever*, CDC denies that it has any obligation to consider those harms *at all*. Instead, it reasons that "no state or local government could be said to have legitimately relied on the CDC [Title 42] Orders … because those orders are, by their very nature, short-term orders, authorized only when specified statutory criteria are met, and subject to change at any time in response to an evolving public health crisis." Order at 23.

29. The CDC's argument fails for two reasons. *First*, regardless of the purported illegitimacy of the State's reliance on the CDC's Title 42 Orders, the CDC still had an obligation to consider the harms to the States since that is an "important aspect of the problem." *Michigan*, 576 U.S. at 752. The CDC has no license to inflict wanton harms on the States without at least first considering what the magnitude of those harms might be and whether they could be mitigated if the agency considered alternatives with those harms in mind. See, *e.g.*, *id.* at 759 (explain that agencies "must consider cost … before deciding whether regulation is appropriate and necessary"). Here the CDC failed to do so—and indeed *expressly refused* to consider those harms. Defendants' APA violation is thus *explicit and admitted*.

30. *Second*, even if the CDC were correct that the "short-term" nature of the Title 42 Orders—which have been in place for two entire years and counting—meant that the States could not rely on the Orders being in place *permanently*, the States still could reasonably rely on the CDC not to

revoke the Orders abruptly at a truly terrible time to do so. The Order's timing will greatly exacerbate an already extant meltdown of operational control at the southern border—which even the Administration and its *supporters* fully expect. *Supra* ¶¶ 2-7, 10. Simply put, the States could reasonably rely on the CDC not suddenly revoking its Title 42 Orders now, thereby stacking crisis upon crisis—or in the words of DHS officer, inflicting a "surge on top of a surge." Furthermore, the States could reasonably rely on the CDC only to revoke the Orders after following the APA's notice-and-comment requirements.

31. A second principal deficiency of the Termination Order is that it fails to analyze meaningfully the entirely predictable—and *actually predicted*—surge of illegal migration that it will cause. Indeed, the Administration has internally predicted that the Termination Order could triple the daily number of illegal aliens attempting to cross the border. *See infra* ¶ 108. But the Termination Order never meaningfully analyzes these impacts or considers ways in which they might be mitigated.

32. These are only the most flagrant of the defects of the Order. It is also arbitrary and capricious because it, for example, (1) failed to consider alternative effective dates, (2) failed to consider DHS's inability to cope with the resulting surge and failure to plan adequately for it, (3) failed to consider the impacts of the fact that there are *huge* numbers of aliens waiting at the southern border to cross the moment that Title 42 is rescinded, and (4) failed to consider the cumulative effects of the rescission of the Title 42 rescission with the Administration's attempted termination of the Migrant Protection Protocol, *see Texas v. Biden*, 20 F.4th 928, 990 (5th Cir. 2021) *cert. granted*, 142 S. Ct. 1098 (2022), whose impacts will snowball upon each other.

33. For all of these reasons, the CDC's Title 42 Termination Order violates the APA many times over. This Court should accordingly "hold unlawful and set aside" that Order. 5 U.S.C. § 706(2).

PARTIES

34. Plaintiff State of Arizona is a sovereign state of the United States of America. Arizona sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Arizona brings this suit through its Attorney General, Mark Brnovich. He is the chief legal officer of the State of Arizona and has the authority to represent the State in federal court. His offices are located at 2005 North Central Avenue, Phoenix, Arizona 85004.

35. Plaintiff State of Louisiana is a sovereign State of the United States of America. Louisiana sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Louisiana brings this suit through its Attorney General, Jeff Landry. He is authorized by Louisiana law to sue on the State's behalf. His offices are located at 1885 North Third Street, Baton Rouge, Louisiana 70802.

36. Plaintiff State of Missouri is a sovereign State of the United States of America. Missouri sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Missouri brings this suit through its Attorney General, Eric S. Schmitt. He is authorized by Missouri law to sue on the State's behalf. His address is P.O. Box 899, Jefferson City, Missouri 65102.

37. Plaintiff State of Alabama is a sovereign State of the United States of America. Alabama sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Alabama brings this suit through its Attorney General, Steve Marshall. He is authorized by Alabama law to sue on the State's behalf. His address is 501 Washington Avenue, P.O. Box 300152, Montgomery, Alabama 36130-0152.

38. Plaintiff State of Alaska is a sovereign State of the United States of America. Alaska sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Alaska brings this suit through its Attorney General, Treg R. Taylor. He is

authorized by Alaska law to sue on the State's behalf. His address is 1031 West 4th Avenue, Suite 200, Anchorage, Alaska 99501-1994.

39. Plaintiff State of Arkansas is a sovereign State of the United States of America. Arkansas sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Arkansas brings this suit through its Attorney General, Leslie Rutledge. She is authorized by Arkansas law to sue on the State's behalf. Her address is 323 Center Street, Suite 200, Little Rock, Arkansas 72201.

40. Plaintiff State of Florida is a sovereign State of the United States of America. Florida sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Florida brings this suit through its Attorney General Ashley Moody. She is authorized by Florida law to sue on the State's behalf. Her address is The Capitol, Pl-01, Tallahassee, Florida 32399-1050.

41. Plaintiff State of Georgia is a sovereign State of the United States of America. Georgia sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Georgia brings this suit through its Attorney General, Christopher M. Carr. He is authorized by Georgia law to sue on the State's behalf. His address is 40 Capitol Square, S.W., Atlanta, Georgia 30334.

42. Plaintiff State of Idaho is a sovereign State of the United States of America. Idaho sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Idaho brings this suit through its Attorney General, Lawrence G. Wasden. He is authorized to sue on the State's behalf. His address is P.O. Box 83720, Boise, Idaho 83720-0010.

43. Plaintiff State of Kansas is a sovereign State of the United States of America. Kansas sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Kansas brings this suit through its Attorney General, Derek Schmidt. He is

authorized by Kansas law to sue on the State's behalf. His address is 120 SW Tenth Avenue, 3rd Floor, Topeka, Kansas 66612-1597.

44. Plaintiff Commonwealth of Kentucky is a sovereign State of the United States of America. Kentucky sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Kentucky brings this suit through its Attorney General, Daniel Cameron. He is authorized by Kentucky law to sue on the State's behalf. His address is 700 Capital Avenue, Suite 118, Frankfort, Kentucky 40601.

45. Plaintiff State of Mississippi is a sovereign State of the United States of America. Mississippi sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Mississippi brings this suit through its Attorney General, Lynn Fitch. She is authorized by Mississippi law to sue on the State's behalf. Her address is 550 High Street, Suite 1200, Jackson, Mississippi 39201.

46. Plaintiff State of Montana is a sovereign State of the United States of America. Montana sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Montana brings this suit through its Attorney General, Austin Knudsen. He is authorized to sue on the State's behalf. His address is 215 N Sanders St., Helena, Montana 59601.

47. Plaintiff State of Nebraska is a sovereign State of the United States of America. Nebraska sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Nebraska brings this suit through its Attorney General, Douglas J. Peterson. He is authorized to sue on the State's behalf. His address is 2115 State Capitol, Lincoln, Nebraska 68509.

48. Plaintiff State of Ohio is a sovereign State of the United States of America. Ohio sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting the health and well-being of its citizens.

49. Plaintiff State of Oklahoma is a sovereign State of the United States of America. Oklahoma sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Oklahoma brings this suit through its Attorney General, John M. O'Connor. He is authorized by Oklahoma law to sue on the State's behalf. His address is 313 NE 21st Street, Oklahoma City, Oklahoma 73105.

50. Plaintiff State of South Carolina is a sovereign State of the United States of America. South Carolina sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. South Carolina brings this suit through its Attorney General, Alan Wilson. He is authorized by South Carolina law to sue on the State's behalf. His address is P.O. Box 11549, Columbia, South Carolina 29211.

51. Plaintiff State of Tennessee is a sovereign State of the United States of America. Tennessee sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Tennessee brings this suit through its Attorney General, Herbert H. Slatery III. He is authorized by Tennessee law to sue on the State's behalf. His address is P.O. Box 20207, Nashville, Tennessee 37202-0207.

52. Plaintiff State of Utah is a sovereign State of the United States of America. Utah sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Utah brings this suit through its Attorney General, Sean D. Reyes. He is authorized by Utah law to sue on the State's behalf. His address is 350 North State Street, Suite 230, Salt Lake City, Utah 84114.

53. Plaintiff State of West Virginia is a sovereign State of the United States of America. West Virginia sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. West Virginia brings this suit through its Attorney General, Patrick

Morrisey. He is authorized by West Virginia law to sue on the State's behalf. His address is State Capitol, Bldg 1, Room E-26, Charleston, WV 25305.

54. Plaintiff State of Wyoming is a sovereign State of the United States of America. Wyoming sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its citizens. Wyoming brings this suit through its Attorney General, Bridget Hill. She is authorized by Wyoming law to sue on the State's behalf. Her address is 109 State Capitol, Cheyenne, Wyoming 82002.

55. Defendants are officials of the United States government and United States governmental agencies responsible for promulgating or implementing the Rule.

56. Defendant Centers for Disease Control and Prevention is constituent agency of the U.S. Department of Health and Human Services ("HHS"). It conducts specified functions under the Public Health Service Act, including exercising authority delegated by HHS.

57. Defendant Rochelle Walensky is the Director of the CDC. She is sued in her official capacity.

58. Defendant U.S. Department of Health and Human Services is an executive department of the United States Government.

59. Defendant Xavier Becerra is the Secretary of HHS. He is sued in his official capacity.

60. Defendant United States Department of Homeland Security ("DHS") is an executive department of the United States Government.

61. Defendant Alejandro Mayorkas is the Secretary of Homeland Security and therefore the "head" of DHS with "direction, authority, and control over it." 6 U.S.C. § 112(a)(2). Defendant Mayorkas is sued in his official capacity.

62. Defendant U.S. Customs and Border Protection ("USBP") is an agency within DHS that is headquartered in Washington, D.C.

63. Defendant Christopher Magnus serves as Commissioner of USBP. Defendant Magnus is sued in his official capacity.

64. Defendant U.S. Immigration and Customs Enforcement ("ICE") is an agency within DHS that is headquartered in Washington, D.C.

65. Defendant Tae Johnson serves as Acting Director of ICE. Defendant Johnson is sued in his official capacity.

66. Defendant U.S. Citizenship and Immigration Services ("USCIS") is an agency within DHS that is headquartered in Camp Springs, Maryland.

67. Defendant Ur Jaddou serves as the Director for USCIS. Defendant Jaddou is sued in her official capacity.

68. Defendant U.S. Border Patrol is an agency within DHS that is headquartered in Washington, D.C.

69. Raul Ortiz serves as the Chief of the U.S. Border Patrol.

70. Defendant Department of Justice ("DOJ") is an executive department of the United States Government.

71. Defendant Merrick Garland is the Attorney General of the United States of America. He is sued in his official capacity.

72. Defendant Executive Office for Immigration Review ("EOIR") is an agency within DOJ that is headquartered in Bailey's Crossroads, Virginia.

73. Defendant David Neal is Director of EOIR. He is sued in his official capacity.

74. Defendant Joseph R. Biden, Jr., is the President of the United States. He is sued in his official capacity.

75. Defendant the United States of America is sued under 5 U.S.C. §§ 702–703 and 28 U.S.C. § 1346 and includes the departments and agencies thereof.

JURISDICTION AND VENUE

76. This Court has subject-matter jurisdiction over this case because it arises under the Constitution and laws of the United States. *See* 28 U.S.C. §§ 1331, 1346, 1361; 5 U.S.C. §§ 701-06.

77. An actual controversy exists between the parties within the meaning of 28 U.S.C. §§ 2201(a), and this Court may grant declaratory relief, injunctive relief, and other relief under 28 U.S.C. §§ 2201-02, 5 U.S.C. §§ 705-06, 28 U.S.C. § 1361, and its inherent equitable powers.

78. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1) because (1) Defendants are United States agencies or officers sued in their official capacities, (2) the State of Louisiana is a resident of this judicial district, (3) no real property is involved, and (4) a substantial part of the events or omissions giving rise to the Complaint occur within this judicial district. *See Atlanta & F.R. Co. v. W. Ry. Co. of Ala.*, 50 F. 790, 791 (5th Cir. 1982); *Ass'n of Cmty. Cancer Centers v. Azar*, 509 F. Supp. 3d 482 (D. Md. 2020).

FACTUAL AND LEGAL BACKGROUND

The INA's Requirements

79. The Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135, and the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, charge DHS with enforcing the United States' immigration laws. Under the immigration laws, "several classes of aliens are 'inadmissible' and therefore 'removable.'" *Dept. of Homeland Sec. v. Thuraissigiam*, 140 S.Ct. 1959, 1964 (2020), citing 8 U.S.C. §§ 1182, 1229a(e)(2)(A). Among these classes are aliens who lack a valid entry document when they apply for admission. 8 U.S.C. § 1182(a)(7)(A)(i)(I). This includes aliens who arrive in the United States and aliens who are present in the United States without having been lawfully admitted, who are deemed to have applied for admission. 8 U.S.C. § 1225(a)(1).

80. An inadmissible alien may be removed; the usual process involves an evidentiary hearing before an immigration judge at which the alien may present evidence and argue against removal.

Thuraissigiam, 140 S.Ct. at 1964. However, this process is slow, and while "removal is being litigated, the alien will either be detained, at considerable expense, or allowed to reside in this country, with the attendant risk that he or she may not later be found." *Id.*

81. To address these problems, Congress created more expedited procedures that apply to aliens who are "present in the United States who [have] not been admitted" and to aliens "who arrive[] in the United States (whether or not at a designated port of arrival ...)[.]" 8 U.S.C. § 1225(a)(1).

82. These aliens are subject to expedited removal if they (1) are inadmissible because they lack a valid entry document; (2) have not "been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility"; and (3) are among those whom the Secretary of Homeland Security has designated for expedited removal. *Id.* § 1225(b)(1)(A). Once an immigration officer determines that such an alien is inadmissible, the alien must be ordered "removed from the United States without further hearing or review." *Id.* § 1225(b)(1)(A)(i).

83. Whether subject to the standard removal process or the expedited process, aliens who intend to claim asylum or who claim a credible fear of persecution are not deportable while that claim is being investigated. *See* 8 U.S.C. §§ 1158, 1225(b)(1). But those aliens must be detained until their entitlement to asylum is determined. *Id.* § 1225(b)(2).

84. It has been generally accepted that DHS has the discretion as to whether to place aliens, other than unaccompanied children, into the standard removal process or into expedited removal. *See, e.g.*, *Matter of M-S-*, 27 I&N Dec. 509, 510 (A.G. 2019); *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520, 524 (BIA 2011); 8 U.S.C. § 1232(a)(5)(D) (exception). Whichever path DHS chooses, aliens placed in removal proceedings must be detained until DHS has finished considering the asylum application or the removal proceedings. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 844–45 (2018), (citing 8 U.S.C. § 1225(b)(1), (2)). DHS may "for urgent humanitarian reasons or significant public benefit"

temporarily parole these aliens, but it may do so "only on a case-by-case basis." 8 U.S.C. § 1182(d)(5)(A).

85. Another class of inadmissible aliens is those who have a "communicable disease of public health significance[.]" 8 U.S.C. § 1182(a)(1)(A)(i). The INA defines a "communicable disease of public health significance" by referring to "regulations prescribed by the Secretary of Health and Human Services." *Id.*

86. There are two circumstances under which aliens must be detained to determine whether they are inadmissible for public-health reasons. First, they must be detained if DHS has reason to believe they are "afflicted with" such a disease. 8 U.S.C. § 1222(a). Second, they must be detained if DHS "has received information showing that any aliens are coming from a country or have embarked at a place" where such a disease is "prevalent or epidemic[.]" This detention must enable "immigration officers and medical officers" to conduct "observation and an examination sufficient to determine whether" the aliens are inadmissible. *Id.*

Covid-19 And The Requirements of the PHSA

87. In the words of the CDC itself, Covid-19 "is a quarantinable communicable disease caused by the SARS-CoV-2 virus." Order Suspending the Right to Introduce Certain Persons, 86 Fed. Reg. 42,828, 42,830 (Aug. 5, 2021). Since it emerged in late 2019, "SARS–CoV–2, the virus that causes COVID–19, has spread throughout the world, resulting in a pandemic." *Id.*

88. Since COVID-19 was first declared a public-health emergency in January 2020, "the U.S. government and CDC have implemented a number of COVID–19 mitigation and response measures.

89. The first Title 42 Order was issued on March 24 as an interim final rule. 85 Fed. Reg. 16,559 (Mar. 24, 2020). At the same time, the CDC expressly invited "comment on all aspects of this interim final rule, including its likely costs and benefits and the impacts that it is likely to have on the

public health, as compared to the current requirements under 42 CFR part 71." *Id.* at 16,559.

90. After receiving 218 comments during the 30-day comment window that closed April 24, 2020, the CDC published a final rule September 11, 2020; that rule "establishe[d] final regulations under which the Director [of the CDC] may suspend the right to introduce and prohibit, in whole or in part, the introduction of persons into the United States for such period of time as the Director may deem necessary to avert the serious danger of the introduction of a quarantinable communicable disease into the United States." 85 Fed. Reg. 56,424, 56,424, 56, 448 (Sep. 11, 2020) (codified at 42 C.F.R. § 71.40). This Final Rule, issued under the authority granted by the PHSA, 42 U.S.C. § 265, became effective October 13, 2020. On October 13, 2020, the day the Final Order became effective, the CDC issued its Order Suspending the Right to Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists. 85 Fed. Reg. 65,806–12 (Oct. 13, 2020). Collectively, the Final Rule and this October Order work together in a process generally known as "Title 42" or "Title 42 Order(s)."

91. Though issued under the Final Rule, the October Order was the latest in a series of orders issued under the original March 24, 2020 interim final rule. As had the earlier orders, the October Order suspended introducing covered aliens into the United States, a suspension lasting until CDC 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[.]" 85 Fed. Reg. at 65,810. The suspension was based on findings that:

- COVID-19 is a communicable disease that poses a danger to the public health;
- COVID-19 is present in numerous foreign countries, including Canada and Mexico;
- Because COVID-19 is so globally widespread, there is a serious danger that it will be carried into the land points of entry and Border Patrol stations at or near the United States' borders with Canada and Mexico, and from there into the interior of the country;

• If their entry were not suspended, covered aliens would be go through immigration processing at the land points of entry and Border Patrol stations that would require many of them (typically aliens who lack valid travel documents and are therefore inadmissible) to be held in the congregate areas of the facilities, in close proximity to one another, for hours or days;

• Holding them in such settings would increase the already serious danger to the public health of the United States; and

• This increased danger rose to the level that it required a temporary suspension of the introduction of covered aliens into the United States.

Id.

92. Customs and Coast Guard officers have the duty to "aid in the enforcement of quarantine rules and regulations," PHSA, 42 U.S.C. § 268, and the Order noted that the CDC had requested "that DHS aid in the enforcement [of] this Order because CDC does not have the capability, resources, or personnel needed to do so." *Id.* at 65,812. The CDC needed this assistance because of its own public health tools not being "viable mechanisms given CDC resource and personnel constraints, the large numbers of covered aliens involved, and the likelihood that covered aliens do not have homes in the United States." *Id.*

93. The October Order applied to all covered aliens, defined as aliens "seeking to enter the United States … who lack proper travel documents," "whose entry is otherwise contrary to law," or "who are apprehended at or near the border seeking to unlawfully enter the United States." *Id.* at 65,807.

94. The October Order noted that expulsions under CDC's prior orders had "reduced the risk of COVID-19 transmission in [points of entry] and Border Patrol Stations, and thereby reduced risks to DHS personnel and the U.S. health care system." *Id.* It further noted that "[t]he public health risks to the DHS workforce—and the erosion of DHS operational capacity—would have been

greater" without the initial suspension order. Further, the suspension orders "significantly reduced the population of covered aliens in congregate settings in [points of entry] and Border Patrol stations, thereby reducing the risk of COVID-19 transmission for DHS personnel and others within these facilities." *Id.*

95. DHS began using its Title 42 authority to expel aliens in March 2020, and the population of aliens processed under Title 8 (the ordinarily applicable immigration rules) plummeted. Out of more than 253,000 total southwest border encounters under Title 8 in Fiscal Year 2020, fewer than 25,000 occurred in the last six months of the year.[20] During that same six-month period, nearly 200,000 aliens were rapidly expelled under Title 42.

96. On July 19, 2021, the CDC issued a new order excepting unaccompanied children from the October Order. Public Health Determination Regarding an Exception for Unaccompanied Noncitizen Children, 86 Fed. Reg. 38,717 (July 22, 2021) (signed July 19, 2021)

97. On August 3, 2021, Defendants issued an order superseding the October Order and incorporating by reference the July Order excepting unaccompanied children. Public Health Reassessment and Order Suspending the Right to Introduce Certain Persons, 86 Fed. Reg. 48,828 (Aug. 5, 2021) ("August Order").

98. The August Order summarized the current state of emergency and nature of the pandemic:

- "Congregate settings, particularly detention facilities with limited ability to provide adequate physical distancing and cohorting, have a heightened risk of COVID-19 outbreaks." *Id.* at 42,833. CBP facilities themselves have "[s]pace constraints [that]

[20] The CBP statistics cited in this Complaint are available at *Sw. Border Land Encounters*, U.S. CUSTOMS AND BORDER PROT., https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters (last visited Aug. 23, 2021).

preclude implementation of cohorting and consequence management such as quarantine and isolation." *Id.* at 42,837.

- "Countries of origin for the majority of incoming covered [aliens] have markedly lower vaccination rates." Of the top five originating countries, El Salvador, at 22%, had the highest rate of vaccinated persons; Guatemala and Honduras, the two lowest, had 1.6% and 1.8%, respectively. *Id.* at 42,834 & n.57.

99. The August Order concedes that "the flow of migration directly impacts not only border communities and regions, but also destination communities and healthcare resources of both." 86 Fed. Reg. at 42,835. It came only days after the Defendants released more than 1,500 COVID-positive unauthorized immigrants into the city of McAllen, Texas.[21]

100. On March 11, 2022, CDC Director Walensky issued a new order (the "March Order") superseding the August Order. 87 Fed. Reg. 15243. The March Order apparently was issued in response to litigation in Texas[22] challenging Defendants' practice of not applying Title 42 to unaccompanied alien children ("UAC"). The March Order found that suspending entry of UACs was "not necessary to protect U.S. citizens," and that the August Order's provisions were terminated as to UACs, but not as to "individuals in family units (FMU) or single adults (SA)." 87 Fed. Reg. 15243, 15245.

Termination of the August and March Orders

101. On April 1, 2022, CDC Director Walensky issued an order terminating the Title 42 policy (the "Termination Order") effective May 23, 2022. Exhibit A, Public Health Determination

[21] Adam Shaw & Bill Melugin, "Texas border city says more than 7,000 COVID-positive migrants released since February, 1,500 in last week," FOX NEWS (Aug. 4, 2021), https://www.foxnews.com/politics/texas-border-city-covid-positive-migrants-released-february-last-week.

[22] *Texas v. Biden*, 21-cv-00579 (N.D. Tex.)

And Order Regarding The Right To Introduce Certain Persons From Countries Where A Quarantinable Communicable Disease Exists, CDC (Apr. 1, 2022), available at https://www.cdc.gov/coronavirus/2019-ncov/cdcresponse/Final-CDC-Order-Prohibiting-Introduction-of-Persons.pdf.

102. The Termination Order claimed that it was "not a rule subject to notice and comment under the Administrative Procedure Act." Ex. A at 29. It did so on two putative bases. First it asserted the good cause exception applied because "it would be impracticable and contrary to the public interest." Second, it asserted that the APA's foreign affairs exception by claiming without offering any detail or explanation that "this Order concerns ongoing discussions with Canada, Mexico, and other countries regarding immigration and how best to control COVID-19 transmission over shared borders." *Id.*

103. Even members of President Biden's own party have criticized the Termination Order. Senator Joe Manchin warned in a letter to President Biden that, "[w]ith encounters along our southern border surging and the highly transmissible Omicron BA.2 subvariant emerging as the dominate strain in the United States, now is not the time to throw caution to the wind" and cancel the Title 42 policy.[23]

Harms to Plaintiffs

104. States "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012). They are, however, limited in their ability to "engage in" their own immigration "enforcement activities." *Id.* at 410. The States thus rely significantly on the federal government to fulfill its duties under the immigration laws, particularly when Congress has created mandatory obligations or otherwise limited the federal government's discretion.

105. As a result, there is little the States can do about the thousands of aliens entering the United States. Record numbers of aliens are already attempting to cross the border illegally.

[23] Joe Manchin, Ltr. to President Biden, (Mar. 29, 2022), https://bit.ly/3J4e2dF.

106. DHS's own statistics show the dramatic increases in the number of crossings into the United States—even with Title 42 in place. Indeed, current levels of illegal crossings are at their highest levels in at least two decades, and perhaps ever. The following is DHS's own chart graphically showing these enormous increases in crossings:

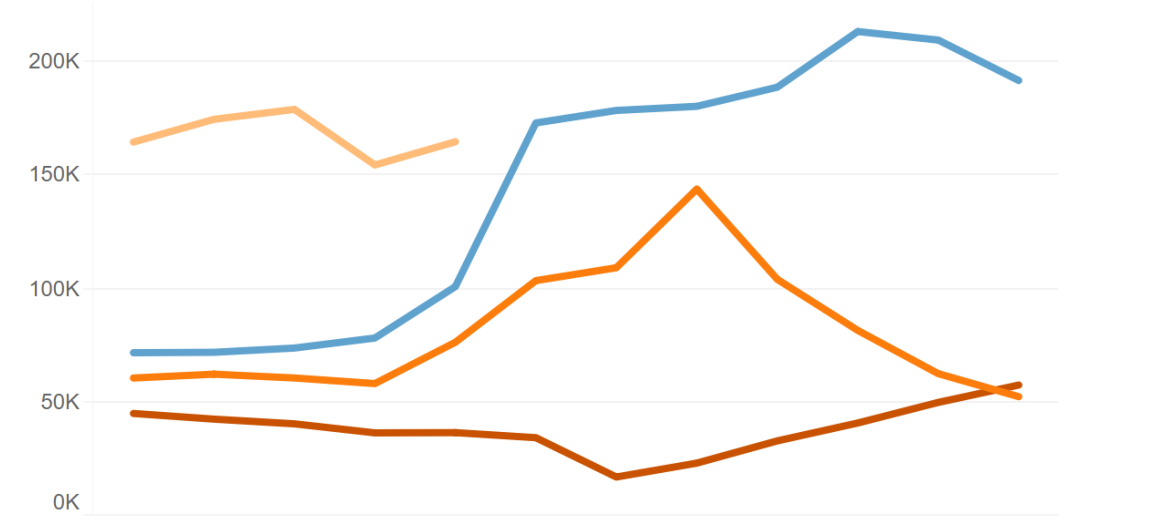
Table 1: DHS Southwest Border Encounters By Month

U.S. Customs and Border Protection

U.S. Customs and Border Protection (CBP) Encounters
US Border Patrol (USBP) Title 8 Apprehensions,
Office of Field Operations (OFO) Title 8 Inadmissible Volumes,
and Title 42 Expulsions by Fiscal Year (FY)

FY: All | Component: All | Demographic: All | Citizenship Grouping: All | Title of Authority: All | Reset Filters

FY 2019 2020 2021 2022 (FYTD)



	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	Total
2022 (FYTD)	164,841	174,870	179,256	154,745	164,973								838,685
2021	71,929	72,113	73,994	78,414	101,099	173,277	178,795	180,597	189,034	213,593	209,840	192,001	1,734,686
2020	45,139	42,643	40,565	36,585	36,687	34,460	17,106	23,237	33,049	40,929	50,014	57,674	458,088
2019	60,781	62,469	60,794	58,317	76,545	103,731	109,415	144,116	104,311	81,777	62,707	52,546	977,509

Source: https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters

107. DHS sources have indicated that "there have been more than 300,000 known 'gotaways' —migrants who were not apprehended or turned themselves in and who got past agents -- since fiscal year 2022 began on October 1st."[24] In addition, "former Border Patrol Chief Rodney Scott said there had been approximately 400,000 gotaways in the entirety of FY 2021." [25]

108. Defendants' unlawful termination of the Title 42 policy will induce a significant increase of illegal immigration into the United States, with many migrants asserting non-meritorious asylum claims. Indeed, press reports state that Defendants themselves predict that the Termination Order will create an unprecedented surge at the border that will overwhelm Defendants' capacity to enforce immigration laws at the border—they predict that the daily number of aliens unlawfully trying to enter the United States will nearly *triple*.[26] White House Communications Director Kate Bedingfield admitted on the record that the Termination Order will cause "an influx of people to the border."[27] This predicted influx will injure the Plaintiff States in multiple ways, including through increased expenditures on health care, education, and law enforcement, as well as through increased numbers of crimes.

109. Another district court in this Circuit has found that reducing the likelihood that an alien will be released into the United States reduces the number of aliens who attempt to enter the United States illegally. *Texas v. Biden*, No. 2:21-cv-67, 2021 WL 3603341, at *6, *18–19 (N.D. Tex. Aug. 13, 2021); *cf. Zadvydas v. Davis*, 533 U.S. 678, 713 (2001) (Kennedy, J., dissenting). ("An alien ...

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[24] Melugin, BillFox News, *62,000+ illegal immigrants got past Border Patrol agents in March: sources* (April 1, 2022), https://fxn.ws/37fqLNq.

[25] *Id.*

[26] Nick Miroff and Maria Sacchetti, "Biden officials bracing for unprecedented strains at Mexicoborder if pandemic restrictions lifted," The Washington Post, Mar. 29, 2022. https://www.washingtonpost.com/national-security/2022/03/29/border-pandemic-title-42-immigration/.

[27] Maria Sacchetti and Nick Miroff, "Biden administration to lift pandemic border restrictions," The Washington Post, Mar. 30, 2022, https://www.washingtonpost.com/national-security/2022/03/30/title-42-border-restrictions-no-longer-needed-public-health-cdc-says/.

has less incentive to cooperate or to facilitate expeditious removal when he has been released, even on a supervised basis, than does an alien held at an [ICE] detention facility.")

110. Defendants' unlawful termination of the Title 42 policy creates incentives to cross the border illegally by reducing the cost of being apprehended. Just as with the Migrant Protection Protocols, by removing the carrot of admission into the United States, reduced the number of false asylum claimants by requiring potential asylees to remain in Mexico, *Texas*, 2021 WL 3603341, at *6, *18–19, the Defendants, by removing the stick of mandatory detention, increase the number of illegal entries into the United States by erasing the possibility that an apprehension will result in anything other than the freedom to remain in the United State

111. Since 1982, the Supreme Court has mandated that States provide public education to school-age aliens not lawfully in the United States. *Plyler v. Doe*, 457 U.S. 202, 230 (1982). As a direct result of the influx of migrants that the Termination Order will cause, some of whom will be minors, the Plaintiff States will be compelled to spend additional moneys on education for these additional immigrants. The Termination Order is thus a direct, but-for cause of these imminent injuries.

112. The presence of these aliens in each State violates each State's quasi-sovereign interest in its territory and the welfare of their citizens.

113. The Termination Order will cost Plaintiffs millions, as explained in further detail below.

Arizona

114. As a border state, Arizona is acutely affected by modifications in federal policy regarding immigration.

115. Defendant DHS has previously recognized that Arizona "is directly and concretely affected by changes to DHS rules and policies that have the effect of easing, relaxing, or limiting immigration enforcement. Such changes can negatively impact [Arizona's] law enforcement needs and

budgets, as well as its other important health, safety, and pecuniary interests of the State of Arizona." Exhibit B, Memorandum of Understanding Between DHS and the State of Arizona at 2. DHS has also recognized that "rules, policies, procedures, and decisions that could result in significant increases to the number of people residing in a community" will "result in direct and concrete injuries to [Arizona], including increasing the rate of crime, consumption of public benefits and services, strain upon the healthcare system, and harm to the environment, as well as increased economic competition with the State of Arizona 's current residents for, among other things, employment, housing, goods and services." *Id.* at 3.

116. Arizona is required to expend its scarce resources when DHS acts unlawfully to induce increased illegal immigration. This includes resources expended by Arizona's law enforcement community.

117. Arizona bears substantial costs of incarcerating unauthorized aliens, which amounts to tens of millions of dollars each year, as reflected by Arizona's State Criminal Assistance Program (SCAAP) requests, the great majority of which are not reimbursed by the federal government.

118. Arizona has approximately 275,000 to 365,000 immigrants living in the State that are not lawfully in the United States; about 54% of them do not have health insurance; about 32% of them have incomes below the poverty level; and they cost Arizona taxpayers more than $1.7 billion a year.[28] If more illegal aliens enter the State, that will increase the costs of the State's healthcare system.

[28] The number of unauthorized aliens is notoriously difficult to calculate. Several studies, however, estimate the number of unauthorized aliens in Arizona to be in this approximate range. *See, e.g.*, Unauthorized Immigrant Population Profiles, Migration Policy Institute, https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/AZ (273,000, 54% uninsured); U.S. unauthorized immigrant population estimates by state, Pew Research Center (2016), https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/ (275,000); The Fiscal Burden of Illegal Immigration, Federation for American Immigration Reform (2017), http://fairus.org/sites/default/files/2017-09/Fiscal-Burden-of-Illegal-Immigration-2017.pdf (365,000, $1.7 billion annual cost).

119. Drug cartels use human trafficking routes to also traffic illegal drugs into the United States. Increased illegal immigration means increased quantities of illegal drugs. For example, drug cartels coordinate surges of unauthorized immigrants who cross the border in large groups and then make non-meritorious asylum claims. This serves as a distraction to Border Patrol personnel. While all available Border Patrol personnel are busy processing these aliens' asylum claims, they are unable to patrol the border, which allows drug mules to enter the United States unimpeded. Individuals believed to be cartel drug smugglers are regularly caught on camera crossing the border, dressed in camouflage and carrying weapons to protect their drug loads.[29] Cartel scouts appear to even brazenly "occupy strategically-selected hilltops for dozens of miles inside Arizona," establishing a presence on American territory to track Border Patrol movements and coordinate surges of aliens entering the United States.[30] Even the drugs themselves are becoming more dangerous, as smugglers are trading large bags of marijuana for smaller packs of more potent "cocaine, fentanyl, heroin, [and] meth."[31] In December 2021, police in Scottsdale, Arizona seized 1.7 million fentanyl pills that were worth $9 million; they also seized ten kilograms of powdered fentanyl and one pound of methamphetamine.[32] The seized drugs were from the Sinaloa Cartel.[33] According to the DEA, "[t]he Sinaloa Cartel primarily

[29] Brian Brennan, *'People don't need to die': Border rancher deals with constant flow of migrants, drug packers*, KGUN 9 (May 20, 2019), https://www.kgun9.com/border-watch/people-dont-need-to-die-border-rancher-deals-with-constant-flow-of-migrants-drug-packers

[30] U.S. House of Representatives, Committee on Homeland Security, *Testimony of Jim Chilton on "Examining the Effect of Border Wall on Private and Tribal Landowners"*, (February 27, 2020), https://homeland.house.gov/imo/media/doc/Testimony%20-%20Chilton1.pdf

[31] Natasha Yee, *As marijuana profits fade, cartels increasingly smuggle fentanyl across the border*, (October 18, 2021), https://gilaherald.com/as-marijuana-profits-fade-cartels-increasingly-smuggle-fentanyl-across-the-border/

[32] Steven Hernandez, *Scottsdale police, DEA seize record 1.7 million fentanyl pills in Arizona*, Arizona Republic, (Dec. 16, 2021), https://www.azcentral.com/story/news/local/phoenix-breaking/2021/12/16/authorities-arizona-seize-9-million-fentanyl-pills-narcotics/8929613002/

[33] *Id.*

uses trafficking routes that go through Arizona,"[34] and the Phoenix area is a major cartel drug transshipment hub.[35]

Louisiana

120. Plaintiff Louisiana is also gravely injured by the Termination Order. Louisiana will be required to stretch its scare resources even further under the Termination Order, because the Order will cause an influx of aliens at the border no longer subject to expulsion, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend initially.. The Rule will create increased crime and drug trafficking in Louisiana's communities, requiring additional expenditure by law enforcement. In addition, by incentivizing further illegal immigration, the Rule will force Louisiana to expend limited resources on education, healthcare, public assistance, and general government services.

121. Defendant DHS has previously recognized that Louisiana "is directly and concretely affected by changes to DHS rules and policies that have the effect of easing, relaxing, or limiting immigration enforcement. Such changes can negatively impact [Louisiana's] law enforcement needs and budgets, as well as its other important health, safety, and pecuniary interests of the State of Arizona." Exhibit C, Memorandum of Understanding Between DHS and the Louisiana Department of Justice at 2. DHS has also recognized that "rules, policies, procedures, and decisions that could result in significant increases to the number of people residing in a community" will "result in direct and concrete injuries to [Louisiana], including increasing the rate of crime, consumption of public benefits and services, strain upon the healthcare system, and harm to the environment, as well as increased

[34] *Id.*

[35] Alex Gallagher, *Record fentanyl seizure by Scottsdale cops, DEA*, Scottsdale Progress, (Dec. 19, 2021), https://www.scottsdale.org/news/record-fentanyl-seizure-by-scottsdale-cops-dea/article_fbf7c02e-6074-11ec-91ab-b35932ed58da.html

economic competition with the State of Louisiana's current residents for, among other things, employment, housing, goods and services." *Id.* at 3.

122. Louisiana has approximately 70,000 to 78,000 aliens living in the State that are not lawfully in the United States; more than 70% of them do not have health insurance; about 34% of them have incomes below the poverty level; and they cost Louisiana taxpayers more than $362 million a year.[36] If more illegal aliens enter the State, that will increase the costs of the State's healthcare system.

123. DHS operates multiple alien detention facilities in the Western District of Louisiana, including the Pine Prairie ICE Processing Center in Pine Prairie, Louisiana, and others in Oberlin, Plain Dealing, Jonseboro, Jena, Natchitoches, Monroe, Ferriday, Basile, and Winnfield, Louisiana. DHS releases illegal aliens from those detention facilities to Louisiana cities throughout the Western District, including Lafayette, Monroe and Shreveport. Releases in Lafayette are so common that a California business advertises "immigration bail bonds in Lafayette" and urges illegal immigrants and their families to "contact our Lafayette bail bondsmen" "if you have a family member who finds him or herself in custody of [DHS]." Upon information and belief, DHS "paroles" many illegal immigrants into Louisiana cities without even the minimal security of a bond. The Termination Order will increase the use of DHS detention facilities and lead to the increased release of aliens into the Western District and throughout the State.

[36] *See, e.g.*, Unauthorized Immigrant Population Profiles, Migration Policy Institute, https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/LA (70,000, 73% uninsured, 34% poverty level); U.S. unauthorized immigrant population estimates by state, Pew Research Center (2016), https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/ (70,000); The Fiscal Burden of Illegal Immigration, Federation for American Immigration Reform (2017), http://fairus.org/sites/default/files/2017-09/Fiscal-Burden-of-Illegal-Immigration-2017.pdf (78,820, $362 million annunal cost).

Missouri

124. Missouri is directly and adversely affected by increases in illegal immigration at the southern border. Based on recent statistics, approximately 56 out of every 1,000 unlawful aliens who enter the United States end up residing in Missouri. These unlawful aliens impose pocketbook injuries on Missouri in the form of education, healthcare, and criminal-justice costs. These pocketbook injuries are irreparable because Missouri has no plausible recourse to recoup them.

125. "Missouri likewise faces a cost of verifying lawful immigration status for each additional customer seeking a Missouri driver's license." *Texas*, 2021 WL 3603341, at *10.The total costs to … Missouri … of providing public education for illegal alien children will rise in the future as the number of illegal alien children present in the State increases." *Id.*

126. "Some aliens who … are being released or paroled into the United States and will use state-funded healthcare services or benefits in … Missouri." *Id.* "The total costs to the State will increase as the number of aliens within the state increases." *Id.*

127. Missouri is also a destination state and hub for human-trafficking crimes within the United States, due to its situation at the confluence of several major interstate highways. Such crimes disproportionately afflict illegal aliens, and these crimes (and other crimes committed by illegal aliens) impose irreparable law-enforcement and criminal-justice costs on Missouri. As another district court recently found, "[s]ome aliens who … are being released or paroled into the United States and will commit crimes in … Missouri," and "Missouri is … a destination and transit State for human trafficking of migrants from Central America who have crossed the border illegally." *Id.* Both crimes committed by unlawful aliens, and human-trafficking crimes committed by and against unlawful aliens, inflict irreparable costs on Missouri, both in law-enforcement costs and providing resources for victims. "Human trafficking" arising from and involving increases in unlawful immigration "causes fiscal harm to … Missouri." *Id.*

128. An increased influx of illegal aliens also affect the labor market and reduce job opportunities for U.S. citizens and lawfully present aliens in Missouri, as illegal aliens frequently compete for jobs at lower wages than workers who are lawfully present. Missouri is a State with large agricultural sector. The presence of large numbers of unlawful aliens distorts Missouri's job markets and inflicts irreparable injury on both the State and its citizens.

Alabama

129. Plaintiff Alabama is also injured by the Termination Order. Alabama will be required to stretch its scarce resources even further under the Termination Order, because the Order will cause an influx of aliens at the border no longer subject to expulsion, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend initially. The Termination Order will create increased crime and drug trafficking in Alabama's communities, requiring additional expenditure by law enforcement. In addition, by incentivizing further illegal immigration, the Termination Order will force Alabama to expend limited resources on education, healthcare, public assistance, and general government services.

130. Alabama has approximately 55,000 to 73,000 illegal aliens living in the State; about 68% of them are uninsured; about 34% of them have incomes below the poverty line; and they cost Alabama taxpayers more than $324.9 million a year.[37] If more illegal aliens enter the State, that will increase the costs of the State's healthcare system.

[37] *See, e.g.*, Unauthorized Immigrant Population Profiles, Migration Policy Institute, https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/AL (62,000, 68% uninsured, 34% below poverty level); U.S. unauthorized immigrant population estimates by state, Pew Research Center (2016), https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/ (55,000); The Fiscal Burden of Illegal Immigration, Federation for American Immigration Reform (2017), http://fairus.org/sites/default/files/2017-09/Fiscal-Burden-of-Illegal-Immigration-2017.pdf (73,190, $324.9 million annual cost).

Alaska

131. Plaintiff Alaska is also injured by the Termination Order. Alaska will be required to stretch its scarce resources under the Termination Order, because the Order will cause an influx of aliens at the border no longer subject to expulsion, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend initially. The Termination Order will create increased crime and drug trafficking in Alaska 's communities, requiring additional expenditure by law enforcement. In addition, by incentivizing further illegal immigration, the Termination Order will force Alaska to expend limited resources on education, healthcare, public assistance, and general government services.

132. Alaska has approximately 5,000 to 11,260 illegal aliens living in the State; they cost Alaska taxpayers more than $72 million a year.[38] If more illegal aliens enter the State, that will increase the costs of the State's healthcare system.

Arkansas

133. Plaintiff Arkansas is also injured by the Termination Order. Arkansas will be required to stretch its scarce resources even further under the Termination Order, because the Order will cause an influx of aliens at the border no longer subject to expulsion, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend initially. The Termination Order will create increased crime and drug trafficking in Arkansas's communities, requiring additional expenditure by law enforcement. In

[38] *See, e.g.*, Unauthorized Immigrant Population Profiles, Migration Policy Institute, https://www.migrationpolicy.org/programs/us-immigration-policy-program-data-hub/unauthorized-immigrant-population-profiles (10,000); U.S. unauthorized immigrant population estimates by state, Pew Research Center (2016), https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/ (5,000); The Fiscal Burden of Illegal Immigration, Federation for American Immigration Reform (2017), http://fairus.org/sites/default/files/2017-09/Fiscal-Burden-of-Illegal-Immigration-2017.pdf (11,260; $72 million annual cost).

addition, by incentivizing further illegal immigration, the Termination Order will force Arkansas to expend limited resources on education, healthcare, public assistance, and general government services.

134. Arkansas has approximately 58,000 to 79,000 illegal aliens living in the State; about 63% of them are uninsured; about 30% of them have incomes below the poverty line; and they cost Arkansas taxpayers more than $339.5 million a year.[39] If more illegal aliens enter the State, that will increase the costs of the State's healthcare system.

Florida

135. Plaintiff Florida is also injured by the Termination Order. Florida will be required to stretch its scarce resources even further under the Termination Order, because the Order will cause an influx of aliens at the border no longer subject to expulsion, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend initially. The Termination Order will create increased crime and drug trafficking in Florida's communities, requiring additional expenditure by law enforcement. In addition, by incentivizing further illegal immigration, the Termination Order will force Florida to expend limited resources on education, healthcare, public assistance, and general government services.

136. Florida has approximately 772,000 to 957,000 illegal aliens living in the State; about 61% of them are uninsured; about 28% of them have incomes below the poverty line; and they cost Florida taxpayers more than $4.7 billion a year.[40] If more illegal aliens enter the State, that will increase the costs of the State's healthcare system.

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[39] *See, e.g.*, Unauthorized Immigrant Population Profiles, Migration Policy Institute, https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/AR (58,000, 63% uninsured, 30% below poverty level); U.S. unauthorized immigrant population estimates by state, Pew Research Center (2016), https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/ (55,000); The Fiscal Burden of Illegal Immigration, Federation for American Immigration Reform (2017), http://fairus.org/sites/default/files/2017-09/Fiscal-Burden-of-Illegal-Immigration-2017.pdf (78,820, $339.5 million annual cost).

[40] *See, e.g.*, Unauthorized Immigrant Population Profiles, Migration Policy Institute,

137. Florida spends over $100 million per year incarcerating illegal immigrants who commit crimes in the State. Florida also provides a variety of public benefits regardless of immigration status. In some circumstances, Florida law requires the State to provide benefits to illegal immigrants released at the border. § 443.101(7), Fla. Stat. (providing unemployment benefits for certain aliens who are paroled under 8 U.S.C. § 1182(d)(5)).

Georgia

138. Plaintiff State of Georgia is directly and adversely affected by any changes to federal immigration policy. When illegal immigration increases, Georgia must redirect its scarce resources. The Termination Order will cause an influx of aliens at the border no longer subject to expulsion, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend initially. Illegal aliens in Georgia receive numerous state services, including healthcare, education, drivers-license, and criminal justice-related costs, among others. Ending the Title 42 policy would injure Georgia by increasing the number of illegal aliens receiving these services at its expense.

139. For instance, Georgia has approximately 339,000 to 422,000 aliens living unlawfully in the State; about 70% of them are uninsured; about 36% of them have incomes below the poverty level; and they cost Georgia taxpayers more than $1.8 billion a year.[41] If more illegal aliens enter the State, that will increase the costs of the State's healthcare system.

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https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/FL (772,000, 61% uninsured, 28% below poverty level); U.S. unauthorized immigrant population estimates by state, Pew Research Center (2016), https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/ (775,000); The Fiscal Burden of Illegal Immigration, Federation for American Immigration Reform (2017), http://fairus.org/sites/default/files/2017-09/Fiscal-Burden-of-Illegal-Immigration-2017.pdf (957,100, $4.7 billion annual cost).

[41] *See, e.g.*, Unauthorized Immigrant Population Profiles, Migration Policy Institute, https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/GA (339,000, 70% uninsured, 36% below poverty level); U.S. unauthorized immigrant population estimates by state, Pew Research Center (2016), https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-

140. The CDC's action will also increase crime and criminal justice expenses in Georgia. In fiscal year 2020, which ended September 2020, ICE's Atlanta Office removed 9,137 aliens, of which 5,889 were convicted criminals and 1,111 had pending criminal charges.[42] If additional illegal aliens migrate to Georgia, some will commit crimes. That will impose irreparable law-enforcement and criminal-justice costs on Georgia.

Idaho

141. Plaintiff Idaho is also injured by the Termination Order. Idaho will be required to stretch its scarce resources even further under the Termination Order, because the Order will cause an influx of aliens at the border no longer subject to expulsion, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend initially. The Termination Order will create increased crime and drug trafficking in Idaho's communities, requiring additional expenditure by law enforcement. In addition, by incentivizing further illegal immigration, the Termination Order will force Idaho to expend limited resources on education, healthcare, public assistance, and general government services.

142. Idaho has approximately 29,000 to 51,000 illegal aliens living in the State; about 60% of them are uninsured; about 27% of them have incomes below the poverty line; and they cost Idaho taxpayers more than $225.4 million a year.[43] If more illegal aliens enter the State, that will increase the costs of the State's healthcare system.

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by-state/ (400,000); The Fiscal Burden of Illegal Immigration, Federation for American Immigration Reform (2017), http://fairus.org/sites/default/files/2017-09/Fiscal-Burden-of-Illegal-Immigration-2017.pdf (422,250, $1.8 billion annual cost).

[42] Local Statistics, ERO FY 2020 Report, U.S. Immigration & Customs Enforcement (Oct. 2021), https://www.ice.gov/doclib/news/library/reports/annual-report/ero-fy20-localstatistics.pdf

[43] *See, e.g.*, Unauthorized Immigrant Population Profiles, Migration Policy Institute, https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/ID (29,000, 60% uninsured, 27% below poverty level); U.S. unauthorized immigrant population estimates by state, Pew Research Center (2016), https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/ (35,000); The Fiscal Burden of Illegal Immigration, Federation for American Immigration Reform

Kansas

143. Plaintiff Kansas is also injured by the Termination Order. Kansas will be required to stretch its scarce resources even further under the Termination Order, because the Order will cause an influx of aliens at the border no longer subject to expulsion, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend initially. The Termination Order will create increased crime and drug trafficking in Kansas communities, requiring additional expenditure by law enforcement. In addition, by incentivizing further illegal immigration, the Termination Order will force Kansas to expend limited resources on education, healthcare, public assistance, and general government services.

144. Kansas has approximately 69,000 to 85,000 illegal aliens living in the State; about 64% of them are uninsured; about 25% of them have incomes below the poverty line; and they cost Kansas taxpayers more than $377 million a year.[44] If more illegal aliens enter the State, that will increase the costs of the State's healthcare system.

Kentucky

145. Plaintiff Kentucky is also injured by the Termination Order. Kentucky will be required to stretch its scarce resources even further under the Termination Order, because the Order will cause an influx of aliens at the border no longer subject to expulsion, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the

(2017), http://fairus.org/sites/default/files/2017-09/Fiscal-Burden-of-Illegal-Immigration-2017.pdf (50,670, $225.4 million annual cost).

[44] *See, e.g.*, Unauthorized Immigrant Population Profiles, Migration Policy Institute, https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/KS (69,000, 64% uninsured, 25% below poverty level); U.S. unauthorized immigrant population estimates by state, Pew Research Center (2016), https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/ (75,000); The Fiscal Burden of Illegal Immigration, Federation for American Immigration Reform (2017), http://fairus.org/sites/default/files/2017-09/Fiscal-Burden-of-Illegal-Immigration-2017.pdf (84,450, $377 million annual cost).

number of aliens Defendants fail to apprehend initially. The Termination Order will create increased crime and drug trafficking in Kentucky's communities, requiring additional expenditure by law enforcement. In addition, by incentivizing further illegal immigration, the Termination Order will force Kentucky to expend limited resources on education, healthcare, public assistance, and general government services.

146. Kentucky has approximately 35,000 to 56,000 illegal aliens living in the State; about 60% of them are uninsured; about 37% of them have incomes below the poverty level; and they cost Kentucky taxpayers more than $261 million a year.[45] If more illegal aliens enter the State, that will increase the costs of the State's healthcare system.

Mississippi

147. Plaintiff Mississippi is also injured by the Termination Order. Mississippi will be required to stretch its scarce resources even further under the Termination Order, because the Order will cause an influx of aliens at the border no longer subject to expulsion, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend initially. The Termination Order will create increased crime and drug trafficking in Mississippi's communities, requiring additional expenditure by law enforcement. In addition, by incentivizing further illegal immigration, the Termination Order will force Mississippi to expend limited resources on education, healthcare, public assistance, and general government services.

[45] *See, e.g.*, Unauthorized Immigrant Population Profiles, Migration Policy Institute, https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/KY (46,000, 60% uninsured, 37% below poverty level); U.S. unauthorized immigrant population estimates by state, Pew Research Center (2016), https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/ (35,000); The Fiscal Burden of Illegal Immigration, Federation for American Immigration Reform (2017), http://fairus.org/sites/default/files/2017-09/Fiscal-Burden-of-Illegal-Immigration-2017.pdf (56,300, $261 million annual cost).

148. Mississippi has approximately 20,000 to 28,150 illegal aliens living in the State; about 75% of them are uninsured; about 49% of them have incomes below the poverty level; and they cost Mississippi taxpayers more than $117 million a year.[46] If more illegal aliens enter the State, that will increase the costs of the State's healthcare system.

Montana

149. Plaintiff Montana is also injured by the Termination Order. Montana will be required to stretch its scarce resources even further under the Termination Order, because the Order will cause an influx of aliens at the border no longer subject to expulsion, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend initially. The Termination Order will create increased crime and drug trafficking in Montana communities, requiring additional expenditure by law enforcement. In addition, by incentivizing further illegal immigration, the Termination Order will force Montana to expend limited resources on education, healthcare, public assistance, and general government services.

150. Montana has approximately 3,000 to 6,000 illegal aliens living in the State, and they cost Montana taxpayers more than $27 million a year.[47] If more illegal aliens enter the State, that will increase the costs of the State's healthcare system.

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[46] *See*, *e.g.*, Unauthorized Immigrant Population Profiles, Migration Policy Institute, https://www.migrationpolicy.org/programs/us-immigration-policy-program-data-hub/unauthorized-immigrant-population-profiles#MS (25,000, 75% uninsured, 49% below poverty level); U.S. Unauthorized immigrant population estimates by state, Pew Research Center (2016), https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/ (20,000); The Fiscal Burden of Illegal Immigration, Federation for American Immigration Reform (2017), https://www.fairus.org/sites/default/files/2017-09/Fiscal-Burden-of-Illegal-Immigration-2017.pdf (28,150, $117 million annual cost).

[47] *See, e.g.*, Unauthorized Immigrant Population Profiles, Migration Policy Institute, https://www.migrationpolicy.org/programs/us-immigration-policy-program-data-hub/unauthorized-immigrant-population-profiles#MT (3,000); U.S. unauthorized immigrant population estimates by state, Pew Research Center (2016), https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/ (<5,000); The Fiscal Burden of Illegal Immigration, Federation for American Immigration Reform (2017), http://fairus.org/sites/default/files/2017-09/Fiscal-Burden-of-Illegal-

Nebraska

151. Plaintiff Nebraska is also injured by the Termination Order. Nebraska will be required to stretch its scarce resources even further under the Termination Order, because the Order will cause an influx of aliens at the border no longer subject to expulsion, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend initially. The Termination Order will create increased crime and drug trafficking in Nebraska's communities, requiring additional expenditure by law enforcement. In addition, by incentivizing further illegal immigration, the Termination Order will force Nebraska to expend limited resources on education, healthcare, public assistance, and general government services.

152. Nebraska has approximately 42,000 to 60,000 illegal aliens living in the State; about 56% of them are uninsured; about 30% of them have incomes below the poverty line; and they cost Nebraska taxpayers more than $233.1 million a year.[48] If more illegal aliens enter the State, that will increase the costs of the State's healthcare system.

Ohio

153. Plaintiff Ohio is also affected by the Termination Order. By drastically increasing the number of aliens who enter the United States without legal authorization, previously expelled under the Title 42 Order, Ohio will be forced to expend limited resources on education, healthcare, public assistance, and general government services on those aliens who are either not apprehended at the border or who are released and travel to Ohio. Ohio, according to a 2019 estimate, has almost 90,000

Immigration-2017.pdf (<6,000, $27 million annual cost).

[48] *See, e.g.*, Unauthorized Immigrant Population Profiles, Migration Policy Institute, https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/NE (42,000, 56% uninsured, 30% below poverty level); U.S. unauthorized immigrant population estimates by state, Pew Research Center (2016), https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/ (60,000); The Fiscal Burden of Illegal Immigration, Federation for American Immigration Reform (2017), http://fairus.org/sites/default/files/2017-09/Fiscal-Burden-of-Illegal-Immigration-2017.pdf (50,670, $233.1 million annual cost).

illegal migrants living in the State.[49] According to the same estimate, half of this population is uninsured, two-thirds live below 200 percent of the poverty level, and 92 percent of school aged children attend school. Ohio is required to pay the cost of emergency medical services for uninsured immigrants who otherwise qualify for Medicaid, through the Emergency Medicaid program. Any increase in this population will increase costs to the State.

154. In addition, Defendants will be unable to adequately screen, mitigate, and treat for communicable diseases—of all types—when illegal border crossings (including crossings of "covered aliens") reach their predicted levels. This presents a serious threat to the public health of Ohio and every State where the unvetted aliens travel.

Oklahoma

155. Plaintiff Oklahoma is also injured by the Termination Order. Oklahoma will be required to stretch its scarce resources even further under the Termination Order, because the Order will cause an influx of aliens at the border no longer subject to expulsion, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend initially. The Termination Order will create increased crime and drug trafficking in Oklahoma's communities, requiring additional expenditure by law enforcement. In addition, by incentivizing further illegal immigration, the Termination Order will force Oklahoma to expend limited resources on education, healthcare, public assistance, and general government services.

156. Oklahoma has approximately 90,000 to 107,000 illegal aliens living in the State; about 68% of them are uninsured; about 27% of them have incomes below the poverty line; and they cost

[49] Profile of the Unauthorized Population: Ohio, Migration Policy Institute (last visited Nov. 9, 2021), https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/OH.

Oklahoma taxpayers more than $467 million a year.[50] If more illegal aliens enter the State, that will increase the costs of the State's healthcare system.

South Carolina

157. Plaintiff South Carolina is also injured by the Termination Order. South Carolina will be required to stretch its scarce resources even further under the Termination Order, because the Order will cause an influx of aliens at the border no longer subject to expulsion, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend initially. The Termination Order will create increased crime and drug trafficking in South Carolina's communities, requiring additional expenditure by law enforcement. In addition, by incentivizing further illegal immigration, the Termination Order will force South Carolina to expend limited resources on education, healthcare, public assistance, and general government services.

158. South Carolina has approximately 88,000 to 98,000 illegal aliens living in the State; about 69% of them are uninsured; about 33% of them have incomes below the poverty line; and they cost South Carolina taxpayers more than $471 million a year.[51] If more illegal aliens enter the State, that will increase the costs of the State's healthcare system.

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[50] *See, e.g.*, Unauthorized Immigrant Population Profiles, Migration Policy Institute, https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/OK (90,000, 68% uninsured, 27% below poverty level); U.S. unauthorized immigrant population estimates by state, Pew Research Center (2016), https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/ (85,000); The Fiscal Burden of Illegal Immigration, Federation for American Immigration Reform (2017), http://fairus.org/sites/default/files/2017-09/Fiscal-Burden-of-Illegal-Immigration-2017.pdf (106,970, $467 million annual cost).

[51] *See, e.g.*, Unauthorized Immigrant Population Profiles, Migration Policy Institute, https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/SC (88,000, 69% uninsured, 33% below poverty level); U.S. unauthorized immigrant population estimates by state, Pew Research Center (2016), https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/ (85,000); The Fiscal Burden of Illegal Immigration, Federation for American Immigration Reform (2017), http://fairus.org/sites/default/files/2017-09/Fiscal-Burden-of-Illegal-Immigration-2017.pdf (95,710, $471 million annual cost).

Tennessee

159. Plaintiff Tennessee is also injured by the Termination Order. Tennessee will be required to stretch its scarce resources even further under the Termination Order, because the Order will cause an influx of aliens at the border no longer subject to expulsion, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend initially. The Termination Order will create increased crime and drug trafficking in Tennessee's communities, requiring additional expenditure by law enforcement. In addition, by incentivizing further illegal immigration, the Termination Order will force Tennessee to expend limited resources on education, healthcare, public assistance, and general government services for the influx of aliens

160. Tennessee has approximately 128,000 to 135,000 illegal aliens living in the State; about 73% of them are uninsured; about 30% of them have incomes below the poverty line; and they cost Tennessee taxpayers more than $593 million a year.[52] If more illegal aliens enter the State, that will increase the costs of the State's healthcare system.

Utah

161. Plaintiff Utah is also injured by the Termination Order. Utah will be required to stretch its scarce resources even further under the Termination Order, because the Order will cause an influx of aliens at the border no longer subject to expulsion, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens

[52] *See, e.g.*, Unauthorized Immigrant Population Profiles, Migration Policy Institute, https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/TN (128,000, 73% uninsured, 30% below poverty level); U.S. unauthorized immigrant population estimates by state, Pew Research Center (2016), https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/ (130,000); The Fiscal Burden of Illegal Immigration, Federation for American Immigration Reform (2017), http://fairus.org/sites/default/files/2017-09/Fiscal-Burden-of-Illegal-Immigration-2017.pdf (135,120, $593 million annual cost).

Defendants fail to apprehend initially. The Termination Order will create increased crime and drug trafficking in Utah's communities, requiring additional expenditure by law enforcement. In addition, by incentivizing further illegal immigration, the Termination Order will force Utah to expend limited resources on education, healthcare, public assistance, and general government services.

162. Utah has approximately 89,000 to 113,000 illegal aliens living in the State; about 61% of them are uninsured; about 23% of them have incomes below the poverty line; and they cost Utah taxpayers more than $521 million a year.[53] If more illegal aliens enter the State, that will increase the costs of the State's healthcare system.

West Virginia

163. Plaintiff West Virginia is also injured by the Termination Order. West Virginia will be required to stretch its scarce resources even further under the Termination Order, because the Order will cause an influx of aliens at the border no longer subject to expulsion, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend initially. The Termination Order will create increased crime and drug trafficking in West Virginia's communities, requiring additional expenditure by law enforcement. In addition, by incentivizing further illegal immigration, the Termination Order will force West Virginia to expend limited resources on education, healthcare, public assistance, and general government services.

[53] *See, e.g.*, Unauthorized Immigrant Population Profiles, Migration Policy Institute, https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/UT (89,000, 61% uninsured, 23% below poverty level); U.S. unauthorized immigrant population estimates by state, Pew Research Center (2016), https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/ (95,000); The Fiscal Burden of Illegal Immigration, Federation for American Immigration Reform (2017), http://fairus.org/sites/default/files/2017-09/Fiscal-Burden-of-Illegal-Immigration-2017.pdf (112,600, $521 million annual cost).

164. West Virginia has approximately 4,000 to 6,000 illegal aliens living in the State, and they cost West Virginia taxpayers more than $26.3 million a year.[54] If more illegal aliens enter the State, that will increase the costs of the State's healthcare system.

Wyoming

165. Plaintiff Wyoming is also injured by the Termination Order. Wyoming will be required to stretch its scarce resources even further under the Termination Order, because the Order will cause an influx of aliens at the border no longer subject to expulsion, causing Defendants to release hundreds of thousands of aliens into the United States monthly and similarly increasing the number of aliens Defendants fail to apprehend initially. The Termination Order will create increased crime and drug trafficking in Wyoming's communities, requiring additional expenditure by law enforcement. In addition, by incentivizing further illegal immigration, the Termination Order will force Wyoming to expend limited resources on education, healthcare, public assistance, and general government services.

166. Wyoming has approximately 5,000 to 7,000 illegal aliens living in the State, and they cost Wyoming taxpayers more than $26.1 million a year.[55] If more illegal aliens enter the State, that will increase the costs of the State's healthcare system.

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[54] *See, e.g.*, Unauthorized Immigrant Population Profiles, Migration Policy Institute, https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/WV (4,000); U.S. unauthorized immigrant population estimates by state, Pew Research Center (2016), https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/ (<5,000); The Fiscal Burden of Illegal Immigration, Federation for American Immigration Reform (2017), http://fairus.org/sites/default/files/2017-09/Fiscal-Burden-of-Illegal-Immigration-2017.pdf (<6,000, $26.3 million annual cost).

[55] *See, e.g.*, Unauthorized Immigrant Population Profiles, Migration Policy Institute, https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/WY (7,000); U.S. unauthorized immigrant population estimates by state, Pew Research Center (2016), https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/ (5,000); The Fiscal Burden of Illegal Immigration, Federation for American Immigration Reform (2017), http://fairus.org/sites/default/files/2017-09/Fiscal-Burden-of-Illegal-Immigration-2017.pdf (<6,000, $26.1 million annual cost).

All Plaintiffs

167. The CDC's Termination Order will result in the entry of tens or hundreds of thousands of aliens unlawfully entering the United States, who would otherwise not be able to gain entry into the United States. This, in turn, will cause Plaintiff States to spend money on healthcare, detention, education, and other services for aliens that would otherwise not have to be spent. For example, Arizona, Louisiana, Missouri, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Mississippi, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, Utah, West Virginia, and Wyoming are required to spend state monies on Emergency Medicaid, including for unauthorized aliens. 42 C.F.R. § 440.255(c).

168. By ignoring the requirements of the INA and PHSA, and thus facilitating the entry of unauthorized aliens into the United States, the Termination Order encourages a greater influx of unauthorized aliens into Plaintiff States, further increasing law enforcement costs in Plaintiff States, including costs related to coordinated activity between federal and state law enforcement agencies in the pursuit of suspected unauthorized aliens.

169. Federal law also requires that emergency medical services be provided to unlawfully present aliens. 42 C.F.R. § 440.255(c).

170. Plaintiff States' emergency medical providers deliver millions of dollars in medical services to unauthorized aliens each year. These costs are not fully reimbursed by the federal government or the aliens themselves.

171. While these costs are impactful in typical years, the COVID-19 pandemic makes the potential for harm to Plaintiff States through additional emergency healthcare costs to unauthorized aliens exceptionally high.

172. The Termination Order necessarily increases the number of aliens in Arizona, Louisiana, Missouri, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Mississippi,

Montana, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, Utah, West Virginia, and Wyoming who are subject to receiving such medical care at the expense of Plaintiff States' healthcare institutions.

173. The Termination Order will allow a far greater number of aliens with meritless asylum claims to enter the United States. Such aliens rarely leave the United States of their own accord, and Defendants rarely remove such aliens, even after their asylum claims have been denied. The Termination Order will therefore increase Plaintiff States' costs of providing emergency medical care to these individuals who would otherwise never have been allowed into the United States. Additionally, the Termination Order encourages a greater influx of unauthorized aliens into Plaintiff States, further increasing the population of unauthorized aliens for whom Plaintiff States must bear the cost of emergency medical care, education, and other social services.

174. The Termination Order will increase illegal immigration into the United States. Some of the additional illegal aliens will migrate into each of the Plaintiff States, and some of those aliens will commit crimes in each of the Plaintiff States. The increased number of illegal aliens in the Plaintiff States will thus also increase crime and criminal justice expenses in Plaintiff States, thus injuring the States through increased law enforcement, incarceration, and crime prevention costs. The increased crime will also injure the citizens of Plaintiff States.

175. In addition, Defendants will be unable to adequately screen, mitigate, and treat for communicable diseases—of all types—when illegal border crossings (including crossings of "covered aliens") reach their predicted levels. This presents a serious threat to the public health of Plaintiff States.

CLAIMS FOR RELIEF

COUNT I
Administrative Procedure Act, 5 U.S.C. § 706(2)(D)
Lack of Notice and Comment

176. Plaintiff States repeat and incorporate by reference each of the Complaint's allegations stated above.

177. The APA provides that courts must "hold unlawful and set aside agency action" that is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

178. The APA requires agencies to publish notice of all "proposed rule making" in the Federal Register, *id.* § 553(b), and to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," *id.* § 553(c). The Termination Order, therefore, only can be issued, if at all, pursuant to notice-and-comment rulemaking under the APA. 5 U.S.C. § 553.

179. Such requirements "are not mere formalities" but rather "are basic to our system of administrative law." *NRDC v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 115 (2d Cir. 2018). "Section 553 was enacted to give the public an opportunity to participate in the rule-making process. It also enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those who are regulated." *U.S. Dep't of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1153 n.17 (5th Cir. 1984); *see also NRDC*, 894 F.3d at 115 (notice and comment serves "the public interest by providing a forum for the robust debate of competing and frequently complicated policy considerations having far-reaching implications and, in so doing, foster reasoned decisionmaking"); *Spring Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (notice and comment "ensures fairness to affected parties[] and provides a well-developed record that enhances the quality of judicial review").

180. The Defendants did not conduct the statutorily required notice-and-comment process for the Termination Order.

181. The Termination Order is not an interpretive rule, general statement of policy, nor is it a rule of agency organization, procedure, or practice otherwise exempt from notice-and-comment rulemaking. Rather, the Termination Order is a substantive rule for APA purposes because it binds agency discretion. 5 U.S.C. § 551(4)–(5). Further, it is a final order because it represents the culmination of the agency's consideration and affects the rights and obligations of those to whom they apply. Indeed, the title of the Termination Order the "right" affected by the rule, specifically "the right to introduce certain persons from countries where a quarantinable communicable disease exists." Ex. A at 1.

182. The CDC offered two bases for excusing notice-and-comment requirements: the good cause exception and the foreign affairs exception. Ex. A at 29. In assessing whether good cause exists, this Court "must rely only on the 'basis articulated by the agency itself' at the time of the rulemaking. 'Post hoc explanations'" do not suffice. *United States v. Johnson*, 632 F.3d 912, 928 (5th Cir. 2011) (cleaned up).

183. The good-cause exception to the APA's notice-and-comment requirement does not apply here, and Defendants' rationale for invoking that exception is insufficient as a matter of law. *See supra* ¶¶ 15-20.

184. Defendants' attempt to invoke the good cause exception ignores that there is a difference between putting in place emergency measures against the backdrop of a rapidly *escalating* pandemic of epic proportions versus taking action in the context of a slowly *dissipating* pandemic—it may be an emergency at the start of the pandemic, when quick action is needed, but not when it is tapering off slowly at a predictable pace. For example, there was ample time for Defendants to notify the public of its intention to revoke and to gather and consider comments on that proposal. On February 2,

2021, President Biden signed Executive Order 14010, in which he ordered that "[t]he Secretary of HHS and the Director of CDC, in consultation with the Secretary of Homeland Security, shall promptly review and determine whether termination, rescission, or modification of the [Title 42 orders] is necessary and appropriate." 86 Fed. Reg. 8267. Defendants have therefore been considering the ending Title 42 for over 14 months. Defendants have had ample time to put potential termination up for notice-and-comment. And Defendants' preparations for the Termination Order has apparently been continuous up until the moment of its issuance. On March 17, 2022, in response to a question about the possible termination of the Title 42 policy, White House spokesperson Vedant Patel affirmed that "the Administration is doing our due diligence to prepare for potential changes at the border."[56] Apparently, however, that diligence did not include fulfilling the Administration's legal obligation under the APA to subject their planned policy change to notice and comment.

185. Nor does the foreign affairs exception to the APA's notice-and-comment requirement apply. "[T]he foreign affairs exception requires the Government to do more than merely recite that the Rule 'implicates' foreign affairs." *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 775 (9th Cir. 2018). A mere "reference in [a] Rule ... to our 'southern border with Mexico' is not sufficient." *Id.* Thus, "the foreign affairs exception applies in the immigration context only when ordinary application of the public rulemaking provisions will provoke definitely undesirable international consequences…. [I]t would be problematic if incidental foreign affairs effects eliminated public participation in this entire area of administrative law." *Id.* at 776 (cleaned up) (citations and quotation marks omitted).

[56] Jonathan Swan and Stef W. Kight, "Scoop: Biden officials fear "mass migration event" if COVID policies end," Axios, Mar. 17, 2022, https://www.axios.com/biden-border-mexico-migrants-title-42-a91b6441-2197-463f-ab1f-2435824a9566.html.

186. In the immigration context, the foreign affairs exception only applies if "the public rulemaking provisions [w]ould provoke definitely undesirable international consequences"; otherwise, "the foreign affairs exception would become distended." *Zhang v. Slattery*, 55 F.3d 732, 744 (2d Cir. 1995) (citation omitted), superseded by statute on other grounds, by 8 U.S.C. § 1101(a)(42). In the Termination Order, Defendants never even claim at all that the Title 42 policy–either its continuance or termination—implicates any "undesirable international consequences." Instead, Defendants attempt to invoke the foreign affairs exception merely by making the obvious and unexceptional disclosure that the Title 42 policy "concerns ongoing discussions with Canada, Mexico, and other countries regarding immigration." Ex. A at 29. This weak attempt to invoke the foreign affairs exception is insufficient. That the United States is engaged in "ongoing discussions with Canada, Mexico, and other countries" *id.* at 29, does not entitle the Defendants to except the Termination Order from the APA's procedures. There is no evidence that complying with the APA's rulemaking procedures would cause a diplomatic incident.

187. Under these circumstances, Defendants' failure to comply with the APA's notice and comment provisions is fatal to the Rule. *Id.* at 928-29 ("Without good cause, we must enforce Congress's choice in favor of the traditional, deliberative rulemaking process.").

COUNT II
Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C)
Arbitrary and Capricious Agency Action
Contrary to 8 U.S.C. §§ 103(g)

188. Plaintiff States repeat and incorporate by reference each of the Complaint's allegations stated above.

189. Under the APA, a court must "hold unlawful and set aside agency action" that is arbitrary or capricious or otherwise not in accordance with law or contrary to the Constitution. 5 U.S.C. § 706(2)(A).

190. "[A]gency action is lawful only if it rests on a consideration of the relevant factors" and "important aspects of the problem." *Michigan v. EPA*, 576 U.S. 743, 750-52 (2015) (requiring "reasoned decisionmaking"). This means agencies must "examine all relevant factors and record evidence." *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017).

191. For starters, an agency cannot "entirely fail[] to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Gresham v. Azar*, 363 F. Supp. 3d 165, 177 (D.D.C. 2019) ("The bottom line: the Secretary did no more than acknowledge—in a conclusory manner, no less—that commenters forecast a loss in Medicaid coverage.").

192. Further, agencies must actually analyze the relevant factors. "'Stating that a factor was considered ... is not a substitute for considering it.'" *Texas v. Biden*, 10 F.4th 538, 556 (5th Cir. 2021) The agency must instead provide more than "conclusory statements" to prove it considered the relevant statutory factors. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016).

193. The Termination Order is arbitrary and capricious for several independently sufficient reasons.

194. *First*, Defendants failed to estimate or account for the costs to the States of the Termination Order, such as the increased health care costs for aliens infected with COVID-19 and the cost of increased illegal immigration caused by the Termination Order, and the presence of much greater numbers of paroled aliens with non-meritorious asylum claims who were induced to enter the United States because of the Termination Order.

195. Federal policy as it relates to immigration "has more than just an incidental effect on the States" because "the States engage in an immigration cost-sharing partnership" with the federal government. *Arizona*, 2022 WL 839672, at *24. Defendants, therefore "cannot so easily dismiss how [their] administration of the immigration laws impacts the States." *Id.* "Immigration 'ha[s] a discernable

impact on traditional state concerns,' considering that 'unchecked unlawful migration might impair the State's economy generally, or the State's ability to provide some important service.'" *Id.* at *30 (quoting *Plyler*, 457 U.S. at 228 n.23) (alteration in original).

196. Thus, when DHS "only considered whether its enforcement policies generally influence state expenditures" and "gave no explanation of how its policy ... might increase state criminal justice expenses," the Southern District of Ohio recently found that DHS had "'entirely failed to consider' an important consequence of its policy," and its rule was therefore arbitrary and capricious. *Id.* (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The CDC has committed the same APA violation here by disclaiming any responsibility for analyzing negative impacts on the States from its Termination Order.

197. *Second* and relatedly, the Termination Order is arbitrary and capricious because the Defendants did not consider Plaintiffs States' reliance interests in the continuation of the Title 42 policy. In particular, the Defendants did not consider whether States relied on continuation of the Title 42 policy when Plaintiffs determined how they would marshal and distribute their resources to address the public-health, safety, and economic effects of the COVID-19 pandemic, as well as their decisions about resource allocations to deal with the number of unauthorized aliens entering their states.

198. Defendants' cursory dismissal of the existence of any reliance interests in the Title 42 policy misses the mark. Ex. A at 23-24. Their analysis is entirely legal in nature and fails to undertake any kind of policy analysis of the actual real-world effects of the Title 42 policy and how States might have legitimately relied on it. The Termination Order even acknowledges that "state or local government[s]" may have "reliance interest[s]" in the Title 42 policy, but characterizes such interests as "misplaced" and claims that delaying the effective date of Termination Order until May 23 would be enough time for states "to adjust their planning in anticipation of the full resumption of Title 8 border

processing." *Id.* at 29. The Termination Order offers no explanation, however, of how 53 days might be enough time for states to "adjust their planning," when the Title 42 policy has been in place for more than two years and when Defendants have in the meantime abdicated most of their other border enforcement obligations, thus leaving Title 42 as the only remaining bulwark against the rising flood of migrants pouring across the border illegally. The Termination Order is arbitrary and capricious because it utterly ignores Plaintiffs' reliance interests, and it must therefore be set aside. *See DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913-14 (2020).

199. *Third*, Defendants also failed to consider the immigration consequences of the Termination Order. Indeed, this failure is particularly brazen, as press reports state that Defendants have made internal assessments of the immigration effects, and are predicting unprecedented waves of new illegal immigration. *See supra* ¶¶ 7, 108. Indeed, the Termination Order itself acknowledges the likelihood of these public health and immigration consequences, as it delays the effective date of Termination Order until May 23, 2022 "to give DHS time to implement additional COVID-19 mitigation measures" and "to provide DHS time to implement operational plans for fully resuming Title 8 processing." Ex. A at 26, 28. By delaying the effective date until May 23, Defendants thus recognize the Termination Order will have consequences and that they have the authority and capacity to delay the Termination Order to account for immigration-related consequences. But they failed to analyze whether they should exercise that authority in a different manner given the enormous immigration consequences that even they predict will occur.

200. *Fourth*, Defendants failed to consider or arbitrarily rejected obvious alternatives to Termination Order, such as continuing the Title 42 policy, rigorous enforcement of immigration laws to deter illegal immigration, or implementing in good faith the Migrant Protection Protocols ("MPP") and withdrawing their challenge to the Fifth Circuit's invalidation of it.

201. *Fifth*, Defendants failed to consider obvious and relevant consequences of the Termination Order, such as the public health and public policy consequences of the emergence of new variants of the COVID-19 virus.

202. *Sixth*, Defendants failed to justify their deviation from prior practice of continuing the Title 42 policy.

203. *Seventh*, Defendants have failed to analyze and consider how their own failure to maintain alien detention capacity affects the purported need to parole aliens into the United States. For example, at the same time Defendants claim that their detention facilities are at overcapacity, Defendants have submitted budget requests to Congress requesting for a *decrease* in funding for detention and detention facilities.[57] Moreover, Defendants have affirmatively degraded their own detention capacity by cancelling contracts with private detention facilities and by closing detention facilities.[58]

204. *Eighth*, Defendants failed to consider alternative timing of the Termination so that the Termination would not coincide with the current unprecedented, continuing surge of migrants unlawfully crossing the border.

205. *Ninth*, Defendants failed to consider accumulated groups of aliens (*e.g.* Haitians) waiting on the Mexican side of the border who are waiting to cross the moment Title 42 is rescinded.[59] "Department of Homeland Security intelligence estimates that perhaps 25,000 migrants already are

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[57] Eileen Sullivan, "Biden to Ask Congress for 9,000 Fewer Immigration Detention Beds," New York Times, Mar. 25, 2022, https://www.nytimes.com/2022/03/25/us/politics/biden-immigration-detention-beds.html.

[58] *Id.*; Priscilla Alvarez, "Biden administration to close two immigration detention centers that came under scrutiny," CNN. May 20, 2021, https://www.cnn.com/2021/05/20/politics/ice-detention-center/index.html.

[59] Maria Sacchetti and Nick Miroff, "Biden administration to lift pandemic border restrictions," The Washington Post, Mar. 30, 2022, https://www.washingtonpost.com/national-security/2022/03/30/title-42-border-restrictions-no-longer-needed-public-health-cdc-says/ ("Thousands [of] Haitian migrants are believed to be waiting in Mexico in anticipation of the end of Title 42, according to DHS officials familiar with the government's planning and preparations.").

waiting in Mexican shelters just south of the border for Title 42 to end."[60] A federal law enforcement official told CNN that the number of aliens in northern Mexico waiting to cross illegally into the United States is "[b]etween 30,000 to 60,000."[61]

206. *Tenth*, Defendants failed adequately to consider the spread of infection in DHS facilities resulting from Title 42 termination, because the INA requires that aliens awaiting removal proceedings must be detained.

207. *Eleventh*, Defendants failed to consider the interaction of the Termination with termination of MPP.

208. This list is not exclusive but merely illustrative of the Termination Order's obvious deficiencies. For each of these independently sufficient reasons and others, the Rule is arbitrary and capricious.

PRAYER FOR RELIEF

NOW, THEREFORE, Plaintiffs request an order and judgment:

1. Declaring, under 28 U.S.C. § 2201, that the Termination Order violates the APA because it was promulgated without notice and comment;
2. Declaring, under 28 U.S.C. § 2201, that the Termination Order is arbitrary and capricious and unlawful under the APA;
3. Vacating the Termination Order;
4. Preliminarily and permanently enjoining, without bond, Defendants from applying the Termination Order;

[60] Jonathan Swan and Stef W. Kight, "Scoop: Biden officials fear "mass migration event" if COVID policies end," Axios, Mar 17., 2022, https://www.axios.com/biden-border-mexico-migrants-title-42-a91b6441-2197-463f-ab1f-2435824a9566.html.

[61] Catherine E. Shoichet, "We're expecting a big increase in migrants at the US-Mexico border. But this time is different." CNN, Apr. 1, 2022, https://www.cnn.com/2022/03/31/politics/border-title-42-whats-next-cec/index.html.

5. Awarding Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees, pursuant to 28 U.S.C. § 2412; and

6. Granting any and all other such relief as the Court finds appropriate.

Dated: April 14, 2022

Respectfully submitted,

By: */s/ Elizabeth B. Murrill*

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

THE STATE OF ARIZONA, By and through its Attorney General, Mark Brnovich, et al., PLAINTIFFS, v. CENTERS FOR DISEASE CONTROL & PREVENTION; et al., DEFENDANTS.	CIVIL ACTION NO. 6:22-cv-00885-RRS-CBW

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The Plaintiff States seek this Court's intervention to forestall an imminent calamity: Defendants' attempt to terminate the Title 42 system, which is the only safety valve preventing this Administration's already disastrous border control policies from descending into an unmitigated catastrophe. Indeed, it is estimated that *half a million* migrants will illegally cross into the United States in the *first month* that the challenged order ("Termination Order" or "Order") goes into effect. Ex. A, Declaration of James K. Rogers ("Rogers Decl."), Ex. 5. The Administration has presented *no* possible way it can identify, quarantine, treat, or mitigate communicable disease risk given the flood of border crossings it predicts. If not enjoined, the Termination Order will inflict devastating injuries upon the Plaintiff States and the entire nation.

This is not merely the opinion of the Plaintiff States, but an expectation widely shared even by many of the Administration's otherwise-ardent *supporters*. Specifically, no less than seven Democratic Senators so far have come out in opposition to the Title 42 Termination, and have even gone so far as to describe it as a "*frightening decision*" (Senator Manchin - WV) and to explain that "Ending Title 42 is expected to cause a *significant increase* of migration to the United States and put more pressure on an already broken system." (Senator Tester - MT). Rogers Decl. Exs. 2, 15 (emphases added). Those same senators are equally clear that the Administration has no plan for addressing the resulting surge in unlawful border crossings that the Termination Order will occasion, explaining variously:

- The "decision to announce an end to Title 42 despite not yet having a comprehensive plan ready shows a lack of understanding about the crisis at our border." (Senator Sinema - AZ).
- "Ending Title 42 prematurely will likely lead to a migrant surge that the administration does not appear to be ready for." (Senator Hassan - NH).
- "We are nowhere near prepared to deal with that influx." (Senator Manchin - WV).
- "This is the wrong way to do this and it will leave the administration unprepared for a surge at the border." (Senator Cortez Masto - NV).

- "I think this is the wrong time and I haven't seen a plan that gives me comfort." (Senator Warnock - GA).

Rogers Decl. Exs. 10, 13-16.

Moreover, the Administration itself has admitted that the Termination Order *will* cause a massive increase of illegal crossings, with the White House's own Communications Director outright declaring that the Administration "ha[s] *every expectation* that when the CDC ultimately decides it's appropriate to lift Title 42, *there will be an influx* of people to the border." Rogers Decl. Ex. 9 (emphasis added). U.S. Customs and Border Protection Commissioner Chris Magnus issued a public statement admitting that "[a]s a result of the CDC's termination of its Title 42 public health order, we will likely face an increase in encounters above the current high levels." Rogers Decl. Ex. 20.

Thus, there should be no serious debate that the Termination Order will cause a dramatic surge in illegal migration into the U.S. if it is not enjoined. And the Fifth Circuit has already recognized, the States will suffer harms establishing Article III standing "if the total number of in-State aliens increase." *Texas v. Biden*, 20 F.4th 928, 969 (5th Cir. 2021) *cert. granted* 142 S. Ct. 1098 (2022). Those harms occur principally in the form of increased expenditures on law enforcement (including jails and prisons), health care, and education. And because the States cannot recover against the United States and its agencies for these harms, their irrecoverable injuries constitute irreparable harm.

The Termination Order also stands out as a radical outlier in Administration policy. While the Order is expressly premised on claimed improvements in the Covid-19 pandemic, those same improvements notably have not resulted in Defendants: (1) lifting the CDC transportation mask mandate, (2) loosening or repealing any of their numerous vaccination mandates, or (3) ending their relentless campaign to discharge members of our military who have applied for religious exemptions for vaccination requirements—which have been almost uniformly denied. First Amended Complaint ("FAC") ¶¶ 9, 13. Amazingly, the "science" underlying these discordant Covid-19 measures just happens to align perfectly with the Administration's political assessments of the relative desirability of

those measures for their partisan objectives. This Court, however, is "'not required to exhibit a naiveté from which ordinary citizens are free.'" *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) (citation omitted).

Defendants' Termination Order is not merely terrible public policy that will inflict enormous injuries upon the States. It is also profoundly illegal. That is principally so for two reasons: (1) Defendants unlawfully flouted the notice-and-comment requirements for rulemaking under the Administrative Procedure Act ("APA"), and (2) Defendants' Order is arbitrary and capricious, thus violating the APA, because it has numerous omissions that each independently render it illegal.

As to the notice-and-comment claim, Defendants seek to excuse their flouting of that APA requirement for two reasons: invoking the "good cause" and "foreign affairs" exceptions of 5 U.S.C. §§ 553(a)(1) and (b)(3)(B). But neither applies.

As to the good cause exception, CDC had *ample* time to take public comment on revoking Title 42 and lacks any pressing need or minimally persuasive excuse for failing to do so. Indeed, CDC had been considering taking that action for *fourteen months*—far more time than needed to take public comment. Defendants also ignore completely that CDC *did take* public comment when implementing the Title 42 system, and offers no reason why it could not do so again. Moreover, while the initial emergency promulgation of Title 42 properly invoked the good cause exception—because its issuance was during the rapidly unfolding beginning of the Covid-19 pandemic—the same is not true here. This Order arises two full years into the pandemic, where it is waning in some areas while a new variant threatens others. The initial exigency simply does not exist anymore. There is no "pandemic exception" to notice-and-comment requirements, particularly two years into it.

Consider next the foreign affairs exception, which "applies in the immigration context only when ordinary application of the public rulemaking provisions [*i.e.*, taking public comment] *will provoke definitely undesirable international consequences*." *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 775–76

(9th Cir. 2018) (cleaned up) (emphasis added). But CDC offered only a single unspecific sentence supporting its foreign-affairs-exception claim, which does not identify *any consequences whatsoever*. Instead, it treats the mere existence of talks with Canada and Mexico about the same subject as a *carte blanche* blessing to dispense with notice-and-comment rulemaking entirely. It is not.

The Termination Order is also unlawful because it is arbitrary and capricious. That is so for two overarching reasons: (1) it fails to consider harms to the States and their reliance interests in the prior Title 42 Orders, and (2) it fails—indeed expressly refuses—to consider the immigration consequences of its actions, which are virtually certain to be calamitous and necessarily poses a serious danger to public health—at least one that must be considered.

As to the harms to the States, that is undeniably an "important aspect of the problem," which the APA mandated reasoned analysis of. But CDC refused to supply even a scintilla of the required analysis. Defendants similarly refused explicitly to consider the States' reliance interests—a position that the Fifth Circuit recently rejected as "astonishing[]" and "squarely foreclosed by" Supreme Court precedent. *Texas v. Biden*, 20 F.4th at 990. Indeed, even if the original Title 42 orders were outright *illegal*—and they plainly were not—CDC *still* would have been required to consider the States' reliance interests in them. *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020). CDC's position that the States' interests can be ignored entirely simply because the original Title 42 orders were purportedly "short-term"—though lasting two entire years—is thus preposterous.

The Termination Order's contention that CDC lacks authority to consider immigration consequences is also at war with the Order itself. In particular CDC explicitly delayed the effective date of the termination based on *immigration consequences*—demonstrating that it has authority to consider such impacts, but lacks the willingness to do so. That is perhaps unsurprising, as CDC would have to take the requisite "hard look" at the man-made disaster that the Termination Order will occasion. But unfortunately for Defendants, that is precisely what the APA demands.

For all of these reasons, and those explained below, this Court should issue a preliminary injunction against implementation of the Termination Order.

BACKGROUND

I. TITLE 42 AND CDC AUTHORITY IN THE IMMIGRATION CONTEXT

The Public Health Services Act ("PHSA") establishes that, whenever the director of 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 ... the [CDC Director], 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. Prior to the COVID-19 pandemic, the applicable § 265 regulations only permitted "suspend[ing] the introduction of property" and "quarantin[ing] or isolat[ing] persons," but did "not address the suspension of the introduction of persons into the United States under section 362." 85 Fed. Reg. 16,559, 16,560 (Mar. 24, 2020).

A. History Of Title 42 Orders During Covid-19 Pandemic

1. The March 2020 IFR

On March 20, 2020, in response to the COVID-19 pandemic, HHS issued an Interim Final Rule amending the applicable regulations to create "an efficient regulatory mechanism to suspend the introduction of persons" to prevent Covid-19 spread into the U.S. *Id.* at 16,562.

In doing so, CDC invoked the APA's good cause exception to the APA, citing "the national emergency caused by COVID-19." *Id.* at 16,565. At the same time, however, CDC expressly invited "comment on all aspects of this interim final rule, including its likely costs and benefits and the impacts that it is likely to have on the public health[.]" *Id.* After receiving 218 comments during the 30-day comment window that closed April 24, 2020, CDC published a final rule September 11, 2020. That

rule "establishe[d] final regulations under which the [CDC] may suspend … the introduction of persons into the United States for such period of time as the Director may deem necessary to avert the serious danger of the introduction of a quarantinable communicable disease into the United States." 85 Fed. Reg. 56,424, 56,424, 56,448 (Sep. 11, 2020) (codified at 42 C.F.R. § 71.40). This Final Rule became effective October 13, 2020. (CDC's collective policies of excluding aliens are hereinafter referred to as the "Title 42 Policy" and "Title 42 Orders.")

2. Title 42 Orders

Concurrently with the March 2020 IFR, the CDC Director issued an order suspending the introduction into the United States of all "persons traveling from Canada or Mexico," except for "U.S. citizens, lawful permanent residents, and their spouses and children" and other limited exceptions. 85 Fed. Reg. 17,060 (Mar. 26, 2020) (the "March 2020 Order").

The March 2020 Order was set to expire after thirty days, but was subsequently renewed twice. *See* 85 Fed. Reg. 22,424, 22,427 (Apr. 22, 2020); 85 Fed. Reg. 31,503 (May 26, 2020). In May, the 30-day renewal requirement was abandoned and instead replaced with a mandatory review of the policy's continued necessity every 30 days. 85 Fed. Reg. at 31,504. When the Final Rule became effective, CDC issued a new order, the "October 2020 Order," under its aegis.

The October 2020 Order was "substantially the same as" prior orders, was subject to 30-day periodic reviews, and was to remain in force until CDC had "publish[ed] a notice in the Federal Register terminating this Order and its Extensions." 85 Fed. Reg. 65,806, 65,807, 65,810, 65,812 (Oct. 16, 2020). The October 2020 Order's suspension of the entry of aliens, together with the orders that preceded it, was based on findings that:

- COVID-19 is a communicable disease that poses a danger to the public health;
- COVID-19 is present in numerous foreign countries, including Canada and Mexico;
- Because COVID-19 is so globally widespread, there is a serious danger that it will be carried

into the land points of entry and Border Patrol stations at or near the United States' borders with Canada and Mexico, and from there into the interior of the country;

- If their entry were not suspended, covered aliens would go through immigration processing that would require many of them (typically aliens who lack valid travel documents and are therefore inadmissible) to be held in the congregate areas of the facilities, in close proximity to one another, for hours or days;
- Holding them in such settings would increase the risk of spreading Covid-19; and
- This increased danger rose to the level that it required a temporary suspension of the introduction of covered aliens into the United States.

Id. at 65,810.

The October 2020 Order noted that CDC had requested "that DHS aid in the enforcement [of] this Order because CDC does not have the capability, resources, or personnel needed to do so." *Id.* at 65,812; *see also* 42 U.S.C. § 268 (stating that Customs and Coast Guard officers have the duty to "aid in the enforcement of quarantine rules and regulations" under the PHSA). As with the prior orders, the October 2020 Order applied to all covered aliens, defined as aliens "seeking to enter the [U.S.] … who lack proper travel documents," "whose entry is otherwise contrary to law," or "who are apprehended at or near the border seeking to unlawfully enter the United States." *Id.* at 65,807.

The October 2020 Order noted that expulsions under CDC's prior Title 42 Orders had "reduced the risk of COVID-19 transmission … and thereby reduced risks to DHS personnel and the U.S. health care system." *Id.* at 65,810. It further noted that "[t]he public health risks to the DHS workforce—and the erosion of DHS operational capacity—would have been greater" without the initial Title 42 Order. Further, the Title 42 Orders "significantly reduced the population of covered aliens in congregate settings in [points of entry] and Border Patrol stations, thereby reducing the risk of COVID-19 transmission for DHS personnel and others within these facilities." *Id.*

On July 19, 2021, CDC issued a new order excepting unaccompanied children. 86 Fed. Reg. 38,717 (July 22, 2021) (the "July 2021 Order"). It subsequently suspended the October 2020 Order and incorporating by reference the July 2021 Order excepting unaccompanied children. 86 Fed. Reg. 48,828 (Aug. 5, 2021) (the "August 2021 Order"). That order conceded that "the flow of migration directly impacts not only border communities and regions, but also destination communities and healthcare resources of both." 86 Fed. Reg. 42,828 42,835 (Aug. 5, 2021).

On March 11, 2022, CDC issued a new order (the "March 2022 Order") superseding the August 2021 Order. 87 Fed. Reg. 15,243 (Mar. 17, 2022). The March 2022 Order apparently was issued in response to litigation in Texas challenging Defendants' practice of not applying Title 42 to unaccompanied alien children ("UAC"). *See Texas v. Biden*, 21-cv-00579 (N.D. Tex.). The March 2022 Order found that suspending entry of UACs was "not necessary to protect U.S. citizens." *Id.* at 15,245.

II. CDC'S TERMINATION ORDER

On February 2, 2021, President Biden signed Executive Order 14010, in which he ordered that "[t]he Secretary of HHS and the Director of CDC, in consultation with [DHS], shall promptly review and determine whether termination, rescission, or modification of the [Title 42 orders] is necessary and appropriate." 86 Fed. Reg. 8,267 (Feb. 5, 2021). The federal government has therefore been actively considering termination of the Title 42 Policy for over 14 months.

On April 1, 2022, CDC Director Walensky issued an order terminating the Title 42 policy (the "Termination Order" or "Order") effective May 23, 2022. FAC, Exhibit A; *see also* 87 Fed. Reg. 19,941 (Apr. 6, 2022). The Termination Order claimed that it was "not a rule subject to notice and comment under the Administrative Procedure Act." Order at 29. It did so on two putative bases: the "good cause" and "foreign affairs" exceptions of 5 U.S.C. §§ 553(a)(1) and (b)(3)(B). *Id.*

III. TITLE 42 AND THE UNPRECEDENTED SURGE IN ILLEGAL IMMIGRATION AT THE SOUTHERN BORDER

A. The Failing Situation At the Border

As explained in greater detail in the FAC (at ¶¶ 104-110), the Administration has lost operational control of the border and is facing historically unprecedented levels of illegal crossings even with Title 42 in place. *See also* Appendix Table 1 (DHS Encounters). Indeed, DHS sources have indicated that "there have been more than 300,000 known 'gotaways'—migrants who were not apprehended or turned themselves in and who got past agents—since fiscal year 2022 began on October 1st." Rogers Decl. Ex. 1. In addition, "former Border Patrol Chief Rodney Scott said there had been approximately 400,000 gotaways in the entirety of FY 2021." *Id.*

B. The Effect of Title 42 At The Border

Against the backdrop of historically unprecedented numbers of encounters and "gotaways," the Title 42 Policy resulted in over one million expulsions of aliens unlawfully entering the United States in Fiscal Year 2021, and over 400,000 to date in FY 2022. *See* Appendix Table 2.

As the Northern District of Texas properly recognized, reducing the likelihood that an alien will be released into the United States reduces the number of aliens who attempt to enter the United States illegally. *Texas v. Biden*, No. 2:21-cv-67, 2021 WL 3603341, at *6, *18–19 (N.D. Tex. Aug. 13, 2021); *cf. Zadvydas v. Davis*, 533 U.S. 678, 713 (2001) (Kennedy, J., dissenting). ("An alien ... has less incentive to cooperate or to facilitate expeditious removal when he has been released, even on a supervised basis, than does an alien held at an [ICE] detention facility.") The Termination Order will thus predictably lead to greater numbers of attempted (and successful) crossings.

Recognizing the essential role that the Title 42 Policy serves, even members of President Biden's own party have severely and extensively criticized the Termination Order. *See* FAC ¶¶ 2-7. They are equally alarmed that this Termination Order will lead to disaster, with Senator Manchin calling it a "*frightening* decision," and adding that "[w]e are *nowhere near prepared to deal with that influx*."

Rogers Decl. Ex. 15 (emphasis added). Since the Complaint, Senator Jon Tester has added his voice to the chorus of criticism even amongst Democratic Senators, explaining that the Title 42 Order "risks undermining our national security" and "is expected to cause a significant increase of migration to the United States." Rogers Decl. Ex. 2.

DHS officials and officers have similarly made clear that the Order will greatly increase illegal crossings into the United States. *See* FAC ¶¶ 9-12, 31, 108, 199, 205. Indeed, DHS "intelligence estimates that perhaps 25,000 migrants already are waiting in Mexican shelters just south of the border for Title 42 to end." Rogers Decl. Ex. 3. A federal law enforcement official told CNN that the number of aliens in northern Mexico waiting to cross illegally into the United States is "[b]etween 30,000 to 60,000." Rogers Decl. Ex. 4.

C. The Order's (Non-)Consideration of Immigration Consequences.

The Termination Order acknowledged the likelihood that it would cause major public health and immigration consequences, as it delayed the effective date of Termination Order until May 23, 2022 "to give DHS time to implement additional COVID-19 mitigation measures" and "to provide DHS time to implement operational plans for fully resuming Title 8 processing." Order at 26, 28. CDC recognizes that terminating the Order will increase COVID-19 risk and spread, because it "will lead to an increase in the number of noncitizens being processed in DHS facilities which could result in overcrowding in congregate setting." Order at 28 The Order itself, however, contains no meaningful analysis of the likely increases in crossings into the United States, or the likely consequences of that increase in migration in the current context.

This failure is particularly noteworthy, as Defendants apparently made internal assessments of the immigration effects, and are predicting that the daily number of aliens unlawfully trying to enter the United States could nearly *triple* to 18,000 crossing per day. Rogers Decl. Ex. 5. According to a former DHS Secretary under the Obama administration, 1,000 crossings in a day is a "relatively bad

number" and 4,000 daily crossings is a "crisis." Rogers Decl. Ex. 6. Neither DHS nor CDC has explained whether or how either agency will be capable of safely *screening* that number of migrants for communicable disease, nor could they.

Furthermore, the Termination Order is in notable conflict with other policies of the Biden Administration. The Title 42 Termination is expressly premised on the "rapid[] decrease" of COVID-19 cases following the recent wave of the Omicron variant of the virus. FAC, Ex. A at 12. Yet, the CDC itself still classifies the level of COVID-19 danger for travelers to Mexico to be "Level 3: High" out of a 4-point scale. Rogers Decl. Ex. 7 In fact, every single country or territory in the Western Hemisphere that has been rated by the CDC is still rated as either "Level 3: High" or "Level 4: Very High." Rogers Decl. Ex. 8.

LEGAL STANDARD

To obtain a preliminary injunction, Plaintiff States "must show: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that the injunction might cause to the defendant; and (4) that the injunction will not disserve the public interest." *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 288 (5th Cir. 2012); *accord Winter v. NRDC*, 555 U.S. 7, 20 (2008).

ARGUMENT

I. PLAINTIFF STATES HAVE STANDING

States are "entitled to special solicitude in" the "standing analysis" when they are suing to protect their "procedural right[s] and ... [their] quasi-sovereign interests." *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). And even if Plaintiffs were not entitled to special solicitude, here the harms are obvious. The Termination Order *will* cause increased illegal immigration into the United States. No one—least of all the Administration—harbors any doubt about that. In the words of the White House Communications Director: "there *will be* an influx of people to the border." Rogers Decl. Ex. 9

(emphasis added). That prediction is well-grounded: during Title 42's operation, it resulted in roughly 1.7 *million* summary expulsions of those crossing into the U.S. illegally. Appendix Table 2.

Such large increases in illegal immigration will cause the Plaintiff States harm, principally in the form of increased health care, education, law enforcement, and imprisonment costs. *See, e.g.*, *Texas v. Biden*, 20 F.4th 928, 969 (5th Cir. 2021) *cert. granted* 142 S. Ct. 1098 (2022) (recognizing that "if the total number of in-State aliens increases, the States will spend more on healthcare" (emphasis added)). Indeed, the Fifth Circuit has been perfectly clear that these sorts of large-scale immigration policies are "precisely the sort of large-scale polic[ies] that [are] amenable to challenge using large-scale statistics and figures, rather than highly specific individualized documents. And [the State's] standing is robustly supported by just such big-picture evidence." *Id.* at 971. Even more tellingly, while DHS sought Supreme Court review of that decision, it made *zero attempt* to challenge that standing holding, either in its petition for certiorari or its merits brief. *See* Petition for Certiorari, *Biden v. Texas*, No. 21-954, 2021 WL 6206109 (U.S. 2021); Brief for Petitioners, *Biden v. Texas*, No. 21-954, 2022 WL 815341 (U.S. 2022); Reply Brief for the Petitioners, *Biden v. Texas*, No. 21-954, 2022 WL 340629 (U.S. 2022).

As in *Texas*, the government's only conceivable standing defense is that the Title 42 Termination won't "cause[] either an increase in entries or an increase in parolees." *Texas*, 20 F.4th at 969. But that would be wholly untenable in light of the Administration's concessions that the Order *will* cause an "influx." *Supra* at 1-2, 11. Moreover, a central premise of the delayed May 23 effective date is that this influx will be *so severe* that DHS needs additional time to prepare for it (with even Democratic Senators publicly doubting that such planning is remotely sufficient). That conceded severe influx precludes any colorable standing defense.

In addition, the States have submitted evidence showing that changes in federal immigration policy cause increased illegal immigration into their states and that illegal immigration causes increased costs to the states for law enforcement and social services. *See* Exhibits B-F.

There is universal agreement that Termination Order will induce a flood of additional illegal immigration. Arizona's recent experience helps to quantify just how staggering the impact of this will be. Cochise County, Arizona, operates "a sophisticated camera system that views remote areas of the border region across a large section of southern Arizona." Ex. B, Declaration of Anthony R. Napolitano ("Napolitano Decl."), Ex. 1 ¶ 4. That camera system shows that "only 27.6%" of "undocumented persons" crossing the southern border were apprehended by the Border Patrol from July 2020 to January 2021. *Id.* Thus, the percentage of "gotaway" aliens who are not apprehended by Border Patrol is 72.4%. Put differently, for every three migrants that Border Patrol apprehends, another seven successfully enter the U.S. without actually being stopped.

Defendants' own internal estimates are that the Termination Order could cause daily illegal border crossings to triple. Rogers Decl. Ex. 5. Because the Border Patrol already has a staffing shortage of "more than 1,000 officers," Rogers Decl. Ex. 2, it cannot triple its capacity in response to the Termination Order. Assuming that Border Patrol capacity at the southern border remains constant and that the Border Patrol continues apprehending the same number of aliens post-Termination Order, then the gotaway percentage could increase to 90.8%. Given that the Biden Administration predicts that, after Termination Order, 18,000 aliens could illegally cross the border per day, Rogers Decl. Ex. 5, there could be an additional 16,341 gotaways *every day*. A month of such flows could mean 490,230 unauthorized aliens entering the country undetected—rougly the population of Atlanta. And because the Cochise County data was collected *before* the start of the 2021 border crisis that stressed the Border Patrol's capacity even further, these numbers likely *under*estimate the number of post-Termination gotaways.

Similarly, the Border Patrol reported 25 notable apprehensions of dangerous criminal aliens at the Arizona border in December 2021. Napolitano Dec. ¶¶ 10-11. The Cochise County data of an approximate three-to-one ratio of gotaways to apprehensions thus suggests that 75 criminal aliens

whose apprehension would have been worth noting publicly managed to enter Arizona undetected in December 2021. Once again applying the federal government's estimate that the number of illegal entries will triple and the assumption that Border Patrol capacity may stay static (or increase only modestly), then the number of dangerous criminal aliens crossing the border into Arizona undetected could increase to 275 per month.

Criminal aliens impose significant law enforcement costs on the State of Arizona and other Plaintiff States. A tripling of illegal crossings will lead to an even greater increase in gotaways, and will significantly increase law enforcement costs as a result of the Termination Order. *See* Napolitano Dec. ¶¶ 2-4. These costs include environmental damage due to those crossing illegally, as well as an increase in the law enforcement costs incident to combatting the illegal drug trade. *See* Napolitano Dec. ¶ 4. Additionally, some of those who cross illegally will commit crimes and impose incarceration and supervised release costs on Arizona. *See* Napolitano Dec. ¶¶ 6-7.

Furthermore, decreased enforcement at the border leads also to increased drug trafficking. Law enforcement officials in Louisiana have "confiscated drugs suspected to have been moved from the border into Louisiana, including but not limited to marijuana, fentanyl, methamphetamine, and heroin. This criminal activity requires substantial law enforcement resources to apprehend, detain, prosecute, and incarcerate the individuals involved." Ex. C, Declaration of Tommy Romero, "Romero Dec.," ¶ 4. Law enforcement in Louisiana "is adversely affected by having to devote resources to respond to this criminal activity. Those resources are necessarily diverted from other public safety activities." *Id.*

Illegal immigration imposes significant costs on healthcare providers and on social services. Under federal law, the Plaintiff States are required to spend state monies on Emergency Medicaid for aliens not lawfully in the United States. *See* 42 C.F.R. § 440.255(c). The increased illegal immigration induced by the Termination Order will imposes real and significant harm on Plaintiffs. For example,

Yuma Regional Medical Center ("YRMC") in Arizona was forced to provide $546,050 in unreimbursed medical care for unauthorized aliens during, for example, the first six months of 2019, when border crossings were lower than even their current level. Napolitano Dec. ¶ 4. Applying the Cochise County data about gotaways and Defendants' prediction that illegal border crossings will triple suggests that YRMC's unreimbursed medical care for unauthorized aliens would increase dramatically. Similarly, "Missouri expended $361,702 in emergency medical care costs for treatment of ineligible aliens during Fiscal Year 2020," and Missouri had to spend $30,114.11 just on database inquiries to "verify unlawful individuals' lawful immigration status." Ex. D, Declaration of Maddie Green "Green Dec.", ¶¶ 11-12. If the Termination Order causes an influx of three times the prior number of illegal aliens into Missouri, then these expenditures for Missouri could increase by approximately $1.2 million a year.

Since 1982, the Supreme Court has mandated that States provide public education to school-age aliens not lawfully in the United States. *Plyler v. Doe*, 457 U.S. 202, 230 (1982). A tripling of the number of illegal alien minors in Plaintiff States will significantly increase education costs the States must spend. For example, "Missouri spent an average of $10,654 per student in school year 2019-2020," in in 2018 "an estimated 3,000 illegal alien school-aged children were enrolled in Missouri schools." Green Dec., ¶¶ 8-9. This works out to approximately $32 million spent to educate illegal aliens in Missouri during the 2019-2020 school year. If the Termination Order causes an influx of three times the prior number of illegal alien children into Missouri, then the cost to Missouri could increase by an additional $98 million a year.

Every Plaintiff State has a population of illegal immigrants residing therein, and will experience similar increases to healthcare and social service costs. *Id.*, Ex. C (chart showing illegal alien population estimates for each state; *see also* FAC ¶¶ 114-166 (allegations about illegal alien populations in each

Plaintiffs State and the related costs to each state). Compounded across all medical and social services in every Plaintiff State, the resulting costs of the Termination Order will be enormous.

Furthermore, because the Termination Order amplifies Defendants' lax border enforcement policies, it will also incentivize human trafficking for sexual exploitation: "Destination countries with weak border security and lax immigration policies in effect create an open door for traffickers to enter and do business. It creates more opportunity for them to make money and in turn motivates traffickers to recruit more victims from origin countries. Put simply, traffickers would not invest the time and resources to groom, recruit and transport large numbers of potential victims to the U.S. border if they had reason to believe a crossing would not be possible. There's no money in that.… Russian mafia, Asian organized crime, and Mexican cartels smuggle people into the United States for the purpose of human trafficking. Much of this occurs across the U.S.-Mexico border…. Unaccompanied and undocumented minors who enter the United States via smugglers are extremely vulnerable to traffickers and other abusers. There is no one to file a missing child report, or issue an Amber Alert. There is no record that the child is even here in this country. No one even knows to look. In the eyes of a trafficker, children in these circumstances make ideal victims." Ex. E, Declaration of Alison Philips, ¶¶ 7-8, 13. Such exploitation occurs in every Plaintiff State. *See id.*. at 6 and ¶ 20.

Cross-border human trafficking imposes significant costs on the States and their citizens in three ways. First, there are direct costs on the "states for things like law enforcement; and other criminal justice system resources, social service costs, [and] the public health system." *Id.* ¶ 17. Second, human trafficking of aliens to provide unskilled labor "results in lost wages and tax revenue and puts downward pressure on wages in general, especially in unskilled labor pools. This further exacerbates the economic challenges for individuals working in those areas of the economy which often impacts increased demand for assistance with housing and food." *Id.* ¶¶ 17, 33-37 And third, "[t]he money made through human trafficking by international organized criminal organizations operating in the

United States further empowers these entities and contributes to an increase in crime in general." *Id.* ¶ 17.

Cross-border human trafficking affects not only border states such as Plaintiff Arizona, but all Plaintiffs States. For example, "[f]or the three years 2017 through 2019, between 9% and 12% of calls made to the National Human Trafficking Hotline for the state of Missouri involved foreign nationals." *Id.* ¶ 19. Cases of trafficked aliens are likely underreported because "[m]ost of these victims are very isolated and marginalized by physical, geographical, cultural and linguistic factors. They, like many human trafficking victims, do not self-identify as victims, do not know their rights, and do not know who or how to ask for help." *Id.* These victims usually were able to "gain entry into the United States due to weaknesses in immigration policy." *Id.* Human trafficking, including of minors for sexual purposes, has become so pervasive that local law enforcement agencies in Plaintiff States often lack the necessary resources to investigate cases that present horrifying circumstances. *See*, *e.g.*, *id.* ¶¶ 23-33 (detailing cases of lack of law enforcement resources to investigate 1) unaccompanied three year girl from Ecuador, possibly for sexual purposes; 2) pregnant 12-year-old girl from Honduras; 3) 11-year-old Central American illegal alien rape victim who had been photographed "wearing lingerie and had sent thousands of nude photos of herself to adult men on her phone"; 4) "50 Hispanic children between the ages of 10 and 16" being trafficking in the back of a "tractor trailer for over 20 hours," where they "had been malnourished and beaten" and were abandoned when the semi-truck pulling the trailer broke down).

And beyond the costs to the States and their citizens, the trafficking which will be facilitated by the Termination Order will do untold harm to the lives of the victims of such trafficking.

Defendant DHS itself has acknowledged the immense harm caused by (intentionally) weak border enforcement. It specifically has acknowledged that both Arizona and Louisiana are "directly and concretely affected by changes ... that have the effect of easing, relaxing, or limiting immigration

enforcement. Such changes can negatively impact [Arizona's and Louisiana's] law enforcement needs and budgets, as well as its other important health, safety, and pecuniary interests." Napolitano Dec., Ex. 7, Memorandum of Understanding Between DHS and the Arizona Attorney General ("DHS-Arizona MOU") at 2; Ex. F, Declaration of Wilbur "Bill" Stiles ("Stiles Dec."), Ex. A, Memorandum of Understanding Between DHS and the Louisiana Department of Justice ("Louisiana-DHS MOU") at 2. DHS has also recognized that "rules, policies, procedures, and decisions that could result in significant increases to the number of people residing in a community" will "result in direct and concrete injuries to [Arizona and Louisiana], including increasing the rate of crime, consumption of public benefits and services, strain upon the healthcare system, and harm to the environment, as well as increased economic competition with the State of Arizona 's current residents for, among other things, employment, housing, goods and services." DHS-Arizona MOU at 3; DHS-Louisiana MOU at 2-3.

Given the multitude and magnitude of the harms that the Title 42 Termination will have upon the Plaintiff States, those States readily satisfy the requirements for Article III standing.

II. PLAINTIFF STATES ARE LIKELY TO SUCCEED ON THEIR NOTICE-AND-COMMENT CLAIM

Plaintiffs are likely to prevail on the merits as Defendants issued the Termination Order in violation of the notice-and-comment requirements of the APA.

A. The Termination Order Is A Substantive Rule Generally Requiring Notice-And-Comment Rulemaking

As an initial matter, there is little doubt that the Termination Order is a "rule" under the APA: the Order itself concedes that it is "a major rule … [under] the Congressional Review Act," Order at 29 n.185—thereby necessarily making it a "rule" under the APA. *See* 5 U.S.C. § 804(2)-(3).

The Termination Order also does not fall within the exception for procedural rules, interpretive rules, or general statements of policy. Where "the rule is based on an agency's power to

exercise its judgment as to how best to implement a general statutory mandate, the rule is likely a legislative one," requiring notice and comment. *United Techs. Corp. v. EPA*, 821 F.2d 714, 719-20 (D.C. Cir. 1987). Here CDC is doing just that—exercising its judgment (albeit poorly). Moreover, "the Supreme Court has said that if an agency … effects '*a substantive change in* the regulation,' notice and comment are required." *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005) ((emphases added) (citation omitted). The Termination Order plainly does so for the prior Title 42 Orders.

Seemingly recognizing that notice-and-comment rulemaking was otherwise required, the Termination Order attempts to invoke the "good cause" and "foreign affairs" exceptions of 5 U.S.C. §§ 553(a)(1) and (b)(3)(B). The validity of its entire rule thus turns on whether CDC has met its burden of establishing those exceptions apply—for which CDC offered only a single paragraph (on page 29 of the Termination Order). As explained next, that skeletal paragraph does not satisfy either exception.

B. Defendants' Attempt To Invoke The Good Cause Exception Fails

For decades now, it has been "commonplace that notice-and-comment rule-making is a primary method of assuring that an agency's decisions will be informed and responsive." *New Jersey Dep't of Env't Prot. v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980). For that reason, "it is well established that the 'good cause' exception to notice-and-comment should be 'read narrowly in order to avoid providing agencies with an 'escape clause' from the requirements Congress prescribed.'" *United States v. Johnson*, 632 F.3d 912, 928 (5th Cir. 2011) (quoting *United States v. Garner*, 767 F.2d 104, 120 (5th Cir. 1985)). Indeed, all of the "various exceptions … will be narrowly construed and only reluctantly countenanced" by federal courts. *Id.* at 1045 n.88 (quoting *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980)); *see also Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (good-cause exception is not an "escape clause[]" to be "arbitrarily utilized at the agency's whim").

Federal courts' "review of the agency's legal conclusion of good cause is de novo." *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014). In assessing whether good cause exists, this

Court "must rely only on the 'basis articulated by the agency itself' at the time of the rulemaking. 'Post hoc explanations'" do not suffice. *Johnson*, 532 F.3d at 928 (cleaned up).

Here, CDC's rationale that "good cause" exists is fatally infirm for four independent reasons.

1. Defendants Had Ample Time To Conduct Notice-And-Comment Rulemaking

CDC's "good cause" invocation fails most obviously because the agency had ample time to take and respond to public comment about terminating the Title 42 Orders during the 14 months in which it was explicitly considering that very question. The Fifth Circuit has made plain that "the good cause exception should not be used to circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them." *Johnson*, 632 F.3d at 929. But that is all that CDC's rationale amounts to.

Under *Johnson*—binding authority here—a central question is whether "[f]ull notice-and-comment procedures *could have been run in the time taken to issue the [challenged] rule*." *Id.* at 929 (emphasis added). Here it plainly could: 14 months is more than sufficient time to take and respond to comments, particularly as CDC did so in *6 months* for the issuance of the October 13, 2020 final rule following the March 20, 2020 interim-final rule that amended 42 C.F.R. § 71.40 to permit Title 42 Orders to reach individuals. *Supra* at 5-7. Similarly, in *Johnson* the available time period was "seven months"—which precluded good cause. *Id.*; *see also Env't Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920-21 (D.C. Cir. 1983) (holding eight-month delay was similarly infirm). CDC had *twice* as much time here.

More specifically in the Covid-19 context, this Court has held that HHS lacked good cause where it "took Agency Defendants almost three months (eighty-two days) from September 9, 2021 [when the mandates were announced], to November 30, 2021, to prepare the Head Start Mandate. The situation was not so urgent that notice and comment were not required." *Louisiana v. Becerra*, __ F. Supp. 3d __, 2022 WL 16571, at *13 (W.D. La. January 1, 2022). But here CDC had nearly *five times* that long between when EO 14010 mandated consideration of terminating Title 42 and its actual

termination. And the federal government tellingly *did not even appeal* from that preliminary injunction.

Moreover, given that CDC has been actively considering whether to revoke Title 42 since February 2021, any "emergency" here was of the agency's "own making [and] can[not] constitute good cause." *NRDC v. Abraham*, 355 F.3d 179, 205 (2d Cir. 2004). Indeed, "'[o]therwise, an agency unwilling to provide notice or an opportunity to comment could simply wait until the eve of a statutory, judicial, or administrative deadline, then raise up the good cause banner and promulgate rules without following APA procedures.'" *NRDC v. NHTSA*, 894 F.3d 95, 114-15 (2d Cir. 2018) (collecting cases). That is precisely what CDC has done here.

2. CDC Improperly Ignores Its Prior Use Of Notice-And-Comment Procedures And Instead Relies On The Covid-19 Pandemic As A Categorical Exception

For similar reasons, CDC's "good cause" rationale is obviously deficient and would fail even under arbitrary-and-capricious review—not the applicable *de novo* standard here—because it entirely ignores the agency's prior use of notice-and-comment procedures in this context.

CDC's principal "good cause" rationale appears to be that Title 42 Orders relating to the Covid-19 pandemic need not comply with Section 553: "Given the *extraordinary nature of an order under Section 265* [*i.e.*, Title 42], the resultant restrictions on application for asylum and other immigration processes under Title 8, and the statutory and regulatory requirements that an CDC order under the authority last no longer than necessary to protect the public health [good cause exists]." Order at 29 (emphasis added). But essentially all of that rationale could be said for the issuance of the March 20, 2020 regulations that permitted CDC to issue Title 42 orders—which the agency *did* take public comment on. *Supra* at 5-7.

By failing to address the fact that CDC previously did not regard major changes in the Title 42 system as "extraordinary" actions for which notice-and-comment could be dispensed with entirely, CDC violated the APA. And just as the initial promulgation of the Title 42 system was sufficiently

significant to demand notice-and-comment, its repeal is equally significant under CDC's own precedents. *See also* 5 U.S.C. § 551(5) (APA requirements apply for "repealing a rule").

Federal courts "have never approved an agency's decision to *completely ignore relevant precedent*." *Jicarilla Apache Nation v. DOI*, 613 F.3d 1112, 1120 (D.C. Cir. 2010) (emphasis added). But that is exactly what CDC has done here. At a bare minimum, the Termination Order's complete failure to *acknowledge* the prior public commenting—let alone *explain* the differential treatment here—violates the APA. And while DOJ will undoubtedly now attempt to backfill those omissions, such "[p]ost hoc explanations" cannot cure APA violations. *Johnson*, 532 F.3d at 928 (cleaned up).

3. The Current Circumstances Do Not Constitute Good Cause

CDC's good-cause rationale also fails to account for the current context—which differs radically from the initial issuance of the Title 42 Order. We are not—unlike March 2020—in the first month of a once-in-a-century pandemic of rapidly exploding infection numbers. Instead, we have now begun the *third* year of this pandemic, and have a very clear sense of available testing, treatment, and prevention capacities and the rates at which those tools are becoming available. The risk CDC appears to be calculating (which, of course, irrationally omits the risk of an immigration surge) was entirely predictable. In short, as predictability has increased, the exigencies have substantially decreased. But agencies' willingness to exploit the pandemic to evade notice-and-comment requirements has simultaneously grown ever bolder even as case numbers *decrease*. And lawless. As the Fifth Circuit has explained in strikingly similar circumstances, the OSHA vaccine mandate's "stated impetus—a purported 'emergency' that the entire globe has now endured for nearly two years … is unavailing." *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 611 (5th Cir. 2021); *see also Louisiana v. Becerra*, 2022 WL 16571, at *13 (collecting cases rejecting reliance on Covid-19 pandemic to invoke good cause exception). And unlike fine wines, this legal gambit does not improve with age into this pandemic.

Moreover, good cause does not exist where agency action "does not stave off any imminent threat to the environment or safety or national security." *Mack Trucks, Inc.*, 682 F.3d at 93. But here, CDC rather ironically invokes the "good cause" exception to *rescind* a regulation that even Democratic Senators acknowledge *has staved off an imminent threat*, and instead dispenses with notice-and-comment so that the agency can *ensure that imminent threat comes to pass*. CDC cannot invoke the "good cause" exception to *inflict* a disaster on the U.S. border, rather than "stave [one] off." But that is just what it seeks to do here.

4. CDC's Timing Rationale Is Unpersuasive

Finally, CDC's "good case" invocation rests on a timing rationale that is both counter-intuitive and pretextual. Specifically, CDC relies overwhelmingly on its purported need for *more time* as a basis for dispensing with notice-and-comment requirements—just apparently not sufficient additional to permit taking and responding to public comment. Within CDC's threadbare one-paragraph rationale, it remarkably makes this point twice, demonstrating its centrality:

- "In light of … DHS's *need for time* to implement an orderly and safe termination of this order, there is good cause *not to delay issuing this termination* … *past* May 23, 2022."
- "It would be impracticable … to delay the effective date … *beyond May 23, 2022*."

CDC's apparent position is thus simultaneously (1) some delay of the effective date of the Termination Order is absolutely essential to avoiding "significant disruption" but that (2) sufficient delay to permit notice-and-comment compliance must be avoided at all costs because … well CDC doesn't ever say. Order at 29. The Order does allude to the purported "statutory and regulatory requirement that a CDC order under the authority last *no longer than necessary to protect public health*." *Id.* (emphasis added). But two problems with that: (1) no such requirement exists (and CDC supplies no citation to it) and (2) that rationale is contradicted on the face of the Order: CDC is explicitly delaying

implementation until May 23 not because of any public-health based reason, but explicitly based on "*DHS's need* for time to implement an orderly and safe termination of the order." *Id.* (emphasis added).

The Termination Order is thus self-contradictory on its face and cannot establish good cause.

C. Defendants' Reliance On The "Foreign Affairs" Exception Is Unavailing

Defendants alternatively attempt to excuse notice-and-comment compliance by invoking the "foreign affairs" exception of 5 U.S.C. § 553(a)(1). That too is unavailing.

As an initial matter, this is hardly the first time that an administration has attempted to invoke the "foreign affairs" exception in the immigration context—which courts have frequently and repeatedly struck down. Defendants' attempt here is particularly flimsy and merits decisive rejection.

Immigration matters, by their very nature, have implications for "foreign affairs." But federal courts have long ago made clear that such implications do not provide generalized immunity from notice-and-comment requirements: "The foreign affairs exception would become distended if applied to INS actions generally, even though immigration matters typically implicate foreign affairs." *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980). Instead, for the exception to apply, "'the public rulemaking provisions should provoke *definitely undesirable international consequences*.'" *East Bay,* 932 F.3d at 775 (quoting *Yassini*, 618 F.2d at 1360 n.4); *accord Rajah v. Mukasey*, 544 F.3d 427, 437 (2d Cir. 2008) (applying same "definitely undesirable international consequences" standard); *Am. Ass'n of Exporters & Importers-Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985) (same); *Jean v. Nelson*, 711 F.2d 1455, 1477 (11th Cir. 1983) *vacated and rev'd on other grounds*, 727 F.2d 957 (11th Cir. 1984) (en banc) (same).[1]

CDC offers the sum total of *one sentence* of reasoning to meet this demanding definitely-undesirable-consequences standard: "this Order concerns ongoing discussions with Canada, Mexico,

[1] The Fifth Circuit does not appear to have addressed the "foreign affairs" exception yet. But there is no reason to believe that it would split from, and adopt a less-stringent standard than, the four circuits have adopted the "definitely undesirable consequences" standard.

and other countries regarding immigration and how best to control COVID-19 transmission over shared borders and therefore directly 'involves a foreign affairs function of the United States.'" Order at 29 (quoting 5 U.S.C. § 553(a)(1)). That is not even conceivably sufficient.

That single sentence does not identify *any* potential "undesirable international consequences"—let along ones that will "definitely" occur. That rationale is thus insufficient on its face. Indeed, it is *exactly* what courts have made clear does not suffice: "the foreign affairs exception requires the Government to do more than merely recite that the Rule 'implicates' foreign affairs." *East Bay*, 932 F.3d at 775. But that is all CDC has done here, with the slight modification of swapping the word "implicates" for "involves." Moreover, just as while the "reference in the Rule that refers to our 'southern border with Mexico' [wa]s not sufficient" in *East Bay*, the mere allusion to discussions with Canada, Mexico, and unspecified other counties does not suffice here.

Accepting CDC's threadbare rationale here would have particularly pernicious effects. It would effectively permit any agency to avoid notice-and-comment rulemaking through the expedient of *talking* perfunctorily with foreign nations about the same subject—which is all that CDC says here. In other words, the executive branch could avoid any obligation to give notice to, and take comments from, the *American* public by talking to a foreign government or two instead. If that were the law, why would an agency *ever* trouble itself with intentionally burdensome notice-and-comment requirements when it could instead engage in a cursory and *un*burdensome conversation with a foreign government? Thankfully, federal courts have never permitted such naked circumvention of the APA under the foreign affairs exception, and there is no reason for this case to be the first.

D. Defendants' Circumvention Of Notice-And-Comment Requirements Is Part Of A Broader Pattern

It is also important to note that Defendants' skirting of notice-and-comment requirements in the immigrant context is hardly an outlier. Indeed, those APA violations are by now notorious with federal courts. *See, e.g.*, *Texas v. United States*, __ F. Supp. 3d ___, 2021 WL 3683913, at *51-58 (S.D.

Tex. Aug. 19, 2021) (holding that DHS's issuance of Interim Guidance, which similarly and severely reduced removals of aliens with criminal convictions, violated notice-and-comment requirements); *Texas v. United States*, 524 F. Supp. 3d 598, 656-62 (S.D. Tex. 2021) (holding same for 100-day moratorium on immigration removals). Indeed, Justice Kagan recently observed at oral argument another potential violation by DHS, explaining that "[t]he real issue to me is [DHS's] evasion of notice-and-comment."[2]

Defendants' violation of notice-and-comment requirements is thus no one-off aberration, but rather part of a recidivous pattern that requires decisive judicial response—particularly as the judicial decisions cited above were apparently insufficient to convince Defendants to comply with notice-and-requirements here.

III. PLAINTIFFS ARE LIKELY TO PREVAIL ON THEIR ARBITRARY-AND-CAPRICIOUS CLAIM

The Plaintiff States are also independently likely to prevail on the merits as the Termination Order is arbitrary and capricious. It is well-established that "agency action is lawful only if it rests on a consideration of the relevant factors" and considers all "important aspects of the problem." *Michigan v. EPA*, 576 U.S. 743, 750-52 (2015) (requiring "reasoned decisionmaking"). This means agencies must "examine all relevant factors and record evidence." *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017). Here, Defendants ignored entire "important aspects of the problem," and thus violated the APA.

A. CDC's Failure to Consider Financial Harms to the States and Other Reliance Interests Is Arbitrary and Capricious

As discussed above, the termination of the Title 42 policy will impose significant financial harms on the States by generating an enormous new influx of illegal immigrants. *Supra* at 1-2, 9-14; *see also* FAC ¶¶ 104-175. CDC's Order gives no consideration to such financial harms and reliance

[2] Transcript at 47-48, *Arizona v. San Francisco*, No. 20-1775 (U.S. Feb. 23, 2022) available at https://bit.ly/3itwfq7

interests. Instead, CDC insists that it *does not have* to consider them because, on CDC's current view, such reliance interests would not be "reasonable" or "legitimate." Order at 23. As the agency states, "CDC has determined that no state or local government could be said to have *legitimately* relied on CDC Orders issued under [Title 42] to implement long-term or permanent changes to its operations because those orders are, by their very nature, short-term orders…." *Id.* This is erroneous as a matter of law. In fact, as the Fifth Circuit recently held, the federal government's argument that it "had no obligation to consider the States' reliance interests at all" is "astonishing[]" and "squarely foreclosed by" Supreme Court precedent. *Texas v. Biden*, 20 F.4th at 990. It is no less astonishingly bad here.

1. CDC did not consider financial harms to the States or other reliance interests

As an initial matter, it is perfectly clear that the CDC did not actually consider any financial or public-health harms to the States or other reliance interests, because the CDC repeatedly admits that it has no idea whether or to what extent such harms exist. *See* Order at 25 ("As a factual matter, CDC *is not aware* of any reasonable or legitimate reliance on the continued expulsion of covered noncitizens…"); *id.* (discounting "any reliance interest *that might be said to exist*"); *id.* ("*To the extent* that any state or local government did rely on the expulsion of noncitizens for purpose of resource allocation…") (emphases added). CDC's professed ignorance is unsurprising, because CDC did not bother to consult with the States before terminating Title 42. Most notably, CDC did not provide the notice-and-comment procedure required by the APA, and thus its failure to consider State reliance interests was preordained—the CDC did not know what they were, and it did not try to find out.

This violated the APA. The financial impact on the States is unquestionably an "important aspect of the problem." *Michigan*, 576 U.S. at 752. Indeed, the Supreme Court has repeatedly recognized "the importance of immigration policy to the States," particularly as the States "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012). The CDC has no license to inflict massive financial injuries on the States without at least first

considering what the magnitude of those harms might be and whether they could be mitigated if the agency considered alternatives with those harms in mind. *Michigan*, 576 U.S. at 752; *id.* at 759 (explaining that agencies "must consider cost … before deciding whether regulation is appropriate and necessary").

In fact, CDC's failure to consider State reliance interests commits a twofold violation of the APA. First, the States' financial and public-health harms and other injuries from CDC's termination decision are themselves an "important aspect of the problem." *Michigan*, 576 U.S. at 752. In addition, by refusing to consider them, CDC necessarily abandoned its duty to consider whether alternative approaches would be less burdensome for the States. "[W]hen an agency rescinds a prior policy its reasoned analysis must consider the 'alternatives' that are 'within the ambit of the existing policy.'" *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (cleaned up) (citation omitted). Here, CDC did not consider any "alternatives … within the ambit of the existing policy," *id.*, that might alleviate the burdens on the States, because it did not consider those burdens in any fashion.

The CDC's failure to consider the practical impact of its Order on the States is particularly egregious because, as discussed further below, the CDC *did* consider the practical impact on *federal* agencies like DHS. The CDC makes clear that, although it has determined that the public-health justification for the Title 42 policy no longer exists *now*, it delays implementation of the termination until May 23, 2022, to allow DHS to "ready its operational capacity." Order at 28. In fact, the CDC's own regulations authorize it to "consult with any State or local authorities" before issuing Title 42 orders. 42 C.F.R. § 71.40(d). The CDC's decision to consider practical impacts on *federal* agencies but not *state* agencies is the antithesis of reasoned decision-making.

2. The Supreme Court and Fifth Circuit have rejected the CDC's justification for refusing to consider State reliance interests

The CDC's stated justification for categorically discounting financial harms and other reliance interests of the States contradicts governing law from the Supreme Court and the Fifth Circuit. In

Regents, the Supreme Court held that DHS acted arbitrarily and capriciously in failing to consider "whether there was 'legitimate reliance' on the DACA Memorandum," which established the Deferred Action for Childhood Arrivals program. 140 S. Ct. at 1913. "When an agency changes course," the Supreme Court held, "it must 'be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.'" *Id.* (citation omitted)). "It would be arbitrary and capricious to ignore such matters." *Id.*

In so holding, the Supreme Court rejected the same reasoning that the CDC employed to avoid considering State reliance interests here. In *Regents*, as here, the Government contended that it did not need to consider reliance interests because there could be no legitimate, reasonable reliance on DACA as a matter of law: "[T]he Government does not contend that [the Secretary] considered potential reliance interests; it counters that she did not need to." *Id.* at 1913. The Government argued that "DACA recipients have no 'legally cognizable reliance interests' because the DACA Memorandum stated that the program 'conferred no substantive rights' and *provided benefits only in two-year increments*." *Id.* (emphasis added). In other words, echoing the CDC here, the Government argued that any reliance interests were not reasonable or legitimate because the program created no vested rights and was inherently temporary. *Compare id. with* Order at 23-24. The Supreme Court rejected this argument as putting the cart before the horse: "[N]either the Government nor the lead dissent cites any legal authority establishing that such features automatically preclude reliance interests, and we are not aware of any. These disclaimers are surely pertinent in considering the strength of any reliance interests, but that consideration must be undertaken by the agency in the first instance, subject to normal APA review." *Regents*, 140 S. Ct. at 1913-14.

Thus, the Supreme Court rejected the same reasoning that the CDC employed to absolve itself of considering reliance interests here. Even if the CDC believes such reliance interests will turn out to

be attenuated or illegitimate, it must at least consider them: "[T]hat consideration must be undertaken by the agency in the first instance." *Id.*

3. The CDC was obligated to consider financial harms to the States flowing from its Termination Order, even without a showing of prior "resource-allocation" decisions based on the Title 42 policy

The CDC's reasoning suffers from another fatal defect. The Termination Order assumes that, to establish "legitimate" reliance interests, the States must show that they made specific *resource-allocation* decisions in reliance on the Title 42 policy. Order, at 23 (determining that "no state or local government could be said to have legitimately relied on the CDC Orders issued under [Title 42] *to implement long-term or permanent changes to its operations*…") *id.* at 25 ("To the extent that any state or local government did rely on the expulsion of noncitizens *for purposes of resource allocation*…."); *id.* ("CDC concludes that *resource allocation concerns* do not outweigh CDC's determination…") (emphases added). Again, governing precedent squarely forecloses this reasoning. The Supreme Court in *Regents* specifically held that the reliance interests that the agency must consider include financial costs to the States, noting that "States and local governments could lose $1.25 billion in tax revenue each year." *Regents*, 140 S. Ct. at 1914. The Supreme Court did not hold that specific resource-allocation decisions were required to render such costs a "noteworthy concern[]" that the agency must consider. *Id.*

Likewise, in *Texas v. Biden*, which considered the termination of another major border-control policy—the Trump Administration's Migrant Protection Protocols ("MPP")—the district court explicitly held that "fiscal harm from the termination of MPP" to the States was an important aspect of the problem that the agency was required to consider. *Texas v. Biden*, 2021 WL 3603341 at *19. "[T]he fact that the agency did not consider the costs to the States at all" rendered the termination decision "arbitrary and capricious." *Id.* "Fiscal burdens on states are 'one factor to consider' — even if the agency could conclude that 'other interests and policy concerns outweigh' those costs." *Id.* (quoting *Regents*, 140 S. Ct. at 1914). Again, in *Texas v. Biden*, there was no showing of specific resource-

allocation decisions made by the States in reliance on MPP—the fact that terminating MPP would impose significant costs on the States was itself an important aspect of the problem that must be considered under the APA.

The Fifth Circuit affirmed this holding, agreeing that the "States' reliance interests" included "costs to States." *Texas v. Biden*, 20 F.4th at 990, *cert. granted on other grounds*, 142 S. Ct. 1098 (2022). Citing *Regents*, the Fifth Circuit agreed that "the States' reliance interests" included financial harms, such as *Regents*' assertion that "States and local governments could lose $1.25 billion in tax revenue each year." *Id.* (quoting *Regents*, 140 S. Ct. at 1914). Thus, under governing Fifth Circuit precedent, the States need not demonstrate that they engaged in specific resource-allocation decisions to establish important interests in the Title 42 program. The fact that the program's abrupt termination will impose significant financial costs on them is an important aspect of the problem that the CDC was obliged to consider—regardless of each State's "resource-allocation" decisions. Indeed, in *Texas v. Biden*, the Government made the same argument that the CDC makes here, and the Fifth Circuit rejected it as "astonishing[]": "Astonishingly, the Government responds that DHS had no obligation to consider the States' reliance interests at all. Yet again, that contention is squarely foreclosed by *Regents*." *Id.* (quotation omitted).

Finally, it makes good sense to treat new financial costs and harms to the States as inherently disrupting State reliance interests, as both the Supreme Court and Fifth Circuit have done. As the federal Government acknowledged in its Agreements with Arizona and Louisiana, State agency budgets are typically "set months or years in advance," and each State typically "has no time to adjust its budget in response to [immigration] policy changes." Doc. 1-2, at 1; Doc. 1-3, at 1. Thus, new and unanticipated costs and financial harms from a change in federal immigration policy, arising in the midst of a budget cycle, necessarily disrupt State reliance interests—regardless of whether the States made specific "resource-allocation" decisions in conscious reliance on the former policy.

4. The CDC's other arguments are meritless, arbitrary, and capricious

The CDC's other justifications for refusing to consider reliance interests are equally arbitrary and capricious. The Termination Order argues that no one could have relied on CDC's two-year-long Title 42 policy because its scope has "fluctuated due to litigation, further rendering it unreasonable for any state or local government to have acted in reliance on the continued exercise of the authority." Order at 24. This is just another variation of the same argument rejected in *Regents*, *i.e.*, that the program was inherently short-term and conferred no guarantee of future benefits. *Regents*, 140 S. Ct. at 1913. It fares no better than the CDC's reliance on the temporary nature of Title 42 orders. In any event, the CDC's claim that its legal authority has "fluctuated due to litigation," Order at 24, is unsupportable. The CDC cites only two cases. First, it cites a preliminary injunction in *P.J.E.S. v. Wolf*, 502 F. Supp. 3d 492 (D.D.C. 2020), which it admits was *stayed pending appeal by the D.C. Circuit*. Order at 24 & n.163 (admitting that "the Government obtained a stay of the injunction in January 2021"). Second, it cites an injunction against "the expulsion of FMU" [*i.e.*, individuals in family units] in *Huisha-Huisha v. Mayorkas*, 2021 WL 4206688, at *12 (D.D.C. Sept. 16, 2021), but it then admits that the "D.C. Circuit recently *upheld* the government's authority under 42 U.S.C. § 265 to expel FMU." *Id.* (emphasis added). In other words, CDC's evidence of "fluctuation due to litigation" consists of two cases where the Court of Appeals effectively *upheld* the CDC's authority. This reasoning is itself arbitrary and capricious. *See Texas v. Biden*, 554 F. Supp. 3d 818 (N.D. Texas 2021) (mischaracterizing evidence and considering "irrelevant" factors is arbitrary and capricious).

Next, the CDC argues that States could not reasonably rely "on CDC's indefinite use of its expulsion authority under Section 265," because the pandemic would eventually subside, and "42 U.S.C. § 265 only authorizes CDC to prevent the introduction of noncitizens when it is required in the interest of public health." Order at 24-25. These arguments merely rehash the CDC's claim that there could be no "legitimate" reliance on the Title 42 policy because it was inherently temporary. As

discussed above, this argument is "squarely foreclosed by *Regents*." *Texas v. Biden*, 20 F.4th at 990. In particular, *Regents* anticipated and rejected the CDC's argument that it need not consider any reliance interests because it supposedly lacks legal authority to extend it further. The dissent in *Regents* made a similar argument, *i.e.*, that the agency did not need to consider reliance on DACA because *the entire program was illegal. See, e.g., Regents*, 140 S. Ct. at 1919 (Thomas, J., dissenting) (arguing that the DACA "program was unlawful from its inception"). Nevertheless, the majority held that the agency was still required to consider reliance interests before terminating the program: "[B]ecause DHS was 'not writing on a blank slate,' it was required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Regents*, 140 S. Ct. at 1915. So too here.

Finally, the CDC purports to assert, in the alternative, that it would have treated the States' reliance interests as "outweigh[ed]" even if it had considered them. Termination Order, Order at 25. But "[s]tating that a factor was considered ... is not a substitute for considering it." *Texas v. Biden*, 20 F.4th at 993 (citation omitted)). Simply put, the CDC cannot cure its failure to do its job by stating, in conclusory fashion, that it would have come to the same conclusion if it *had* done its job. The CDC's "failure to consider the regulatory alternatives … cannot be substantiated by conclusory statements." *Id.* (quoting *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1226 (5th Cir. 1991)).

B. The CDC's Failure to Consider the Immigration Consequences of Its Termination Order Is Arbitrary and Capricious

As even the President's allies admit, the Termination Order is likely to have catastrophic consequences for an already-fraught situation at the border. The Government itself predicts a massive increase in illegal immigration as a result of the Order, potentially doubling or even tripling unlawful border encounters over the current historic highs. *Supra* at 9-11. Yet the CDC gave no meaningful consideration to this harsh reality as it assessed only mitigation measures as applied to *current* border

trends, or its impact on the States, border communities, and lawfully present Americans. The CDC's refusal to consider the immigration consequences of its Termination Order is arbitrary and capricious.

1. The Termination Order contradicts itself in failing to consider immigration consequences

As with its refusal to consider State reliance interests, the CDC erroneously contends that it "did not need to" consider the catastrophic immigration and border-control consequences of terminating its Title 42 policies at the worst possible time—right at the beginning of summer migration. *Regents*, 140 S. Ct. at 1913. The CDC reasons that it need not—indeed, cannot—consider such consequences because Title 42 is not an immigration-control provision: "[T]he CDC Orders issued under [Title 42] are not, and do not purport to be, policy decisions about controlling immigration; rather … CDC's exercise of its authority under Section 265 depends on the existence of a public health need." Order at 25. The CDC argues, "42 U.S.C. § 265 only authorizes the CDC to prevent the introduction of noncitizens when it is required in the interest of public health," *id.*, and thus termination of the policy is mandatory "once CDC determined that there is no longer sufficient public health risk present with respect to the introduction of covered noncitizens." *Id.* In other words, CDC argues, it lacks statutory authority to consider immigration consequences in deciding whether to extend or terminate the Title 42 policy. *Id.*

This is arbitrary and capricious for two reasons. First, it contradicts the CDC's own reasoning. Immediately after stating that termination is mandatory regardless of its immigration consequences, the CDC states that "[t]his Termination will be implemented on May 23, 2022, for the *operational* reasons outlined herein." *Id.* at 25-26 (emphasis added). But CDC makes very clear that it has determined that there is no longer a public-health justification for the Title 42 policy *now*. *See, e.g., id.*

at 20 ("[L]ess burdensome measures are *now* available to mitigate the introduction, transmission, and spread of COVID-19 resulting from the entry of covered noncitizens") (emphasis added).[3]

Notwithstanding its clear determination that the public-health justification for the Title 42 orders is no longer valid *now*, the CDC delays implementation of the Termination Order for seven weeks, until May 23, 2022, "for operational reasons." *Id.* at 25-26. These "operational reasons" comprise *non-public-health* considerations—notably, DHS's "resumption of border operations under Title 8 authorities." *Id.* at 28. Though the CDC insists that the seven-week delay is due, at least in part, to DHS's plan to implement a vaccination program for arriving immigrants, *id.*, it also states explicitly that the public-health justification for the Title 42 policy no longer exists regardless of whether DHS has implemented its vaccination program. *Id.* at 22 n.145 ("CDC believes the serious risk to public health that the CDC Orders were intended to address has been sufficiently alleviated, *even in the absence of complete implementation of the DHS vaccination program*.") (emphasis added). In addition, the CDC makes clear that its seven-week delay in implementation is based on other non-public-health considerations as well—particularly, DHS's ability to "operationalize" to address the additional influx of immigrants. "The implementation timeline of this termination will provide DHS with time to … ready its operational capacity … and prepare for resumption of regular migration under Title 8." *Id.* at 28. CDC acknowledges that "DHS reports that it is taking steps to plan for such increases" in illegal immigration, and that "[p]utting such plans in place, ensuring that the workforce is adequately and appropriate[ly] trained for their shifting roles, and deploying critical resources require time." *Id.* For

[3] *See also id.* at 21 (because "other public health measures are *now* available to provide necessary public health protection," the risk of COVID-19 transmission "does not present a sufficiently serious danger to public health to necessitate maintaining the August order"); *id.* at 22 n.145 ("[G]iven the *current* status of the pandemic and the range of measures *currently* in place … CDC believes the serious risk to public health … has been sufficiently alleviated"); *id.* at 23 ("At this point in the pandemic, the previously identified public health risk is no longer commensurate with the extraordinary measures instituted by the CDC Orders."); *id.* at 27 ("I find that there is *no longer a public health justification* for the August Order and previous Orders… [T]he justification … is *no longer* sustained.") (emphases added).

these reasons, "[t]his Termination will be implemented on May 23, 2022, to provide DHS with additional time to ready such operational plans." *Id.*

The CDC, therefore, speaks out of both sides of its mouth on this issue. To the States and others adversely affected by illegal immigration, it asserts that it has no statutory authority to consider the impact on illegal immigration in crafting and rescinding Title 42 orders. *Id.* at 25. Instead, it says that its hands are tied—it may only consider public-health justifications, and once those no longer exist, it must rescind the orders even if that would have catastrophic immigration consequences. *Id.* But to the federal agency most affected—DHS—the CDC sings a different tune. For DHS, the CDC is willing to consider "operational" concerns, "deploying critical resources," "[p]utting … plans in place," "ensuring that the workforce is adequately and appropriate [*sic*] trained," "ready[ing] operational capacity," and similar *non-public-health* practical factors, to justify a significant extension of a public-health policy that CDC insists no longer has a public-health justification. *Id.* at 26, 28. This reasoning is self-contradictory. If the CDC can consider the practical impacts of the anticipated upsurge in illegal immigration on DHS's "operational capacity," *id.* at 28, it can—and must—consider the practical impacts of that upsurge on the rest of the country, including the States.

Second, "immigration consequences" are certainly an important part of the public health problem, meaning failure to consider them is irrational decision-making. Title 42 never would have been necessary if the northern or southern borders experienced only 1-2 attempted crossers per day. Numbers are *extremely* relevant to public health risk. In forgetting that, CDC claims it has tools to combat Covid -19, and thus the Title 42 policy is no longer required—but will those tools be sufficient when the numbers climb to 18,000 border crossings per day as presently predicted? Rogers Decl. Ex. 5. It strains credulity to imagine that CDC could even screen that number of migrants for communicable diseases (including Covid-19). CDC certainly never indicates otherwise. And even if it could, CDC nowhere demonstrates it could treat or mitigate communicable diseases for that number

of migrants. At best, CDC hopes to vaccinate up to 6,000 migrants per day when fully operational. Rogers Decl. Ex. 17. That does nothing to address the serious risk presented by the Administration's own immigration assessments. By failing to consider immigration consequences in assessing danger to public health risk, CDC failed to consider an important aspect of the problem.

2. Under the APA, the CDC must consider non-public-health impacts of its policy change

Second, the CDC's contention that it lacks authority to consider non-public-health concerns in adopting a major policy change contradicts the APA. As *Regents* and *State Farm* held, the CDC must consider all important aspects of the problem in adopting the rescission order. Even if the CDC ultimately decides to give them limited weight, for either legal or factual reasons, it must at least consider them. It failed to do so here.

Regents makes this very clear. In *Regents*, the Supreme Court considered the termination of DACA, an immigration-related policy. But in terminating DACA, the agency was not allowed to limit its consideration only to the "operational" impact on immigration policy. Instead, the Supreme Court held that it was arbitrary and capricious to fail to consider a wide range of non-operational, and even non-immigration-related, factors impacted by DACA. *Regents*, 140 S. Ct. at 1913-14. "When an agency changes course … it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *Id.* at 1913 (quotation marks omitted) (citation omitted)). Such interests extend beyond the immigration-related (or, here, public-health-related) considerations that led to the policy in the first place. *Id.* In *Regents*, these included the fact that "DACA recipients have enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children," *id.* at 1914; that cancelling DACA would impact "the schools where DACA recipients study and teach," and "the employers who have invested time and money in training them," *id.*; that cancelling DACA would "result in the loss of $215 billion in economic activity and an associated $60 billion in federal tax revenue," *id.*; and (as discussed above)

that "States and local governments could lose $1.25 billion in tax revenue each year," *id.* These factors went beyond the "operational" concerns, and extended far beyond even immigration-related concerns, to areas (such as federal and state tax collection) where DHS had no statutory authority whatsoever. Yet *Regents* held that the agency (DHS) was required at least to consider these important impacts of its sudden change in policy. "[T]hat consideration must be undertaken by the agency in the first instance, subject to normal APA review." *Id.* at 1913-14. "There was no such consideration in the Duke Memorandum," and there was no such consideration here. *Id.* at 1914. Instead, CDC "did not appear to appreciate the full scope of [its] discretion." *Id.* at 1911.

As discussed above, the CDC's decision to consider the immigration consequences of its decision *only* in the context of accommodating DHS's "operational" concerns, Order at 28, makes its decision even worse. By considering DHS's operational concerns and delaying implementation for a full seven weeks based on them, the CDC effectively concedes that it *does* have authority to consider the impact of terminating Title 42 on illegal immigration. By delaying its Order, it effectively concedes that it *does* have authority to consider "alternatives" short of full termination "within the ambit of the existing policy." *Regents*, 140 S. Ct. at 1913. But it artificially cabins its consideration to one tiny slice of the problem—DHS's "operational" concerns—while ignoring the catastrophic non-public-health consequences of an enormous surge in illegal immigration at the height of the migration season for the States, border communities, American citizens, and lawfully present aliens.

Finally, the CDC's recital that it "recognizes that the Termination of the August Order will lead to an increase in the number of noncitizens being processed in DHS facilities," Order at 28, does not cure this problem for two reasons. First, as discussed above, this statement occurs only in the context of acknowledging (and accommodating) DHS's "operational" concerns, while giving no consideration whatsoever to the consequences of increased illegal immigration on the States and others. *Id.* Second, this one-line recital is made in conclusory terms with no discussion of the potential

scope of the problem or any of its practical impacts. As noted above, "[s]tating that a factor was considered ... is not a substitute for considering it," *Texas v. Biden*, 20 F.4th at 993 (quoting *Getty v. Fed. Sav. and Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986)), and the CDC's "failure to consider the regulatory alternatives … cannot be substantiated by conclusory statements." *Id.* (quoting *Corrosion Proof Fittings*, 947 F.2d at 1226).

In sum, the CDC cannot have it both ways. It cannot insist to the States that it may only consider public-health concerns, while granting a significant change in policy to accommodate DHS's non-public-health, "operational" concerns. If the CDC may consider the impact of a massive surge in illegal immigration on DHS's "operational capacity," it must consider the impact on States, border communities, and ordinary Americans as well. Its refusal to do so is arbitrary and capricious.

3. CDC's Recent Extension Of Its Transportation Mask Mandate Underscores The Termination Order's Deficiencies

The April 1 Termination Order is expressly predicated on *improvements* in the Covid-19 pandemic. *See, e.g.*, Order at 22-23. But a mere 12 days later, CDC extended its mask mandate for transportation (airplanes, buses, etc.) because it fears of the BA.2 variant worsening the pandemic, Rogers Decl. 18 and 19—the very same fears it downplays in the Order. Order at 13. This divergence is not yet explained, rendering the Order arbitrary and capricious. CDC cannot simultaneously take actions based upon the Covid-19 pandemic both *improving and deteriorating* at the same time.

Moreover, CDC discordant treatment of Title 42 and the mask mandate (and other restrictions) renders incredible CDC's claims that it is "aligning the public health measures response … with the best available science." Order at 20. That rationale is obviously pretextual and, at a bare minimum, the mask-mandate extension makes plain that the timing of the Title 42 Termination is overwhelmingly and self-evidently based on *political* grounds, not those of public health.

An order may not stand if it rests on a "pretextual basis" *Department of Commerce*, 139 S. Ct. at 2573. Nor is this Court "'required to exhibit a naiveté from which ordinary citizens are free.'" *Id.* at 2575 (2019) (citation omitted). And accepting that the differing treatment between Title 42 and the mask mandate is based

only on "best available science"—rather than the perfect correlation with the ideological views on the respective policies of the Administration's political base—requires a level of naiveté that even the most credulous of our citizenry likely lacks.

IV. PLAINTIFF STATES WILL SUFFER IRREPARABLE HARM WITHOUT AN INJUNCTION

Plaintiff States will also suffer irreparable harm in the absence of injunctive relief. As set forth above, the Termination Order will impose costs on the States in the form of increased law enforcement, education, and health care spending. *See supra* Section I. Indeed, states bear the "heavy financial costs" of supporting an increased number of immigrants "on state and local programs" as a consequence of a federal agency rulemaking. *City & Cnty. of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 981 F.3d 742, 762 (9th Cir. 2020). The Supreme Court has similarly recognized that States "bear[] many of the consequences of unlawful immigration." *Arizona*, 567 U.S. at 397.

Due to sovereign immunity, the States cannot recover damages from the federal government. Their irrecoverable injuries thus constitute irreparable harm. *See*, *e.g.*, *Texas v. Biden*, 20 F.4th at 1001; *East Bay*, 993 F.3d at 677. Indeed, the Fifth Circuit has squarely recognized economic harms resulting from unlawful federal immigration policy as constituting irreparable harm. *See Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016).

Plaintiffs have also suffered irreparable procedural harm tied to their unrecoverable monetary damages, having been deprived of the opportunity to provide input through notice-and-comment rulemaking. *East Bay,* 993 F.3d at 677 ("Intangible injuries may also qualify as irreparable harm, because such injuries 'generally lack an adequate legal remedy.'" (citation omitted)). The States are subject to actionable harm when "depriv[ed] of a procedural protection to which [they] are entitled" under the APA, including the opportunity to shape the rules through notice and comment. *Northern Mariana Islands v. United States*, 686 F.Supp.2d 7, 17, 18 (D.D.C. 2009).

V. AN INJUNCTION WOULD SERVE THE PUBLIC INTEREST

The remaining *Winter* factors also support the States' motion. As to the balance of harms, this case is unusual and the States' arguments are uniquely strong. A preliminary injunction here will not only avoid harm to the States, but also prevent the federal government from perpetrating self-inflicted harm upon itself. Even CDC backhandedly acknowledges that its Termination Order is likely to cause calamitous immigration consequences—which is the entire basis for delaying the effective date until May 23 to mitigate those harms. Order at 28. But those harms to the *federal government* can be *completely averted* by entering a preliminary injunction—as well as the harms to the States. This case is truly rare in that a preliminary injunction will *avoid* harms to all sides. Here there is no balancing to be had, because all the harms are on one side of the scale.

The public interest also favors the states: "The 'public interest is in having governmental agencies abide by the federal laws that govern their existence and operations.' And 'there is generally no public interest in the perpetuation of unlawful agency action.'" *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1143 (5th Cir. 2021) (cleaned up). Because the Termination Order's promulgation violates the APA multiple times over, the public interest favors enjoining it.

VI. THIS COURT SHOULD ENTER A NATIONWIDE INJUNCTION.

This Court should enjoin implementation of the Termination Order nationwide, and not just in Plaintiff States. On this issue, "the Fifth Circuit's precedent in this area is applicable and controlling." *Texas v. United States*, 524 F. Supp. 3d at 667. In this context "a geographically-limited injunction would be ineffective" as once migrants crossed U.S. borders in other states they "would be free to move among states." *Texas v. United States*, 809 F.3d at 188. Instead, "immigration policy" is supposed to be "a comprehensive and *unified* system." *Id.* Moreover, given that Plaintiffs include 21 states, an injunction limited to those states could create an unworkable patchwork.

Given the magnitude of harms that even Defendants predict will occur if Title 42 is permitted to expire in the current context, it should not be permitted to go into effect anywhere.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff States' Motion for a Preliminary Injunction.

Dated: April 14, 2022

Respectfully submitted,
By: */s/ Elizabeth B. Murrill*

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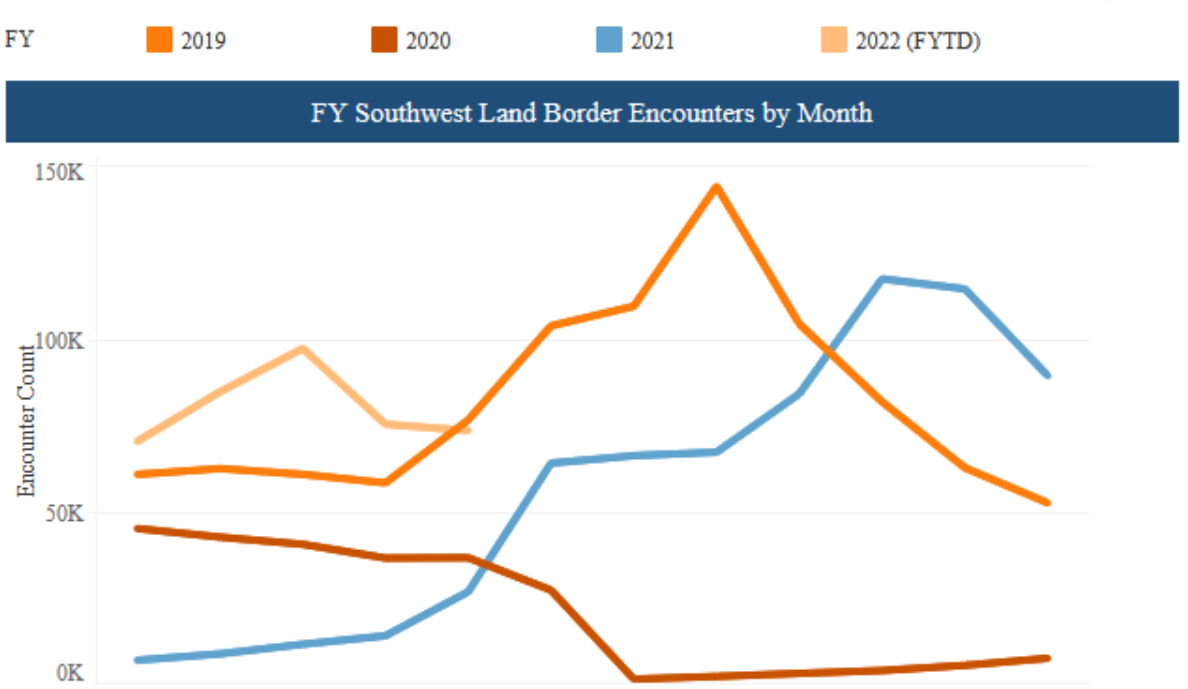
APPENDIX

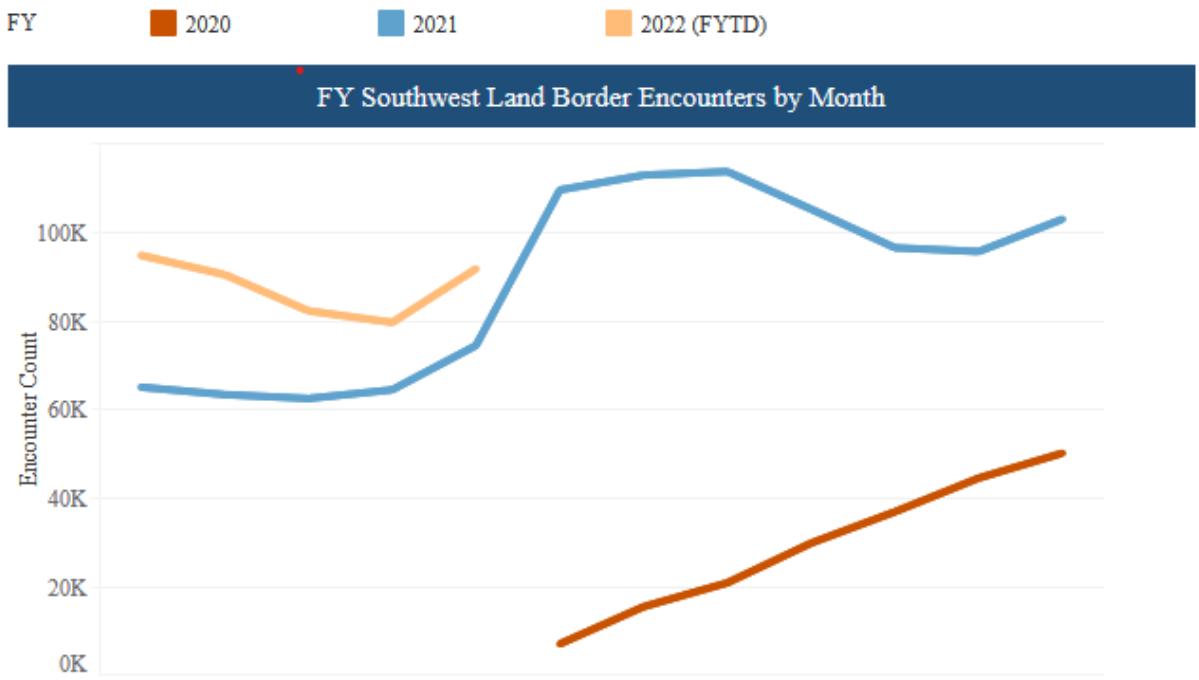
Table 1: DHS Encounters by Month



	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	Total
2022 (FYTD)	70,305	84,659	97,203	75,295	73,460								400,922
2021	7,035	8,883	11,652	14,110	26,834	64,028	66,205	67,205	84,106	117,341	114,433	89,328	671,160
2020	45,139	42,643	40,565	36,585	36,687	27,310	1,584	2,342	3,220	4,058	5,561	7,607	253,301
2019	60,781	62,469	60,794	58,317	76,545	103,731	109,415	144,116	104,311	81,777	62,707	52,546	977,509

Source: https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters

Table 2: DHS Expulsions Under Title 42 Policy



	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	Total
2022 (FYTD)	94,536	90,211	82,053	79,450	91,513								437,763
2021	64,894	63,230	62,342	64,304	74,265	109,249	112,590	113,392	104,928	96,252	95,407	102,673	1,063,526
2020						7,150	15,522	20,895	29,829	36,871	44,453	50,067	204,787
2019													

Source: https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters