

No. 22-30303

**In the United States Court of Appeals
for the Fifth Circuit**

STATE OF LOUISIANA; STATE OF ARIZONA; STATE OF MISSOURI;
STATE OF WEST VIRGINIA; STATE OF SOUTH CAROLINA; *et al.*,
Plaintiffs-Appellees,

v.

CENTERS FOR DISEASE CONTROL AND PREVENTION; ROCHELLE
WALENSKY; UNITED STATES DEPARTMENT OF HEALTH AND HUAN
SERVICES; XAVIER BERCERRA; UNITED STATES DEPATRMENT OF
HOMELAND SECURITY; *et al.*,

Defendants-Appellants,

and

INNOVATION LAW LAB,

Proposed-Intervenor-Defendant.

On Appeal From The U.S. District Court For The
Western District Of Louisiana (Lafayette) No. 6:22-cv-00885-RRS-CBW

**BRIEF FOR THE AMERICA FIRST POLICY INSTITUTE
& CHAD WOLF AS *AMICI CURIAE* IN SUPPORT OF
PLAINTIFFS - APPELLEES**

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The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Pursuant to Fed. R. App. P. 26.1, amici state that they do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in any of the amici.

Dated: September 7, 2022

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INTEREST OF *AMICI CURIAE*¹

The America First Policy Institute (AFPI) is a non-profit, non-partisan research institute dedicated to the advancement of policies that put the American People first. Its guiding principles are liberty, free enterprise, the rule of law, America-first foreign policy, and a belief that American workers, families, and communities are the key to the success of our country. It is the job of policymakers to advance and serve these interests above all others. As part of its mission, the America First Policy Institute seeks to advance policies that couple American innovation with national-security efforts to protect the public safety and security of Americans.

Chad Wolf serves as the Executive Director, Chief Strategy Officer, and the Chair for the Center for Homeland Security and Immigration at AFPI. Prior to joining AFPI, Wolf served as Acting Secretary of the U.S. Department of Homeland Security (DHS). During his time at DHS, he successfully navigated numerous global and domestic challenges to the Nation's security, including numerous border and immigration crises, civil unrest, historic natural disasters, and threats to global aviation security. As Acting Secretary, he was a leading government official in addressing COVID-19, including applying Title 42's public health authority at the

¹ All parties have consented to the filing of this brief. No parties' counsel authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund its preparation or submission.

border. Former Acting Secretary Wolf writes and speaks frequently on national security, border security, immigration, China, and counterterrorism issues. He has received the U.S. Secretary of Transportation 9/11 Medal, the U.S. Secretary of Homeland Security Distinguished Service Medal, and the National Intelligence Distinguished Service Medal.

SUMMARY OF ARGUMENT

In December 2019, SARS-CoV-2, a novel coronavirus was first detected in Wuhan, Hubei Province, People's Republic of China. Commonly referred to as COVID-19, this coronavirus spread rapidly across the globe, including in the United States. The Trump Administration acted quickly, with the Secretary of Health and Human Services (HHS) declaring a public health emergency on January 31, 2020. As an additional proactive measure to slow the spread of the virus, in March 2020, the Centers for Disease Control and Prevention (CDC) issued a public health emergency declaration under Title 42 of the United States Code. The declaration authorized the immediate expulsion of aliens at the border and ports of entry. Implementation of Title 42's authority fell to U.S. Customs and Border Protection (CBP) personnel under the leadership of Department of Homeland Security (DHS) former Acting Secretary Chad Wolf.

The application of Title 42 was immensely successful. In March 2020, DHS turned away 91% of aliens apprehended at the southern border.² Total border apprehensions in March 2020 dropped below 35,000 compared to 103,731 illegal aliens apprehended in March 2019. In the first six months of Title 42's application, CBP apprehended approximately 200,000 illegal aliens *total* at the southern border. This includes a low of 17,106 apprehensions in April 2020 to a high of 50,014 in August 2020, with an average of 33,133 apprehensions per month. After the CDC extended Title 42 in May 2020, former Acting Secretary Wolf, in his official capacity, said, "This order has been one of the most critical tools the department has used to prevent the further spread of the virus and to protect the American people, DHS frontline officers, and those in their care and custody from COVID-19."³ Specifically, the ability to return aliens back to Mexico within two hours of being apprehended at the border was an indispensable prevention tool as our Nation was facing an unprecedented medical emergency by focusing on preventing the spread of a rapidly transmitted disease.⁴

² *Southwest Land Border Encounters*, U.S. Customs and Border Protection (last visited: Sept. 2, 2022), <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

³ *Acting Secretary Wolf's Statement on the Extension of Title 42*, Department of Homeland Security (May 19, 2020), <https://www.dhs.gov/news/2020/05/19/acting-secretary-wolf-s-statement-extension-title-42>.

⁴ 'Reversing course is no way forward': Acting Secretary Wolf Outlines Border Security and Immigration Priorities of the Trump Administration, Department of Homeland Security (Oct. 22, 2020), <https://www.dhs.gov/blog/2020/10/22/reversing-course-no-way-forward-acting-secretary-wolf-outlines-border-security-and>.

The policy changes from the Trump Administration to the Biden Administration set off a historic border crisis. The Biden Administration discarded sound policy in favor of an open-borders regime. Indeed, in Fiscal Year 2021, CBP apprehended a record 1.74 million illegal aliens at the southern border.⁵ From July to August 2021, CBP apprehended over 200,000 illegal aliens each month; by comparison, the first 6 months of Title 42's application had approximately 200,000 apprehensions total. Even before the Biden Administration issued the Termination Order, it was not faithfully applying Title 42 in the same rigorous manner as the Trump Administration. For instance, the Biden Administration exempted unaccompanied alien children (UACs) from its application, which has contributed to record number of UACs being trafficked and smuggled into the U.S.⁶ Moreover, by July 2022, only 37% of alien adults who were apprehended at the border were subjected to Title 42 expulsion. While Title 42 is not an immigration authority, its partial application by the Biden Administration is the only policy preventing a bona fide open border.

Beyond COVID-19, an unsecure border poses significant public health and national security threats to the country. In addition to human trafficking, one of the

⁵ U.S. Customs and Border Protection, *supra* note 2.

⁶ See *Title 42 Termination with Respect to Unaccompanied Noncitizen Children*, Centers for Disease Control and Prevention (March 12, 2022), <https://www.cdc.gov/media/releases/2022/s0311-title-42-termination.html>.

most pressing concerns is Chinese-produced fentanyl that the Mexican cartels are successfully moving across the southern border. It is responsible for creating a fentanyl pandemic that has claimed tens of thousands of American lives. Similarly, an unsecure border damages DHS's counterterrorism operations that are, and will continue to be, diverted to CBP operations at the southern border.

AFPI submits that CDC's Title 42 Termination Order is unlawful on procedural and substantive grounds. Title 42, thus, needs to remain in place. The Court should affirm the District Court's decision.

ARGUMENT

Congress enacted Title 42's expulsion authority as part of the Public Health Service Act of 1944 to prevent the spread of communicable disease within our borders. The prevention of a novel infectious disease like COVID-19 was the appropriate moment to utilize this Title 42 authority on an emergency basis. The situation is very different today than it was at the beginning of the COVID-19 pandemic. Now, because of the current administration's policies, large numbers of illegal aliens are entering our country with virtual impunity, creating a resource strain on our federal, state, and municipal law enforcement agencies. For instance, all levels of law enforcement must: (1) police the border at greater numbers; (2) intercept and detain illegal aliens and drugs; and (3) investigate, apprehend, and prosecute associated criminal activity that would not otherwise transpire in the

United States but for the southern border crisis. These attendant national security and law enforcement concerns must be considered when evaluating the continuation of Title 42. Former DHS Acting Secretary Chad Wolf explained the downstream considerations that are implicated by CDC's decision to revoke Title 42, stating:

By removing this authority, Border Patrol agents will be forced to encounter more individuals attempting to illegally enter the country than ever before and Americans across the country will see more mass releases of into their communities. Today's decision, coupled with other devastating decisions made over the last 14 months, represents a complete abdication of the federal government's responsibility to implement and uphold the rule of law along the border. The American people deserve better.

Chad F. Wolf, former Acting Homeland Security Secretary, April 1, 2022⁷

Therefore, the Court should consider the critical national security consequences when evaluating the Termination Order. We submit that, upon doing so, the Court will uphold the lower court's decision maintaining Title 42.

I. Former Acting Secretary Wolf's DHS Followed the APA, and It Is Clear in This Case the Termination Order Violates the APA's Notice and Comment Requirement.

Before considering the merits of the Termination Order, the Court must first determine whether the Executive Branch followed the proper procedural steps in effectuating the policy change. The Administrative Procedure Act (APA) generally

⁷ America First Policy Institute, *Statement: Fmr DHS Acting Sec. Chad Wolf on Centers for Disease Control Decision to revoke Title 42* (April 1, 2022), <https://americafirstpolicy.com/latest/statement-fmr-dhs-acting-sec-chad-wolf-on-centers-for-disease-control-decision-to-revoke-title-42>.

requires the Executive Branch to first publish a notice of proposed rulemaking in the Federal Register to “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.”⁸

The APA affords an exception to the “notice and comment” requirement “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”⁹ According to the Congressional Research Service, “what precisely constitutes good cause is not explicit from the APA’s text.”¹⁰ Their report, however, makes clear that the good cause exception is a narrow one that is specifically limited to: (1) emergencies; (2) “contexts where prior notice would subvert the underlying statutory scheme”; and (3) laws where Congress expressly waives the APA requirement.¹¹

AFPI and former Acting Secretary Wolf wholly endorse the District Court’s determination that the Executive’s Termination Order violates the APA. As DHS

⁸ 5 U.S.C. § 553(c).

⁹ 5 U.S.C. § 553(b)(3).

¹⁰ Jared P. Cole, Cong. Rsch. Serv., R44356, *The Good Cause Exception to Notice and Comment Rulemaking: Judicial Review of Agency Action* (Jan. 29, 2016), <https://crsreports.congress.gov/product/pdf/R/R44356>.

¹¹ *Id.*

Acting Secretary, Chad Wolf oversaw the development of numerous regulations covering America's homeland security regime. Under his leadership, DHS adhered to the APA's notice and comment requirements unless a good cause exception applied. APA rulemaking compliance can extend beyond a year. Naturally, this delay can frustrate a presidential administration as it seeks to effectuate its preferred policies. Nevertheless, the delay is the point. The APA and Executive Order 12866 contemplate extended deliberation to ensure the American people, who will be affected by these regulations, can meaningfully engage the Executive Branch before new policies are put in place.¹²

In its imprudent haste to reverse Trump Administration policies, the Biden Administration unlawfully cut APA corners. Pursuant to Executive Order 14010, President Biden requested that “[t]he Secretary of [Health and Human Services (HHS)] and the Director of CDC, in consultation with [DHS], promptly review and determine whether termination, rescission, or modification of the [Title 42 Orders are] necessary and appropriate.”¹³ In April 2022, the CDC sought to withdraw the Title 42 Orders without affording the public an opportunity to weigh in through the notice and comment period. As previously mentioned, the exceptions that allow the

¹² Exec. Order No. 12,866, 58 Fed. Reg. 190 (Oct. 4, 1993), <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>.

¹³ 86 Fed. Reg. 8,267 (Feb. 5, 2021).

Executive Branch to bypass notice and comment are narrow, none of which are applicable here. While the Trump Administration had an emergency-based good cause exception to implement Title 42 authority at the beginning of the pandemic, the situation is very different two years later. As a result, the Executive Branch's failure to seek public input and consider alternatives short of full termination render the Termination Order unlawful on procedural grounds.

More significantly, even if the Biden Administration had complied with the APA, the Termination Order would fail on substantive grounds.

II. The Biden Administration's Open Border Policy Has Created a Humanitarian Nightmare That Requires the Continuation of Title 42.

Title 42's original application not only assisted America's interest in preventing the spread of infectious disease during the immediate uncertainty around COVID-19, but it also had secure border effects by disrupting the illegal alien, human trafficking, and illicit drug pipeline into America that the Mexican cartels have put in place. During the first six months of Title 42's application, CBP apprehended approximately 200,000 illegal aliens, and the amount of drugs flooding into our country dropped precipitously. By the end of the Trump Administration, the southern border was never more secure, and the smuggling and trafficking networks were never more deprived of profit. President Biden ran on policies that, in effect, promised open borders, and his Administration has not disappointed. Since taking office, the Biden Administration has not in any meaningful or serious way

enforced our immigration laws. As a result, illegal aliens, deadly drugs, general contraband, and contagious diseases are easily finding their way into the country through our porous southern border.

What is more, the failed policies of the Biden Administration harm the fabric and well-being of the American people through the diversion and depletion of scarce resources. For example, the expense taxpayers must cover on the education and healthcare of illegal aliens and the ballooning law enforcement costs of prosecuting illegal alien criminal activity, from drug smuggling to human trafficking. In Fiscal Year (FY) 2021, CBP apprehended a record 1.74 million illegal aliens at the southern border.¹⁴ In July and August 2021, CBP apprehended over 400,000 illegal aliens. The situation has only gotten worse in FY 2022, as CBP has already apprehended 1.94 million illegal aliens through July.¹⁵ In total, the apprehension numbers for six individual months--July 2021, August 2021, March 2022, April 2022, May 2022, June 2022—have exceeded the total number of illegal aliens apprehended during the first six months in which Title 42 was put in place.¹⁶ As of July 2022, the Biden Administration is only applying Title 42 to 37% of illegal aliens

¹⁴ U.S. Customs and Border Protection, *supra* note 2.

¹⁵ *Id.*

¹⁶ *Id.*

apprehended at the border and has completely exempted UACs from the expulsion authority.¹⁷

With the massive influx of illegal aliens into the country, CBP has gone from a critical federal law enforcement agency to an administrative migrant processing bureau. Without policies in place to ensure law enforcement has the infrastructure to sustain open borders, lifting Title 42 will almost guarantee the failure of Border Patrol's other homeland security missions. To illustrate, CBP is now diverting much of its scarce resources to screen illegal aliens and care for UACs, who are being trafficked at record numbers. As a result, CBP's counterterrorism efforts are suffering. Currently, CBP has apprehended almost two million illegal aliens this fiscal year from over 150 countries—including 66 known or suspected terrorists (KST).¹⁸ Thus far, the Biden Administration has apprehended 81 KST at the border compared to 14 total during the entirety of the Trump Administration.¹⁹ There is no telling how many KSTs and other bad actors came into the country undetected while CBP was distracted. DHS's mission will continue to be hampered if their resources are diverted to preventing migrant surges in the absence of the Title 42 Orders.

¹⁷ *Id.*

¹⁸ See *CBP Enforcement Statistics Fiscal Year 2022*, U.S. Customs and Border Protection (last visited: Aug. 15, 2022), <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics>.

¹⁹ *Id.*

By attempting to lift the CDC Order, the Biden Administration is imperiling our national security. If the Termination Order is allowed to go into effect, DHS predicts that CBP could apprehend up to 18,000 illegal aliens *per day* or 90,000 *per month*.²⁰ This is not sustainable and would completely overwhelm the workforce, require the movement of other, non-CBP personnel to compensate for the surge, and compromise other national security priorities within DHS. In reaction to the administration's announcement to end Title 42, former Acting Secretary Wolf observed, "If you've been appalled by the mass releases of illegal immigrants on street corners and midnight flights around the country, you haven't seen anything yet."²¹ Wolf added, "the cartels, traffickers, and smugglers will no doubt advertise this change in policy to encourage even more illegal migration to the U.S. This will inevitably lead to a further surge of illegal apprehensions along the border—something we cannot afford."²²

The border states of Texas and Arizona are bearing the brunt of this chaos, overwhelming many state services and resources. In Texas, for instance, the Department of Public Safety is heavily engaged with the crisis at the border, thus

²⁰ Alejandro Mayorkas, *DHS Plan for Southwest Border Security and Preparedness*, U.S. Department of Homeland Security, (April 26, 2022), https://www.dhs.gov/sites/default/files/2022-04/22_0426_dhs-plan-southwest-border-security-preparedness.pdf.

²¹ Chad Wolf, *Wolf: Biden Admin Pulled the Plug on Title 42. Now America is in for a Reckoning*, America First Policy Institute, (April 5, 2022), <https://americafirstpolicy.com/latest/biden-admin-pulled-the-plug-on-title-42>.

²² *Id.*

diluting its traditional capabilities and capacities. Local law enforcement is also reeling from the situation, as these agencies lack resources to deal with the unprecedented number of illegal aliens coming through their jurisdictions. If the Termination Order goes into effect, the crisis will only worsen, as caravans are already forming to arrive at our southern border. As many as 1.1 million new illegal aliens may potentially arrive within the first six weeks of the termination of the Title 42 orders.

The Government has not disputed that, with respect to Arizona, “an increase in border crossings as a result of the Termination Order will increase the state’s costs for healthcare reimbursements.” *Louisiana, et al. v. CDC, et al.*, No. 22-cv-00885, 2022 WL 1604901, at *6. Nor has the Government disputed that “an increase in border crossings as a result of the Termination Order will increase the state’s costs for healthcare reimbursements, the provision of educational services, and the administration of its driver’s license program.” *Id.* at *7. On balance, “the Termination Order is likely to result in a significant increase in border crossings, that this increase will impact their healthcare systems, and that they will incur higher costs for healthcare reimbursements.” *Id.* at *14. The same is true for the educational services that will be provided to the UACs allowed into the country. *Id.* at *15.

But the problem does not stay at the border. As the District Court observed, “the CDC acknowledged the impact of migration on border communities: ‘[T]he flow of migration directly impacts not only border communities and regions, but also destination communities and healthcare resources of both.’” *Louisiana*, 2022 WL 1604901, at *5 (quoting 86 Fed. Reg. 42,828, 42,835 (Aug. 5, 2021)). Even big city mayors thousands of miles from the border are recognizing that every state is a border state and that illegal immigration is a burden on taxpayer resources. For instance, after Texas Governor Greg Abbott bused a few thousand illegal aliens to the District of Columbia, D.C. Mayor Muriel Bowser requested a National Guard deployment to address the flood of illegals into the city. Specifically, she pleaded with the Department of Defense that, “We need the Guard to deal with this humanitarian crisis that we expect to escalate the number of people crossing the border seeking asylum.”²³ She further declared, “[L]ocal taxpayers are not picking up the tab and should not pick up the tab” for the housing, healthcare, and other costs associated with illegal immigration.²⁴ The District’s mayor is correct, but the

²³ 7News Staff, *‘Humanitarian Crisis’: Bowser Calls for National Guard to Help with Migrants Bused to DC*, ABC News (July 28, 2022), <https://wjla.com/news/local/humanitarian-crisis-muriel-bowser-calls-for-national-guard-to-help-with-migrants-bused-to-dc-arizona-texas-federal-government-union-station>.

²⁴ Face The Nation, *Mayor Muriel Bowser says Migrants Along the Border are ‘Being Tricked’ onto Buses to D.C.*, YouTube (July 17, 2022), <https://youtu.be/bowc359um0o>.

solution is not to put federal taxpayers on the hook for the processing and services of illegal aliens who have no legal right to be in the country.

The Biden Administration does not have a plan to secure the border and protect the homeland if the Termination Order is lifted. According to CBP Commissioner Chris Magnus, DHS would take the following steps to address the surge: [shift] Border Patrol agents and CBP officers from other locations to assist at the border; [increase] the number of [Immigration and Customs Enforcement (ICE)] personnel working alongside CBP personnel to assist in processing migrants and enforcement actions along the border; [i]ncreasing [CBP's] work with other governmental agencies, including [ICE], the Federal Emergency Management Agency, the Department of Health and Human Services, U.S. Citizenship and Immigration Services, the Department of Justice, the U.S. Marshals Service, the Department of State and other federal entities to address potential increases in the number of migrants coming across the border.”²⁵ This is a recipe for disaster.

Diverting resources away from other parts of the DHS mission to process illegal aliens is a failed strategy. As former Acting Secretary Wolf observed, “instead of attacking the issue of illegal activity and abuse of the asylum system

²⁵ *Statement of U.S. Customs and Border Protection Commissioner Chris Magnus Concerning Title 42*, U.S. Customs and Border Protection (April 4, 2022), <https://www.cbp.gov/newsroom/speeches-and-statements/statement-us-customs-and-border-protection-commissioner-chris>.

head-on, the[] [Government’s] approach is to simply throw more resources toward the goal of processing illegal immigrants more quickly into the U.S.”²⁶ Instead, DHS should have “spent the past year preparing for the consequences of removing Title 42,” including developing “alternative programs and policies that bring control, order, and legal processes back to the border.”²⁷ He added that “[t]here are many tried and tested options available to DHS to do just this. It simply takes courage, leadership, and a commitment to put the interests of the American people first.”²⁸ The Biden Administration, including DHS Secretary Mayorkas, has failed to do so, and that necessitates the continuation of Title 42’s expulsion authority.

III. The Biden Administration’s Open Border Policy Has Allowed Fentanyl to Pour into Our Country, Thus Creating a New Public Health Emergency That Requires the Continuation of Title 42.

The Termination Order combined with the Biden Administration’s ideological refusal to enforce U.S. immigration laws incentivize the cartels to increase their human smuggling and trafficking operations. The natural consequences have already materialized within our country over the last 18 months: higher numbers of trafficking victims are being exploited in the U.S. exploding crime rates in local communities; and an increase in drug and other contraband flowing into our country.

²⁶ Chad Wolf, *supra* note 21.

²⁷ *Id.*

²⁸ *Id.*

According to the Drug Enforcement Administration's (DEA) 2020 National Drug Threat Assessment, most illegal drugs and narcotics enter the U.S. through the southern border.²⁹ According to the assessment:

The trafficking and abuse of illicit drugs inflict tremendous harm upon individuals, families, and communities throughout the United States. The violence, intimidation, theft, and financial crimes carried out by transnational criminal organizations (TCOs), criminal groups, and violent gangs pose a significant threat to our nation. The criminal activities of these organizations operating in the United States extend well beyond drug trafficking and have a profoundly negative impact on the safety and security of U.S. citizens. Their involvement in alien smuggling, firearms trafficking, and public corruption, coupled with the high levels of violence that result from these criminal endeavors, poses serious homeland security threats and public safety concerns.³⁰

The opioid crisis, which has materially contributed to lower Americans' life expectancy, is largely driven by fentanyl that is manufactured in China and then synthesized by the Mexican cartels before it is trafficked into the U.S. at the southern border.³¹ The threat of fentanyl-related deaths has grown exponentially as a direct result of the Biden Administration's open borders policies. In 2019, opioids killed nearly 37,000 Americans while approximately 57,550 people died in 2020.³² The

²⁹ 2020 Drug Enforcement Administration National Drug Threat Assessment, Drug Enforcement Administration (March 2021), https://www.dea.gov/sites/default/files/2021-02/DIR-008-21%202020%20National%20Drug%20Threat%20Assessment_WEB.pdf.

³⁰ *Id.*

³¹ Mark S. Gold, MD, *The Role of Alcohol, Drugs, and Deaths of Despair in the U.S.'s Falling Life Expectancy*, National Library of Medicine (Mar.-April 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7144704/>.

³² *Overdose Death Rates*, National Institute on Drug Abuse (Jan. 20, 2022), <https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates>.

DEA called those levels an “epidemic” in the 2020 report.³³ But those numbers pale in comparison to the death toll that has accreted under the Biden Administration. In 2021, nearly 108,000 Americans died of drug overdoses, with fentanyl responsible for almost two-thirds of them.³⁴ Indeed, 2021 was the first time in our Nation’s history that we surpassed 100,000 drug overdoses in a year, which is roughly 300 Americans dying each day. That is an unfathomable and unacceptable loss of American life.

Let us be clear: the fentanyl crisis a pandemic. Brave law enforcement officers on the front lines are also arriving at the same conclusion.³⁵ Every state in the country is suffering because of the opioid crisis. Over the past two years, the number of fentanyl-related deaths has more than doubled in 30 states, more than tripled in 15 states, and increased five-fold in six states.³⁶

The fentanyl-fueled drug addiction wreaking havoc on American communities necessitates the continuation of Title 42’s expulsion authority. According to the Mayo Clinic, “[d]rug addiction, also called substance use disorder, is a *disease* that

³³ Drug Enforcement Administration, *supra* note 29.

³⁴ *Provisional Drug Overdose Death Counts*, Centers for Disease Control and Prevention (last visited: Sept. 2, 2022), <https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm>.

³⁵ See Joshua Caplan, *Arizona Police Chief Sounds Alarm Over Fentanyl ‘Pandemic’ at Border*, Breitbart, (Aug. 9, 2022), <https://www.breitbart.com/politics/2022/08/09/arizona-police-chief-sounds-alarm-over-fentanyl-pandemic-at-border/>.

³⁶ *Death Rate Maps & Graphs: Drug Overdose Deaths Remain High*, Centers for Disease Control and Prevention (last visited: Sept. 2, 2022), <https://www.cdc.gov/drugoverdose/deaths/index.html>.

affects a person’s brain and behavior and leads to an inability to control the use of a legal or illegal drug or medication.”³⁷ Medical experts from the Indiana University of Health explain that “[a]ddiction changed the way the brain works, rewiring its structure.”³⁸ Importantly, “[a]ddiction doesn’t discriminate. High-rent districts, ‘seed’ neighborhoods, age, race, sex or income—addiction weaves its way through all walks of life. No one thing can predict your risk of developing a substance use disorder.”³⁹

Fentanyl is incredibly dangerous compared to other drugs and diseases, and it is killing Americans at record levels. We are in a public health emergency because of the flood of drugs coming across the southern border. Until the Biden Administration develops and implements a strategy to secure the border and keep these deadly drugs out of our country, Title 42 must be kept in place.

³⁷ Mayo Clinic Staff, *Drug Addiction (Substance use Disorder)*, Mayo Clinic (Oct. 26, 2017), <https://www.mayoclinic.org/diseases-conditions/drug-addiction/symptoms-causes/syc-20365112>.

³⁸ *Is Addiction Really a Disease?*, Indiana University Health (March 8, 2022), <https://iuhealth.org/thrive/is-addiction-really-a-disease>.

³⁹ *Id.*

CONCLUSION

For the reasons stated above, and in the Plaintiffs' pleadings, the judgment of the District Court should be affirmed.

DATE: September 7, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because it contains 4,308 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). The brief also complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font size 14.

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