No. 22-30303

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

State of Louisiana; State of Arizona; State of Missouri; State of West Virginia; State of South Carolina, *et al.*,

Plaintiffs-Appellees,

v.

Centers for Disease Control and Prevention; Rochelle Walensky; United States Department of Health and Human Services; Xavier Becerra; United States Department of Homeland Security, *et al.*,

Defendants-Appellants,

and

Innovation Law Lab,

Movant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF APPELLEES

MATT A. CRAPO
CHRISTOPHER J. HAJEC
Immigration Reform Law Institute
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
Telephone: (202) 232-5590

Attorneys for *Amicus Curiae*

SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1 and Fed. R. App. P. 26.1, *amicus curiae* Immigration Reform Law Institute makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

3) The following entity has an interest in the outcome of this case: Immigration Reform Law Institute.

DATED: September 7, 2022

Respectfully submitted,

/s/ Matt Crapo

Matt A. Crapo
Immigration Reform Law Institute
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
Telephone: (202) 232-5590

Attorney for *Amicus Curiae*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

MISCELLANEOUS

INTEREST OF *AMICI CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens, and also to assisting courts in understanding and accurately applying federal immigration law. For more than twenty years the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 579 U.S. 547 (2016); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 942 F.3d 504 (D.C. Cir. 2019); *Ariz. Dream Act Coalition v. Brewer*, 855 F.3d 957 (9th Cir. 2017); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

[1] All parties have consented in writing to the filing of IRLI's *amicus curiae* brief. No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

Congress has provided two avenues for protecting the public health through the regulation of immigration: 1) the detention of aliens who come from a country where a communicable disease of public significance is prevalent or epidemic under regular Title 8 immigration processes to ensure that those aliens do not have that disease; or 2) the prohibition of the introduction of aliens from those countries into the United States under Title 42. In order to meet the challenge of protecting the public health against the COVID-19 pandemic, the Centers for Disease Control and Prevention ("CDC") opted to suspend the right to introduce such aliens into the United States. In terminating its suspension-of-entry order, however, the CDC failed to address Congress's directive that such aliens, if they are not prohibited from entering the United States under Title 42, must be detained for a period sufficient to determine whether they are inadmissible as a carrier of a communicable disease. The CDC's failure to consider this important aspect of the problem renders its Termination Order arbitrary and capricious.

Plaintiffs-Appellees have amply demonstrated that the district court reasonably determined that CDC's Termination Order is procedurally flawed and is arbitrary and capricious for other reasons. But even if the Court finds those reasons inadequate, it should affirm the district court's preliminary injunction for the alternative reason set forth herein.

ARGUMENT

The Termination Order is Arbitrary and Capricious Because CDC Failed to Consider the Congressional Directive to Detain All Aliens That Would Otherwise be Amenable to Title 42 Suspension Orders.

Although the district court enjoined the CDC's Termination Order on the basis of a procedural APA flaw, "it is an elementary proposition, and the supporting cases too numerous to cite, that this court may affirm the district court's judgment on any grounds supported by the record." *Texas v. United States*, 809 F.3d 134, 178 (5th Cir. 2015) (internal quote omitted). Therefore, as an alternate and additional ground for affirming the preliminary injunction, the Court may address the substantive issue of whether CDC's Termination Order is arbitrary and capricious because it failed to address an important aspect of the problem addressed by its order.

Under the Administrative Procedures Act ("APA"), courts are directed to "hold unlawful and set aside agency action[s]" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). "The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). In other words, courts must ensure that "the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Id.*; *see also Michigan*

v. EPA, 576 U.S. 743, 750, 752 (2015) ("[A]gency action is lawful only if it rests on a consideration of the relevant factors" and "important aspect[s] of the problem." (quotation omitted)). Here, the CDC failed to consider an important aspect of the problem, Congress's directive that all aliens covered by CDC's Title 42 orders be detained under Title 8 procedures in order to ensure that they are neither infected with nor can transmit COVID-19.

Congress has enacted two provisions that regulate immigration for the purpose of protecting the public health from the introduction or spread of communicable diseases. Under the Immigration and Nationality Act ("INA"), or in CDC parlance, Title 8, aliens who have a "communicable disease of public health significance … are inadmissible." 8 U.S.C. § 1182(a)(1)(A)(i).[2] Further, there are two circumstances in which Congress has directed the Department of Homeland Security ("DHS") to detain aliens to determine if they are inadmissible for public

[2] Congress has defined a "communicable disease of public health significance" by referring to "regulations prescribed by the Secretary of Health and Human Services." *Id.* There is no question that COVID-19 is such a communicable disease of public health significance. *See* CDC, *Order Suspending the Right to Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists*, 85 Fed. Reg. 65,806, 65,810 (Oct. 13, 2020) ("October Order") ("COVID-19 is a communicable disease that poses a danger to the public health."); *see also* Termination Order ROA.320 ("Coronavirus disease 2019 (COVID-19) is a quarantinable communicable disease caused by the SARS-CoV-2 virus." (footnote omitted)).

health reasons. First, aliens must be detained if DHS has reason to believe that they are "afflicted with" such a "communicable disease of public health significance." 8 U.S.C. § 1222(a). DHS must also detain aliens if it "has received information showing that [they] are coming from a country or have embarked at a place" where such a disease is "prevalent or epidemic[.]" *Id.* The detention must enable "immigration officers and medical officers" to conduct "observation and an examination sufficient to determine whether" the aliens are inadmissible as carriers of a communicable disease. *Id.*

In addition to directing DHS to detain aliens who may be infected with a communicable disease, Congress has granted the Department of Health and Human Services, through CDC, "the power to prohibit, in whole or in part, the introduction of persons and property" from countries in which any communicable disease exists and "there is serious danger of the introduction of such disease into the United States" such that "a suspension of the right to introduce such persons and property is required in the interest of the public health." 42 U.S.C. § 265. Thus, in order to protect the public health, Congress requires either the detention of aliens from countries where a communicable disease is prevalent or the prohibition of their introduction into the United States.

On September 11, 2020, the CDC published a final rule that "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 (Sep. 11, 2020) (codified at 42 C.F.R. § 71.40). This Final Rule, issued under the authority granted by 42 U.S.C. § 265, became effective on October 13, 2020. On the day the Final Rule became effective, the CDC issued its October Order suspending the right to introduce certain persons from countries where a quarantinable communicable disease exists. 85 Fed. Reg. 65,806 (Oct. 13, 2020).

In its October Order, the CDC opted to prohibit the introduction of aliens who would otherwise be detained under Title 8. *See* October Order, 85 Fed. Reg. at 65,808 (defining "covered aliens" as "persons who are traveling from Canada or Mexico (regardless of their country of origin), and who must be held longer in congregate settings in [ports of entry (POEs)] or Border Patrol stations to facilitate immigration processing," which would typically include "aliens seeking to enter the United States at POEs who do not have 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."); *see also* CDC, *Public Health Reassessment and Order Suspending the Right To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease*

Exists, 86 Fed. Reg. 42,828, 42,829 (Aug. 5, 2021) ("August Order") (continuing the suspension of the right to introduce "covered noncitizens," as defined therein). That is, the CDC recognized that aliens amenable to its Title 42 orders would otherwise be detained by DHS under regular Title 8 immigration procedures absent the exercise of CDC's Title 42 authority.

In its orders suspending the right to introduce certain persons into the United States, the CDC recognized that those aliens who would otherwise be detained by DHS in congregate settings for immigration processing under Title 8 would be those most likely to spread communicable diseases and made its suspension-of-entry orders applicable only to those "covered aliens."

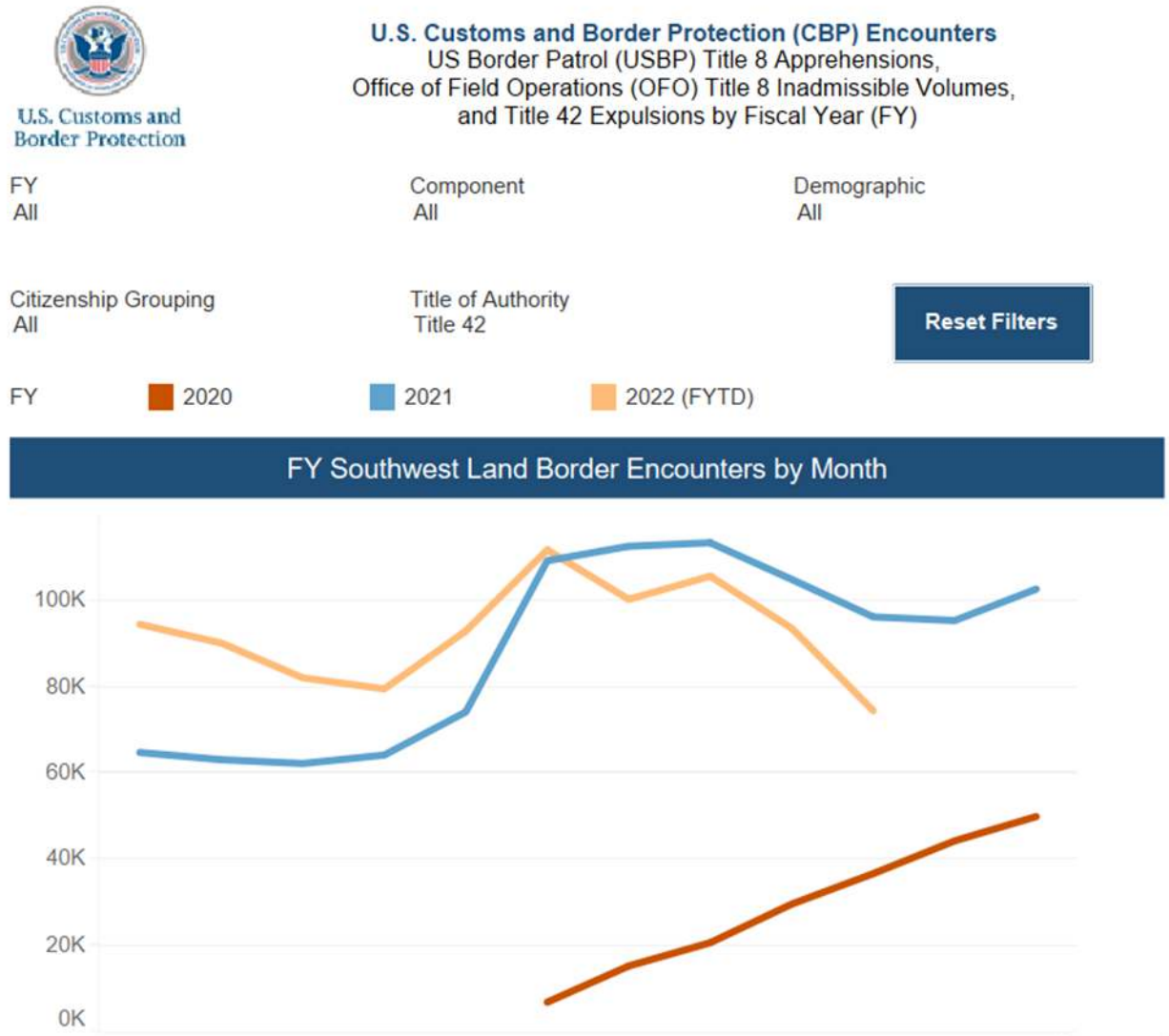
> But for this suspension-of-entry order under 42 U.S.C. § 265, covered aliens would be subject to immigration processing at the land POEs and Border Patrol stations and, during that processing, many of them (typically aliens who lack valid travel documents and are therefore inadmissible) would be held in the congregate areas of the facilities, in close proximity to one another, for hours or days.

October Order, 85 Fed. Reg. at 65,810. "Complete termination of any order under 42 U.S.C. § 265 would increase the number of noncitizens requiring processing under Title 8, resulting in severe overcrowding and a high risk of COVID-19 transmission among those held in the facilities and the CBP workforce, ultimately burdening the local healthcare system." August Order, 86 Fed. Reg. at 42,838.

Despite its earlier acknowledgement of this problem, nowhere in its Termination Order did CDC acknowledge the Title 8 congressional directive to

detain all aliens from countries where a communicable disease of public health significance is widespread or epidemic. *See* 8 U.S.C. § 1222(a). To be sure, CDC acknowledged that the termination of the August Order would lead to an increase in the number of aliens detained by DHS in congregate settings, but only in the context of explaining why the effective termination date would be delayed. *See* ROA.345 (recognizing that "the Termination of the August Order will lead to an increase in the number of noncitizens being processed in DHS facilities which could result in overcrowding in congregate settings"). Indeed, CDC acknowledged that DHS projected "an increase in encounters in the coming months, which could lead to further crowding in DHS facilities." ROA.345

But nothing in the Termination Order shows that CDC contemplated, much less reasonably considered, Congress's directive at 8 U.S.C. § 1222(a) that aliens arriving from countries in which a communicable disease is prevalent or epidemic be detained. This is remarkable inasmuch as more than 111,000 aliens at the Southwest border were prohibited from entering the United States under Title 42 according to DHS's own numbers in the month leading up to CDC's April 1, 2022, Termination Order. *See* Figure 1, *infra* (showing that 111,753 aliens were processed under Title 42 in March 2022).



	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	Total
2022 (FYTD)	94,528	90,190	82,153	79,605	92,992	111,753	100,302	105,673	93,633	74,573			925,402
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

Figure 1. (source: https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters (last visited Sept. 6, 2022)).

In contrast, fewer aliens (96,252) were expelled under Title 42 in July 2021, the month preceding the CDC's August Order, in which the CDC concluded that "[c]omplete termination of any order under 42 U.S.C. § 265 would increase the number of noncitizens requiring processing under Title 8, resulting in *severe overcrowding and a high risk of COVID-19 transmission among those held in the facilities and the CBP workforce*, ultimately burdening the local healthcare system." August Order, 86 Fed. Reg. at 42,838 (emphasis added). In its Termination Order, the CDC fails to explain how 96,000 aliens per month would severely overcrowd DHS facilities while 111,000 aliens per month would not.

To be sure, in its Termination Order, the CDC noted that the number of COVID-19 cases in the United States had decreased significantly in early 2022 and that hospitalization rates had similarly dropped. *See* ROA.329-30. But the CDC did not determine that COVID-19 is no longer prevalent or epidemic in Mexico (or other neighboring countries), and thus that screening of aliens from such countries for COVID-19 is no longer warranted. Indeed, as Appellees point out, this Administration has renewed the COVID-19 emergency declaration and continues to pursue other pandemic-control measures. *See* States' Answering Brief at 84-85.

In the absence of CDC's suspension-of-entry orders, each alien processed under Title 42 would be subject to Congress's detention directive under 8 U.S.C. § 1222(a). Instead of reasonably explaining how the Termination Order would

avoid overwhelming DHS's detention capacity by increasing the number of aliens subject to a detention directive by approximately 100,000 per month, CDC merely pointed to "DHS reports that it is taking steps to plan for such increases, including by readying decompression plans, deploying additional personnel and resources to support U.S. Border Patrol, and enhancing its ability to safely hold noncitizens it encounters." ROA.345. But DHS has repeatedly argued in the federal courts that it lacks the detention capacity to detain every alien that Congress has directed be detained under Title 8. *See*, *e.g.*, *Texas v. Biden*, 554 F. Supp. 3d 818, 852 (N.D. Tex. 2021) ("But DHS admits it does not have the capacity to meet its detention obligations under Section 1225 because of 'resource constraints.'"), *rev'd on other grounds*, 142 S. Ct. 2528 (2022); *Texas v. United States*, 2022 U.S. Dist. LEXIS 104521, *72, 2022 WL 2109204 (S.D. Tex. June 10, 2022) ("Throughout this case, the Government has trumpeted the fact that it does not have enough resources to detain those aliens it is required by law to detain."), *cert. granted*, No. 22-58 (22A17), 2022 U.S. LEXIS 3279 (July 21, 2022); *see also id.* at *9-12 (discussing DHS detention capacity and stating that the number of detention beds available number between 25,000 and 34,000 nationwide).

Instead, CDC simply decided that "[p]utting [DHS's] plans in place, ensuring that the workforce is adequately and appropriate trained for their shifting roles, and deploying critical resources require time" and thereby delayed the

implementation of its Termination Order by seven weeks, or until May 23, 2022, "to provide DHS with additional time to ready such operational plans and prepare for full resumption of regular migration under Title 8." ROA.345.

CDC's termination of its suspension-of-entry order will have the predictable result that approximately 100,000 aliens per month (a number likely to increase) will suddenly become subject to Congress's detention directive under 8 U.S.C. § 1222(a) and overwhelm DHS's detention capacity. CDC's failure adequately to consider such an important aspect of the problem before it—that of protecting the public health—renders its decision arbitrary and capricious, and this Court should uphold the district court's preliminary injunction on that alternative basis.

CONCLUSION

For the forgoing reasons, the Court uphold the district court's preliminary injunction.

DATED: September 7, 2022

Respectfully submitted,

/s/ Matt Crapo
Matt A. Crapo
Christopher J. Hajec
Immigration Reform Law Institute
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
Telephone: (202) 232-5590

Attorneys for *Amicus Curiae*

CERTIFICATE OF SERVICE

I certify that on September 8, 2022, I electronically filed the foregoing *amicus* brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Matt Crapo
Matt A. Crapo

CERTIFICATE OF COMPLIANCE

The foregoing brief complies with Fed. R. App. P. 27(d)(2)(A) because it contains 2,551 words, as measured by Microsoft Word software. The brief also complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & 32(a)(6) because it has been prepared in a proportionally spaced, Roman-style typeface of 14 points or more.

DATED: September 7, 2022

Respectfully submitted,

/s/ Matt Crapo
Matt A. Crapo