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

STATE OF LOUISIANA, *et al.*, Plaintiffs, v. CENTERS FOR DISEASE CONTROL & PREVENTION, *et al.*, Defendants.	Civil Action No. 6:22-CV-00885-RRS-CBW

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR AN ORDER TO SHOW CAUSE

Table of Contents

Table of Authorities

Cases

Other Auhorities

INTRODUCTION

Plaintiffs moved for an order to show cause why Defendants should not be held in contempt for violating this Court's preliminary injunction, which enjoined Defendants from implementing the April 1, 2021 order of the Centers for Disease Control and Prevention ("CDC") terminating CDC's prior Title 42 orders. This Court should deny Plaintiffs' motion because it is based on two erroneous assumptions: (1) that Defendants have stopped enforcing Title 42 against Haitian migrants, and (2) that Defendants are using Title 42's humanitarian exception to circumvent the Court's injunction. As explained below and in the attached Declaration of the Acting Assistant Secretary for Border and Immigration Policy, Department of Homeland Security ("DHS"), DHS continues to enforce Title 42 against Haitian migrants in the same manner as it does migrants of any other nationality. While DHS has granted more humanitarian exceptions from Title 42 in recent months, that is in response to an increase in the number of migrants whose circumstances warrant such exceptions.

Plaintiffs' assertion that there is a 99% decrease in Title 42 enforcement against Haitians is misleading. It appears that they derive that number from data provided in DHS's monthly reports from two DHS entities—the Office of Field Operations and U.S. Border Patrol—without considering the key denominator, the number of Haitians encountered after they have unlawfully crossed between ports of entry into the United States. The drop in the number of Haitians subject to Title 42 expulsions is due to the fact that Haitians have largely stopped crossing the border unlawfully—not a change in DHS's enforcement policies.

There has been a dramatic shift in the migration pattern for Haitian migrants. Instead of attempting to illegally cross the border and risk being expelled to Haiti (as Mexico does not accept Title 42 expulsions of Haitians), Haitian migrants have been waiting in shelters in Mexico near ports of entry in the hope of being granted humanitarian exceptions under Title 42. As shown by the government's reports, the number of encounters of Haitian migrants between ports of entries dropped significantly in June 2022. In May 2022, more than 3,000 single adults from Haiti were encountered by U.S. Border Patrol after illegally crossing the border between ports of entry into the United States. But since that time, there have been no more than 165 such encounters in a single month. This

marked decline led to a correspondingly low number of Title 42 expulsions reported by U.S Border Patrol.

Meanwhile, the Office of Field Operations' data does not include the large number of migrants who are prevented from entering the United States due to DHS's enforcement of Title 42. The Office of Field Operations, which operates ports of entry, enforces Title 42 by preventing migrants from crossing the international boundary line into the United States in the first place. Because such migrants never enter the United States, they are not processed or recorded as Title 42 "expulsions." The only Title 42 expulsions that are recorded are the few migrants who manage to evade Title 42 enforcement at the international boundary line, are processed while in the United States, and then expelled. The Office of Field Operations' data does include those migrants who are processed under immigration laws in Title 8 of the U.S. Code, after having been excepted from Title 42 for humanitarian or other approved reasons. Thus, while only those granted the humanitarian exception and processed under Title 8 are reflected in the Office of Field Operations' data, the hundreds if not thousands of other Haitian nationals who are prevented from entering United States because of Title 42 are not reflected in the data. Plaintiffs' use this data to assess DHS's Title 42 enforcement efforts is thus inappropriate.

Nor is DHS's increased grant of humanitarian exceptions in recent months an attempt to circumvent the preliminary injunction. CDC's Title 42 orders have always authorized DHS to grant exceptions to the application of Title 42 for humanitarian or other reasons, and the preliminary injunction does not purport to limit that authority. Indeed, the Court has said that it did not "inten[d] to limit or prevent" DHS's exercise of discretion to grant humanitarian, law enforcement, or other exceptions "authorized by the [Title 42] orders" prior to the issuance of the Termination Order. 4/25/22 TRO Hr'g Tr. at 10:15–23, ECF No. 36. DHS exercised its discretion to grant more humanitarian exceptions because there is an increase in the number of migrants warranting such exceptions.

Plaintiffs make much of DHS's clarification as to the precise timing of when DHS first increased the number of humanitarian exceptions. Although the preliminary injunction requires DHS to provide only the total number of humanitarian exceptions in a given month, for the sake of

transparency, DHS included in its monthly report for June the additional information that it began increasing the number of such exceptions on July 13, 2022. Upon discovering that there had also been a more modest increase beginning on June 4, 2022, Defendants provided that information as well in its report for August. Because DHS was able to provide the precise dates for such increases, Plaintiffs surmise that DHS must have made "material changes to the *legal standard* for humanitarian exception itself," Pls.' Mot. for Order to Show Cause ("Mot.") 4 (emphasis in original), and yet failed to report them as required by the preliminary injunction. But DHS has made no such change; it merely has set a maximum number of humanitarian exceptions officers and agents of the Customs and Border Protection generally could grant daily and has incrementally increased those maximum numbers on specific dates, based on its the processing capacity, in response to an increase in the number of migrants whose circumstances warrant such exceptions. There was no policy change to report. Nor was DHS's clarification material. While Defendants regret the initial error, at all times DHS has provided accurate numbers of total humanitarian exceptions in its monthly reports.

In short, an order to show cause is not warranted, and this Court deny Plaintiffs' motion as well as their request for discovery.

BACKGROUND

A. The Court's Preliminary Injunction

On April 1, 2022, CDC issued an order terminating its prior Title 42 public health orders, which suspend certain noncitizens' entry into the United States to prevent the spread of COVID-19. 87 Fed. Reg. 19,941 (Apr. 6, 2022) (Termination Order). On April 3, 2022, Plaintiffs brought this suit to challenge the Termination Order for failing to meet the Administrative Procedure Act's notice-and-comment requirements and as arbitrary and capricious agency action. ECF No. 1. Plaintiffs thereafter moved for a preliminary injunction seeking to enjoin the enforcement of the Termination Order, which had an effective date of May 23, 2022. ECF No. 13. On May 20, 2022, the Court granted Plaintiffs' motion and issued a nationwide preliminary injunction. ECF Nos. 90, 91.

The preliminary injunction enjoined Defendants "from enforcing the April 1, 2022 Order Under Sections 362 & 365 of the Public Health Service Act anywhere within the United States." ECF

No. 91 at 2. The Court further ordered DHS to "file monthly reports providing (i) the number of single adults processed under Title 42 and Title 8 by country, (ii) the number of recidivist border crossers for whom DHS has applied expedited removal, (iii) the number of migrants that have been excepted from Title 42 under the NGO-supported humanitarian exception process, and (iv) any material changes to policy regarding DHS's application of the Title 42 process." *Id.*

B. Defendants' Compliance with the Preliminary Injunction

Defendants have complied with the Court's preliminary injunction. As explained below and in the attached Declaration of Blas Nuñez-Neto, Acting Assistant Secretary for Border and Immigration Policy, dated November 10, 2022, DHS has not implemented the Termination Order. Fourth Nuñez-Neto Decl. ¶¶ 3, 8. DHS continues to expel tens of thousands of noncitizens each month under the authority of CDC's operative August 2021 Title 42 Order. *See* ECF Nos. 151, 154, 155, 159. In total, since the Court's preliminary injunction, DHS has expelled, among others, over 278,000 single adults under CDC's Title 42 authority. *See id.* DHS has also complied with the Court's requirement that it file monthly data reports regarding its application the Title 42 Order. *See id.* Those reports have specified the numbers of single adults processed under Title 42 and Title 8, respectively, broken down by country. *Id.* They have also specified the number of recidivist border crossers for whom DHS has applied expedited removal and the number of migrants that have been excepted from Title 42 under the NGO-supported humanitarian exception process. *Id.*

Defendants' data reports show that the overall Title 42 expulsion rate for single adults from all nationalities has remained at around 50% since the preliminary injunction. ECF Nos. 151, 154, 155, 159 (showing monthly expulsion rates ranging from 42% to 56%). Moreover, DHS has been consistent in its application of Title 42. For example, a key metric that the parties have used to assess DHS's application of Title 42 has been the percentage of single adults from the Northern Triangle countries of El Salvador, Guatemala, and Honduras who have been expelled under Title 42 by U.S.

Border Patrol.[1] That percentage has remained relatively consistent since the Court entered the preliminary injunction. In June 2022, U.S. Border Patrol expelled, under Title 42, 92.3% of single adults traveling from Northern Triangle countries. ECF No. 151. It expelled 92.1% of such adults in July 2022, ECF No. 154, 91.8% of such adults in August 2022, ECF No. 155, and 92.7% of such adults in September 2022, ECF No. 159. U.S. Border Patrol's application of Title 42 as to single adults from Mexico has also been consistent, with the expulsion rates ranging from 90.2% (in July) to 91.7% (in September). ECF Nos. 151, 154, 155, 159.

DHS's ability to enforce Title 42, however, depends largely on the cooperation of foreign governments; DHS may expel a noncitizen under Title 42 only if either (i) the Government of Mexico agrees to accept the relevant nationality and demographic or (ii) the individual's country of origin agrees to accept Title 42 expulsions. *See* 86 Fed. Reg. 42,828, 42,836 (August 2021 Order); Fourth Nuñez-Neto Decl. ¶ 4; First Nuñez-Neto Decl. ¶ 9, ECF No. 27-1. Until recently, the Government of Mexico generally accepted Title 42 expulsions of only Mexicans and certain Northern Triangle nationalities, which is why the data reflects that the vast majority of expulsions were citizens of Mexico or Northern Triangle countries. Fourth Nuñez-Neto Decl. ¶ 5 .

For nationals of many countries, however—such as Cuba and (until recently) Venezuela—neither the Government of Mexico nor the country of origin has agreed to accept Title 42 expulsions. Fourth Nuñez-Neto Decl. ¶ 5. As a result, the vast majority of migrants from these countries must be processed under Title 8. For example, in August 2022, U.S. Border Patrol encountered 18,102 Venezuelan single adults who crossed the border between ports of entry illegally, and the vast majority (17,666) were processed under Title 8. ECF No. 155. In September, the number of encounters increased to 24,808, with 24,745 processed under Title 8. ECF No. 159. In October 2022, the Government of Mexico agreed to accept the expulsion of Venezuelan nationals for the first time, and since then, DHS has expelled Venezuelans pursuant to Title 42. Fourth Nuñez-Neto Decl. ¶ 8.

[1] *See, e.g.*, TRO at 3, ECF No. 37 (using the percentage of single adults traveling from Northern Triangle Countries who have been expelled under Title 42 as a "historical benchmark").

C. DHS's Tracking of Its Enforcement of Title 42

Although DHS has continued to enforce Title 42, the data submitted in its monthly reports does not reflect the full scale of such enforcement. Specifically, DHS's data is derived from U.S. Customs and Border Protection ("CBP") statistics, which include data from U.S. Border Patrol ("USBP") and the Office of Field Operations ("OFO"). *See, e.g.*, ECF No. 159 (reporting USBP and OFO data broken down by Title 8 and Title 42, and by country). Although both entities enforce Title 42, they track their data differently. USBP engages migrants after they have crossed the border into the United States, and all encounters are included in USBP's data under either Title 42 or Title 8. Fourth Nuñez-Neto Decl. ¶ 18. By contrast, the vast majority of individuals processed by OFO and included in OFO's data are those who are being processed under Title 8 after having been granted an exception from Title 42. *Id.* ¶¶ 19–20. This is so because OFO, which manages operations at ports of entry, enforces Title 42 by preventing covered noncitizens from crossing the international boundary line into ports of entry in the United States. *Id.* Because those migrants never enter the United States, they are not recorded in OFO's data. *Id.* OFO does encounter a small number of individuals who manage to evade Title 42 enforcement at the international boundary line, and those encounters are included in OFO's data. *Id.* ¶ 19. But these numbers are small given that the primary mechanism for enforcing Title 42 at the ports of entry is OFO's enforcement at the international boundary line. *Id.* The vast majority of the individuals reflected in OFO's data are those who are processed under Title 8.

D. DHS's Discretion to Grant Humanitarian Exceptions

CDC's Title 42 Orders have always authorized DHS to except from Title 42 "persons whom customs officers determine, with approval from a supervisor, should be excepted from [Title 42] based on the totality of the circumstances, including consideration of significant law enforcement, officer and public safety, humanitarian, and public health interests." *See, e.g.*, 86 Fed. Reg. at 42,841 (Aug. 2021 Order). The Court's preliminary injunction does not limit DHS's authority in that regard. *See* ECF Nos. 90, 91. To the contrary, the Court has stated that it did not intend to limit or prevent DHS's exercise of discretion to grant exceptions. *See* 4/25/22 TRO Hr'g Tr. at 10:15–23, ECF No. 36

("[T]here are certain bases for exceptions. You cited the humanitarian exception. There's also the law enforcement exception. These are discretionary decisions that were made prior to April 1st and it is not my intent to limit or prevent that because they were authorized by the prior orders.").

Consistent with the preliminary injunction, CBP officers and agents have continued to grant humanitarian exceptions where warranted. As part of the humanitarian-exception process, DHS coordinates with non-governmental organizations (NGOs) to provide a safer and more orderly mechanism for particularly vulnerable noncitizens, including families, to apply for exceptions to Title 42. Fourth Nuñez-Neto Decl. ¶ 11. Partner NGOs facilitate the process by referring names and biographic information of vulnerable individuals to CBP for consideration. *Id.* Those partner NGOs will then work with DHS to schedule a specific time and port of entry for those who may warrant a humanitarian exception. *Id.* DHS, however, retains sole discretion to determine whether an exception is warranted when the individual presents himself or herself at the port of entry. *Id.*

Since the issuance of the preliminary injunction, DHS has not made any material changes to its policy on how it applies humanitarian exceptions to Title 42. Fourth Nuñez-Neto Decl. ¶ 12. DHS has set the maximum number of humanitarian exceptions CBP officers and agents generally may grant daily, and since the preliminary injunction, DHS has from time to time increased those maximum numbers, as permitted by operational capacity, to respond to an increase in the number of particularly vulnerable noncitizens whose circumstances warrant an exception. *Id.* Specifically, it did so on June 4, July 13, September 7, and October 19. *Id.*; *see also* ECF No. 151 n.1; ECF No. 154 n.1; ECF No. 155 n.1.

E. Defendants' Attempts to Address Plaintiffs' Concerns and Plaintiffs' Motion for an Order to Show Cause

Since Defendants filed their first data report in this case on May 4, 2022, Plaintiffs have at times requested explanations from Defendants, which Defendants have readily provided. On May 9, 2022, Plaintiffs asked why it appeared that the Office of Field Operations had "effectively terminated" Title 42. *See* Ex. 1. Defendants explained that, as noted above, the OFO data does not capture applications of Title 42 to the hundreds or thousands individuals covered by the Title 42 Order who

are prevented from crossing the border into the United States; OFO data reflects mainly individuals processed under Title 8 after having been granted a humanitarian exception from Title 42. *Id.* Plaintiffs also asked why Title 42 enforcement rates varied by country, and Defendants explained that this was primarily due to the fact that DHS may expel an individual under Title 42 only if either the Government of Mexico or the individual's country of origin agrees to accept him or her. *Id.*

On August 22, 2022, Plaintiffs asked whether DHS has stopped enforcing Title 42 as to Haitians because there appeared to be a significant decrease in Title 42 expulsions of Haitians. *See* Mot. Ex. A at 6–11. Defendants explained that DHS had not, and that the perceived decrease was due to a significant drop in the number of Haitians attempting to cross the border between ports of entry illegally and the manner in which USBP and OFO are able to track their enforcement of Title 42, as explained above. *Id.* On October 20, 2022, Plaintiffs repeated the same question about Haitians and further asked for an explanation of the increases in the number of humanitarian exceptions granted by DHS. *Id.* at 1–5. Defendants reiterated their explanation about Haitians and also explained that DHS had made no material policy changes as to how it applies the humanitarian exception; rather, the increases were due to a significant increase in the number of individuals warranting such exceptions. *Id.*

Plaintiffs thereafter filed this instant motion for an order to show cause why Defendants should not be held in contempt. ECF No. 160. Conspicuously absent from Plaintiffs' description of Defendants' explanations is the critical fact that the OFO data Plaintiffs used to calculate the supposed drop in Title 42 enforcement against Haitians does not reflect the number of Haitians prevented from entering ports of entry due to OFO's application of Title 42. Plaintiffs further request that the Court order discovery into alleged policy changes and depositions of unnamed DHS officials. *Id.* Defendants now oppose Plaintiffs' motion.

STANDARD OF REVIEW

A party moving for a contempt order must demonstrate that the respondent "violate[d] a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order." *Travelhost, Inc. v. Blandford*, 68 F.3d 958,

961 (5th Cir. 1995). If the Court were to issue an order to show cause, Plaintiffs would "bear[] the burden of establishing by clear and convincing evidence . . . that [Defendants] failed to comply with the court's order." *Petroleos Mexicanos v. Crawford Enters.*, 826 F.2d 392, 401 (5th Cir. 1987). To meet the clear-and-convincing standard, "[t]he evidence must be so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case." *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 582 (5th Cir. 2005).

As explained below, Plaintiffs cannot establish even a *prima facie* case that Defendants have violated the preliminary injunction. Accordingly, the Court should deny Plaintiffs' motion for an order to show cause and for discovery.

ARGUMENT

Plaintiffs contend that Defendants appear to be violating the preliminary injunction in two ways. First, Plaintiffs allege that Defendants "appear to have ended the Title 42 Policy for citizens of Haiti." Mot. 9–18. Second, Plaintiffs allege that Defendants "appear to be using humanitarian exceptions to circumvent" the Court's preliminary injunction. Mot. 18–23. Neither contention has merit.

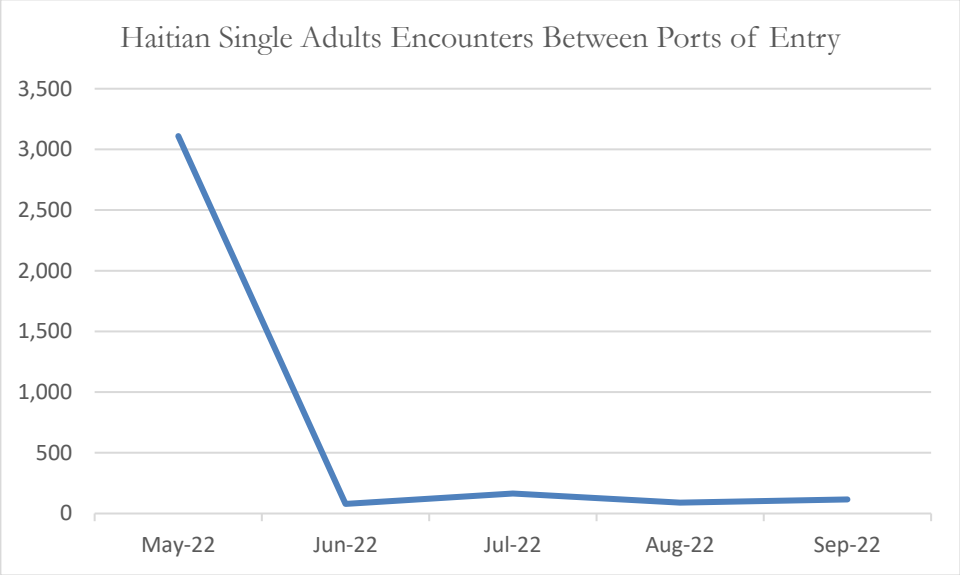
I. Defendants Have Not Ended the Title 42 Policy for Haitians

Defendants have not ended the Title 42 Policy for Haitians. Fourth Nuñez-Neto Decl. ¶ 13. DHS continues to apply Title 42 to Haitians in the same manner that it applies Title 42 to every other nationality. *Id.*

Plaintiffs note that the total number of Haitians expelled under Title 42 has decreased in recent months according to Defendants' monthly reports. Mot. 2. By Plaintiffs' calculation, the drop is as much as 99% since June, the timing of which Plaintiffs attribute to the effective date of the Termination Order had it not been enjoined by the Court. *Id.* at 1–2. But the drop in the number of expulsions is not because DHS has made any changes to the manner it applies Title 42 to Haitians. Fourth Nuñez-Neto Decl. ¶ 17. Rather, it is due largely to a significant change in the migration pattern of Haitians. *Id.* ¶ 15. Before June 2022, most Haitians encountered by CBP had illegally crossed the border *between* ports of entry into the United States. *See, e.g.*, ECF No. 147 at 2, 4 (reflecting 3,110

Haitian single adult encounters between ports of entry in May 2022 versus 1,049 single adults processed at ports of entry that same month). DHS processed such individuals under Title 42, typically by returning them to Haiti via expulsion flights. Fourth Nuñez-Neto Decl. ¶ 14. Those Haitians who were expelled under Title 42 were recorded in DHS's monthly data reports because U.S. Border Patrol tracks such data. *Id.* ¶ 18; *see also, e.g.*, ECF No. 147 at 4 (showing in May that U.S. Border Patrol processed 1,928 Haitian single adults under Title 42 and 1,182 Haitian single adults under Title 8).

Beginning around June 2022, however, the vast majority of Haitian migrants stopped attempting to illegally enter the United States between ports of entry. Fourth Nuñez-Neto Decl. ¶ 14. For example, in June 2022, U.S. Border Patrol encountered only 79 Haitian single adults attempting to cross between ports of entry, down 98% from May 2022 level. ECF No. 151 at 3. Similarly, in July 2022, U.S. Border Patrol encountered only 165 Haitian single adults. ECF No. 154 at 4. The numbers have remained low for August (89 single adults) and September (116 single adults). ECF Nos. 155, 159. The chart below shows the steep decline in the number of Haitian single adults encountered between ports of entry by U.S. Border Patrol:



In recent months, it appears that instead of seeking to cross the border illegally and risk being expelled back to Haiti, Haitians have been traveling to shelters near ports of entry on the Mexican side

of the border, where they apply for, and wait to learn whether they will be considered for a humanitarian exception. Fourth Nuñez-Neto Decl. ¶¶ 14–15. This dramatic shift in the migration pattern of Haitians is significant because unlike Haitians who attempt to cross the border between ports of entry, Haitians who gather outside ports of entry in Mexico are not tracked by DHS. *Id.* ¶¶ 19–20. This is so even though it is Title 42 that is effectively preventing such Haitians from entering the United States; but for Title 42, they would enter ports of entry to seek asylum or other immigration protections. *Id.*

As noted above, an individual seeking entry at a port of entry will generally be reflected in DHS's monthly data only if DHS has already granted that individual a humanitarian (or other) Title 42 exception, in which case that individual will necessarily be processed under Title 8. *Id.* This explains why individuals processed by DHS's Office of Field Operations are generally reported as being processed under Title 8. It also explains why the data reflects a decrease in the number of expulsions of Haitians—despite the fact that CDC's Title 42 Order suspending the right to enter the United States remains in full effect for Haitians and all other nationalities. Fourth Nuñez-Neto Decl. ¶¶ 19–20. DHS obviously cannot expel those Haitians who are sheltering in Mexico.[2]

Defendants explained this to Plaintiffs twice—in emails dated August 25 and October 21. *See* Mot. Ex. A. Nonetheless, Plaintiffs suggest that DHS has violated the preliminary injunction because it may have had some role in "caus[ing] the shift" in the migration pattern. *Id.* Mot. 17. But even if

[2] There is also no basis for Plaintiffs' suggestion that DHS has "demonstrated its willingness to effectuate illegal country-specific policies." Mot. 13. To support that claim, Plaintiffs cite an article from February 2021—more than a year before this lawsuit was filed—stating that U.S. Immigration and Customs Enforcement (which enforces immigration laws in the interior of the United States, not the border) had halted a single Title 8 deportation flight (not a Title 42 expulsion flight) to Africa to provide individuals more time to pursue Title 8 humanitarian claims in immigration courts. *Id.* (citing Nick Miroff & Maria Sacchetti, *New Biden Rules for ICE Point to Fewer Arrests and Deportations, and a More Restrained Agency*, Wash. Post (Feb. 7, 2021)). Plaintiffs do not explain why the halting of this one flight would have been "illegal," let alone how this establishes a DHS practice that is in any way relevant to this lawsuit. Nor is there any basis for Plaintiffs' suggestion that DHS "illegally began implementing the Termination Order before its effective date . . . primarily or purely only for Northern Triangle countries," Mot. 13. *See, e.g.*, ECF Nos. 27, 27-1 (explaining that DHS had continued to prioritize Title 42 expulsion flights to Northern Triangle countries).

DHS had caused such a shift due to its enforcement of Title 42 between ports of entry and its grant of humanitarian exceptions at ports of entry when warranted, that by no means would establish that Defendants had violated the preliminary injunction. Indeed, from a law enforcement perspective and given the need to conserve scarce resources, the safer and more orderly processing of migrants at ports of entry is preferrable to trying to capture and detain individuals after they have surreptitiously crossed the border into the United States. Fourth Nuñez-Neto Decl. ¶¶ 16, 23. More importantly, DHS has continued to enforce the Title 42 Order and has not implemented the Termination Order in any way as to Haitians or any other nationality.

DHS believes that the migration shift is due to multiple factors, including an expansion of expulsion flights to Haiti and increased capacity for processing humanitarian exceptions. *Id.* ¶¶ 14–15. Indeed, the risk of being expelled back to Haiti could be a significant deterrent considering the journey the Haitian migrants might have had to undertake to reach the southern border. *See id.* ¶¶ 5, 14–15. Additionally, DHS does not control how NGOs identify vulnerable individuals for referral into the exception process. *Id.* ¶ 17. It may be the case that NGOs are referring more Haitians for humanitarian exceptions, but that does not mean that DHS has changed its policy on granting humanitarians to Haitians or any other nationality. *Id.* Plaintiffs contend that these explanations are "unpersuasive," Mot. 17, but each of their criticisms misses the mark.

DHS's Enforcement Efforts. Plaintiffs first contend that DHS's enforcement of Title 42 between ports of entry "cannot account for the sudden and enormous decrease that occurred in June 2022." Mot. 15. They also question why the shift in the migration pattern persisted past June 2022, when Plaintiffs allege that DHS's enforcement of Title 42 became "non-existent." *Id.* But, again, DHS never stopped enforcing Title 42 between ports of entry. Haitian migrants would likely have known the significant risk of being expelled back to Haiti, which is why, as a general mater, they appear to have stopped trying to cross between ports of entry. *See, e.g.*, Rosa Flores, *Dreams of Safety, Health Care, Jobs: Why Thousands of Migrants Are waiting in Mexico – And Thousands More Arrive Each Week*, CNN (Sept. 1, 2022), https://perma.cc/89EJ-R85V (discussing migrants' use of social media platforms to share information).

Plaintiffs also question why Haitian migrants "uniquely" shifted their migration pattern. Mot. 15. Plaintiffs note that, unlike for Haitians, there has not been a drop in Title 42 expulsions for citizens of Mexico and Northern Triangle countries. Mot. 16. But the reason is that unlike Haitians, who are expelled to Haiti via expulsion flights, Mexican citizens can be expelled to Mexico. Fourth Nuñez-Neto Decl. ¶ 5. The same is true for most nationals of Northern Triangle countries, as Mexico accepts such expulsions. *Id.* And because a Title 42 expulsion carries no immigration consequences, such individuals may simply attempt to cross the border again. *See, e.g.*, First Nuñez-Neto Decl. ¶ 11, ECF No. 27-1. Thus, DHS's enforcement efforts between ports of entry may serve as a stronger deterrent to Haitians than to Mexicans or nationals of Northern Triangle countries, who are often returned to Mexico rather than expelled to their home countries via expulsion flights. Fourth Nuñez-Neto Decl. ¶¶ 5, 15–16.

Ports of Entry. Plaintiffs contend that Defendants' data reports are "fully consistent with the proposition that DHS effectively terminated Title 42 for Haitians (but no other nationalities) at ports of entry," which they suggest explains "why Haitians (and not other nationalities) suddenly stopped crossing the border between ports of entry." Mot. 17. But as already explained above, the vast majority of migrants entering the United States through ports of entry (as opposed to those encountered between ports of entry) are processed under Title 8 because they have been granted an exception under Title 42, whereas those prevented from entering the ports of entry in the first place are not included in DHS's data, as the Office of Field Operations simply cannot track such individuals. For example, in September, DHS processed 131 Armenians at ports of entry, all of whom were processed under Title 8 after being excepted from Title 42. ECF No. 159 at 2. That same month, DHS processed 66 Belarusians at ports of entry, all of whom were likewise processed under Title 8 after being excepted from Title 42. *Id.* Other examples include:

Citizenship	Title 42	Title 8	Total
El Salvador	10	199	209
Guatemala	21	125	146
Honduras	16	582	598
Kyrgyzstan	0	73	73
Russia	2	827	829
Tajikistan	0	32	32

Far from suggesting some special treatment for Haitians, Defendants' data reports demonstrate that DHS has been enforcing Title 42 in the same manner regardless of nationality.

Planning Document Referenced by NBC News. Plaintiffs also seek to support their allegation that DHS has stopped enforcing Title 42 as to Haitians by citing an alleged "internal planning document" obtained by NBC News that purportedly supports the proposition. Mot. 18; *id.* at 14 (citing Julia Ainsley, *Number of Haitians Deported Plunged in June as More Are Allowed to Seek Asylum*, NBC News (July 7, 2022)). But DHS searched for, and did not find, any such internal planning document. Fourth Nuñez-Neto Decl. ¶ 16. As Defendants have explained to Plaintiffs, DHS found internal deliberative emails discussing Haitians, but none fits the description or sets forth any policy about Haitians (or any other nationalities). *Id.*.

* * *

As the foregoing shows, DHS has not stopped enforcing Title 42 as to Haitians. The purported "evidence" that Plaintiffs cite in support of their claim consists of trends in data that are attributable to a shift in the migration pattern, not any implementation of the Termination Order. This "evidence" does not warrant entering an order to show cause and falls far short of the "clear, direct and weighty and convincing" evidence necessary to support a finding of contempt. *Test Masters*, 428 F.3d at 582.

II. Defendants Are Not Using Humanitarian Exceptions to Effectuate the Termination Order

There is likewise no support for Plaintiffs' contention that DHS is "using humanitarian exceptions to circumvent or violate this Court's preliminary injunction." Mot. 18. CDC's Title 42 orders have always authorized DHS to grant exceptions on a case-by-case basis, based on the totality of the circumstances, including for humanitarian reasons. 86 Fed. Reg. at 42,841 (Aug. 2021 Order). And the Court has made clear that it did not "inten[d] to limit or prevent" the grant of humanitarian or other exceptions because they "were authorized by the [Title 42] orders" "prior to April 1st." 4/25/22 TRO Hr'g Tr. at 10:15–23, ECF No. 36.

Plaintiffs contend that the increase in the number of humanitarian exceptions granted in recent months suggests that DHS is implementing the Termination Order in violation of the preliminary injunction. Mot. 18–23. That is not so. The preliminary injunction does not prevent or limit DHS's discretion to grant humanitarian exceptions. While DHS has granted more humanitarian exceptions in recent months, that has been due to a significant increase in the number of individuals whose circumstances warrant such exceptions. Fourth Nuñez-Neto Decl. ¶ 12.

Unable to identify any provision of the preliminary injunction that prohibits DHS's exercise of discretion to grant humanitarian exceptions, Plaintiffs turn their focus to DHS's statements in its monthly data reports that it has "made no material changes to its policy on [its] application of the Title 42 process." Mot. 19–21. Plaintiffs argue that these statements "appear dubious" in light of the increasing number of humanitarian exceptions, *id.* at 19–20, surmising that DHS must have "made material changes to the legal standard for humanitarian exception." *Id.* at 4; *see also id.* at 21 (suggesting that DHS must have "loosen[ed] its standards). But Plaintiffs ignore the logical alternative explanation that the number of humanitarian exceptions has increased because the number of people warranting such exceptions has increased. Fourth Nuñez-Neto Decl. ¶ 12. DHS has made no material change to the "legal standard" it applies for the humanitarian exception. *Id.*

Plaintiffs are also wrong to suggest that DHS's ability to "put a precise date on" its increases suggests that it has "made material changes to the legal standard" for humanitarian exceptions. Mot. 4, 20–21. As explained above, those dates correspond to dates when DHS increased the maximum

number of humanitarian exceptions that generally could be granted by CBP officers and agents at ports of entry daily based on processing capacity. Fourth Nuñez-Neto Decl. ¶¶ 12. And the increases in the maximums were made in response to increases in the number of individuals whose circumstances warrant humanitarian exceptions. *Id.* The increases are consistent with DHS's past practice of applying humanitarian exceptions where warranted, as permitted by CDC's Title 42 Order and the Court's preliminary injunction. *Id.* ¶¶ 9–12. DHS's monthly reports have thus accurately stated that DHS has made no material changes to its policy on its application of the Title 42 process.

In any event, as Plaintiffs acknowledge, DHS disclosed when it first began increasing the number of humanitarian exception in its monthly report—which corresponded to the date of the increase in the maximum number of individuals who could be granted exceptions—and also disclosed when there were subsequent incremental increases, which again are pegged to the dates of the increases in the maximum numbers. ECF No. 151 at 5 n.1; ECF No. 154 at 6 n.1; ECF No. 155 at 6 n.1. DHS did so well *before* Plaintiffs ever raised the issue with Defendants. *See* Mot. 3 (incorrectly suggesting that Defendants "suddenly changed their tune" only "after" Plaintiffs raised the issue). In their monthly report for June 2022 (filed on July 15), Defendants disclosed that "[g]iven a significant increase in the number of individuals who have presented themselves with situations that warrant humanitarian exceptions . . . , DHS has, beginning July 13, 2022, begun to gradually increase the number of humanitarian exceptions it applies, subject to operational constraints." ECF No. 151 at 5 n.1. DHS included this information again in its report for July 2022, filed on August 16. ECF No. 154 at n.1. It was not until August 22 that Plaintiffs contacted Defendants about the data, and even then, Plaintiffs focused solely on the reduction of expulsions of Haitians under Title 42, not the general increase in humanitarian exceptions. *See* Mot. Ex. A. at 8–11.

Contrary to Plaintiffs' assertion, Defendants did not "start[] spinning a different tale" in their August 2022 report. Mot. 20. That report included a clarification as to when DHS first began increasing the number of humanitarian exceptions. Defendants had initially provided the July 13, 2022 date—which corresponded to an increase in the maximum number of humanitarian exceptions CBP officers and agents generally could grant daily—in its report for June (filed on July 15), but later,

upon learning that there was a more modest increase in the maximum on June 4, Defendants clarified that information. This clarification had nothing to do with Plaintiffs contacting Defendants about the number of Haitians processed under Title 42. Far from "undermin[ing]" Defendants' representations, Mot. 8, Defendants' clarification, as well as disclosure of the increases, show that Defendants have been transparent with Plaintiffs and the Court. And, in any event, Defendants have accurately reported the precise number of humanitarian exceptions granted each month as required by the preliminary injunction, so Plaintiffs cannot possibly show that they have suffered any harm as a result of any alleged failure to characterize any increase as a "material change" in the legal standard of the Title 42 humanitarian exception.

Nor is there anything "suspicious" about the timing of the increases. Mot. 21. DHS increased the numbers at the times that it did in response to an observed increase in the number of individuals whose circumstances warrant humanitarian exceptions and when permitted by operational capacity. Fourth Nuñez-Neto Decl. ¶¶ 12. The fact that the increases took place after the Court issued the preliminary injunction does not mean that it was an attempt to "circumvent" the injunction. Mot. 21.

III. The Court Should Deny Plaintiffs' Requested Discovery and Other Remedial Measures

In addition to seeking an order directing Defendants to explain why they should not be held in contempt, Plaintiffs also request a broad range of other relief. *See* ECF No. 160-3 (listing six requests for information or deposition). For the reasons explained below, the Court should decline Plaintiffs' request.

Requests (i)–(ii): Discovery into alleged policy changes

The Court should not issue the requested order to require Defendants to (i) "file a report with this Court explaining in detail all policy changes . . . that may have contributed" to the increased number of Haitians processed under Title 8 and the increased number of humanitarian exceptions, and (ii) produce to Plaintiffs "all documents and communications" related to any such policy changes. ECF No. 160-3 at 1. As explained above and in the attached Declaration of the Acting Assistant Secretary for Border and Immigration Policy, DHS has made no such policy changes, and has not

changed how it applies Title 42 to Haitians. Fourth Nuñez-Neto Decl. ¶¶ 12–13. The declaration also explains DHS's reasons for increasing the number of humanitarian exceptions. *Id.* ¶ 12. The declaration thus serves the same purpose as Plaintiffs' requested report. And ordering written discovery into "all documents and communications related to [the alleged] policy changes" would serve no purpose because, as explained, there have been no such policy changes.

Request (iii): Alleged Internal Planning Document

The Court should likewise decline Plaintiffs' request that the Court order Defendants to produce to Plaintiffs "any internal planning documents or communications that might be the 'internal planning document' about processing of citizens of Haiti that was referred to in press reports." ECF No. 160-3. As discussed above, DHS has already searched for, and did not find, any such document. Fourth Nuñez-Neto Decl. ¶¶ 16.

Request (iv): Data on Humanitarian Exceptions Broken Down By Nationality

Plaintiffs also request that Defendants produce to produce to Plaintiffs "numbers broken down by nationality of all grants of humanitarian exceptions to the Title 42 Policy." ECF No. 160-3 at 2. As noted in the attached Nuñez-Neto Declaration, DHS will voluntarily provide Plaintiffs with the requested information for the period from May through October 22, the last month for which DHS has fully settled and verified data. DHS will provide the data as soon as operationally feasible, but no later than November 16. There is thus no reason to order Defendants to produce data that is has voluntarily agreed to provide.

Request (v): Attestation for Future Monthly Reports

Plaintiffs further request that "[e]ither the Assistant Secretary for Border and Immigration Policy or the Secretary of Homeland Secretary" be required to "attest to the veracity and completeness of all future reports under penalty of perjury." ECF No. 160-3 at 2. In the interest of cooperation, Acting Assistant Secretary Nuñez-Neto will attest to the veracity and completeness of DHS's future monthly data reports. Fourth Nuñez-Neto Decl. ¶¶ 25.

Request (vi): Depositions of "Up to Five" DHS Officials

Finally, Plaintiffs seek to depose up to five DHS officials. ECF No. 160-3 at 2. The Court should decline Plaintiffs' request because Plaintiffs offer no legitimate reasons as to why such depositions are necessary. *See* Mot. 6. Acting Assistant Secretary Nuñez-Neto has already provided a detailed declaration addressing each of Plaintiffs' contentions, and Defendants are voluntarily agreeing to two of Plaintiffs' demands. Plaintiffs are not entitled to discovery simply to assuage unjustified concerns that the government is not complying with the preliminary injunction.

To the extent Plaintiffs seek depositions of high-ranking DHS officials, they would have to demonstrate "exceptional circumstances" justifying such a request, *In re FDIC*, 58 F.3d 1055, 1062 (5th Cir. 1995); *see also Morgan v. United States*, 304 U.S 1, 18 (1938), which they have not done. The Fifth Circuit has made clear that "it will be the rarest of cases . . . in which exceptional circumstances can be shown where the testimony is available from an alternate witness." *In re FDIC*, 58 F.3d at 1062; *see also, e.g.*, *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008) ("The duties of high-ranking executive officers should not be interrupted by judicial demands for information that could be obtained elsewhere."). This is because of the longstanding recognition that "[h]igh ranking government officials have greater duties and time constraints than other witnesses." *In re FDIC*, 58 F.3d at 1060. "[S]ubjecting officials to interrogation about how they reached particular decisions would impair that decision-making process by making officials less willing to explore and discuss all available options." *Walker v. NCNB Nat'l Bank of Fla.*, 810 F. Supp. 11, 12 (D.D.C. 1993); *see also In re Stone*, 986 F.2d 898, 904 (5th Cir. 1993) ("High-ranking officials of cabinet agencies could never do their jobs if they could be subpoenaed for every case involving their agency.").

Plaintiffs have not even attempted to show the requisite "exceptional circumstances" or that this is the "rarest of cases" where such testimony might be warranted. *In re FDIC*, 58 F.3d at 1060, 1062. Indeed, they have not demonstrated why any deposition is appropriate. Accordingly, the Court should deny Plaintiffs' request to take five depositions of DHS officials.

CONCLUSION

The Court should deny Plaintiffs' motion for an order to show cause.

Date: November 10, 2022

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
U.S. Department of Justice, Civil Division

JEAN LIN
Special Litigation Counsel (NY #4074530)

/s/ John Robinson
JOHN ROBINSON (DC #1044072)
Trial Attorneys
1100 L St. N.W.
Washington, DC 20530
U.S. Department of Justice, Civil Division
Federal Program Branch
(202) 514-3716
Jean.lin@doj.gov
John.j.robinson@usdoj.gov

Attorneys for Defendants

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

FOURTH DECLARATION OF BLAS NUÑEZ-NETO

I, Blas Nuñez-Neto, pursuant to 28 U.S.C. § 1746 and based upon my personal knowledge, and documents and information made known or available to me from official records and reasonably relied upon in the course of my employment, hereby declare as follows:

1. I am the Acting Assistant Secretary for Border and Immigration Policy at the Department of Homeland Security (DHS) as of October 1, 2021. My permanent role is Chief Operating Officer at U.S. Customs and Border Protection (CBP), which I began on March 5, 2021. Since August 24, 2021, I have been concurrently serving as the Vice Chair for the Secretary of Homeland Security's Southwest Border Taskforce. I also previously served as an Advisor to CBP Commissioner Gil Kerlikowske from January 12, 2015 to January 16, 2017.

2. I am familiar with the series of orders issued by the Centers for Disease Control and Prevention (CDC) invoking its authority under the Public Health Service Act, 42 U.S.C. § 265, including the currently operative order issued in August 2021. I am also familiar with the

CDC's April 1, 2022 Order terminating its Title 42 orders, *see Public Health Determination and Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists*, 87 Fed. Reg. 19,941 (Apr. 6, 2022), which I understand was enjoined by this Court.

I. Background Information

3. DHS continues to assist in the implementation of the CDC's Title 42 Order at the southwest border, as required by this Court's ruling. Since March 2020, when the CDC's first Title 42 public health Order was issued, DHS has, consistent with the requirements of that Order, expelled covered noncitizens that are encountered between ports of entry and denied entry to covered noncitizens who present at ports of entry (POE). Under the currently operative Title 42 Order, single adults and family units encountered at the land border between POE are subject to expulsion unless they cannot be expelled or they are excepted from the Order. Single adults and family units who attempt to enter at a POE can be denied entry at the international boundary line under the Order. Unaccompanied children are excepted from the currently operative Title 42 Order.

4. As I have described in previous declarations in this case, noncitizens encountered at the southwest border (SWB) between POE can only be expelled pursuant to the Title 42 Order if the Government of Mexico (GOM), the noncitizen's home country, or some other third country agrees to receive them. Not all countries of origin agree to accept the return of their nationals pursuant to the Title 42 Order—and those that do sometimes impose requirements that make returns difficult, if not impossible, to operationalize. In addition, the GOM has placed certain nationality- and demographic-specific restrictions on the individuals that they will accept for return under the Title 42 Order.

5. Over the past two years, DHS has reached agreements with a number of foreign governments to accept the return of their nationals under the Title 42 Order—including Guatemala, Honduras, Haiti, Colombia, Brazil, Ecuador, and Peru. Many of these countries, however, impose restrictions on how Title 42 flights can be operated—including testing requirements, manifest submission deadlines, and limitations on authorized flights per week—that effectively limit the number of expulsion flights. Other key countries in our hemisphere, including Venezuela and Cuba, do not allow the return of individuals pursuant to the Title 42 Order. Meanwhile, Mexico has, until recently, generally only allowed the return of its own citizens as well as citizens of El Salvador, Guatemala, and Honduras pursuant to the Title 42 Order.

6. Within these limitations, DHS continues to expel all noncitizens covered by the Title 42 Order that can be expelled, subject to applicable humanitarian and other protections. Over the past fiscal year (FY), DHS has expelled 887,080 individuals to Mexico and 216,879 individuals to third countries, including a total of 10,479 to Haiti.

7. DHS implements the CDC Order differently depending on whether the noncitizen has crossed the border between ports of entry or seeks to enter the United States at a port of entry. Individuals encountered between ports of entry have already physically entered the United States unlawfully and are thus subject to expulsion after U.S. Customs and Border Protection (CBP) processes them. At ports of entry, by contrast, covered individuals may be prevented from entering the United States at the international boundary line by DHS personnel. Therefore, covered noncitizens who seek to enter the United States at a POE, and are not allowed to enter under Title 42, are not "encountered," "processed," or "expelled." As a result, DHS does not keep records on the numbers of individuals who are stopped at the international boundary line and not allowed to enter at a POE.

8. On April 1, 2022, the CDC issued an Order terminating the application of the Title 42 public health Order, with an effective date of May 23, 2022. This Court issued a preliminary injunction, enjoining DHS from enforcing the April 1 termination order on May 20, 2022. DHS has been abiding by the Court's preliminary injunction by continuing to enforce Title 42 at the land border, including by working to increase the nationalities that can be expelled under the Title 42 Order. On October 12, 2022, the Government of Mexico agreed to accept the expulsion of Venezuelan nationals for the first time.

9. Every CDC Title 42 Order—from the first March 2020 Order through the currently operative August 2022 Order—has authorized CBP officers and agents to except individuals from its application, on a case-by-case basis, based on the totality of circumstances, including considerations of humanitarian, law enforcement and public safety. Those excepted from the CDC Order are instead processed under Title 8 of the U.S. Code; they are inspected for admissibility and removability, which could include referral to U.S. Immigration and Customs Enforcement (ICE) for removal and/or for immigration removal proceedings.

10. Pursuant to the terms of the Title 42 Order, CBP officers and agents have—since the beginning of its application—granted exceptions for humanitarian and other reasons, on a case-by-case basis, to individuals and families that would otherwise be subject to the Order. Over the past two years, DHS has streamlined the process to provide a safe and orderly mechanism for certain covered individuals who are in Mexico to seek exceptions. This process was created in consultation with the Department of State (DOS), CDC, and international and non-governmental organizations (NGOs) who help support the exception process.

11. The exception process is designed to allow particularly vulnerable migrants, including family units, to present themselves at a port of entry, be considered for an exception for

humanitarian and other reasons, and be processed pursuant to Title 8 immigration authorities as a result. NGOs operating along the border refer the names and biographic information of vulnerable individuals to CBP for consideration. These NGOs also work with CBP to schedule a specific time and port of entry for those individuals who may be granted exceptions to present themselves. CBP, however, retains the sole discretionary authority to determine, on a case-case basis, whether an exception is warranted, and if so, whether the individual is admissible to the United States or subject to removal under Title 8. Importantly, these case-by-case determinations are made regardless of nationality.

12. On April 21, 2022—prior to the issuance of the preliminary injunction—CBP had already begun increasing its capacity to process noncitizens potentially amenable for exceptions to Title 42. Over time, and in response to an increased number of migrants whose circumstances warrant exceptions for humanitarian and other reasons, CBP has gradually increased the overall number of exceptions processed across the SWB, consistent with the capacity to safely process these individuals at ports of entry. In light of these considerations, and consistent with operational capacity, DHS increased the maximum number of individuals who could be granted exceptions at POEs on June 4, July 13, September 7, and October 19. Importantly, DHS has not made any material changes to its policy on how it applies humanitarian exceptions to Title 42.

II. Haiti

Shift in Irregular Migration Trends of Haitian Nationals

13. Plaintiffs allege that DHS has effectively ceased applying the Title 42 Order to nationals of Haiti, citing data that shows a decrease in expulsions of Haitian nationals. However, nothing could be further from the truth. DHS consistently enforces CDC's Title 42 public health Order in expelling covered noncitizens able to be returned to Mexico or the respective country of origin, including with respect to Haitians.

14. In fact, these enforcement efforts, in conjunction with an increased capacity for processing exceptions from Title 42 at POEs, has resulted in a dramatic decrease in unlawful entries (and thus Title 42 expulsions) of Haitian nationals since June 2022. From January to May 2022, CBP encountered 19,117 Haitian nationals seeking to enter unlawfully between POEs along our southwest border, numbers that sharply increased from 1,903 in March, to 4,462 in April, to 7,762 in May. From May to June, U.S. Border Patrol (USBP) total encounters of Haitian nationals between ports of entry dropped significantly—from 7,762 to 145, a 98 percent reduction—and have remained at low levels since. This was the result of multiple factors, including an expansion of expulsion flights to Haiti and increased capacity for processing humanitarian exceptions, that provided a safe and orderly process for vulnerable individuals to enter the United States without crossing unlawfully between ports of entry.

15. In sum, enforcement of the Title 42 Order on Haitian nationals at the land border between POEs, combined with an orderly process to except particularly vulnerable Haitian migrants from the Title 42 Order at the POEs, has resulted in a change to migratory patterns. Instead of seeking to cross the border unlawfully between ports of entry, the vast majority of Haitians are waiting in Mexico and seeking enter the United States lawfully through ports of entry.

DHS's Policy on Humanitarian Exceptions Remains the Same

16. DHS policy continues to focus on deterring unlawful migration between ports of entry and providing mechanisms that channel migratory flows into safe and orderly pathways, including by encouraging migrants to present lawfully at ports of entry. Importantly, DHS does not exclude or prioritize any nationality, including Haitians, as it advances these policy goals. While the plaintiffs have referenced an "internal planning document" about the processing of

Haitian nationals, DHS searched for, and did not find, any such internal planning document. There are only internal deliberative emails discussing Haitian migration patterns.

17. DHS also does not control how NGOs identify vulnerable individuals for referral into the exception process. Any increase with respect to Haitians is due to the demographics of the vulnerable individuals that NGOs encounter and refer for exception; it is not due to any change in DHS policy on granting humanitarian exceptions, including to Haitians.

DHS Data on Haitian Encounters

18. DHS's reports reflect data from two distinct CBP operational components, the Office of Field Operations (OFO) and USBP. The two components engage with migrants differently and thus enforce the Title 42 Order in different ways. USBP primarily engages migrants who have crossed the border between ports and entry and are encountered and processed in the United States. These encounters are recorded, including the number of Title 42 expulsions from those encounters. As described above, these numbers have dropped significantly because significantly fewer Haitians are crossing unlawfully between ports of entry.

19. OFO primarily engages with migrants at ports of entry along the land border, as well as at airports and seaports. At land ports of entry, the primary way that OFO enforces the Title 42 Order is by preventing individuals from crossing the international boundary line into the United States. Because these individuals never enter the United States, they are not processed, as they would be if they were physically in the United States. Because these individuals are not processed by CBP, the interaction is not recorded. In other words, covered noncitizens who are prevented from crossing the international boundary line into the United States pursuant to Title 42 are not included in OFO's data. A small number who evade Title 42 enforcement at the international boundary line, and are subsequently expelled after being processed while in the

United States, are recorded as Title 42 expulsions. However, these numbers are small given that the primary mechanism for enforcing Title 42 at the ports of entry is OFO's enforcement at the intentional boundary line.

20. As a result, OFO's data primarily reports those, including Haitians, who fall within a humanitarian exception to Title 42 and are processed under Title 8. Thus, the numbers reported by OFO primarily include those processed under Title 8, not Title 42—in fact, anything to the contrary would raise questions about why more individuals were not being stopped at the international boundary line under Title 42. Any suggestion that the numbers presented indicate a failure to enforce the Title 42 Order is based on a misinterpretation of the data, and the facts.

III. Conclusion

21. DHS continues to comply with the preliminary injunction requiring continued enforcement of the CDC Title 42 public health Order and has been consistent in its application of granting humanitarian exceptions to that order.

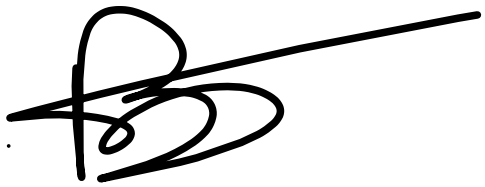
22. The continued enforcement of Title 42 between POEs, combined with a safe and orderly process for granting exceptions to Title 42 at the POEs on a case-by-case basis, has dramatically reduced encounters of Haitians between POEs and incentivized migrants to wait for a safer and more orderly process to enter the United States.

23. If the court were to restrict DHS's ability to process such humanitarian exceptions, vulnerable individuals may, instead of pursuing an orderly and established means to present at a designated POE, seek to enter unlawfully between ports of entry. That is, migrants—including Haitians—that are currently waiting in Mexico in the hopes of being processed for exceptions could be incentivized to enter unlawfully between POEs, rather than crossing in a safe and orderly process at the POEs. The net result of the "relief" that plaintiffs are requesting actually risks creating a perverse incentive that would increase unlawful activity between ports of entry.

24. I further understand Plaintiffs have requested numbers broken down by nationality of all grants of humanitarian exceptions to the Title 42 policy. In the interest of cooperation, DHS is working to provide the requested information from May 2022 to October 2022, which is the last month for which DHS has fully settled and verified data. The data will be provided as soon as operationally feasible, but no later than November 16, 2022.

25. Further, I agree to attest to the veracity and completeness of DHS's future monthly data reports filed pursuant to the Preliminary Injunction.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief. Executed on this 10 day of November, 2022.



Blas Nuñez-Neto
Acting Assistant Secretary for·Border and Immigration Policy
Department of Homeland Security

From: Robinson, John J. (CIV)
Sent: Wednesday, May 11, 2022 9:57 AM
To: Ensign, Drew; Murrill, Elizabeth; 'John.Sauer@ago.mo.gov'; St. John, Joseph; Roysden, Beau
Cc: Lin, Jean (CIV); Kossak, Jonathan (CIV); DeMott, Joseph (CIV)
Subject: RE: Arizona v. CDC - First data report

Drew,

Thanks again for your email. We've conferred with DHS and can provide the further context below, which we hope addresses your concerns. We would be happy to discuss further if you have questions.

OFO vs. USBP data

As you note, the report reflects data from two distinct CBP components—the Office of Field Operations (OFO) and U.S. Border Patrol (USBP). The two components engage with migrants differently and so enforce Title 42 in different ways.

OFO primarily engages with migrants at ports of entry along the land border, as well as at airports and seaports. The primary way that OFO enforces Title 42 is by preventing individuals from crossing the "limit line" into the United States. Because these individuals never enter the United States, they are not processed the way they would be if they crossed into the United States. As a result, none of OFO's Title 42 enforcement at the limit line is recorded or reflected in our encounter data. Accordingly, individuals that OFO prevents from crossing the limit line into the U.S. pursuant to Title 42 are not included in the data.

OFO does encounter some individuals who have crossed the limit line into the U.S., and these individuals are included in the data we provided. These individuals break down into two categories: (1) those excepted from Title 42, for humanitarian or other reasons, pursuant to the terms of the CDC Order, and (2) those who evade the Title 42 restrictions at the limit line and are encountered by OFO after having crossed the limit line (primarily individuals in personal vehicles). Individuals excepted from Title 42 do cross the limit line, are recorded as "encounters," and are *all* processed pursuant to Title 8. As a result, the large majority of OFO "encounters" are processed via Title 8, and this has always been the case. (We are advised that since April 2020, approximately two-thirds of OFO recorded encounters have been processed under Title 8). As to the latter, the small number of individuals who evade the restrictions at the limit line, and are encountered by OFO after having crossed the limit line, are processed, when possible, for expulsion under Title 42, and these expulsions are reflected in the data.

USBP, by contrast, primarily engages migrants encountered in the United States, between ports of entry. Unlike with OFO, all of these USBP encounters are recorded. As a result, as noted, there has always been a significant differential between the percentage of Title 42 vs. Title 8 encounters for OFO vs. USBP.

Country-specific data

You also asked why the Title 42 vs. Title 8 percentage varies by country. This is primarily due to the fact, for those encountered or apprehended on the Southwest land border, DHS may expel an individual under Title 42 only if either (i) the Government of Mexico agrees to accept the relevant nationality and demographic or (ii) the individual's country of origin agrees to accept Title 42 expulsions via flight. *See generally* 86 Fed. Reg. 42,828, 42,836 (Aug. 5, 2021); First Nuñez-Neto Decl. ¶ 9, ECF No. 27-1. The Government of Mexico has generally allowed Title 42 expulsions of only Mexicans and certain Northern Triangle nationalities, with limited exceptions, which explains the higher Title 42 percentage for Northern Triangle countries. Many of the countries you identified are (1) countries whose citizens Mexico will not accept via expulsion, and (2) countries that have refused to accept Title 42 flight expulsions at all. For those

countries that do accept Title 42 expulsions, some impose other restrictions as a precondition for accepting such expulsions that make it operationally infeasible or difficult to return individuals under Title 42. Such restrictions include caps on the number and/or frequency of flights, COVID-19 testing requirements, and requiring DHS to submit passenger manifests several days in advance of a flight. This further limits DHS's ability to apply Title 42 to many nationalities.

This also explains why CBP's Title 8 processing for all countries was 43% of the total encountered. As you know, the 5% benchmark was only for single adults from Northern Triangle countries, for whom the Government of Mexico has generally agreed to accept Title 42 expulsions with limited exceptions.

General limitations

We also want to emphasize again that because of the way that DHS's operational data systems work, it can take several days—and up to two weeks—for the data to settle and become fully reliable. For example, in addition to the issues we've previously flagged, Title 42 expulsion flights generally take place no sooner than 3-4 days after the initial encounter, so those expulsions are almost certainly undercounted in the reporting. Again, we would be happy to discuss if you have further questions.

Best,
John

John Robinson
Trial Attorney
U.S. Department of Justice, Civil Division
Federal Programs Branch
1100 L Street NW
Washington, DC 20005
Tel: (202) 616-8489

From: Robinson, John J. (CIV)
Sent: Tuesday, May 10, 2022 8:05 PM
To: 'Ensign, Drew' <Drew.Ensign@azag.gov>; Murrill, Elizabeth <MurrillE@ag.louisiana.gov>; 'John.Sauer@ago.mo.gov' <John.Sauer@ago.mo.gov>; St. John, Joseph <StJohnJ@ag.louisiana.gov>; Roysden, Beau <Beau.Roysden@azag.gov>
Cc: Lin, Jean (CIV) <Jean.Lin@usdoj.gov>; Kossak, Jonathan (CIV) <Jonathan.Kossak@usdoj.gov>; DeMott, Joseph (CIV) <Joseph.DeMott@usdoj.gov>
Subject: RE: Arizona v. CDC - First data report

Hi Drew,

As an update, we expect to be able to get back to you on this either later this evening or first thing tomorrow.

Best,
John

From: Ensign, Drew <Drew.Ensign@azag.gov>
Sent: Monday, May 9, 2022 2:00 PM
To: Robinson, John J. (CIV) <John.J.Robinson@usdoj.gov>; Murrill, Elizabeth <MurrillE@ag.louisiana.gov>; 'John.Sauer@ago.mo.gov' <John.Sauer@ago.mo.gov>; St. John, Joseph <StJohnJ@ag.louisiana.gov>; Roysden, Beau <Beau.Roysden@azag.gov>
Cc: Lin, Jean (CIV) <Jean.Lin@usdoj.gov>; Kossak, Jonathan (CIV) <Jonathan.Kossak@usdoj.gov>; DeMott, Joseph (CIV)

<Joseph.DeMott@usdoj.gov>
Subject: [EXTERNAL] Re: Arizona v. CDC - First data report

Thanks, John. We appreciate that.

One other country I inadvertently left off my prior email was Nicaragua, immigrants from which appear to be being processed under Title 8 roughly 97% of the time by CPB (1,867/1,926). The difference between Nicaragua and neighboring Honduras, which has 9.2% processing under Title 8 (95/1,030) is particularly striking and without obvious explanation to us.

Drew

From: Robinson, John J. (CIV) <John.J.Robinson@usdoj.gov>
Sent: Monday, May 9, 2022 10:28 AM
To: Ensign, Drew; Murrill, Elizabeth; 'John.Sauer@ago.mo.gov'; St. John, Joseph; Roysden, Beau
Cc: Lin, Jean (CIV); Kossak, Jonathan (CIV); DeMott, Joseph (CIV)
Subject: RE: Arizona v. CDC - First data report

Hi Drew,

Thanks for your email. We are conferring with DHS on your questions and will get back to you as soon as we can.

Best,
John

John Robinson
Trial Attorney
U.S. Department of Justice, Civil Division
Federal Programs Branch
1100 L Street NW
Washington, DC 20005
Tel: (202) 616-8489

From: Ensign, Drew <Drew.Ensign@azag.gov>
Sent: Monday, May 9, 2022 1:10 PM
To: Robinson, John J. (CIV) <John.J.Robinson@usdoj.gov>; Murrill, Elizabeth <MurrillE@ag.louisiana.gov>; 'John.Sauer@ago.mo.gov' <John.Sauer@ago.mo.gov>; St. John, Joseph <StJohnJ@ag.louisiana.gov>; Roysden, Beau <Beau.Roysden@azag.gov>
Cc: Lin, Jean (CIV) <Jean.Lin@usdoj.gov>; Kossak, Jonathan (CIV) <Jonathan.Kossak@usdoj.gov>; DeMott, Joseph (CIV) <Joseph.DeMott@usdoj.gov>
Subject: [EXTERNAL] Re: Arizona v. CDC - First data report

Thanks, John. Some of these numbers are a bit puzzling. We wanted to reach out to see if DOJ/DHS could provide some context before we would potentially trouble the Court.

At least for the Office of Field Operations ("OFO") it appears that Title 42 is effectively terminated already. It appears that more than 3/4 of migrants processed by OFO are under Title 8 (1,013 out of 1,308). For some countries, the percentage processed under Title 8 is at or near 100% (e.g., Armenia is 31/32, Haiti is 181/181,

Honduras is 116/117). Is there some explanation that DHS can provide that would provide some indication either that (1) the vast majority of these Title 8 processings are recidivists who fall under the exception that the parties agreed to or (2) some other factor(s) is at work here, other than early implementation of the Title 42 Termination Order?

The numbers appear better for CPB, but are still potentially alarming. It appears that the rate of processing under Title 8 was about 43% (10,500 out of 24,445). That obviously is above the prior benchmark of 5%. How much of that is the recidivist exception we have agreed to and how much of that is within the exceptions of Title 42 Order themselves?

The country-specific data is also a bit odd, and difficult to understand in the abstract. It does appear that for the Northern Triangle countries, the rate of processing under Title 8 is about 5.7% (188/3,327), in line with historical benchmarks. But for many other countries, it appears that Title 42 is essentially over entirely. Leaving aside countries with fewer that 100 migrants processed (who may have small number bias), it appears that migrants from *every* country save Mexico is essentially being processed largely or entirely under Title 8.

Countries for which Title 42 appears abolished in all but name include Brazil (128/129 under Title 8), Ecuador (163/166), Georgia (142/142), Haiti (340/352), India (295/295), Peru (472/472), Turkey (246/246) and Venezuala (602/603). The story appears a bit more mixed with Cuba or Colombia, although Title 8 processings clearly predominate: 3,934/4,197 for Cuba and 978/1,101 for Colombia.

Candidly, it appears that DHS might be treating the TRO as if it only applies to Northern Triangle countries and no others. While that was the focus of our TRO motion, the terms of the actual TRO are not so limited. *See, e.g.*, TRO at 2. Instead, it bars *any* "implementat[ation] of the Termination Order, including increases ... in processing of migrants from Northern Triangle Countries." *Id.*

We understand that this data is complex and much could be lurking behind the surface numbers. Could you please provide any context that DHS wishes to supply **by tomorrow COB**?

Sincerely,
Drew