IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
FORT WORTH DIVISION

STATE OF TEXAS, Plaintiff, v. JOSEPH R. BIDEN, JR., et al., Defendants.	Civil Action No. 4:21-cv-00579-P

BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

The worldwide SARS-CoV-2 virus ("COVID-19" or "COVID") pandemic infected and contributed to the deaths of millions of Americans. It crippled economies and shuttered businesses. It caused children of all ages to be forced into virtual learning environments, resulted in mandated mask-wearing indoors and outdoors, and restrained ordinary activities for Americans across the country. It touched every part of life for Americans and people across the world.

Approximately eight months ago, recognizing the threat COVID-19 posed at the international land borders, the Defendants issued a Final Rule and a detailed Order (collectively commonly referred to as the "Title 42" process) through the Director of the Centers for Disease Control and Prevention ("CDC"). This rule was designed to prevent aliens infected with COVID-19, who could end up in a congregate care setting, from crossing land borders into the United States. In practice, this rule resulted in the U.S. Department of Homeland Security ("DHS") rapidly expelling illegal aliens from the United States shortly after their unlawful entries.

This was not an arbitrary or isolated response to the pandemic. Recognizing the unique threats posed by international travel during a worldwide pandemic, governments across the world also repeatedly imposed travel restrictions—including the Defendants, who as recently as April 30, 2021, suspended the entry of nationals

from India—to prevent the further spread of COVID-19 across international boundaries.[1]

Despite issuing this generally applicable Final Rule and detailed Order, the Defendants appear to have decided that protecting Americans through use of the Title 42 process was less important than perpetuating the near-certain indefinite presence of aliens arriving as members of family units and as unaccompanied alien children.[2] So, they tried to except unaccompanied alien children from the Title 42 process through a procedurally defective order in February ("the February Order"). For members of family units, they made no such formal announcement, but have unilaterally altered their practices without following the requirements of the Administrative Procedure Act ("APA").

Unsatisfied with their haphazard lack of compliance with their own rules, the Defendants *did nothing* to ensure they would comply with provisions of the Immigration and Nationality Act ("INA") that require the detention of aliens coming from places where diseases of public health significance are present. Instead, the Defendants have chosen to take courses of action that have resulted in the release of tens of thousands of aliens into Texas and the United States.

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[1] *See* Presidential Proclamation 10199 of April 30, 2021, Suspension of Entry as Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease 2019, 86 Fed. Reg. 24,297.

[2] The term "unaccompanied alien child" means "a child who — (A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom — (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody." 6 U.S.C. § 279(g)(2). The term "family unit" refers to alien children younger than eighteen accompanied by adult alien parents or legal guardians.

The Defendants' abandonment of their authority to prevent the introduction of aliens who might carry COVID-19 into the United States under the Public Health Service Act of 1944 ("PHSA") combined with their failure to ensure the detention of those aliens whom they process under the INA results in significant harms to Texas and its citizens. Texans will continue to be exposed to COVID-19 or new variations thereof, Texans will continue to contract COVID-19, Texans will die from COVID-19, and Texas will incur significant costs in terms of healthcare and law enforcement resources.

This Court should preliminarily enjoin the Defendants' ongoing noncompliance with their obligations. Texas is likely to prevail on the merits of its claims. Texas is suffering continued, irreparable injury. The threatened injury to Texas if the injunction is denied outweighs any harm that will result to the Defendants if the injunction is granted. And granting an injunction is in the public interest.

BACKGROUND

I. The Defendants Utilized Longstanding Authority to Suspend the Introduction of Persons Along the International Land Borders, and Subsequently Departed from Their Own Rules, Triggering a Surge of Illegal Migration at the Southwest Border.

On September 11, 2020, the CDC published a final rule entitled "Control of Communicable Diseases; Foreign Quarantine: Suspension of the Right to Introduce and Prohibition of Introduction of Persons From Designated Countries or Places for Public Health Purposes." *See* Appendix ("App.") 1-37; *see also* 85 Fed. Reg. 56,424

(Sep. 11, 2020) ("Final Rule"). The Final Rule's effective date was October 13, 2020. *Id.* at 1. And it is still in effect today.

The Final Rule, issued pursuant to the statutory authority provided in section 362 of the PHSA, 42 U.S.C. § 265, "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." *Id.* (codified at 42 C.F.R. § 71.40).

The Final Rule followed a similar CDC interim final rule promulgated in March 2020, 85 Fed. Reg. 16,559 (Mar. 24, 2020), as well as an initial 30-day order, 85 Fed. Reg. 17,060 (Mar. 26, 2020), which CDC subsequently extended for another 30 days, 85 Fed. Reg. 22,424 (Apr. 22, 2020), and then amended to cover the duration of the COVID-19 emergency subject to an internal 30-day review cycle, 85 Fed. Reg. 31,503, 31,507-08 (May 26, 2020).

On October 13, 2020, the CDC Director issued an order entitled "Order Suspending the Right to Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists." *See* App. 38-44; *see also* 85 Fed. Reg. 65,806–12 (Oct. 16, 2020) ("October Order"). The CDC Director's October Order—although issued pursuant to the authority provided in the Final Rule—was the latest in a series of orders issued under the prior interim final rule and orders, all of which similarly prevented the introduction of covered aliens into the United States.

Collectively, the Final Rule and the October Order work together in a process generally known as "Title 42."

In the October Order, the CDC Director again suspended the introduction of covered aliens into the United States until the CDC determines that "the danger of further introduction of COVID-19 into the United States has ceased to be a serious danger to the public health," 85 Fed. Reg. at 65,810 (Oct. 16, 2020), based on the following findings:

- 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;
- There is a serious danger of the introduction of COVID-19 into the land POEs and Border Patrol stations at or near the United States borders with Canada and Mexico, and into the interior of the country as a whole, because COVID-19 exists in Canada, Mexico, and the other countries of origin of persons who migrate to the United States across the land borders with Canada and Mexico;
- But for this suspension-of-entry order under 42 U.S.C. § 265, covered aliens would be subject to immigration processing at the land POEs and Border Patrol stations and, during that processing, many of them (typically aliens who lack valid travel documents and are therefore inadmissible) would be held in the congregate areas of the facilities, in close proximity to one another, for hours or days; and
- Such introduction into congregate settings of persons from Canada or Mexico would increase the already serious danger to the public health of the United States to the point of requiring a temporary suspension of the introduction of covered aliens into the United States.

Id.

The CDC does not, itself, have the personnel, equipment, or facilities to enforce the CDC Director's Order. Accordingly, the CDC Director noted his consultation with DHS in issuing the October Order, stating that he "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.[3] He further stated that "DHS's assistance with implementing the Order is necessary, as CDC's other public health tools are not 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.*

The CDC Director noted that his October Order should apply to *all* covered aliens—which he defined as those "seeking to enter the United States at POEs who lack proper travel documents, aliens whose entry is otherwise contrary to law, and aliens who are apprehended at or near the border seeking to unlawfully enter the United States between POEs." *Id.* at 65,807.

Aside from exceptions not relevant here, the CDC Director specified that the October Order "does not apply to persons whom customs officers determine, with approval from a supervisor, should be excepted based on the totality of the circumstances, including consideration of significant law enforcement, officer and public safety, humanitarian, and public health interests." *Id.* In these limited circumstances, the CDC Director specified that "DHS shall consult with CDC concerning how these types of *case-by-case, individualized exceptions shall be made to help ensure consistency with current CDC guidance and public health assessments*." *Id.* (emphasis added).

[3] Another provision of the PHSA, 42 U.S.C. § 268, provides that "[i]t shall be the duty of the customs officers and of Coast Guard officers to aid in the enforcement of quarantine rules and regulations[.]"

In practice, in enforcing the CDC Director's October Order, DHS was able to rapidly expel covered aliens from the United States, thereby preventing their introduction into the United States and into congregate care settings.

The CDC Director noted in his October Order that the prior orders "reduced the risk of COVID-19 transmission in POEs and Border Patrol Stations, and thereby reduced risks to DHS personnel and the U.S. health care system." *Id.* at 65,810. He further noted that "[t]he public health risks to the DHS workforce—and the erosion of DHS operational capacity—would have been greater absent the March 20, 2020 Order[,]" adding that "DHS data shows that the March 20, 2020 Order has significantly reduced the population of covered aliens in congregate settings in POEs and Border Patrol stations, thereby reducing the risk of COVID-19 transmission for DHS personnel and others within these facilities." *Id.*

As a result of the use of Title 42, the population of aliens processed under Title 8 (the ordinarily applicable immigration rules) declined sharply, meaning that the number of aliens rapidly expelled increased significantly over the last six months of Fiscal Year 2020. Of the 253,301 total southwest border encounters under Title 8 in Fiscal Year 2020, only 24,372 occurred in the last six months of the year (from April through September). *See* App. 45; *see also* U.S. Customs and Border Protection, *Southwest Border Land Encounters*, https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters (selecting FY 2020 as the Fiscal Year, and Title 8 as the Title of Authority) (last visited June 21, 2021). During roughly the same six-month period, 204,787 aliens were rapidly expelled pursuant to Title 42. *See* App. 46; *see also* U.S.

Customs and Border Protection, *Southwest Border Land Encounters*, https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters (selecting FY 2020 as the Fiscal Year, and Title 42 as the Title of Authority) (last visited June 21, 2021).

On November 18, 2020, Judge Emmet Sullivan issued a preliminary injunction in the matter of *P.J.E.S. v. Wolf*, No. 20-2245 (D.D.C. 2020). Judge Sullivan held that unaccompanied alien children ("UAC") were improperly expelled pursuant to Title 42, and enjoined the government from applying Title 42 to UAC encountered by DHS. *Id.* On January 29, 2021, the United States Court of Appeals for the D.C. Circuit issued an order staying Judge Sullivan's injunction. *P.J.E.S. v. Pekoske*, No. 20-5357 (D.C. Cir. Jan. 29, 2021). Despite obtaining a stay of Judge Sullivan's injunction from the D.C. Circuit and having the ability to apply Title 42 to UAC, the CDC Director subsequently announced an exception from the October Order for UAC effective January 30, 2021. *See* App. 47. *See also* Notice of Temporary Exception from Expulsion of Unaccompanied Noncitizen Children Encountered in the United States Pending Forthcoming Public Health Determination, 86 Fed. Reg. 9,942 (Feb. 17, 2021) (the "February Order").

The exception noted that while COVID-19 continued to pose a "highly dynamic public health emergency," the CDC was "*in the process of reassessing* the overall public health risk at the United States' borders and its 'Order Suspending the Right to Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists' based on the most current information regarding the COVID-19

pandemic *as well as the situation at the Nation's borders*." *Id.* (emphasis added). But other than those general statements, the CDC Director provided no explanation whatsoever of the decision not to apply Title 42 to UAC.

Unsurprisingly, the number of UAC encountered at the southwest border increased to 9,429 in February. *See* App. 48*; see also* U.S. Customs and Border Protection, *Southwest Border Land Encounters*, https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters (selecting 2021 as the Fiscal Year and UC/Single Minors as the Demographic) (last visited June 21, 2021). And DHS encountered 18,951 in March, 17,148 in April, and 14,158 in May. *Id.*

The Defendants also departed from their own rules pertaining to their processing of members of family units encountered along the southwest border. Although in that context, not only have they offered no explanation for any change in processing, but they have also not made any public announcement about a change in processing or an exception to the CDC Director's October Order.

CBP encountered a total of 4,300 members of family units in November 2020, 4,404 in December 2020, 7,296 in January 2021, 19,588 in February 2021, 54,115 in March 2021, 50,094 in April, and 44,639 in May of 2021.[4] *See* App. 49*; see also* U.S. Customs and Border Protection, *Southwest Border Land Encounters*,

[4] The "FMUA" demographic depicted in the Appendix at 49-51 refer to family unit apprehensions. *See* U.S. Customs and Border Protection, *Southwest Border Land Encounters,* https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters (last visited June 21, 2021). These numbers, as with the UAC numbers, appear to have fluctuated slightly since the filing of the complaint in this case. This is likely the result of enhanced data validation with more recent numbers.

https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters (selecting 2021 as the Fiscal Year and FMUA as the Demographic) (last visited June 21, 2021).

Of those total encounters, 3,639 were processed using Title 42 in November, 3,332 in December, 4,546 in January, 9,476 in February, 21,423 in March, 17,795 in April, and 8,986 in May of 2021. *See* App. 50; *see also* U.S. Customs and Border Protection, *Southwest Border Land Encounters*, https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters (selecting 2021 as the Fiscal Year, FMUA as the Demographic, and Title 42 as the Title of Authority) (last visited June 21, 2021). Conversely, DHS processed 661 members of family units in November 2020 under Title 8, 1,072 in December 2020, 2,750 in January 2021, 10,112 in February 2021, 32,692 in March, 32,299 in April, and 35,653 in May. *See* App. 51*; see also* U.S. Customs and Border Protection, *Southwest Border Land Encounters*, https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters (selecting 2021 as the Fiscal Year, FMUA as the Demographic, and Title 8 as the Title of Authority) (last visited June 21, 2021).

Put differently, encounters of members of family units have spiked by more than 900 percent between November 2020 and May 2021, yet the use of Title 42 for those aliens encountered has plummeted as a percentage of total encounters. Yet while the Defendants have apparently abandoned their own rules as applied to family units, they have not publicly announced any such change.

II. The Defendants Have Simultaneously Failed to Comply with Provisions of the INA That Require the Detention of Aliens Who Could Carry Communicable Diseases of Public Health Significance.

When DHS is not rapidly expelling aliens using Title 42, the INA directs DHS to undertake certain actions when it encounters aliens who could carry a communicable disease of public health significance.

The INA charges DHS with enforcing the immigration laws pertaining to the admission of arriving aliens, including 8 C.F.R. Part 235, which governs the inspection of aliens applying for admission to the United States. In general, aliens who apply for admission to the United States must present themselves to an immigration officer at a POE or other designated location. *See* 8 C.F.R. § 235.1(a). Section 212(a)(1)(A) of the INA renders aliens inadmissible if they are determined to have a "communicable disease of public health significance." *See* 8 U.S.C. § 1182(a)(1)(A)(i). The INA defines a "communicable disease of public health significance" by reference to "regulations prescribed by the Secretary of Health and Human Services." 8 U.S.C. § 1182(a)(1)(A)(i).

To determine whether an alien is inadmissible due to their infection with a communicable disease of public health significance—or due to their arrival from a country where such diseases are prevalent—section 232(a) of the INA requires the detention of such aliens:

> For the purpose of determining whether aliens (including alien crewmen) arriving at ports of the United States belong to any of the classes inadmissible under this chapter, by reason of being afflicted with *any of the diseases or mental or physical defects or disabilities set forth in section 1182(a)* [8 U.S.C. § 1182(a)] of this title, or whenever [DHS] has received information showing that any aliens are *coming from a*

> *country or have embarked at a place where any of such diseases are prevalent or epidemic*, such aliens shall be detained for a sufficient time to enable the immigration officers and medical officers to subject such aliens to observation and an examination sufficient to determine whether or not they belong to inadmissible classes.

8 U.S.C. § 1222(a) (emphasis added). Regulations similarly authorize detention of such aliens where there are "reasonable grounds for believing that persons arriving in the United States should be detained for reasons specified in section 232 of the Act [8 U.S.C. § 1222]." 8 C.F.R. § 232.3; *accord* 8 U.S.C. § 1222(a).

DHS policies and statistics prove that DHS does not meaningfully enforce the plain requirements of the INA to detain any such aliens for a "sufficient time to enable the immigration officers and medical officers to subject such aliens to observation and an examination sufficient to determine whether or not" they could be carrying a communicable disease of public health significance, including COVID-19. 8 U.S.C. § 1222(a).

For instance, CBP does not detain aliens for medical observation or examination. CBP's medical policy "applies to the provision of enhanced medical support for individuals in CBP custody along the [Southwest Border (SWB)]." *See* App. 52*; see also* U.S. Customs and Border Protection, *CBP Directive No. 2210-004* at 1 (Dec. 30, 2019), https://www.cbp.gov/sites/default/files/assets/documents/2019-Dec/CBP_Final_Medical_Directive_123019.pdf (last visited June 21, 2021) ("the Directive."). The Directive "applies to CBP steady-state and surge operation and includes crisis-level operations," and states that "it is the policy of CBP that all individuals in custody will receive appropriate medical support in accordance with applicable authorities, regulations, standards, and policies." *Id.* And it states that

"[c]onsistent with short-term detention standards and applicable legal authorities, individuals will not be detained in CBP facilities for the sole purpose of completing *non-emergency medical tasks*." *Id.* (emphasis added).

The Directive describes a "phased approach to the identification of potential medical issues in persons in custody." *Id.* at 55. The first phase involves observing persons in custody and proactively alerting CBP personnel about any medical issues of concern and conducting health interviews or medical assessments for people with identified medical issues. The second phase involves a health interview for all individuals in CBP custody under the age of eighteen. And the third phase, "subject to the availability of resources and operational requirements," directs a medical assessment to be conducted on tender-age children, any person who self-identified a medical issue during a screening, and "any other person in custody with a known or reported medical concern." *Id.* at 55-56.

The Directive makes no mention of detention for individuals under the circumstances required by 8 U.S.C. § 1222(a). Therefore, combined with the fact that CBP's own Directive states that "individuals will not be detained in CBP facilities for the sole purpose of completing non-emergency medical tasks," the Defendants' compliance with the requirements of 8 U.S.C. § 1222(a) could only come through detention with ICE, the other immigration enforcement arm of DHS.

And while ICE may have medical policies in place for individuals transferred to its custody depending upon the nature of the facility itself,[5] ICE's own statistics demonstrate that the overwhelming majority of aliens in family units are not being transferred to ICE custody in the first instance. This means that CBP is releasing family unit aliens directly from its custody at the border. Even those few transferred to an ICE Family Residential Center are being quickly processed and released into the interior of the United States—rather than detained for observation or examination as required by 8 U.S.C. § 1222(a).

ICE publishes data on those aliens brought into its custody, those aliens it detains, and those aliens it releases. *See* App. 57-58; *see also* U.S. Immigration and Customs Enforcement, *ICE Detention Data, FY21 YTD*, https://www.ice.gov/doclib/detention/FY21_detentionStats061121.xlsx (at the Tab entitled "Detention FY21 YTD") (last visited June 21, 2021).

ICE's data prove that it is not detaining the overwhelming majority of members of family units whom CBP encounters at the border and is releasing the few it does process in Family Residential Centers in a matter of days. Indeed, ICE's data shows that in Fiscal Year 2021, to date, it has only processed a total of 5,031 aliens into Family Residential Centers. *Id.* at 57. These data show that as of June 2021, ICE was only detaining 1,371 aliens in family units in Family Residential Centers, with

[5] *See, e.g.*, U.S. Immigration and Customs Enforcement, *Family Residential Standards 2020* § 4.3 (2020), https://www.ice.gov/doclib/frs/2020/4.3_HealthCare.pdf (last visited June 21, 2021); U.S. Immigration and Customs Enforcement, *Performance-Based National Detention Standards 2011* § 4.3 (2011), https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf (last visited June 21, 2021).

an Average Daily Population of 1,205. *Id.* The Average Length of Stay was 7.5 days in March, 8.8 days in April, 5.4 days in May, and 5.6 days in June. *Id.* at 58.

Comparing ICE's reported total of 5,031 aliens being processed into a Family Residential Center so far in Fiscal Year 2021, *id.* at 57, with the 115,765 total aliens CBP processed under Title 8 (as opposed to immediate expulsion under Title 42), *see* App. 51, proves that ICE is also not detaining the overwhelming majority of members of family units in accordance with the plain language of 8 U.S.C. § 1222(a).

The Defendants' failure to use Title 42 with respect to UAC and family units, coupled with their failure to follow the INA's requirements regarding the detention of aliens who could have communicable diseases of public health significance, results in the release of aliens into Texas—threatening the health and safety of all Texans.

SUMMARY OF THE ARGUMENT

Texas is entitled to a preliminary injunction because it more than adequately satisfies the four factors required for such relief. Namely, Texas is likely to succeed on the merits of the underlying case because the Defendants' actions are self-evidently arbitrary and capricious in violation of the Administrative Procedure Act. There is a significant threat to public health. The costs of protecting against such a public health risk are minimal insofar as applying the law by detaining or expelling aliens who are not lawfully present and have no legal status under the INA are minimal compared to the risks posed by another outbreak in COVID-19 or the introduction of a new strain of the virus. And finally, the issuance of a preliminary injunction will be in the interest of public health and safety, not in disservice of it.

ARGUMENT

This Court should grant a preliminary injunction against the Defendants' illegal actions because Texas is likely to succeed on the merits, Texas faces a substantial threat of irreparable injury, the threatened injury if a preliminary injunction is denied outweighs any harm that will result if the injunction is granted, and an injunction will not disserve the public interest. *See Ladd v. Livingston*, 777 F.3d 286, 288 (5th Cir. 2015) ("To be entitled to a preliminary injunction, a movant must establish (1) a likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted; and (4) that the grant of an injunction will not disserve the public interest."); *see also Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974) (en banc); *Digital Generation, Inc. v. Boring*, 869 F. Supp. 2d 761, 772 (N.D. Tex. 2012) (citing *Canal Authority of State of Fla.*, 489 F.2d at 572).

I. Texas is Likely to Succeed on the Merits Because the Defendants' Actions are Self-Contradictory and Without a Proper Foundation

Texas is likely to succeed on the merits of this case. *See Elite Rodeo Ass'n v. Pro. Rodeo Cowboys Ass'n, Inc.*, 159 F. Supp. 3d 738, 748 (N.D. Tex. 2016) ("A movant must present a prima facie case to show a likelihood of success on the merits.") (citing *Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 582 (5th Cir. 2013)). Texas is likely to succeed for several reasons, including, but certainly not

limited to, the following: (1) the Defendants lacked a reasoned decision-making process; and (2) the Defendants did not consider State reliance interests.

A. *The Defendants Failed to Use Reasoned Decision-Making When They Departed from the Title 42 Process.*

The February Order is arbitrary and capricious because it does not offer a reasoned explanation for excepting UAC from the Title 42 process. The APA provides that reviewing courts "shall . . . hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In applying this standard, the Fifth Circuit has held:

> [F]ederal agencies are required to engage in reasoned decisionmaking. The agency's process must be logical and rational, and its decision is lawful only if it rests on a consideration of the relevant factors. The agency must articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. Under this standard, courts have vacated agency decisions that created unexplained inconsistencies in the rulemaking record.

Sierra Club v. United States Env't Prot. Agency, 939 F.3d 649, 664 (5th Cir. 2019) (internal citations and quotations omitted). In short, the government's actions must be logical and rational, and courts can vacate agency decisions where there are "unexplained inconsistencies," as is the case here.

The February Order, which amends the October Order and Title 42 process, is a final agency action. *See* 5 U.S.C. § 551(6), (13). The sole rationale given for this final agency action is that the "*CDC is in the process of reassessing* the overall public health risk at the United States' borders and its [October Order] based on the most current information regarding the COVID-19 pandemic as well as the situation at the Nation's borders." App. 47. Thus, by their own admission, the Defendants have not

yet completed the reassessment that they would need to completely reverse course and fundamentally change an existing program. Such an uncompleted process is not enough to suspend an existing rule. "On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 863-64 (1984).

If the existence of a still-underway "reassessment" were a sufficient rationale, agencies could suspend or amend rules at will just because they were doing what *Chevron* already requires in any event. Far from having a "reasoned decision-making process," the Defendants have reversed course and issued a final rule without any new data or reasoning beyond that on which they based the October Order.[6] Specifically, the October Order concluded that suspending the introduction of UAC was "necessary to continue to protect the public health from an increase in the serious danger of the introduction [of COVID-19.]" *See* App. 40, 85 Fed. Reg. at 65,808. In the October Order, the CDC Director had stated that the CDC was conducting monthly reviews of "the latest information regarding the status of the COVID-19 pandemic and associated public health risks to ensure that the [October] Order remains necessary to protect the public health." *Id.* at 65,809.

[6] The Defendants cannot add new rationales as part of this litigation: "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) (pre-APA); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 50 (1983) (APA review limits agencies to the "the basis articulated by the agency itself" in the record).

The evidence before the agency at the time of the February Order consisted of the October Order's determination that suspending the introduction of covered aliens (which includes UAC) is necessary to protect public health, based on the information available at that time, and approximately four monthly reviews reaffirming the necessity of that policy in light of the most recent public health data about the COVID-19 pandemic. *See* App. 47. Importantly the February Order does not identify *any new information* arising after October 16, 2020, that would provide a rational explanation for the CDC's abrupt departure from the process outlined in the October Order. *Id.*

Thus, the Defendants are using the same underlying facts and data that support the October Order to come to an entirely different outcome in the February Order. These actions are self-contradictory and irrational, and are therefore likely to be found arbitrary and capricious within the meaning of the APA.

B. The Defendants Failed to Consider State Reliance Interests.

Texas is also likely to succeed on the merits on separate grounds because, in issuing the February Order and effectively ceasing the Title 42 process for family units, the Defendants acted in an arbitrary and capricious manner by not considering the State of Texas's reliance interests in the continuation of the Title 42 policy.

The Defendants did not consider whether "there was 'legitimate reliance' on the" use of Title 42 for nearly a year—in the middle of a pandemic—that enabled Texas to devote resources to addressing the needs of its citizens, or to ease economically-damaging pandemic-related restrictions on its citizens, thus improving

Texas's economy and increasing the state's tax revenues. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (quoting *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996)). In issuing the February Order, the Defendants gave no consideration whatsoever to the impact on available State resources. That failure was arbitrary and capricious; where, as here, "an agency changes course . . . it must 'be cognizant that longstanding policies may have engendered serious reliance interest that must be taken into account.'" *Id.* (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting another source)); *see also*, *Gonzales-Veliz v. Barr*, 938 F.3d 219, 234 (5th Cir. 2019) ("[U]nexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice"). The Title 42 process protected the health, safety, and resources of Texans since the early days of the pandemic.

The Defendants also ignored the harms that ceasing to use Title 42 for UAC and family units would cause, such as increased costs to Texas and other states, which always "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012). As noted above, the February Order did not address such costs at all. This failure, too, was arbitrary and capricious. *See Michigan v. E.P.A.*, 576 U.S. 743, 751 (2015).

II. Texas Will Suffer Irreparable Harm Absent a Preliminary Injunction from This Court.

Texas faces undoubted irreparable harm from the Defendants' actions, and that harm more than adequately resolves any potential questions regarding Texas' standing in this case.

A. Texas Faces Continuing Irreparable Harm from the Defendants' Actions.

"In order to establish that there is a substantial threat of irreparable injury, [the movant] must show 'a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm.'" *Brink's Inc. v. Patrick*, No. 3:14-CV-775-B, 2014 WL 2931824, at *6 (N.D. Tex. June 27, 2014) (quoting *TRAVELHOST, Inc. v. Figg*, No. 3:11-CV-0455-D, 2011 WL 6009096, at *4 (N.D. Tex. Nov. 22, 2011)). This court has stated that "[t]he analysis for determining whether harm is irreparable encapsulates the purpose of a preliminary injunction. An injury is generally considered to be irreparable if the injury cannot be undone through monetary relief." *ADT, LLC v. Cap. Connect, Inc.*, 145 F. Supp. 3d 671, 694 (N.D. Tex. 2015) (citing *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472–73 (5th Cir. 1985)). Also, "[i]f determining the amount of damage would be extremely difficult, the court can consider the harm irreparable." *ADT, LLC*, 145 F. Supp. 3d at 694 (citing *ICEE*

Distributors, Inc. v. J&J Snack Foods Corp., 325 F.3d 586, 597 (5th Cir. 2003); *Wilkinson v. Manpower, Inc.*, 531 F.2d 712, 714 (5th Cir. 1976)).

Here, the harm has already occurred and continues to be imminent. Aliens are coming across the border every single day at an ever-increasing rate. *See* App. 48-51. This is not a far-off or future threat. It is one that is daily, pending, and currently happening. *Id.* And the threat of an outbreak only grows with each alien who crosses the border without being screened.

As the world has witnessed, COVID-19 is highly contagious, and with an incubation period of several days to two weeks, it is nearly impossible to contain once it is introduced to the population. *See* Centers for Disease Control, *Clinical Questions about COVID-19: Questions and Answers*, https://www.cdc.gov/coronavirus/2019-ncov/hcp/faq.html#Transmission (under the tab "When is someone infectious?") (last visited June 21, 2021). Manifestly, the harm that would be caused by the continuation of this public health crisis, or another public health crisis, would be irreparable. As the last 14 months have shown, the effects of COVID-19 reach every facet of everyday life and cause damages that even trillions of dollars of government funding and private donations cannot fully compensate. *See*, Alvin Powell, *What Might Covid Cost the U.S.? Try $16 Trillion*, THE HARVARD GAZETTE, https://news.harvard.edu/gazette/story/2020/11/what-might-covid-cost-the-u-s-experts-eye-16-trillion/ (November 10, 2020).

Indeed, the full extent of damages caused in response to the first outbreak are still not known—and may not be known for many years, or even decades. In Texas

alone, there have been more than 2.5 million confirmed cases, and more than 50,000 people have died. *See* Texas Department of State Health Services, *DSHS COVID-19 Dashboard*, https://dshs.texas.gov/coronavirus/cases.aspx (last visited June 9, 2021).

And most critically, the Defendants have—on at least two occasions—admitted the harms that befall Texas from their actions.

The CDC Director's October Order acknowledged as much, when it described that "several cities and states, including *several located at or near U.S. border*s, continue to experience widespread, sustained community transmission that has *strained their healthcare and public health systems*. Furthermore, continuing to slow the rate of COVID-19 transmission is critical as states and localities ease public health restrictions on businesses and public activities in an effort to mitigate the economic and other costs of the COVID-19 pandemic." 85 Fed. Reg. 65,812 (emphasis added). DHS has also acknowledged that policies that contribute to the presence of illegal aliens in Texas cause Texas significant harm. "Texas, like other States, 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 impact Texas's law enforcement, housing, education, employment, commerce, and healthcare needs and budgets." App. 59, Memorandum of Understanding between Texas and the U.S. Department of Homeland Security (Dec. 30, 2010).

As these admissions by the Defendants demonstrate, the release of illegal aliens—including UAC, family units, and other aliens—into Texas exposes Texas residents to COVID-19 and causes Texas to incur significant costs, including higher

education, driver's license and identification card, healthcare, and law enforcement costs. When the Defendants do not remove or exclude illegal aliens in compliance with federal law, the Defendants' inaction causes Texas to incur these higher costs, which are not recoverable at law from the federal government.

The Supreme Court has held that States have a constitutional obligation to provide free education to unlawfully present aliens. *Plyler v. Doe*, 457 U.S. 202 (1982). And the costs incurred are significant. For example, Texas spends an estimated $9,216 per student in attendance for each school year, but that number increases to $11,432 for students requiring Bilingual and Compensatory Education. *See* App. 72-73 ¶ 3 (Decl. of Leonardo R. Lopez). And if the number of UAC released to sponsors in Texas remains as high as it was from October 2020 through March of 2021, "4,778 UAC would be released to sponsors in Texas for that period. This would be an increase of nearly 105% over the previous 12-month period number 2,336." *Id.* at 74 ¶ 6. And based on the current situation, Mr. Lopez anticipates "that the total costs to the State of providing public education to UAC will rise in the future to the extent that the number of UAC enrolled in the State's public school system increases." App. 75 ¶ 9.

If the Defendants, instead, followed their own rules and expelled UAC rather than resettling them into Texas, the State of Texas would not incur these additional costs above those it incurs for educating children already here.

Similarly, Texas incurs costs associated with the issuance of driver licenses and identification cards. *See* App. 76-80 (Decl. of Sheri Gipson). This includes individuals who simply have employment authorization, who receive a "limited term

driver license or personal identification certificate."[7] App. 77 ¶ 5. "Each additional customer seeking a limited term driver license or personal identification certificate imposes a cost on DPS." App. 78 ¶ 8. "DPS estimates that for an additional 10,000 driver license customers seeking a limited term license, DPS would incur a biennial cost of approximately $2,014,870.80." *Id.* Again, as with the cost of educating UAC, Texas's costs in this space increase significantly when the Defendants fail to expel aliens under Title 42, as required by their own rules, and instead release aliens into the State of Texas.

Texas incurs costs associated with the provision of healthcare services to illegal aliens. Texas has previously studied the cost of providing such services and found such costs to run in the hundreds of millions of dollars. *See* App.88-90 ¶ 4-5 (Decl. of Lisa Kalakanis). Such costs include: "(i) Texas Emergency Medicaid; (ii) the Texas Family Violence Program (FVP); and (iii) Texas Children's Health Insurance Program (CHIP) Perinatal Coverage." App. 89 ¶ 6.[8] Texas spent an estimated $80 million on emergency Medicaid services in 2019. App. 89-90 ¶ 7. Texas spent an estimated $1 million on Family Violence Program services in 2019. App. 90 ¶ 8. And Texas spent an estimated $6 million on CHIP Perinatal Coverage in 2019. App. 90-91 ¶ 9. Additionally, Texas incurs costs associated with "uncompensated medical care

[7] The category of individuals who simply have employment authorization, but not lawful status includes asylum applicants who meet certain requirements. *See* U.S. Citizenship and Immigration Services, *Asylum*, https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum (under the tab "Permission to Work in the United States") (last visited June 18, 2021).

[8] Medicaid requires Texas to provide emergency services to individuals, regardless of immigration status, as a condition of its participation. *See* 42 U.S.C. § 1395dd; 42 C.F.R. § 440.255.

provided by state public hospital district facilities" to illegal aliens. App. 91 ¶ 10. The most recent estimate of the cost of such services was for 2008, when Texas spent an estimated $716.8 million to provide such services. *Id.*

Texas anticipates that total costs of providing these services will "continue to reflect trends to the extent that the number of [illegal aliens] residing in Texas increases or decreases each year." *Id.* ¶ 11. Accordingly, if the number of illegal aliens residing in Texas increases because of the Defendant's illegal policies at issue in this case, Texas will incur additional costs.

Texas also incurs costs associated with the care, custody, and rehabilitation of persons convicted of criminal offenses in Texas, including illegal aliens. App. 95-97 (Decl. of Rebecca Waltz). Those costs are not fully known due to a variety of data limitations, but because of its participation in the State Criminal Alien Assistance Program (SCAAP), Texas can estimate "correctional officer salary costs for incarcerating [illegal aliens] with at least one felony or two misdemeanor convictions for violations of state or local law, and incarcerated for at least 4 consecutive days" during certain reporting periods. App. 95 ¶ 3. "For the most recently completed SCAAP application (reporting period of July 1, 2017 through June 30, 2018), [Texas] reported data for 8,951 eligible inmates and a total of 2,439,110 days." App. 96 ¶ 6. Texas estimates that it spent $152,054,117 related to the incarceration of those inmates. Of that, Texas received reimbursement from SCAAP in the amount of $14,657,739, or roughly one-tenth of the total cost associated with that limited population of criminal aliens. *Id.* ¶ 7. To the extent that the number of criminal aliens

in its custody increases, Texas's unreimbursed costs will correspondingly increase. *Id.* ¶ 8.

In having the duty to assume these responsibilities, the Supreme Court and Fifth Circuit have both held that state and local governments can suffer injury to their financial interests "based on the actions of the federal government." *Texas v. United States*, 2021 WL 2096669, slip at 11 (S.D. Tex. 2021); *see also Clinton v. City of N.Y.*, 524 U.S. 417, 430–31, 118 S.Ct. 2091, 2099 (1998) (finding that a local government's claim of injury to its borrowing power and fiscal planning was sufficient for standing). In fact, both courts have "expressly acknowledged such financial injuries in the immigration context, where States have 'an interest in mitigating the potentially harsh economic effects of *sudden shifts* in population.'" *Id.* (quoting *Plyler v. Doe*, 457 U.S. 202, 228, 102 S.Ct. 2382, 2400 (1982)).

Such is the case here. The February Order marked an abrupt and severe shift in immigration policy that, as discussed above, drew tens of thousands of people to Texas's border, necessitating a dramatic shift in resources on the part of the state. *See* App. 48-51. As recognized by the Supreme Court, the Fifth Circuit, and the Southern District of Texas, this as a harm in and of itself.

B. Texas Has Standing to Pursue its Claims.

The Defendants' unlawful actions injure Texas in two cognizable ways: financial injury to Texas itself in the form of increased costs from the influx of illegal aliens, and a public-health injury to citizens of Texas—and thus to Texas as *parens*

patriae—in the form of unnecessary and unlawful exposure to COVID-19 from untested and unquarantined illegal aliens.

Both injuries are "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (internal quotations and citation omitted). And whether analyzed through the lens of the special solicitude afforded to states, s*ee Massachusetts v. EPA*, 549 U.S. 497, 520 (2007); *Texas v. United States*, 809 F.3d 134, 151–55 (5th Cir. 2015), or through a traditional standing analysis, the harms described above demonstrate that Texas has standing to pursue this case.

The Supreme Court has recognized that states, such as Texas, "bear[] many of the consequences of unlawful immigration." *Arizona v. United States,* 567 U.S. 387, 397 (2012). Texas will suffer a concrete injury should the defendants be allowed to essentially dispose of the Title 42 process. As discussed above, the number of aliens coming to Texas's southern border has only continued to grow since the February Order, which necessarily increase costs to Texas. *See* App. 48-51. Federal courts have repeatedly recognized that these costs imposed by federal immigration policies give Texas standing to challenge the lawfulness of those policies. *Texas v. United States*, 809 F.3d 134, 155-61 (5th Cir.), *aff'd by an equally divided Court*, 136 S.Ct. 2271 (2016); *Texas v. United States*, 86 F. Supp. 3d 591, 625-28 (S.D. Tex. 2015) (Hanen, J.); *Texas v. United States*, No. 6:21-cv-0003, 2021 U.S. Dist. LEXIS 33890, at *27-35 (S.D. Tex. Feb. 23, 2021) (Tipton, J.). These collected decisions establish that Texas has standing to challenge lax federal enforcement as a matter of issue preclusion, *see*

United States v. Mendoza, 464 U.S. 154, 158 (1984) (citing *Montana v. United States*, 440 U.S. 147, 153 (1979)) (mutual collateral estoppel available against federal government).

The Defendants will likely raise the Supreme Court's recent decision in *Texas v. California*, No. 19-1019, 2021 WL 2459255 (June 17, 2021) as somehow diminishing Texas's standing in this case. But reliance on that case is misplaced. Here, the harm Texas faces is "directly traceable to any actual or possible unlawful Government conduct[,]" *id.* at *7, namely, the Defendants' abject failure to abide by their own rules promulgated under Title 42. And as opposed to a law that has no meaningful enforcement mechanism—purportedly affecting a state's ability to show a causal relationship between the claimed injury and the challenged action—here, there can be no doubt "that third parties will likely react in predictable ways," *Id.* (citation omitted). Individuals have violated our immigration laws for decades not with the intention of taking a short visit to a resort or to take their families to Disneyworld and then returning home, but instead, to remain in the United States for as long as possible. Their very act in coming to the United States demonstrates their intent and their reactions to changes in immigration policies are easy to predict—and illustrate the commonsense reasons why the State of Texas incurs significant costs.

In addition, the Defendants' unlawful actions are in no way considered sovereign actions by the federal government: "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not

sovereign actions." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949); Kenneth Culp Davis, *Suing the Government by Falsely Pretending to Sue an Officer,* 29 CHI. L. REV. 435, 453-54 (1962). Thus, while "a State [does not] have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate *parens patriae* of every American citizen," *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966) (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923), that rule does not apply to unlawful agency action by mere federal officers. As Judge Hanen explained at length in *Texas v. United States*, 86 F. Supp. 3d at 625-28 (collecting cases), there is "an established line of cases that have held that states may rely on the doctrine of *parens patriae* to maintain suits against the federal government" where "not bringing suit to *protect* their citizens *from* the operation of a federal statute" but rather "to *enforce* the rights guaranteed by a federal statute." *Id.* at 626 (emphasis in original). Texas brings such an action here.

Indeed, the Supreme Court recognized the distinction in *Mellon*: "We need not go so far as to say that a State may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress; but we are clear that the right to do so does not arise here." *Mellon*, 262 U.S. at 485. Texas has the police power to protect the health and welfare of its citizens, *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 475 (1996) ("States have exercised their police powers to protect the health and safety of their citizens," which "are primarily, and historically, ... matters of local concern") (interior quotation marks and alterations omitted), and the United

States lacks a police power. *United States v. Morrison*, 529 U.S. 598, 618-19 (2000) ("we always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power"). As Judge Hanen further explained, a State has the required "quasi-sovereign interest 'in the health and well-being—both physical and economic—of its residents.'" *Texas*, 86 F. Supp. 3d at 627 (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982)). Again, Texas brings such an action here.

In the PHSA and INA, Congress has given executive officials authority to *block* the entry of aliens with communicable diseases in compliance with those statutes and the APA.[9] It would be strange if executive officers' non-sovereign acts *in violation* of the substantive and procedural requirements that Congress has set could bar a state from protecting its citizens, and neither the Fifth Circuit nor the U.S. Supreme Court has ever so held.

Texas can show that the harm is traceable to the Defendants' conduct and is redressable by a favorable order. The danger posed by increased risks of COVID-19 cases would not exist if the Defendants rapidly expelled aliens through the Title 42 process. As discussed above, statistics demonstrate that following the February Order, migration to the border surged while enforcement of immigration laws

[9] Whatever deference the Court chooses to give to the Defendants' interpretation of the PHSA and INA, that deference does not enter into the standing inquiry because the "threshold inquiry into standing in no way depends on the merits of the [plaintiff's] contention that particular conduct is illegal." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (interior quotation marks omitted); *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003) ("in reviewing the standing question, the court … must therefore assume that on the merits the plaintiffs would be successful in their claims"). However the Court decides the merits, the Defendants' actions must be assumed to violate the APA, PHSA, and INA.

plummeted. *See supra* pp. 7-10. The Administration sent a signal that it would not enforce immigration laws and, almost overnight, the amount of people seeking entry to the United States grew exponentially. But more fundamentally, the harm is traceable to the conduct. By allowing tens of thousands of people to flow across the border, the Defendants have increased the public health and safety risk to Texas, a risk that did not exist prior to the Defendants' actions.

Finally, as to redressability, a favorable order from this court would immediately prevent further harm or risk of harm for the reasons discussed above.[10]

III. The Harms to Texas Outweigh Any Harms That Might Arise If This Court Grants a Preliminary Injunction.

"[T]o obtain a preliminary injunction [the movant] 'must show that the injury [it] will suffer if the court denies injunctive relief is greater than the injury the defendants will suffer if the relief is granted.'" *Med-Cert Home Care, LLC v. Azar*, 365 F. Supp. 3d 742, 757 (N.D. Tex. 2019) (quoting *Bennigan's Franchising Co., L.P. v. Swigonski*, No. CIVA 3:06CV2300G, 2007 WL 603370, at *5 (N.D. Tex. Feb. 27, 2007)).

[10] Indeed, for procedural injuries like APA rulemaking claims alleged in the complaint, those injuries *relax* the Article III threshold for redressability. *Sierra Club v. Glickman*, 156 F.3d 606, 613 (5th Cir. 1998); "If a party claiming the deprivation of a right to notice-and-comment rulemaking under the APA had to show that its comment would have altered the agency's rule, section 553 would be a dead letter." *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 95 (D.C. Cir. 2002). Instead, here, *vacatur* would put the parties back in the position they should have been in all along, and thus provide enough redress, even if the federal defendants *potentially could* take the same action on remand, leaving Texas no better off in the end. *Vacatur* and remand redress the procedural injury "even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason." *FEC v. Akins*, 524 U.S. 11, 25 (1998). When considered in the procedural-rights context, Texas's standing is particularly obvious.

In this case, the harm to Texas, as detailed above, is both imminent and irreparable, and could be easily avoided by the Defendants' continuation of practices used prior to the February Order. At stake for Texas is the health of the people of Texas. Conversely, there is no harm to the Defendants from their resuming their operations as they were prior to the February Order. Nor is there any legal harm to persons removed pursuant to those procedures, as such individuals are aliens who lack lawful status in the United States, and whose rights are not being violated.

IV. A Preliminary Injunction Is in the Public Interest.

The final factor is the public interest, which collapses into the merits when a strong showing has been made on the likelihood of prevailing on the merits. *In re Campbell*, 750 F.3d 523, 534 (5th Cir. 2014); *Sunbeam Prods., Inc. v. West Bend Co.*, 123 F.3d 246, 260 (5th Cir. 1997) ("public interest calculus is subsumed within the merits"), *abrogated on other grounds by TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23 (2001)).

This court has recognized that there are a wide variety of public interests that could be considered and that, as a result, there can be overlap between the third and fourth elements of the preliminary injunction analysis. For example, a court has determined that "the balance of harm tip[s] in favor of granting the injunction because the harm threatened to the public was perceived as being greater than any speculative harm that might be suffered by United." *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 626 (5th Cir. 1985); *see also Janvey v.*

Alguire, 647 F.3d 585, 601 (5th Cir. 2011) (analyzing the balance of harms and the public interest issues together).

Similarly, here, the requested Preliminary Injunction is in the public interest given the public health concerns discussed above, and the lack of any public interest in the continuation of the Defendants' unlawful policies, or harm to the Defendants from ceasing them. And, at the very least—to employ the precise legal standard applicable here— the Preliminary Injunction is not contrary to the public interest.

CONCLUSION

For the foregoing reasons, this Court should issue a Preliminary Injunction ordering the Defendants (1) to cease all activities in furtherance of the February Order, (2) resume activities in furtherance of the October Order, to include applying Title 42 to all covered aliens arriving at the U.S. Border—without categorically excepting classes of people, whether families, unaccompanied minors, or others—and (3) enjoining the Defendants from failing to apply the detention scheme required in the alternative by 8 U.S.C. § 1222(a).

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I certify that, on June 23, 2021, I conferred with counsel for the Defendants regarding this Motion. The Defendants oppose this Motion.

/s/ Aaron F. Reitz
AARON F. REITZ
Lead Counsel

CERTIFICATE OF SERVICE

I certify that, on June 23, 2021, I served this Motion through CM/ECF upon the Defendants.

/s/ Aaron F. Reitz
AARON F. REITZ
Lead Counsel