The Oversized Role of Title 42 in U.S. Southwest Border Security

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Abstract

Even before the Centers for Disease Control (CDC) issued its first order under Title 42 of the U.S. Code directing the expulsion of illegal migrants at the Southwest border in response to the Covid-19 pandemic in March 2020, Trump administration policies had allowed the Department of Homeland Security (DHS) to gain a significant level of operational control at the U.S. Southwest border. The Biden administration quickly reversed nearly all those Trump policies and instituted a de facto "non-detention" regime for illegal entrants, violating congressional mandates and encouraging a surge in illegal migration. That migrant surge had left Border Patrol agents increasingly helpless to stop drug and migrant smuggling into the United States. CDC's Title 42 expulsion orders were the only remaining Trump-era policy enabling agents to maintain any control of the border, while DHS expects the illegal migrant flow to more than double once Title 42 ends. For those reasons, CDC's health-related Title 42 orders were playing an oversized role in border security, prompting U.S. states concerned about the deleterious effects of illegal migration in their communities to challenge the administration's efforts to end Title 42, taking the issue all the way to the U.S. Supreme Court.

Keywords: USA, Title 42, parole, expulsion, Remain in Mexico

1. Introduction

"Title 42" has been a focal point of U.S. immigration policy for more than three years. Understanding what Title 42 is, why and how it has been implemented, and the battles over its termination are crucial to comprehending the current parlous state of the nation's control over its borders. In this paper, I will describe the genesis of Title 42, analyze court challenges – both to continue and to end the program – it faced, how it was terminated, and most importantly, why it has been so critical to border security under the Biden administration.

2. The Tortuous History of Title 42

The phrase "Title 42" is an example of rhetorical overload. In general, it refers to the title of the U.S. Code[1] dealing with "public health and welfare."

In the current immigration context, however, it refers to a series of orders[2] issued by the U.S. Department of Health and Human Services' Centers for Disease Control and Prevention (CDC) that "suspend the introduction of covered aliens" into the United States and direct "the movement of all such aliens to the country from which they entered the United States, or their country of origin, or another location . . . as rapidly as possible".[3] That latter process is known as "expulsion" to differentiate it from deportation under the Immigration and Nationality Act (INA), which is formally termed "removal."

The first Title 42 order was issued on March 20, 2020, in response to "an increase in the danger of the introduction of Coronavirus Disease 2019 (COVID-19) into" the 328 U.S. land border ports of entry (POEs) along the U.S. Northern and Southwest borders and the 136 Border Patrol stations between those POEs.[4] Those facilities fall under the jurisdiction of U.S. Customs and Border Protection (CBP), an agency within the Department of Homeland Security (DHS).

The term "covered aliens" refers to foreign nationals coming into the United States across the Canadian and Mexican borders, who are either entering illegally between those POEs or presenting themselves at the POEs without proper entry documents. The purpose of those orders was to prevent covered aliens from being placed in "congregate settings" at the POEs or Border Patrol processing centers- where they would be exposed to and transmit COVID-19 to one another and to U.S. government personnel- for extended periods of time.[5]

The practical effect of those Title 42 orders had been the quick expulsion of a large (but shrinking) percentage of illegal entrants at the land borders from the United States, without requiring CBP officers and agents to go through the often-time-consuming process of formally removing those aliens in accordance with the requirements in the INA.

[1] Title 42, Public Health and Welfare 2023.
[2] Nat'l Ctr. for Immunization and Respiratory Diseases, Division of Viral Diseases 2022.
[3] Redfield, M.D. 2020.
[4] Ibid.
[5] Ibid.

Those orders are referred to collectively as "Title 42" because they were issued pursuant to section 265[6] of Title 42 of the U.S. Code, which dates to June 1944.[7]

By regulation,[8] the authority to make such designations has been reassigned from the Surgeon General to the director of the CDC.

That initial March 20, 2020, order was extended the next month, and then amended in May 2020,[9] to apply to CBP coastal border facilities as well. That May 2020 order also made clear that it would remain in effect until the CDC determined "that the danger of further introduction of COVID-19 into the United States from covered aliens has ceased to be a serious danger to the public health."[10]

In October 2020, CDC issued yet another Title 42 expulsion order, replacing those prior orders.[11] It expressly exempted U.S. citizens and lawful permanent residents (green card holders), U.S. military personnel and their immediate families, foreign nationals with lawful entry documents, aliens required to test negative for COVID-19 before they could be returned to their home countries, and aliens whom CBP personnel believed should be exempted on law enforcement, public safety, humanitarian, and public-health grounds from expulsion.[12]

Directly after the pandemic was declared, Americans were deeply concerned about the virality and lethality of COVID-19. Consequently, there were few initial legal challenges to restrictions imposed to stem the spread of the disease, including to CDC's migrant expulsion orders under Title 42. That changed within a few months, however.

[6] 42 U.S.C. § 265 2023.
[7] See ibid. ("Whenever the Surgeon General determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, and that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required in the interest of the public health, the Surgeon General, in accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose.").
[8] 42 C.F.R. § 71.40 2020.
[9] McGowan 2020.
[10] Ibid.
[11] Witkofsky 2020.
[12] Ibid.

In August 2021, advocates for a 16-year-old male migrant from Guatemala filed a class-action complaint[13] in *P.J.E.S. v. Wolf*, challenging expulsions of unaccompanied alien children (UACs)-minors encountered by CBP seeking to enter illegally without an accompanying parent or other adult- under Title 42.

In November 2020, Judge Emmet Sullivan of the U.S. District Court for the District of Columbia (D.C. District)-first appointed to the court by then-President Bill Clinton in 1994[14]-issued an order in *P.J.E.S.*, which blocked Title 42 expulsions of UACs.[15] The Department of Justice (DOJ) appealed that order, but it wasn't until January 29, 2021-nine days after President Biden's inauguration-that the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) issued an order staying Judge Sullivan's injunction.[16] Despite that order, 19 days later, on February 17, 2021, the now-Biden administration-led CDC issued a "temporary exception" of UACs from expulsion under Title 42, essentially adopting Judge Sullivan's restrictions by regulation even though the D.C. Circuit order meant it was under no obligation to do so.[17]

On April 29, 2021, the state of Texas filed suit (*Texas 1*) seeking an injunction of that amended Title 42 order, arguing that the order violated the terms of the Administrative Procedure Act (APA), and that the Biden administration was failing to enforce the INA.[18]

With respect to the APA, as the Congressional Research Service has explained:

> *The [APA], which applies to all executive branch and independent agencies, prescribes procedures for agency rulemakings and adjudications, as well as standards for judicial review of final agency actions.*
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> *The APA describes rulemaking as the "agency process for formulating, amending, or repealing a rule." A "rule," for purposes of the statute, is defined expansively to include any "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." Rules that are issued in compliance with certain legal requirements, and that fall within*

[13] Class Action Complaint for Declaratory and Injunctive Relief, No. 1:20-cv-02245 D.D.C. 2020.
[14] Schallhorn 2018.
[15] P.J.E.S v. Wolf, ___ F. Supp. 3d___ 1:20-cv-02245, slip op. D.D.C. 2020.
[16] Aquino 2021.
[17] Berger 2021a.
[18] Arthur 2022c.

the scope of authority delegated to the agency by Congress, have the force and effect of law.

(. . . .)

As a general matter, there is a "strong presumption that Congress intends judicial review of administrative action." This presumption is embodied in the APA, which provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review."

(. . . .)

Specifically, the APA states:

The reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.[19]

Thereafter, in July 2021, CDC issued an order[20] specifically excepting UACs from its October 2020 Title 42 order, followed by yet another Title 42 order in August.[21] That August order explained that "the flow of migration directly impacts not

[19] Garvey 2017.
[20] Berger 2021b.
[21] Berger 2021c.

only border communities and regions, but also destination communities and the healthcare resources of both",[22] but nonetheless included an exception for UACs.

On March 4, 2022, the judge in *Texas 1*, Mark Pittman of the U.S. District Court for the Northern District of Texas, issued an order blocking that Title 42 UAC exception.[23] In his order, a clearly frustrated Judge Pittman complained: "Why a state and the federal government are litigating this issue -instead of working to solve it - is simply beyond the comprehension of the undersigned."[24]

While that case was ongoing, however, on September 16, 2021, Judge Sullivan issued yet another Title 42 decision in a separate case, *Huisha-Huisha v. Mayorkas*, enjoining the expulsion of illegal entrant adults travelling with children in "family units" under Title 42.[25]

The government appealed that order, and on March 4, 2022, the D.C. Circuit affirmed DHS's authority to expel illegal migrants under Title 42, but not to places where those aliens would be persecuted or tortured.[26]

That order, coupled with the Biden administration's voluntary decision to exempt UACs from Title 42 expulsion, significantly reduced both the number and percentage of illegal migrants who were expelled under the CDC orders.

As noted, the purpose of those expulsion orders was to restrict the period of exposure between migrants and CBP officers and to limit the time that migrants spent in congregate settings in CBP custody. Screening migrants for persecution and torture claims largely defeated that goal, so to reduce the period aliens with potential persecution and torture claims spent in its custody, Biden's CBP increasingly released them into the United States in lieu of expulsion.

Biden administration attempts thereafter to end Title 42 spurred yet more litigation from states concerned about the administration's failure to otherwise control the Southwest border and anxious about the effects that a wave of post-Title 42 migrants would have on their communities.

The president began the process of ending Title 42 on April 1, 2022, when the administration announced it would lift the CDC orders, effective May 23, 2022.[27]

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[22] Ibid.
[23] *Texas v. Biden*, ___ F. Supp. 3d ___, No. 4:21-cv-0579-P, slip op. at 36 N.D. Tex. 2022.
[24] Ibid. p. 1.
[25] *Huisha-Huisha v. Mayorkas*, ___ F. Supp. 3d, No. 21-100(EGS), slip op. at 58 D.D.C. 2021.
[26] *Huisha-Huisha v. Mayorkas*, ___ F. 4th___, No. 21-5200, slip op. at 32 D.C. Cir. 2022.
[27] Alvarez 2022.

Notably, the president made that announcement even though DHS had warned that up to 18,000 migrants would seek to enter illegally *per day* once Title 42 ended-three times the then-current rate.[28]

In response to those warnings, DHS Secretary Alejandro Mayorkas published a "six pillar" plan for dealing with that expected influx of migrants into the United States once Title 42 was lifted in late April.[29] That plan largely focused on surging federal government resources to the Southwest border. As a colleague who had served as a Trump-appointed official at U.S. Immigration and Customs Enforcement (ICE) explained, this would require the reassignment of ICE officers (who enforce the immigration laws within the United States) to the border, significantly diminishing the agency's capacity to enforce the immigration laws in the interior of the United States:

> *Mayorkas explains that he's taking law enforcement officers from their assigned missions in the interior of the United States (such as ICE officers) and relocating them to the U.S. border to spend their time processing illegal aliens (i.e., releasing them into the interior of the United States). ICE officers have complained to me that the agency's field offices have reduced staffing as a result, and that the Biden administration is making no effort to backfill those positions. . .. . Notably, the Biden administration's budget request for FY 2023 seeks a decrease in funding for ICE's Enforcement and Removal Operations (ERO). The FY 2019 budget included a target of 151,000 criminal aliens to be deported from the country; the Biden administration has decided to target only 91,500 criminal aliens for removal in FY 2022, and it's unlikely that target will be reached.*[30]

Other elements of Mayorkas' plan included efforts to increase CBP's "processing efficiency" to alleviate overcrowding at the agency's frontline border processing centers; expand the use of "expedited removal"; boost the number of single adult illegal migrants DHS detains; "bolster[] . . . the capacity of non-governmental organizations to receive" migrants released from DHS custody; and enhance diplomatic efforts in Central America aimed at "deterring irregular migration south of our border."[31]

[28] Miroff – Sacchetti 2022.
[29] Mayorkas 2022.
[30] Feere 2022.
[31] Ibid.

In the interim, a group of Republican-led states filed suit in April 2022 in the U.S. District Court for the Western District of Louisiana, in a case captioned *Louisiana v. CDC*, to block CDC from ending Title 42.[32]

The state plaintiffs in *Louisiana* alleged that CDC's attempted termination of Title 42 violated the APA because that component failed to consider the effects ending Title 42 would have on immigration enforcement.[33]

On May 20, 2022-three days before Title 42 was supposed to expire-the judge assigned to hear the claims in *Louisiana*, Robert Summerhays, issued a preliminary injunction blocking the administration's attempt to lift the CDC Title 42 expulsion orders on those grounds.[34]

The Biden administration appealed Judge Summerhays' order,[35] but continued to comply with it while that appeal was pending.

It's important to note that while Judge Summerhays' order required the executive branch to continue Title 42 expulsions until that order was stayed or vacated by either the judge or a higher court, it did not prevent any other federal court from issuing a conflicting order ending Title 42.

Which is what happened on November 16, 2022, when Judge Sullivan issued yet another order in *Huisha-Huisha*, this time finding that the CDC Title 42 expulsion orders were arbitrary and capricious in violation of the APA.[36] As relief, he vacated the CDC's Title 42 policy and permanently enjoined DHS from expelling illegal border migrants thereunder.[37]

Although Judge Sullivan initially said he wouldn't stay his order pending appeal, he quickly acceded to the government's request to give DHS five weeks-until December 21, 2022- to prepare for the end of Title 42.[38]

For those confused about how one federal district court judge (Judge Sullivan) could vacate and enjoin a policy that a separate federal district court judge (Judge Summerhays) had enjoined the federal government from terminating, it should be noted that Judge Sullivan's order swept more broadly than Judge Summerhays'

[32] Complaint, *Louisiana v. CDC*, No. 6:22-cv-00885 W.D. La. 2022.
[33] Ibid.
[34] *Louisiana v. CDC*, ___ F. Supp. 3d___, No. 2-CV-00885, slip op. at 47 W.D. La.2022.
[35] Notice of Appeal, *Louisiana v. CDC*, No. 6:22-CV-00885-RRS-CBW W.D. La.2022.
[36] *Huisha-Huisha v. Mayorkas*, ___ F. Supp. 3d___, No. 21-100 (EGS), slip op. at p. 20 D.D.C. 2022.
[37] Ibid, pp. 48–49.
[38] Garcia 2022.

did: "The latter simply prevented the Biden administration from revoking the CDC's Title 42 orders, while the former vacates those orders in their entirety."[39] In layman's terms, Judge Summerhays found that the Biden administration had erred in the way it ended Title 42, while Judge Sullivan held that the CDC had violated the law in implementing Title 42 to begin with.

While the administration had initially signaled that it was considering appealing Judge Sullivan's order, it delayed doing so. Consequently, and again fearing the consequences of the end of Title 42, on November 20, 2022, the state plaintiffs in *Louisiana* filed a motion to intervene on appeal to block Judge Sullivan's order in *Huisha-Huisha*, suggesting that the administration was colluding with the plaintiffs in that case in an attempt to end Title 42:

> *[D]espite defending this lawsuit [Huisha-Huisha] since January of 2021, the Federal Defendants have shifted course and abandoned their defense of Title 42. In essence, Federal Defendants have circumvented APA notice-and-comment requirements by abandoning defense of Title 42 and instead agreeing with Plaintiffs on a December 21 end date.*
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> *Because invalidation of the Title 42 Orders will directly harm the States, they now seek to intervene to offer a defense of the Title 42 policy so that its validity can be resolved on the merits, rather than through strategic surrender. This motion is plainly timely because it comes within a week of the Federal Defendants' volte-face – which made plain that the States' interests are no longer adequately represented.*[40]

On December 7, 2022, the government filed its notice to appeal Judge Sullivan's order but asked the D.C. Circuit to hold that appeal in abeyance pending the Fifth Circuit's consideration of its own appeal in *Louisiana*.[41] DOJ didn't, however, ask the D.C. Circuit to stay Judge Sullivan's order ending Title 42.[42]

There are many reasons why the Biden administration would have appealed both the order in *Louisiana* and the order in *Huisha-Huisha* at this stage. One reason would have been "institutional", to assure that the executive branch could issue similar Title 42 expulsion orders in response to some future pandemic.

[39] Arthur 2022g.
[40] Motion to Intervene by the States of Arizona, Louisiana, Alabama, Alaska, Kansas, Kentucky, Mississippi, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Virginia, West Virginia, and Wyoming, *Huisha-Huisha v. Mayorkas*, Civ. A. No. 21-100 (EGS) D.D.C. 2022.
[41] Notice Regarding Decision to Appeal the Court's November 15, 2022 Order and November 22, 2022 Final Judgment, *Huisha-Huisha v. Mayorkas*, No. 21-100 (EGS) D.D.C. 2022.
[42] Arthur 2022i.

Another reason, however, would have been purely political, to blunt allegations that it was colluding with the plaintiffs in *Huisha-Huisha* to obtain the result the White House desired – an end to migrant expulsions under those Trump-era CDC orders.

On December 16, 2022, the D.C. Circuit denied the states' motion to intervene, holding:

> *First, although this litigation has been pending for almost two years, the States never sought to intervene in the district court until almost a week after the district court granted plaintiffs' partial summary judgment motion and vacated the federal government's Title 42 policy. The filing was so late in the litigation process that the federal government's filing of a notice of appeal shortly thereafter, in the States' view, deprived the district court of jurisdiction even to act on the motion.*
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> *...*
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> *Second, long before now, the States have known that their interests in the defense and perpetuation of the Title 42 policy had already diverged or likely would diverge from those of the federal government's should the policy be struck down.*[43]

In other words, the circuit court found that the states shouldn't be surprised an administration that was trying to end Title 42 wouldn't be fighting at the same time to keep it in place.

With Judge Sullivan's December 21 deadline for ending Title 42 approaching, the states filed an emergency application for a stay pending certiorari (Supreme Court review) of Judge Sullivan's order with Supreme Court Chief Justice John Roberts – the circuit justice for the D.C. Circuit – on December 19.[44]

This time, they specifically alleged that the federal government was attempting to bypass the APA's notice and comment requirements and Judge Summerhays' order by "collusively agree[ing] with" the plaintiffs in *Huisha-Huisha* "to recreate the enjoined [by Judge Summerhays] order terminating the Title 42 System, with the same delayed effective date and same lack of notice-and-comment compliance as the enjoined rule".[45]

[43] *Huisha-Huisha v. Mayorkas*, ___ F.4th ___, No. 22-5325, slip op. at p. 2 D.C. Cir. 2022.
[44] Application to the Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court of the United States and Circuit Justice for the D.C. Circuit, For A Stay Pending Certiorari, Arizona v. Mayorkas, No. 22A544 U.S. 2022.
[45] Ibid., p.1.

The chief justice granted a stay that day and directed the government to file a response.[46]

On December 20, the government filed its opposition to the states' request, denying it was colluding with the plaintiffs in *Huisha-Huisha* while "recogniz[ing] that the end of the Title 42 orders will likely lead to disruption and a temporary increase in unlawful border crossings."[47]

By that point, however, "other than Mexican" (OTM) migrants had already begun assembling on the Mexican side of the Southwest border waiting for Title 42 to end, many of them across the border from El Paso, Tex.[48] With large groups of migrants crossing the Rio Grande into the city, El Paso Mayor Oscar Leeser declared a state of emergency on December 17,[49] which the city council extended for 30 days on December 23.[50]

The chief justice's stay remained in place through Christmas (December 25 in the United States). On December 27, the Supreme Court issued an opinion in the case (now captioned *Arizona v. Mayorkas*), granting the states' applications for certiorari and staying Judge Sullivan's order while the justices considered the question of whether the states should be allowed to challenge that order before the D.C. Circuit.[51]

Notably, only five of the nine justices (the chief justice, and Justices Clarence Thomas, Samuel Alito, Brett Kavanaugh, and Amy Coney Barrett) voted to hear the states' appeal in *Arizona*. Justices Sonia Sotomayor and Elena Kagan opposed the states' application for certiorari without further explanation, while Justice Neil Gorsuch, writing for himself and Justice Katanji Brown Jackson, went into detail as to why they were dissenting from the Court's opinion.[52]

Justice Gorsuch, a Trump appointee and so-called "originalist"[53] (that is, a judge who believes the laws and constitution should be interpreted as the authors intended), opined that the "case-specific decision" of the D.C. Circuit in *Huisha-Huisha* was "not of special importance in its own right and would not normally

[46] *Arizona v. Mayorkas*, ___ U.S.___, No. 22A544, slip op. U.S. 2022.
[47] Federal Respondents Opposition to the Application for a Stay Pending Certiorari, *Arizona v. Mayorkas*, No. 22A544, p. 2 U.S. 2022.
[48] Melhado 2022.
[49] Ibid.
[50] Arthur 2022j.
[51] *Arizona v. Mayorkas*, ___ U.S. ___, No. 22A544, slip op. U.S. 2022.
[52] Ibid., p. 2.
[53] Kim 2017.

warrant expedited review". Rather, he asserted, "The D.C. Circuit's intervention ruling takes on whatever salience it has only because of its presence in a larger underlying dispute about the Title 42 orders."[54]

In what was likely the most important passage in any of these Title 42 decisions, he continued:

> *The States contend that they face an immigration crisis at the border and policymakers have failed to agree on adequate measures to address it. The only means left to mitigate the crisis, the States suggest, is an order from this Court directing the federal government to continue its COVID-era Title 42 policies as long as possible - at the very least during the pendency of our review.*
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> . . .
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> *But the current border crisis is not a COVID crisis. And courts should not be in the business of perpetuating administrative edicts designed for one emergency only because elected officials have failed to address a different emergency. We are a court of law, not policymakers of last resort.*[55]

Republicans regained control of the U.S. House of Representatives in the November midterm elections,[56] ousting the Democrats who has controlled that chamber since 2019. The current, 118th, Congress convened on January 3,[57] but due to internecine battles, former Minority Leader Kevin McCarthy (R-Calif.) was not elected speaker until the 15th ballot, early in the morning of January 7.[58]

By that point, the end date for Title 42 was wholly dependent on the Supreme Court's ultimate ruling. Nonetheless, and taking apparent advantage of the Republicans' disarray, the White House issued its latest post-Title 42 plans in a fact sheet captioned "New Border Enforcement Actions" on January 5.[59] Under that plan, would-be inadmissible entrants would be able to access DHS's CBP One online app (which previously could only be used for legitimate entrants) to schedule appointments "to present themselves for inspection and to initiate a protection claim".[60] While the Biden administration claims that this aspect of its plan would allow aliens "to enter the United States lawfully through" border POEs, as I explained at the time, "'entering' without a visa through a port of entry is as

[54] Ibid.
[55] Ibid., p. 3.
[56] Weissert – Burnett – Colvin 2022.
[57] Jones 2023.
[58] Karni 2023.
[59] White House 2023.
[60] Ibid.

'illegal' as crossing the border without a visa between the ports of entry, regardless of whether you have an appointment to do so."[61] Further, as I later explained, that CBP One POE scheduling proposal would "actually endanger even greater numbers of foreign nationals by encouraging them in greater numbers to travel illegally to the other side of the Southwest border."[62]

Another aspect of the White House's January 5 plan was an expansion of a current Biden policy that brings otherwise inadmissible Venezuelan nationals to the United States on two-year periods of "parole".[63] I address DHS's parole authority further below, but under that plan as expanded, 30,000 nationals of Venezuela, Nicaragua, Haiti, and Cuba would be allowed into the country per month-360,000 annually in total.[64]

On January 24, 2023, 20 Republican-led state plaintiffs filed suit in the U.S. District Court for the Southern District of Texas, seeking to block that parole proposal.[65] Among other claims, the states allege in that suit that the administration has failed to "'explain or analyze' how it 'would remove from the United States aliens paroled through the program after the end of any period of authorized parole, despite admitting general difficulty removing such aliens to their home countries presently'."[66] They further assert that the January 5 parole program violates the APA because it exceeds DHS's parole authority.[67]

It should be noted that, under the White House plan, nationals of those four countries who enter the United States illegally instead of applying in advance for parole would be "subject to expulsion to Mexico" – which apparently presumed the continuation of the same Title 42 expulsion protocol that the administration is attempting to end in *Louisiana* and *Arizona*[68] (as noted, aliens deported under the provisions in the INA are "removed", not "expelled").

Finally, under the White House plan, illegal migrants who "fail to seek protection in a country through which they traveled on their way to the United States, will be subject to a rebuttable presumption of asylum ineligibility in the United States."[69]

[61] Arthur 2023a.
[62] Arthur 2023d.
[63] White House 2023.
[64] Ibid.
[65] Complaint, *Texas v. DHS*, No. 6:23-cv-00007 S.D. Tex 2023.
[66] Ibid., p. 11.
[67] Ibid., p. 30.
[68] Arthur 2023c.
[69] Jacobs 2023.

The Trump administration had previously proposed such a "third-country transit bar" to asylum for OTMs who failed to apply for protection in a country they had transited on their way to the United States where such protection is available,[70] but as a colleague and former Trump official at U.S. Citizenship and Immigration Services (USCIS) observed:

> *There are important differences to the Trump administration's policy and the Biden administration's forthcoming proposal. First, the third-country transit rule sought to impose an actual bar to asylum. The Biden administration's forthcoming regulation, on the other hand, will instead impose a "rebuttable presumption of asylum ineligibility". This means that aliens who make a credible fear claim could present evidence to overcome this presumption, thus giving asylum officers more issues to analyze in already long credible fear interviews.*
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> *Second (and this is important), the Biden administration's border strategy says nothing at all about detention. While the administration claims to be "expanding expedited removal [which I will also explain below]" for those without a legal basis to enter or remain in the country, as my colleague Andrew R. Arthur has repeatedly explained, expedited removal does not work without detention - even if aliens are supposedly barred from asylum.*
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> *That is because asylum is not the only form of protection that aliens can receive after they make a credible fear claim to a DHS officer. An alien could be ineligible for asylum, but nevertheless be allowed to remain in the United States because an asylum officer determines that the alien may be eligible for statutory withholding of removal or protections under the Convention Against Torture (CAT). Credible fear applicants do not need to explicitly request relief under these forms of protection to receive a positive credible fear determination — asylum officers can (and often do) make this determination on their own after hearing an alien's testimony.*[71]

The most recent development with respect to Title 42 was a January 30 announcement by the White House's Office of Management and Budget (OMB) that the administration will be extending the COVID-19 national emergency (which had been set to expire on March 1) and the COVID-19 public health emergency ("PHE", which had been scheduled to end on April 11) to May 11, and end both on that date.[72]

[70] Arthur 2019.
[71] Jacobs 2023.
[72] Office of Management and Budget 2023.

DOJ filed a brief with the Supreme Court in *Arizona* arguing that the OMB announcement mooted the states' claims.[73] While the justices cancelled the scheduled March 1 oral arguments in that case, it was not clear then whether they concurred with DOJ's contentions.[74]

On May 18, however-seven days after the administration stopped expelling migrants at the Southwest border under Title 42-the justices remanded *Arizona* to the D.C. Circuit with directions to dismiss the case as moot.[75] Thus, after more than three years, Title 42 ended with a whimper.

Except, again, for Justice Gorsuch, who used that order as an opportunity to rail against the threats to civil liberties that COVID-19 restrictions had imposed, and to take to task the federal and state governments and courts that had stood silent as those liberties were eroded.[76]

3. Title 42 Expulsions Under Trump and Biden

Between the issuance of the first Title 42 order in March 2020 and the end of the Trump administration, Border Patrol agents at the Southwest border rigorously enforced those CDC directives, expelling more than 87 percent of illegal Southwest border migrants who were subject to Title 42.[77]

Title 42 expulsions were lower and continuously declined, however, throughout the Biden administration. In the last eight months of FY 2021, between February (Biden's first full month in office) and September 2021, just 58 percent of migrants encountered by CBP at the Southwest border were expelled, a figure that dropped below 48 percent in FY 2022.[78] By December 2021-a month in which there were more CBP Southwest border encounters than in any previous month in history, just 21.5 percent of those apprehended by Border Patrol were expelled.[79]

Biden disfavored Title 42, which prevented illegal migrants from seeking asylum-a key objective of his administration, as explained below- and had acceded to court orders that barred the application of those CDC orders to UACs by rewriting

[73] Garcia 2023.
[74] Ibid.
[75] *Arizona v. Mayorkas*, 598 U.S.___, No. 22-592, slip op. at 1.
[76] Ibid., at 1-8.
[77] Arthur 2022k.
[78] Arthur 2022h.
[79] Arthur 2023b.

those CDC orders, but those weren't the only reasons why Title 42 expulsions dropped under the current administration.

Within days of Biden's election, the Mexican Congress passed a law captioned "Various Articles of the Migration Law and the Law on Refugees are Reformed, Complementary Protection and Political Asylum in the Matter of Migrant Children", which was signed by Mexican President Andrés Manuel López Obrador on November 11, 2020.[80]

That law:

> *[P]rohibited federal detentions of migrant families with minor children – with or without parents – in all fifty-eight Mexican detention facilities nationwide. To remain in compliance with Mexico's other laws requiring the feeding and sheltering of migrant children, the new law required the government to merely refer them to voluntary-stay shelters. This meant that after January 11, 2021, Mexico could start emptying its detention centers, and thousands of families with their young children could travel freely inside the country, which everyone knows means the U.S. border.*[81]

Thus, from the start, the Biden administration was largely unable to expel migrant children and families under Title 42.

Further, from the beginning of the Biden administration, the Mexican government had been increasingly unwilling to accept migrants expelled under Title 42 who weren't Mexican citizens or nationals of the "Northern Triangle" countries of El Salvador, Guatemala, and Honduras.[82] As *PBS News Hour* explained in May 2022:

> *For other nationalities . . . . high costs, poor diplomatic relations and other considerations make it difficult for the U.S. to fly migrants to their home countries under Title 42. Instead, they are typically freed in the U.S. to seek asylum or other forms of legal status.*[83]

Likely not coincidentally, the number of nationals of countries from farther abroad than Mexico and the Northern Triangle who have been entering illegally across the Southwest border has swelled.[84]

[80] Bensman 2022, p. 168.
[81] Ibid., pp. 168-169.
[82] Spagat 2022.
[83] Ibid.
[84] Shoichet – Hickey 2022.

For example, in all of FY 2020, Border Patrol agents at the Southwest border apprehended just 1,227 Venezuelan nationals, and just 781 in the first four months of FY 2021 (as noted, Biden took office at the end of January 2021).[85]

The United States has only limited diplomatic relations with Venezuela (making it difficult to deport nationals of that country), however, and the Mexican government increasingly refused to accept Venezuelan nationals who had been expelled.

Venezuelan migrants progressively realized that they were unlikely to be deported or expelled, and consequently, by the end of FY 2021,[86] Border Patrol apprehensions of illegal Venezuelan entrants exceeded 47,000, topping 187,000 in FY 2022.[87]

Those same factors (poor diplomatic relations and an increased unwillingness under Biden for the Mexican government to accept returns) applied to Nicaraguan nationals, as well. In all of FY 2020, Border Patrol agents apprehended just 2,123 illegal Nicaraguan entrants, and an additional 1,807 in the first four months of FY 2021.[88]

By the end of FY 2021, however, nearly 50,000 illegal Nicaraguan migrants had been apprehended at the Southwest border, and more than 163,500 others in FY 2022.[89]

While illegal Cuban migration has not been quite so rare in recent years (agents at the Southwest border apprehended just fewer than 10,000 of them in FY 2020), their numbers have also jumped since Biden took office-to more than 38,000 in FY 2021 and 220,000-plus in FY 2022.[90]

Again, strained diplomatic relations between Washington and Havana and a refusal of the Mexican government to accept the return of expelled Cuban nationals clearly drove that jump.

Then, there are Ukrainian migrants. Just five Ukrainian nationals were apprehended entering illegally in FY 2020, and six more between October 2020 and May 2021.[91] The Russian invasion of the country in late February 2022 drove refugees from Ukraine, and 36 illegal Ukrainian migrants ended up at the Southwest border between June and September 2022.[92]

[85] Customs and Border Protection 2023.
[86] Ibid.
[87] Ibid.
[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] Ibid.

That figure climbed through FY 2022, with agents apprehending 585 illegal Ukrainian entrants at the Southwest border that fiscal year.

Diplomatic relations did not play so much a role in their illegal entry as an unwillingness on the part of the Biden administration to either expel or deport removable Ukrainians did, culminating in an administrative "pathway" for nationals of the country to come to the United States, called "Uniting for Ukraine" on April 21, 2022.[93]

As the DHS press release for that program explained:

> *Ukrainians should not travel to Mexico to pursue entry into the United States. Following the launch of Uniting for Ukraine, Ukrainians who present at land U.S. ports of entry without a valid visa or without pre-authorization to travel to the United States through Uniting for Ukraine will be denied entry and referred to apply through this program.*[94]

That admonition notwithstanding, more than 303 Ukrainians were apprehended entering illegally across the Southwest border between the issuance of that press release and the end of April 2023.[95]

4. The Oversized Importance of Title 42

All of which raises the question why Title 42-which in essence is a public health policy-has taken on such oversized importance to U.S. border security, or why states are suing the administration to continue the policy.

When Joe Biden took office, he inherited what his first Border Patrol chief, Rodney Scott, described in September 2021 as "arguably the most effective border security in" U.S. history.[96]

The new administration, Scott complained, quickly allowed that security to "disintegrate" as "inexperienced political appointees" ignored "common sense border security recommendations from experienced career professionals."[97]

[93] Dep't of Homeland Security 2022.
[94] Ibid.
[95] Customs and Border Protection 2023.
[96] Scott 2021, p. 2.
[97] Ibid.

The effects are apparent in CBP's own statistics. Between FY 2015 and FY 2018, Border Patrol apprehended fewer than 409,000 migrants annually at the Southwest border, and never stopped more than 48,000 in any given month.[98]

In FY 2019, however, agents apprehended more than 851,000 illegal entrants, hitting a monthly peak of just fewer than 133,000 in May 2019.[99] Monthly apprehensions quickly declined thereafter, however, falling to just over than 30,000 in February 2020,[100] the month before CDC issued its first Title 42 order.

To understand how Trump had secured the Southwest border prior to Title 42, it's necessary to go back to the INA itself, and to the Obama administration.

In the INA, Congress gave DHS two separate methods by which it could process aliens who were apprehended entering illegally: (1) expedited removal under section 235(b)(1) of INA;[101] and (2) "regular" removal under section 235(b)(2) of the INA.[102]

Regular removal requires DHS to obtain a removal order from an immigration judge before it can deport an alien – a time consuming process that can take years to complete,[103] particularly when the alien is not detained.

Expedited removal, on the other hand, allows agents to remove illegal entrants quickly, without having to place them into formal removal proceedings.[104]

The catch in that fast-track process is an INA requirement that CBP send aliens who have asserted a fear of harm or expressly requested asylum to USCIS asylum officers, for an interview to determine whether those aliens have a "credible fear" of persecution.

In those interviews, asylum officers screen the aliens to determine whether they *may* be eligible for asylum. The credible fear standard is low, requiring just "a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum."[105]

[98] CBP Newsroom 2021.
[99] Ibid.
[100] Ibid.
[101] 8 U.S.C. § 1225 2023.
[102] Ibid.
[103] Rappaport 2022.
[104] Arthur 2023a.
[105] Ibid.

Section 235(b)(1) of the INA requires that aliens subject to expedited removal be detained, from the moment that they are apprehended until they are either granted asylum or removed,[106] notwithstanding DHS's limited authority to release aliens on parole.

Despite that fact, in December 2009, Obama's first ICE director, John Morton, directed his agency to release aliens who had received "positive" credible fear determinations from an asylum officer on "parole."[107]

Parole allows an otherwise inadmissible alien (including an illegal entrant) to enter the United States without being formally admitted.[108] In section 212(d)(5)(A) of the INA, however, Congress tightly restricted that authority, allowing DHS to parole aliens "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit."[109]

Despite those congressional limitations on parole, the Morton parole directive was implemented without any court challenge. As could reasonably be expected, the number of illegal migrants at the border who claimed a credible fear of return soared quickly thereafter.

Between FY 2006 and FY 2009, just between four and five percent of aliens subject to expedited removal claimed credible fear -roughly about 5,000 to 5,400 claims per year.[110],[111]

By the time Trump took office in FY 2017, 44 percent of aliens subject to expedited removal were claiming credible fear, a figure that climbed to 48 percent of the more than 178,000 aliens in expedited removal proceedings by FY 2018.[112] Trump at that point could not detain the more than 65,000 aliens who had received positive credible fear determinations, and so he could not reverse the Obama-era parole policy.[113]

In lieu of detaining those aliens, however, the Trump administration implemented the Migrant Protection Protocols (MPP), better known as "Remain in Mexico".[114] Under that program, OTM aliens apprehended entering illegally across the

[106] Arthur 2021a.
[107] Arthur 2022e.
[108] Bruno 2020.
[109] 8 U.S.C. § 1182 2023.
[110] Dep't of Homeland Security 2019, p. 7.
[111] Arthur 2022e.
[112] Ibid.
[113] Ibid.
[114] Ibid.

Southwest border were sent back across the border to await their removal hearings at "port courts". If those migrants received asylum, they would be admitted; if denied, they would be removed.[115]

In DHS's October 2019 assessment of the program, the department found that MPP was "an indispensable tool in addressing the ongoing crisis at the southern border and restoring integrity to the immigration system", particularly as related to alien families.[116] Asylum cases were expedited under the program, while at the same time, MPP removed incentives for aliens to make weak or fraudulent claims when they were apprehended, and therefore less likely those to enter illegally.[117]

Despite the success of Remain in Mexico, Biden derided the program as "inhumane", and on his first day in office stopped new enrollments in the program.[118] Subsequently, Secretary Mayorkas has terminated MPP (twice) even while conceding that MPP "likely contributed to reduced migratory flows", albeit by "imposing substantial and unjustifiable human costs."[119]

The states of Texas and Missouri filed suit in the U.S. District Court for the Northern District of Texas in April 2021, seeking to force DHS to reinstitute MPP, in *Texas 2*.[120] The judge hearing *Texas 2*, Matthew Kacsmaryk, issued an order enjoining DHS from terminating Remain in Mexico in August 2021.[121] After hearing the government's appeal of Judge Kacsmaryk's decision, the Fifth Circuit affirmed that order. The Biden administration appealed the Fifth Circuit's decision in *Texas 2* to the Supreme Court.[122] On June 30, 2022,[123] the justices invalidated Judge Kacsmaryk's injunction on largely procedural grounds.[124] The justices then remanded the matter back to the lower courts for further consideration, while passing on the questions of whether DHS is required to detain inadmissible aliens and is exceeding its statutory parole authority.[125] *Texas 2* has been pending on remand ever since, and the Biden administration has not returned any migrants under MPP since August 2022.[126]

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[115] Ibid.
[116] Dep't of Homeland Security 2019, p. 2.
[117] Ibid., pp. 2-3.
[118] Ahmed 2022.
[119] Niedzwiadek 2021.
[120] Complaint, *Texas v. Biden*, No. 2:21-cv-00067-Z N.D. Tex. 2021.
[121] *Texas v. Biden*, ___ F. Supp. 3d___, No. 2:21-cv-067-Z, slip op. at 52 N.D. Tex. 2021.
[122] Pet. for a Writ of Cert., *Biden v. Texas*, No. 21-954 U.S. 2021.
[123] *Biden v. Texas*, ___ U.S. ___, No. 21-954, slip op. U.S. 2022.
[124] Ibid., p. 22.
[125] Ibid., p. 25.
[126] CBP Newsroom 2022.

Remain in Mexico may have been the most successful of Trump's border initiatives, but it was not the only one. One Trump-era program, Prompt Asylum Claim Review (PACR), enabled DHS to quickly review asylum claims made by OTM migrants, facilitated by Trump's third-country transit bar.[127] A similar program, the Humanitarian Asylum Review Process (HARP), allowed DHS to quickly review credible fear claims by Mexican nationals.[128]

The Trump administration was also able to obtain crucial assistance from the Mexican government in securing the two nations' common border.

Remain in Mexico only worked because the Mexican government had agreed to accept the return of OTM migrants who had crossed the border illegally, and to "ensure that foreigners who have received their notice to appear have all the rights and freedoms recognized in the Constitution, the international treaties to which Mexico is a party, and its Migration Law."[129]

Mexico had also agreed during the Trump era to secure its own southern border with Guatemala, to stop U.S.-bound migrants from continuing their treks north.[130]

Those Trump-administration initiatives and others created the security that Chief Scott referenced in his September 2021 letter, even before CDC issued its first Title 42 order in March 2020.

While Biden had campaigned on reversing the Trump border policies (including and especially MPP), as president-elect he explained that he would have to end those policies "at a slower pace than he initially promised, to avoid winding up with '2 million people on our border", and only after "'setting up the guardrails' to find a solution to the immigration issue."[131]

Once in office, however, Biden quickly reversed nearly all those Trump-era border policies. In a February 2, 2021, executive order, for example, the president ended PACR and HARP, and implemented a review of MPP,[132] resulting in the congoing litigation in *Texas 2*.

[127] Arthur, Andrew 2020.
[128] Ibid.
[129] Ibid.
[130] Long – Fox 2020.
[131] Miroff – Sacchetti 2020.
[132] Biden Pres. 2021.

While that executive order also called for a review of CDC's Title 42 orders,[133] the Biden administration nonetheless retained that policy voluntarily until it successfully ended Title 42 on May 11.

Title 42 was essentially the only Trump-era border policy Biden kept as he broke his vow to "set up guardrails" around immigration. Worse, Biden is the first president in history to reject the deterrence of illegal migrants as a border policy. Nowhere was this clearer than in an exchange between Secretary Mayorkas and host Bret Baier on the May 1, 2022, edition of "Fox News Sunday".[134] Baier asked Mayorkas: "Is it the objective of the Biden administration to reduce, sharply reduce, the total number of illegal immigrants coming across the southern border? Is that the objective?"[135] To which Mayorkas replied: "It is the objective of the Biden administration to make sure that we have safe, orderly, and legal pathways to individuals to be able to access our legal system."[136]

By "pathways . . . to access our legal system", Mayorkas means to "apply for asylum", and in fact the Biden administration has treated all illegal entrants as "asylum seekers", regardless of the strength of their claims or even whether they come seeking asylum at all.[137]

In line with the administration's shift from reducing the total number illegal immigrants coming across the border to providing all migrants with "safe, orderly, and legal pathways . . . to access our legal system", the president has also largely rejected using the primary tools Congress has given the executive branch to deter illegal entrants-detention and prosecution.

Illegal entry is both a civil violation (subjecting the offender to removal) and a criminal offense, punishable as a misdemeanor carrying a sentence of up to six months and a fine for the first offense and a felony subject to up to two years' imprisonment and a fine for subsequent offenses under section 275 of the INA.[138]

Criminal prosecutions under this provision peaked in 2018 and 2019 under Trump and then plummeted with the onset of the COVID-19 pandemic, which reduced detention space.[139] Even as illegal entries surged under the Biden administration

[133] Ibid.
[134] Fox News Sunday 2022.
[135] Ibid.
[136] Ibid.
[137] Arthur 2022d.
[138] 8 U.S.C. § 1325 2023.
[139] TRAC 2020.

and pandemic-related restrictions on detention have eased, however, the number of prosecutions for improper entry have remained low.[140]

Part of the reason for that low prosecution rate under Biden was due to the availability of Title 42. Aliens expelled under Title 42 weren't also prosecuted for illegal entry, but note that even under those CDC orders, DHS could have referred "egregious" reentrants who had been expelled two or more times for prosecution. Under Biden, it simply chose not to do so.

The same lack of deterrence also applies to the Biden administration's near blanket-refusal to detain illegal migrants it hasn't expelled.

Since Biden took office, Border Patrol at the Southwest border has set new yearly records for migrant apprehensions, first in FY 2021, as agents apprehended nearly 1.6 million illegal migrants,[141] and again in FY 2022, as apprehensions exceeded 2.2 million.[142]

Despite that historically unprecedented surge in illegal migrants, however, Biden asked Congress to cut the number of daily beds DHS has available for immigration detainees, to 25,000 from 34,000, in its FY 2023 budget request.[143]

Instead of detaining those illegal migrants-as, again, Congress has mandated-Biden has released an estimated 1.8 million of them since taking office.[144]

Initially, the Biden administration released most of those aliens with "Notices to Report" (NTRs), documents directing those migrants to appear at an ICE office near their intended destinations in the United States within 60 days, at which time they would be served with a "Notice to Appear" (NTA), the charging document in removal proceedings.[145]

Not only were releases of illegal entrants without an NTA and a hearing date "unprecedented",[146] releasing aliens on NTRs isn't statutorily authorized under the INA. Not surprisingly, many of those migrants released with NTRs failed to later appear.[147]

[140] TRAC 2022.
[141] Arthur 2021b.
[142] Arthur 2022f.
[143] Sullivan 2022.
[144] Arthur 2023e.
[145] Kight 2021.
[146] Ibid.
[147] Arthur 2022b.

Increasingly, however, the administration has been releasing apprehended border migrants on parole. In FY 2022, more than 378,000 illegal migrants apprehended by Border Patrol at the Southwest border were paroled into the United States, while nearly 311,000 others were released on their own recognizance with an NTA.[148]

In the first three months of FY 2023 alone, however, Border Patrol has paroled more than 295,000 illegal migrants who had been apprehended at the Southwest border into the United States, while fewer than 66,000 others were released on their own recognizance with NTAs.[149]

This shift toward releasing migrants on parole is being driven by efficiency. Aliens released on their own recognizance must be given a date to appear in immigration court before they are released, while Secretary Mayorkas has explained that DHS is not placing migrants who have been granted parole into removal proceedings until *after* it terminates parole.[150]

That is a break from the practice under prior administrations, even for aliens released pursuant to the 2009 Morton parole directive (which paroled aliens after they received NTAs and court dates), but in any event it raises the question of how long those aliens remain free in the United States before they are ever served with an NTA and expected to appear in removal proceedings.

NBC News reported in early February 2023 that of the more than 800,000 migrants who were released with NTRs or on parole between March 2021 and late January, only about 214,000 of them have received NTAs and court dates, "meaning that roughly 588,000 did not know when or where to report for their asylum hearings."[151]

At this point, it's questionable whether DHS will be able to even find those individuals to begin the removal hearing process (which can take years[152]), but in any event it's beyond cavil that the Biden administration's "catch and release" border policies are driving the massive increase in illegal entries. Or, as the judge hearing a challenge by the state of Florida to Biden's release policies put it, the administration has:

[148] CBP Newsroom 2022.
[149] CBP Newsroom 2023.
[150] Johnson 2022.
[151] Ainsley 2023.
[152] Chishti – Gelatt 2022.

> *[E]ffectively turned the Southwest Border into a meaningless line in the sand and little more than a speedbump for aliens flooding into the country by prioritizing "alternatives to detention" over actual detention and by releasing more than a million aliens into the country . . ..*[153]

Consequently, those release policies (and DHS's release of hundreds of thousands of migrants under its limited parole authority in particular) are currently being challenged by state plaintiffs under the APA in two separate federal court actions: *Texas 2*-wherein, as noted, the states are attempting to force DHS to reimplement Remain in Mexico in lieu of parole releases; and *Florida v. U.S.*,[154] in which the state directly claims DHS is exceeding its limited parole power and maintaining a "non-detention" policy for illegal migrants.

This massive surge in migrants has taken its toll on Border Patrol's ability to fulfill its mission of preventing terrorists and terrorist weapons, drugs and other contraband, and unauthorized aliens from entering the United States at the border.[155]

Agents are so busy apprehending migrants who have surrendered themselves to Border Patrol in the expectation of release (known colloquially as "give ups") and then transporting, processing, caring for those migrants prior to release that they are unable to stop the drugs and apprehended other migrants who don't want to be caught.

During a February 2023 hearing before the House Committee on Oversight and Accountability, John Modlin, the Border Patrol's Tucson sector chief, explained: "Agency-wide, we recognize we need more people. . .. I certainly know I do not have enough agents within Tucson sector to deal with the flow that we're dealing with now."[156]

As a result, 1.2 million migrants (referred to as "got aways") have crossed the Southwest border illegally under the Biden administration, evaded Border Patrol agents, and successfully entered the interior.[157]

Title 42 alleviated some of the burdens those agents would have borne and freed up limited resources by enabling CBP to expel unauthorized aliens within just a few hours, instead of the more extended periods INA processing requires.[158]

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[153] *Florida v. U.S.*, ___ F. Supp. 3d ___, slip op. at 5-6 N.D. Fla. 2023.
[154] Complaint for Declaratory and Injunctive Relief, *Florida v. U.S.*, No. 3:21-cv-1066 2021.
[155] Customs and Border Protection 2021.
[156] Katz 2023.
[157] Hagstrom – Melugin 2023.
[158] Montoya – Galvez 2023.

Which is why states fought all the way to the Supreme Court to keep Title 42 in effect.

Conversely, the Biden administration opposed Title 42 because it has outlived its stated purpose as a public health measure with the COVID-19 pandemic waning, but more importantly because aliens expelled under those CDC orders are prevented from applying for asylum in the United States-and ensuring aliens have access to asylum is, as Secretary Mayorkas' explained on May 1, 2022, the administration's main border objective.

5. Conclusion

CBP encounters of illegal migrants and other inadmissible aliens have reached historically high levels since Joe Biden took office in January 2021 and reversed nearly every policy that the Trump administration implemented to enable DHS to gain operational control of the Southwest border.

Unless and until the Biden administration implements border policies to deter foreign nationals from undertaking the dangerous trek[159] to enter the United States in violation of U.S. law, tens of thousands of migrants will continue to cross the Southwest border illegally per month.

CBP generally, and Border Patrol in particular, lacks the manpower and resources to handle that illegal migrant surge. Although the Biden administration has recently issued policies to funnel would-be illegal migrants into the United States through POEs in lieu of entering illegally, those policies will provide-at best- short-term relief, and in the long run will encourage even greater numbers of migrants to enter the United States illegally at the Southwest border.

Worse, however, those administration policies are of questionable legal validity, and face a significant risk of being vacated or enjoined. Should that occur, illegally entries between the POEs are likely to exceed even current historically high levels.

Title 42 is a public-health initiative, but in the absence of an effective border response from the administration it provided what little relief there was for overworked CBP officers and agents in the field.

[159] Arthur 2018.

As Justice Gorsuch noted in his dissent in *Arizona*, however, "courts should not be in the business of perpetuating administrative edicts designed for one emergency only because elected officials have failed to address a different emergency. We are . . . not policymakers of last resort."

Given that, and absent a sea change in the administration's border policies, it will be incumbent on the newly installed Republican majority in the House to force the White House to comply with congressional mandates to detain inadmissible aliens at our borders, and to keep DHS's use of its parole authority within its statutory limits.

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