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Legal Sidebar

COVID-Related Restrictions on Entry into the United States Under Title 42: Litigation and Legal Considerations

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In response to the Coronavirus Disease 2019 (COVID-19) pandemic, in March 2020 the executive branch invoked statutory powers to impose restrictions on the entry into the United States of certain individuals who are not citizens or nationals of the United States (i.e., "aliens" as defined in the Immigration and Nationality Act (INA)). Invoking authority under 42 U.S.C. § 265 ("Section 265"), the Centers for Disease Control and Prevention (CDC) directed immigration officials to expel certain individuals—that is, aliens who either do not have visas or other "proper travel documents" or who seek to enter the United States unlawfully between ports of entry (POE)—to Mexico or their countries of origin.

The CDC's invocation of this Section 265 authority (often referred to as "Title 42") during the COVID-19 public health emergency, along with the executive branch's attempt to terminate the Title 42 restrictions on entry, have been subject to ongoing litigation. A federal district court in November 2022 declared the current Title 42 order unlawful and directed the policy to end. However, on December 27, 2022, the Supreme Court stayed implementation of the district court order while the Court considers whether several states may intervene in the litigation to defend the policy. The passage of the Pandemic is Over Act (H.R. 382) by the House of Representatives on January 31, 2023, which would end a COVID-related public health declaration, as well as the Biden Administration's announcement of its plan to end COVID-related emergency declarations on May 11, 2023, raises further uncertainty over the future of the Title 42 restrictions on entry.

Overview of 42 U.S.C. § 265

The CDC's order imposed during the COVID-19 pandemic derives statutory authority from a public health provision in Title 42 of the U.S. Code, specifically 42 U.S.C. § 265, which provides:

> 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

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> 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.

In other words, this provision gives the executive branch the authority to prohibit the entry of individuals who pose a danger to public health into the United States. The statutory language, enacted in 1944, refers to the Surgeon General, but a 1966 reorganization plan transferred this authority to the Department of Health and Human Services (HHS), which then delegated this authority to the CDC Director.

Since 1893, federal public health law has empowered certain federal officials to prohibit the introduction of persons and property from abroad to stem the introduction of communicable disease from certain countries. This authority to restrict entry due to communicable disease has been rarely invoked. Prior to the invocation of Title 42 authority in response to the COVID-19 pandemic, perhaps the most notable prior instance where such authority was exercised occurred in 1929, when President Herbert Hoover invoked authority under Section 265's precursor statute to restrict travel from certain countries during a meningitis outbreak.

The "Title 42" Orders in Response to COVID-19

On March 20, 2020, to combat the spread of COVID-19, the CDC issued an order suspending the introduction of certain persons into the United States from countries or places where the communicable disease exists. The CDC has reassessed and extended this restriction on entry since March 2020 several times, with the most recent rule continuing the restrictions on entry of covered noncitizens issued in August 2021 ("August 2021 Order").

The order issued by the CDC is implemented by the Department of Homeland Security (DHS). The order applies to "covered noncitizens," defined as "persons travelling from Canada or Mexico (regardless of their country of origin) who would otherwise be introduced into a congregate setting in a POE or U.S. Border Patrol station at or near the U.S. land and adjacent coastal borders subject to certain exceptions." The term *covered noncitizens* includes "noncitizens who do not have proper travel documents, noncitizens whose entry is otherwise contrary to law, and noncitizens who are apprehended at or near the border seeking to unlawfully enter the United States between POE." The order applies only to those "covered noncitizens" who lack authorization to enter the United States and who are encountered "at or near" the border and therefore does not apply to those in the interior of the United States.

On April 1, 2022, the CDC issued an order terminating the August 2021 Order with an implementation date of May 23, 2022 ("Termination Order"). The CDC explained in the Termination Order that "[w]hile earlier phases of the pandemic required extraordinary actions by the government," more knowledge of the pathogen and other public health mitigation measures, such as vaccines and treatments, "have permitted the country to safely transition to more normal routines." The Termination Order purports to end the invocation of Title 42 to suspend the entry of covered noncitizens. However, ongoing litigation over the lawfulness of the agency's termination of the August 2021 Order has interfered with its termination. Thus, the August 2021 Order suspending the entry of covered noncitizens has remained in effect despite the executive branch's stated intention to end it.

The orders issued under Title 42 have allowed DHS to eliminate the asylum screening procedures that would typically be available under the INA for certain aliens without authorization to enter the United States who are encountered at the border. Under the INA, these individuals are inadmissible to the United States but may initiate claims for asylum or related protections from persecution or torture. To evaluate such claims, the INA requires DHS to conduct screening interviews for asylum seekers (i.e., "credible fear" interviews) or refer the asylum seekers directly to proceedings in immigration court where they may pursue their claims. At the outset of these procedures, DHS's Customs and Border Protection (CBP)

typically holds asylum seekers in short-term custody in a facility near the border. The orders under Title 42 differ from this standard INA framework by authorizing CBP to "expel" certain "covered noncitizens" from the United States without granting them access to any screening procedures. (To compare the implementation of Titles 8 and 42 at the southwest border, see this CRS Infographic.) The CDC had described the restriction on entry as a necessary measure to avoid outbreaks of COVID-19 in the CBP facilities where inadmissible aliens typically are held following apprehension.

The August 2021 Order allows CBP to except certain individuals, including unaccompanied alien children, as well as a catch-all exception for individuals who are considered "covered noncitizens" and who CBP officers "determine, with approval of a supervisor, should be excepted [from the order] based on the totality of the circumstances." Some circumstances potentially warranting discretion include risks related to sexual orientation, gender identity, or age, as well as health concerns.

How the orders issued under Title 42 have worked in practice is not always clear. Since March 2020, CBP has expelled over 2.4 million covered noncitizens under the Title 42 authority, but has continued to process many aliens under the INA instead. The CDC maintains that covered noncitizens are expelled under Title 42 "where possible," but it notes that restrictions imposed by foreign governments (e.g., return limitations for Venezuelan nationals) has hampered implementing the order. The CDC has also emphasized that DHS has general discretion to make case-by-case exceptions. Additionally, CBP reportedly recognizes an exception for aliens who make an affirmative and "reasonably believable" assertion that they fear torture in the country to which they would be expelled.

Ongoing Litigation

There are currently two major lawsuits focusing on the executive branch's Title 42 policy—one lawsuit challenging the lawfulness of the existing order and the other challenging the executive branch's attempt to end it. This section examines these two lawsuits, including the Supreme Court decision to stay a federal district court order directing the termination of Title 42 restrictions on entry, pending the Supreme Court's decision on whether several states may intervene in the litigation to defend that policy.

Challenge to the August 2021 Title 42 Order: *Huisha-Huisha v. Mayorkas*

A group of covered noncitizen families filed a class action lawsuit on January 12, 2021, in the U.S. District Court for the District of Columbia (D.C. district court) on behalf of a class of families subject to the restrictions on entry under Title 42. The court issued a preliminary injunction enjoining the executive branch from expelling the plaintiffs under the Title 42 order. The court held that the plaintiffs would likely succeed on the merits of their claim that Section 265 does not authorize removal, that they would experience harm if they were expelled without the opportunity to seek asylum or other humanitarian relief, and that the balance of equities and public interest favored granting the relief.

On March 4, 2022, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) upheld the preliminary injunction on appeal but disagreed with the lower court's conclusion that Section 265 does not allow removal. The D.C. Circuit explained that Section 265 grants the executive branch "sweeping authority to prohibit aliens from entering the United States during a public-health emergency; that the Executive may expel aliens who violate such a prohibition; and that under [8 U.S.C.] § 1231(b)(3)(A) and the Convention Against Torture, the Executive cannot expel aliens to countries" where they would be persecuted or tortured. The D.C. Circuit then remanded the case to the D.C. district court for further proceedings and resolution of the merits.

On November 15, 2022, declaring the policy to be arbitrary and capricious in violation of the Administrative Procedure Act (APA), the D.C. district court vacated the August 2021 Order in its entirety and issued a permanent injunction barring its application with respect to the plaintiff class. The court

reasoned that the CDC's August 2021 Order failed to explain its departure from past practice of using less restrictive means to protect public health; the executive branch failed to consider the consequences of suspending immigration practices to certain aliens; the executive branch failed to adequately consider alternatives, such as the availability of effective therapeutics; and there was a "lack of evidence regarding the effectiveness of the Title 42 policy." The D.C. district court granted a five-week stay of the injunction for the executive branch to prepare to revert back to processing aliens under the INA. On December 7, 2022, the executive branch notified the district court of its intention to appeal to the D.C. Circuit the vacatur of the August 2021 Order and permanent injunction, and the government filed the appeal with the D.C. Circuit on December 9, 2022. That appeal remains pending.

Challenge to Agency Action to End the Title 42 Termination Order: *Louisiana v. Centers for Disease Control and Prevention*

On April 3, 2022, the States of Arizona, Louisiana, and Missouri (later joined by 21 other states) filed suit in the U.S. District Court for the Western District of Louisiana (Western Louisiana district court) challenging the Termination Order under the APA. The states claim that the Termination Order violated the APA because (1) the federal government failed to follow the APA rule-making process; and (2) the Termination Order is arbitrary and capricious.

On May 20, 2022, the Western Louisiana district court issued a nationwide preliminary injunction preventing the Termination Order from going into effect. The court held that the CDC did not properly follow the APA rule-making process when it failed to abide by the typical notice-and comment requirements before issuing the Termination Order. The court rejected the executive branch's argument that the Termination Order was exempt from the typical notice-and-comment requirement under the "good cause" and foreign relations exceptions. At this stage of litigation, the court declined to address the plaintiff states' argument that the Termination Order is arbitrary and capricious. In May 2022, the executive branch filed an appeal to the Fifth Circuit and the appeal remains pending. The federal government provided notice to the Fifth Circuit of the D.C. district court's vacatur of the August 2021 Order in *Huisha-Huisha*.

The courts in *Huisha-Huisha* and *Louisiana* have issued potentially conflicting injunctions. As discussed above, *Huisha-Huisha* resulted in a class-wide permanent injunction vacating and enjoining the *enforcement* of the August 2021 Order, while *Louisiana* resulted in a preliminary injunction barring implementation of the Biden Administration's order to terminate the August 2021 Order. Litigation is ongoing in both cases.

Recent Litigation Developments

Following the district court's ruling in *Huisha-Huisha*, the executive branch indicated that it would prepare to terminate the August 2021 Order and revert back to processing under the INA. The executive branch has also filed an appeal of the D.C. district court's ruling vacating the August 2021 Order and requested that the district court case be held in abeyance pending resolution in the *Louisiana* litigation. Several states involved in the *Louisiana* litigation have also filed a motion to intervene in the *Huisha-Huisha* litigation to oppose the termination of the August 2021 Order, which the D.C. district court judge denied.

In addition, on December 12, 2022, the states involved in the *Louisiana* litigation filed an emergency motion to intervene in the *Huisha-Huisha* litigation and for a stay of the district court's order in that case pending appeal in the D.C. Circuit. On December 16, 2022, a three-judge panel issued a per curiam decision in *Huisha-Huisha* denying the motion to intervene and dismissing the motion for a stay as moot,

explaining that the "inordinate and unexplained untimeliness of the States' motion to intervene on appeal weighs decisively against intervention."

Before the Supreme Court: *Arizona v. Mayorkas*

On December 19, 2022, the states filed an application with Supreme Court Chief Justice John Roberts, in his capacity as a Circuit Justice, seeking a stay of proceedings in *Huisha-Huisha* pending the Court's consideration of its request for review of the case. The Chief Justice ordered an administrative stay of the D.C. district court's ruling to allow further time to consider the states' application. On December 27, 2022, the Supreme Court by a 5-4 vote granted the request by the states to review whether the D.C. Circuit wrongly barred them from intervening in the *Huisha-Huisha* litigation. The Court clarified that it will not review the underlying merits of the decision to vacate the August 2021 Order, and the Court noted that the merits of that district court's decision had not yet been addressed by the D.C. Circuit. The Court stayed the implementation of the lower court's order pending the Court's judgment on intervention, leaving Title 42 in effect for now.

The Court scheduled oral arguments for March 1, 2023, but on February 16, 2023, removed the argument from its calendar. Although the Court did not explain why it removed the case from the argument calendar, this follows an announcement by the Biden Administration of its intention to terminate the Public Health Emergency Declaration on May 11, 2023. As described below, such a move would most likely end the August 2021 Order and potentially render ongoing lawsuits moot. In their reply brief before the Court filed on February 17, 2023, the states argued that a "non-binding promise about future events does not moot anything now." It is unclear whether the case will be argued at a later date.

Considerations for Congress

On January 30, 2023, the Biden Administration announced that on May 11, 2023, it will end the COVID-related public health emergency declared pursuant to Section 319 of the Public Health Service Act (COVID-PHE declaration) and the emergency declaration under the National Emergency Act (NEA), both established in 2020. There is congressional interest as to whether ending the COVID-PHE and NEA declarations would terminate the August 2021 Order directing immigration officials to expel certain aliens. Although the invocation of such authority to suspend the introduction of certain aliens into the United States under 42 U.S.C. § 265 does not require a PHE or NEA declaration, the August 2021 Order provides that it remains effective until either the expiration of the PHE or a further determination by the CDC. Specifically, the Order states:

> This Order shall remain effective until either the expiration of the Secretary of HHS' declaration that COVID-19 constitutes a public health emergency, or [the CDC Director] determine[s] that the danger of further introduction, transmission, or spread of COVID-19 into the United States has ceased to be a serious danger to the public health and continuation of this Order is no longer necessary to protect public health, whichever occurs first.

Consequently, in this context, termination of the COVID-PHE would likely end the August 2021 Order.

Some have taken the position that termination of the COVID-PHE declaration will not impact the August 2021 Order, contending that the two orders are based in separate authorities and are legally distinct. They argue that the statutory language of Section 265 does not require the existence of a PHE or NEA declaration for the President to invoke authority to restrict the entry of certain persons due to communicable disease. Critics have also pointed out that President Biden could modify the August 2021 Order or, alternatively, issue a new order under Section 265 to restrict entry.

The expiration of the August 2021 Order would likely impact the ongoing litigation described above. Reviewing courts would likely consider whether the expiration of the August 2021 Order renders those

lawsuits moot. Before the Supreme Court in *Arizona v. Mayorkas*, the federal government asserts in its brief that, "[a]bsent other relevant developments, the end of the public health emergency will (among other consequences) terminate the Title 42 orders and moot this case." According to the federal government, because the end of the COVID-PHE declaration would terminate the August 2021 Order, there would no longer be a "live case or controversy" in the underlying lawsuit *Huisha-Huisha*, in which the states seek to intervene. Additionally, the federal government made a similar argument before the Fifth Circuit in the *Louisiana* litigation, and the Fifth Circuit subsequently paused the Biden Administration's appeal until May 11, 2023. In sum, the Biden Administration's announcement of its plan to end COVID-related public health emergency declarations on May 11, 2023, raises uncertainty over the future of the August 2021 Order.

More broadly, the invocation of Section 265 to prevent the "introduction of persons" at the border to combat the spread of communicable disease raises important considerations for Congress about the scope and application of the statutory provision. As discussed above, Section 265 appears to grant the executive branch broad authority to prevent the entry of persons and property to combat communicable disease. Congress may use its legislative authority to amend Section 265 to impose certain guidelines or restraints on this authority. For instance, Congress may consider clarifying the standard for determining when the executive branch might invoke this authority. Another possibility would be to impose a timeframe on this authority and a special procedure for either continuing or terminating its invocation. Congress might also consider whether certain aliens should be exempt from Section 265 restrictions on entry, such as those seeking asylum or other humanitarian relief. Alternatively, Congress may desire for the executive branch to continue to have broad discretion in order to respond to rapidly developing situations involving communicable disease.

The House of Representatives passed the Pandemic is Over Act (H.R. 382) on January 31, 2023, which would terminate the COVID-related PHE declaration issued pursuant to the HHS Secretary's statutory authority under 42 U.S.C. § 247d. Introduced in the 118th Congress, S. 208 would impose certain procedural requirements, such as providing written notice to certain congressional committees, following the termination of an order under Section 265. Another bill (H.R. 801) would amend Section 265 to expand authority to also restrict the import of certain controlled substances. The 117th Congress introduced some proposed legislation that would have extended the entry restrictions under Title 42 until February 1, 2025 (see H.R. 7707 and S.4022). Another bill, H.R. 7760 would have imposed certain procedures before terminating a determination under Section 265 that suspends the entry of certain individuals.

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