Oral Argument Not Yet Scheduled
No. 22-5325

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Nancy Gimena Huisha-Huisha, et al.,

Plaintiffs - Appellees,

v.

Alejandro N. Mayorkas, et al.,

Defendants – Appellants,

and

State of Arizona, et al.,

Movants-Intervenors.

BRIEF FOR AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF A STAY PENDING APPEAL

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 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, whose mission is: to defend responsible immigration policies in court, before administrative agencies, and before legislative bodies on behalf of the American people; to serve as a watchdog to safeguard against abuses of power; and to educate the American people about the threat of unchecked mass migration to themselves and their communities.

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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); *Arizona Dream Act Coal. 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); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 942 F.3d 504 (D.C. Cir. 2019); *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).

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[1] 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 entrusted the Director of the Centers for Disease Control and Prevention ("CDC") with the power to prohibit the entry of persons into the country in order to protect the country against communicable diseases. In response to the COVID-19 pandemic, the CDC exercised this authority by implementing the Title 42 policy, which empowers border control authorities to expel persons who have no right to enter the country. Currently, between one-third to one-half of all aliens apprehended attempting to enter the country surreptitiously at the southern border are being expelled under the Title 42 policy. *See* U.S. Customs and Border Protection (CBP) Encounters for fiscal years 2022 and 2023 (available at: https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy22, and https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics, respectively) (showing that recently, approximately 75,000 aliens are expelled under Title 42 each month compared to more than 100,000 aliens processed under Title 8 immigration authorities).[2] Thus,

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[2] Moreover, there are large numbers of aliens amassing on the Mexican side of the southern border waiting to enter the United States when the Title 42 policy ends. *See*, *e.g.*, New York Post, *'Avalanche' of immigrants preparing to enter US when Title 42 ban is lifted*, Nov. 18, 2022 (available at: https://nypost.com/2022/11/18/avalanche-of-immigrants-wait-to-enter-us-when-title-42-ends/) (quoting a source "currently living in a tent city of mostly Venezuelans half a football field away from El Paso, Texas—with only the Rio Grande and Title 42 standing between him and the US," stating that when the

the continued implementation of the Title 42 policy substantially mitigates the fiscal and health-related injuries the States sustain due to the large influx of unlawful aliens across the southern border.

SUMMARY OF ARGUMENT

In striking down the Title 42 policy, the district court failed to accord the proper deference to the CDC's judgment that prohibiting the introduction of certain persons into the country is necessary to protect the public health. Under the proper standard of review, the CDC's Title 42 policy is reasonable and should be upheld, and absent a stay of the district court's judgment vacating the Title 42 policy, the ongoing border crisis will only intensify and cause irreparable harm to the health and safety of the country. For all of these reasons, along with the reasons set forth by the States in their emergency motion for a stay, this Court should grant a stay pending appeal.

Title 42 policy ends in December, "it's going to be an avalanche of people; a sea of people" who will enter the United States); Breitbart, *EXCLUSIVE: 'Nightmare is Beginning' as Title 42 Ends, Says CBP Source*, Nov. 16, 2022 (available at: https://www.breitbart.com/border/2022/11/16/exclusive-nightmare-is-beginning-as-title-42-ends-says-cbp-source/) (reporting that a CBP source in Eagle Pass, Texas, claimed that "processing migrants under the previous and inefficient asylum pathway will likely result in severe overcrowding at Border Patrol processing facilities. Most [migrants] will be released into the United States to pursue asylum claims.").

ARGUMENT

I. The District Court Failed to Accord Proper Deference to the CDC's Title 42 Policy

It has long been recognized that the power "to forbid the entrance of foreigners … or to admit them only in such cases and upon such conditions as it may see fit to prescribe" is an inherent sovereign prerogative entrusted exclusively to Congress. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *see also Galvan v. Press*, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress . . . ."). Here, Congress entrusted the CDC with "the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as [the CDC Director] shall designate," whenever CDC "determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States" and that "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.

Exercising this authority, the CDC issued an order suspending the right to introduce aliens migrating through Mexico or Canada, concluding that their entrance "creates a serious danger of the introduction of COVID-19 into the United States" and that a temporary suspension of their entry is "necessary to protect the public health." *See* Order Suspending the Right to Introduce Certain Persons from

Countries Where a Quarantinable Communicable Disease Exists, 85 Fed. Reg. 65806, 65,806 (Oct. 16, 2020) ("October Order"). The October Order was later superseded by an order re-affirming that implementation of the Title 42 policy remains necessary during the COVID-19 public health emergency. *See* 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, 42,835 (Aug. 5, 2021) ("August Order").

Here, as the States point out (Emergency Stay Motion at 14-15), the district court held the CDC to a "least restrictive means" standard in implementing the Title 42 policy. But nowhere in § 265 does Congress impose a "least restrictive means" standard upon CDC's authority to prohibit the introduction of persons, and the CDC did not adopt such a standard in promulgating its regulation governing the exercise of this authority. *See* 42 C.F.R. § 71.40. Indeed, this Court, in this very case, has recognized the CDC's "sweeping authority," which is hardly compatible with a "least restrictive means" test. *Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 733 (D.C. Cir. 2022) (holding "that [42 U.S.C.] § 265 grants the Executive sweeping authority to prohibit aliens from entering the United States during a

public-health emergency[3]; [and] that the Executive may expel aliens who violate such a prohibition").

In addition to applying the wrong standard in reviewing the Title 42 policy, the district court failed to accord the agency the appropriate deference in light of the technical expertise required for setting public health policy. For example, this Court "give[s] an extreme degree of deference to the agency when it 'is evaluating scientific data within its technical expertise.'" *Kennecott Greens Creek Min. Co. v. Mine Safety & Health Admin.*, 476 F.3d 946, 954-55 (D.C. Cir. 2007) (quoting *Huls Am. v. Browner*, 83 F.3d 445, 452 (D.C. Cir. 1996)). The Supreme Court has recognized that "[o]ur Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)). "The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable

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[3] The federal government maintains that this public health emergency—that arising from the COVID-19 pandemic—continues to exist. *See* Xavier Becerra, Secretary of Health and Human Services, Renewal of Determination that a Public Health Emergency Exists, Oct. 13, 2022 (available at: https://aspr.hhs.gov/legal/PHE/Pages/covid19-13Oct2022.aspx).

disagreement." *Id.* Because the elected branches of government are better positioned to marshal scientific expertise and craft specific policies in response to changing circumstances, the courts should afford elected officials "especially broad" discretion when they "'undertake to act in areas fraught with medical and scientific uncertainties.'" *Id.* (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)). But instead of affording the CDC broad deference in reviewing the Title 42 policy, the district court did the opposite, holding the CDC to an erroneously heightened "least restrictive means" standard.

Further, the Supreme Court affords broad deference to public health judgments of the elected branches even where those judgments might impinge on fundamental and constitutional rights, such as the freedom to exercise religion. *See*, *e.g.*, *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613-14 ("Where those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people.") (citing *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545 (1985)); *but see Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curium) (applying strict scrutiny in enjoining a regulation that limited church services to 10 people without imposing comparable limits to commercial businesses).

Here, there is no basis for holding the Title 42 policy to a higher standard of review than reasonableness review. Under this correct standard, a court "simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021).

Plaintiffs in this case have no right to enter the United States, so the Title 42 policy prohibiting their introduction to the country does not affect any right Plaintiffs may possess. Indeed, to the extent Plaintiffs have a statutory right not to be expelled to a place where they would face persecution or torture, the CDC's Title 42 policy, as interpreted by this Court, does not apply to them. *Huisha-Huisha*, 27 F.4th at 733 (holding "that under [8 U.S.C.] § 1231(b)(3)(A) and the Convention Against Torture, the Executive cannot expel aliens to countries where their 'life or freedom would be threatened' on account of their 'race, religion, nationality, membership in a particular social group, or political opinion' or where they will likely face torture"). Thus, Plaintiffs have no fundamental or constitutional right affected by the Title 42 policy that might justify a heightened standard of judicial review.

Finally, the fact that the CDC has subsequently determined that the Title 42 policy is no longer warranted is of no moment. "Ordinarily we review only the order or rule before us, not subsequent events." *Great Lakes Commun. Corp. v.*

FCC, 3 F.4th 470, 478 (D.C. Cir. 2021) (citing *COMPTEL v. FCC*, 978 F.3d 1325, 1334 (D.C. Cir. 2020)); *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) ("[I]n reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record."). "If a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision." *Water O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984). The CDC's subsequent order terminating the Title 42 policy is the subject of litigation before the Fifth Circuit Court of Appeals and is not before this Court.

CONCLUSION

For the foregoing reasons, along with the reasons set forth by the States, this Court should grant a stay pending appeal.

DATED: December 13, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with Fed. R. App. P. 27(d)(2) because it contains 2,006 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: December 13, 2022

Respectfully submitted,

/s/ John M. Miano
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CERTIFICATE OF SERVICE

I certify that on December 13, 2022, I electronically filed the foregoing motion and attached *amicus* brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia 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/ John M. Miano
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