

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

ANGELA POE, individually and as mother and next friend
to Ana Poe,
LINDA ROE, individually and as next friend to Lina Roe,
Luna Roe, and Lia Roe,
LINA ROE,
LIA ROE,
JOHN DOE, individually and as next friend to Jane Doe,
June Doe, and Jax Doe, and
JANE DOE,

Plaintiffs,

v.

ALEJANDRO MAYORKAS, Secretary of Homeland
Security,
TROY MILLER, senior official performing the duties of the
commissioner of U.S. Customs and Border Protection,
WILLIAM A. FERRARA, Executive Assistant
Commissioner of CBP Office of Field Operations,
RODNEY S. SCOTT, Chief of U.S. Border Patrol,
TAE D. JOHNSON, Acting Director of U.S. Immigration
and Customs Enforcement,
NORRIS COCHRAN, Acting Secretary of Health and
Human Services,
ROCHELLE P. WALENSKY, Director of Centers for
Disease Control and Prevention,
HEIDI STIRRUP, Acting Director of the Office of Refugee
Resettlement,
ROBERT M. WILKINSON, Acting Attorney General,

Defendants.

Civ. No.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

Introduction

1. This case seeks to bring to safety seven asylum seekers—including four children—who were summarily expelled from the United States without any chance to seek protection under U.S. law. Each was removed as part of the government’s unlawful application of 42 U.S.C. § 265, a public health provision. Fulfilling its goal of shuttering the asylum system, the Trump administration seized upon the Covid-19 pandemic to claim that Title 42 gave it the unprecedented power to expel noncitizens without following U.S. immigration laws. But Title 42 provides no such authority. It does not override immigration law, and it authorizes quarantines, not expulsions. With their Massachusetts family members, these plaintiffs ask the Court to enjoin the application of Title 42 to them and to require the Department of Homeland Security to process their claims for protection under immigration law, 8 U.S.C. §§ 1101 *et seq.*

2. Plaintiff Angela Poe is an indigenous woman who fled Guatemala in 2018. After crossing the border into the United States, she was apprehended, placed in removal proceedings, and released on supervision. She is awaiting a hearing on her case.

3. Ms. Poe left her minor daughter, Ana Poe, with an aunt in Guatemala, believing that she would be well cared for. But Ana faced persecution and violence, and ultimately fled. She crossed the border into the United States in October 2020 and was apprehended by U.S. officials. At 16, she thought she was finally safe.

4. But instead of referring Ana to an immigration judge and placing her in the least restrictive setting—consistent with protections in effect for unaccompanied minors—DHS simply put her on a plane to Guatemala, the very country she had fled. Her expulsion occurred within days of apprehension, and without any legal process or inquiry into whether she would be safe there.

5. Other plaintiffs were expelled even more quickly. Plaintiff Lina Roe and her family—her young daughter and teenage sister—fled El Salvador and crossed the U.S. border to escape a violent gang, but they were fingerprinted and expelled into Mexico within hours. Plaintiff Jane Doe fled Guatemala with her children to escape a man who terrorized her for years. But they, too, were fingerprinted and expelled within hours, without any opportunity to assert claims for protection and without the procedures required by immigration law.

6. U.S. immigration law provides a comprehensive scheme balancing the protection of asylum seekers—including Ana Poe, Lina Roe and her family, Jane Doe and her children—with the expeditious enforcement of immigration law and the protection of national security and public health.

7. The Immigration and Nationality Act (“INA”) permits the expedited removal of noncitizens who enter the United States unlawfully and without entry documents, if, after an opportunity to be screened by an immigration judge, they are found *not* to have a “significant possibility” of establishing asylum eligibility. 8 U.S.C. § 1225(b). But noncitizens may not be sent to countries where they will face persecution, and those seeking asylum may not be removed without either an asylum screening or a full proceeding before an immigration judge. The INA also provides special protections for unaccompanied minors like Ana Poe, who cannot be subject to expedited removal, and must have their claims evaluated by an immigration judge at a removal proceeding.

8. U.S. immigration law also makes express provision for public health. It has long provided procedures for removing individuals believed to be infected with communicable diseases, and for detaining and examining noncitizens “coming from a country . . . where any of such diseases are prevalent or epidemic.” 8 U.S.C. §§ 1182(a)(1)(A)(i), 1222(a).

9. The Trump administration tried for years to eliminate legal protections for asylum seekers. Former President Trump personally directed his administration to stop asylum seekers at the southern border by any and all means. In response, in January 2019—under a program it called the “Migrant Protection Protocols” (MPP)—DHS began expelling asylum seekers into dangerous Mexican border cities to await their U.S. immigration hearings.

10. In March 2020, the White House used the coronavirus pandemic as a means of augmenting this effort to end asylum at the southern border. Purporting to act under the “inspection and quarantine” provisions of 42 U.S.C. § 265, the Centers for Disease Control and Prevention (“CDC”) enacted regulations and issued a sweeping order purporting to authorize not inspection and quarantine, but expulsion. Whereas migrants processed through the MPP are in removal proceedings in the United States, and can apply for asylum, migrants expelled under Title 42 are not placed in any U.S. legal proceedings. Instead, often without any paperwork, they are simply expelled into Mexico, or detained for days or weeks and then put on planes to their home countries. Title 42 expulsions are driven by immigration policy goals, not public health imperatives, and have already been found to be illegal, *see P.J.E.S. v. Wolf*, No. 20-cv-2245, 2020 WL 6770508 (D.D.C. Nov. 18, 2020), appeal pending, D.C. Cir. No. 20-5357. The Biden administration has not disavowed the policy.

11. Ana Poe, Lina Roe and her family, and Jane Doe and her children were each unlawfully expelled by DHS under the CDC’s Title 42 order without the legally-required inquiry into whether they would face persecution. These expulsions violated immigration law, Title 42, the Administrative Procedure Act, and the Constitution. Plaintiffs seek declaratory and injunctive relief vacating their expulsions and providing them the opportunity to have their requests for protection considered in accordance with the INA.

Parties

12. Plaintiff Angela Poe resides in Massachusetts. She brings suit on her own behalf and as next friend to her daughter, Ana Poe.¹

13. Plaintiff Ana Poe fled Guatemala to seek asylum in the United States, but was expelled under Title 42 to Guatemala, where she remains. She appears by and through her mother, Angela Poe.

14. Plaintiff Linda Roe is a lawful permanent resident and resides in Massachusetts. She brings suit on her own behalf and as next friend to her sisters, Lina Roe and Lia Roe, and to her young niece, Luna Roe.

15. Plaintiff Lina Roe fled El Salvador to seek asylum in the United States, but is now stranded in Mexico after being expelled under Title 42. She is the mother of Luna Roe. She appears individually and, alternatively, by and through her sister, Linda Roe.²

16. Plaintiff Luna Roe fled El Salvador to seek asylum in the United States, but is now stranded in Mexico after being expelled under Title 42. She appears by and through her aunt, Linda Roe.

17. Plaintiff Lia Roe fled El Salvador to seek asylum in the United States, but is now stranded in Mexico after being expelled under Title 42. She appears individually and, alternatively, by and through her sister, Linda Roe.

18. Plaintiff John Doe resides in Massachusetts. He brings suit on his own behalf and as next friend to his sister, Jane Doe, and her children, June Doe and Jax Doe.

¹ A motion for leave to proceed under pseudonym is forthcoming, pending an opportunity to confer with the United States Attorney's Office under Local Rule 7.1.

² Due to the danger faced by the adult plaintiffs who were expelled from the United States and the uncertainty regarding their ability to maintain contact with counsel while outside the United States, each appears here both personally and by and through a next friend.

19. Plaintiff Jane Doe fled Guatemala to seek asylum in the United States, but is now stranded in Mexico after being expelled under Title 42. She appears individually and, alternatively, by and through her brother, John Doe.

20. Plaintiff June Doe fled Guatemala to seek asylum in the United States, but is now stranded in Mexico after being expelled under Title 42. She appears by and through her uncle, John Doe.

21. Plaintiff Jax Doe fled Guatemala to seek asylum in the United States, but is now stranded in Mexico after being expelled under Title 42. He appears by and through his uncle, John Doe.

22. Defendant Alejandro Mayorkas is the Secretary of Homeland Security and the Cabinet-level officer responsible for the administration of U.S. immigration law, including implementing the Title 42 Process. He is sued in his official capacity.

23. Defendant Troy Miller is the senior official performing the duties of the commissioner of U.S. Customs and Border Protection (“CBP”), the DHS component responsible for the initial processing of migrants at the border, including implementing the Title 42 Process. He is sued in his official capacity.

24. Defendant William A. Ferrara is the Executive Assistant Commissioner of CBP Office of Field Operations (“OFO”), the component of CBP responsible for border security, including immigration and travel through U.S. ports of entry. Mr. Ferrara is a supervisory official responsible for implementing the Title 42 process at ports of entry. He is sued in his official capacity.

25. Defendant Rodney S. Scott is the Chief of the Border Patrol. Border Patrol is responsible for border security between ports of entry. Mr. Scott is a supervisory official

responsible for implementing the Title 42 process between ports of entry. He is sued in his official capacity.

26. Defendant Tae D. Johnson is the Acting Director of U.S. Immigration and Customs Enforcement. ICE is the DHS component that oversees immigration detention and carries out removals, including carrying out expulsions under Title 42 involving air travel. Mr. Johnson is sued in his official capacity.

27. Defendant Norris Cochran is the Acting Secretary of the Department of Health and Human Services (“HHS”), a Cabinet-level department of the U.S. Government that includes the CDC. He is sued in his official capacity.

28. Defendant Rochelle P. Walensky is the Director of the CDC. Dr. Walensky has authority over the Title 42 Process at issue in this case. She is sued in her official capacity.

29. Defendant Heidi Stirrup is the Director of the Office of Refugee Resettlement (“ORR”), the component of HHS that is responsible for the care and custody of unaccompanied children in immigration custody. She is sued in her official capacity.

30. Defendant Robert M. Wilkinson is the Acting Attorney General of the United States and shares responsibility for implementing asylum and other immigration laws, including protecting noncitizens from being sent to countries where they face persecution or torture. He is sued in his official capacity.

Jurisdiction and Venue

31. This Court has jurisdiction under 28 U.S.C. §§ 2201-2202 (declaratory judgment) and 28 U.S.C. § 1331 (federal question), as Plaintiffs’ claims arise under the APA, 5 U.S.C. § 701 *et seq.*, immigration laws, international law, and the U.S. Constitution.

32. Venue is proper in the District of Massachusetts because Defendants are officers of the United States and Plaintiffs Angela Poe, Linda Roe, and John Doe reside in this district. 28 U.S.C. § 1391.

Facts

33. Plaintiffs Ana Poe, Lina Roe and her family, and Jane Doe and her children all fled persecution and threats in Central America and crossed the U.S.-Mexico border to seek safety in the United States. After entering the United States, they were apprehended, processed under Title 42, and expelled without any inquiry into their fear of persecution. Plaintiff Ana Poe was returned to Guatemala—the very place she had fled from—and placed in the hands of her father, with whom she did not feel safe. Plaintiffs Lina Roe and her family and Jane Doe and her children were summarily expelled into Mexico, where migrants are systematically targeted for violence, without inquiry into whether they would be persecuted there or in the countries they came from. The government’s conduct left the Massachusetts Plaintiffs—Angela Poe, John Doe, and Linda Roe—with the financial responsibility of supporting their relatives who were left stranded under Title 42 and the knowledge that their family members are unsafe.

I. The Poe family

34. Plaintiff Angela Poe fled Guatemala with her youngest son in 2018 to escape violence and threats. She crossed the border into the United States, was served with a Notice to Appear in immigration court for removal proceedings, and was released into the United States. She settled in Massachusetts, where she is awaiting a hearing in her asylum case.

35. Ms. Poe left two daughters, including Ana Poe, in the care of a relative that she believed would care for them. But the girls suffered physical abuse and were forced to leave school and work as maids.

36. Ana's sister fled and came to the United States in 2019. After that, Ana's situation worsened. In 2020, she too fled.

37. Ana crossed the border into the United States in October 2020. U.S. officials did not comply with the requirement to provide Ana with a full removal proceeding for consideration of asylum and other forms of relief, or the requirement to transfer her into the custody of ORR for placement in the least restrictive setting consistent with her best interest—reunification with her mother and siblings.

38. Instead, after approximately four days in detention, Ana was flown back to Guatemala.

39. Ana did not receive a removal proceeding, and no asylum officer or immigration judge screened her asylum claim or determined that she would be safe in Guatemala.

40. In Guatemala, authorities turned her over to her father, with whom she did not feel safe. After a few days there, she left his care. She is now intermittently staying with different relatives and living on her own. In Massachusetts, Ms. Poe worries daily.

II. The Roe family

41. Plaintiff Lina Roe fled El Salvador with her young daughter and her 17-year-old sister—Luna Roe and Lia Roe—in late September 2020 to escape a gang that threatened their lives.

42. They crossed the border into the United States around November 10, 2020. In U.S. custody, Ms. Roe cried and tried to explain to the officers what would happen if she and her family were sent to El Salvador. Officers taunted them and refused to listen. Officers forced Lia Roe's mouth open and then insisted, based on looking at her teeth, that she was not a minor.

They said that they would send her back to Mexico, where Mexican officials would get the truth out of her.

43. Ms. Roe and her family did not receive a removal proceeding and no asylum officer or immigration judge screened their asylum claims or determined that they would be safe in El Salvador or Mexico. Nor did U.S. officials transfer then 17-year-old Lia Roe to ORR custody, where she could be placed in the least restrictive setting consistent with her best interests.

44. Instead, on the same day that they entered the United States, Ms. Roe and her family were summarily expelled into Reynosa.

45. Reynosa is in the Mexican state of Tamaulipas, for which the U.S. Department of State has issued a travel advisory of “Level 4: Do Not Travel”—the same level issued for Syria and Afghanistan. The State Department warns that “[h]eavily armed members of criminal groups often patrol areas of the state . . . and operate with impunity.” Criminal activity is widespread there, including “gun battles, murder, armed robbery, carjacking, kidnapping, forced disappearances, extortion, and sexual assault,” and “law enforcement has limited capability to respond.” Because of these dangers, U.S. government employees may travel in Tamaulipas only in limited areas and may not go to Reynosa at all.

46. Since being returned to Tamaulipas, Lina Roe and her family have lived in fear of both Mexican cartels and the gang they fled—whose members continue to search for them. They found temporary shelter and avoid going outside as much as possible. They depend on help from Linda Roe and other relatives, and the charity of others, in order to survive.

III. The Doe family

47. Jane Doe left Guatemala with her children to escape a husband who terrorized her for years. The abuse escalated during the Covid-19 pandemic.

48. Ms. Doe and her children crossed the border into the United States around October 10, 2020. When they encountered U.S officials, Ms. Doe thought they were finally safe.

49. But U.S. officials transported them to a station where they told Ms. Doe that she and her children would be returned to Mexico. She pleaded with them and showed them papers that she had brought documenting her husband's abuse. When officers began pushing her out, she grabbed onto a post. Officers removed her hands from the post and escorted them to the gate leading into Mexico. An officer who walked behind her pushed her repeatedly with both hands on her back.

50. Mexican officials processed them and ordered them to leave Mexico within a period of time.

51. About six days later, Ms. Doe and her children crossed the border again, and were again expelled to Mexico. When Ms. Doe pleaded with the CBP officer and attempted to explain her situation, he belittled her fear of violence, telling her that even women who were enslaved in their countries could not seek asylum.

52. Ms. Doe and her children did not receive a removal proceeding and no asylum officer or immigration judge screened their asylum claims or determined that they would be safe in Guatemala or Mexico.

53. Ms. Doe and her children are now in a shelter, where they depend on the support of her brother, John Doe, and the charity of others, in order to survive. Ms. Doe's husband continues to pursue her and her children, and they worry that he will find them in Mexico.

Background

54. U.S. immigration law provides the “sole and exclusive” procedures for admitting or removing noncitizens from the United States. 8 U.S.C. § 1229a(a)(3). Its comprehensive scheme provides detailed procedures for considering asylum claims, protecting unaccompanied minors, preventing the spread of disease, and, where appropriate, summarily removing noncitizens. 8 U.S.C. §§ 1158, 1225, 1229a, 1231(b)(3). The INA even addresses the powers of immigration officers during an “epidemic” and the removal of those with communicable diseases. *Id.* §§ 1182(a)(1); 1222(a).

55. The executive branch now claims the authority to set aside each provision of U.S. immigration law whenever it deems necessary for public health. It does so based on a few words in an 1893 “quarantine and inspection” statute that authorizes public health officials to “prohibit . . . the introduction of persons” into the United States in order to prevent the “introduction” of a communicable disease. 42 U.S.C. § 265. In an unprecedented regulation and series of orders, the government has claimed the implied authority under this statute not only to “expel” noncitizens whenever it sees fit, but to send noncitizens into countries where they will be persecuted. Nothing in the 128 words of 42 U.S.C. § 265 provides that sweeping authority to ignore the INA’s specific requirements for the protection of minors and asylum seekers.

I. United States law requires the government to protect asylum seekers from persecution.

56. United States law protects asylum seekers like Plaintiffs. It forbids sending people to countries where they will be persecuted, and it provides procedures for considering the claims of those who seek safety on U.S. soil.

A. U.S. law makes humanitarian protection available to noncitizens who would face persecution abroad.

57. U.S. law implements the commitment to protect those who face persecution.

58. Two key international agreements—the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees—arose from a commitment to protect refugees after a global failure to do so during the Holocaust and World War II. The United States acceded to the Protocol in 1968, thereby binding itself to the substantive provisions of the Convention.

59. The principle of non-refoulement is at the core of these agreements. Under Article 33 of the Convention, the United States may not “expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion.” The duty of non-refoulement is also a *jus cogens*—that is, a universal, and obligatory norm of customary international law from which the United States cannot derogate, and which U.S. courts are bound to enforce.

60. The United States also signed the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) in 1988, pledging not to “expel, return . . . or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

61. U.S. statutes and regulations implement these international commitments by creating three forms of humanitarian protection— asylum, withholding of removal, and protection under CAT.

62. First, the INA permits a noncitizen to apply for asylum who is “physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such alien’s status. . . .” 8 U.S.C. § 1158(a)(1). To qualify for asylum, the noncitizen must show a “well-founded fear of persecution on account of race, religion,

nationality, membership in a particular social group, or political opinion.” 8 U.S.C. §§ 1101(a)(42)(A), 1158. The asylum statute carves out criminal and other exceptions to eligibility, but does not impose the public health exceptions that apply to other immigration benefits. *See id.* § 1158(a)(2), (b)(2); 1182(a)(1).³

63. Second, withholding of removal is a nondiscretionary form of protection that must be granted to noncitizens who demonstrate it is more likely than not that their “life or freedom would be threatened” on account of a protected ground in the country to which they face removal, subject to certain exceptions such as for noncitizens convicted of “particularly serious crime[s].” *See* 8 C.F.R. § 208.16. This mandatory form of relief is designed to implement the U.S.’s duty of non-refoulement. *See* 8 U.S.C § 1231(b)(3).

64. Third, protection under CAT is also nondiscretionary and must be granted to noncitizens who demonstrate that they are more likely than not to be tortured in the country to which they face removal. 8 C.F.R. §§ 208.16-208-18.

B. U.S. law creates procedures that must be followed before an asylum seeker can be removed, including the opportunity to appear before an immigration judge.

65. U.S. immigration law also sets out the specific procedures that the government must follow before noncitizens may be sent to countries in which they fear persecution, including the opportunity to see an immigration judge.

66. The default means of removing a noncitizen from the United States is through full, formal removal proceedings before an immigration judge. *See* 8 U.S.C. § 1229a. Noncitizens placed in removal proceedings may apply for asylum, withholding of removal, and

³ Asylum is a discretionary form of protection that “may” be granted to those who satisfy its requirements. 8 U.S.C. § 1158(b)(1)(A).

CAT protection, along with any other available defense to removal. “Unless otherwise specified” in immigration law, a § 1229a proceeding “shall be the sole and exclusive procedure for determining whether an alien may be . . . removed from the United States.” *Id.* § 1229a(a)(3).

67. In 1996, Congress created the expedited removal process. That process provides for the prompt removal of noncitizens who arrive at a port of entry—or who have recently entered the country illegally—without valid entry documents.⁴

68. But even those who are subject to summary expulsion are still entitled to protection from persecution and torture. Thus, noncitizens who qualify for expedited removal, but express a fear of persecution or intent to seek asylum, must be provided a fear assessment interview conducted by an asylum officer. 8 U.S.C. § 1225(b)(1)(A)(ii). If the officer determines the noncitizen has a “credible fear of persecution or torture”—defined as a “significant possibility” that the noncitizen can establish eligibility for asylum or CAT relief—the noncitizen is placed in full removal proceedings before an immigration judge where these forms of relief can be considered. 8 U.S.C. § 1225(b)(1)(B)(v). A noncitizen may only be removed if at the end of the proceeding the immigration judge orders removal. 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. §§ 208.30(e)–(f), 235.6.⁵ If an asylum officer does not find a credible fear, the noncitizen is entitled to review by an immigration judge. 8 U.S.C. § 1225(b)(1)(B)(iii)(III).

⁴ Expedited removal is available when noncitizens are inadmissible for one of two reasons—they lack an entry document or have committed a misrepresentation. *See* 8 U.S.C. §§ 1182(a)(6)(C), 1182(a)(7), 1225(b)(1)(A)(i). To be subject to expedited removal, a noncitizen who falls under one of these two inadmissibility grounds must be either arriving at a port of entry or must be apprehended within two years of unlawfully entering the United States. 8 U.S.C. § 1225(b)(1)(A)(iii)(II); 84 Fed. Reg. 35,409 (July 23, 2019). Until recently, expedited removal was limited to individuals encountered within 100 air miles of a U.S. land border and within 14 days of entry. *See* 69 Fed. Reg. 48,877 (Aug. 11, 2004).

⁵ Under regulations enacted by the Trump administration on December 11, 2020, an individual who passes a credible fear screening would be referred to an immigration judge for an “asylum-

69. Even in the few instances where the law does not provide for either full removal proceedings or a credible fear screening, it prohibits the removal of those who fear persecution unless there is first an inquiry into that fear. For example, where a noncitizen has been legally removed from the United States and unlawfully re-enters, the prior removal order may be reinstated. 8 U.S.C. § 1231(a)(5). But even then, a noncitizen who expresses a fear of persecution *cannot* be removed without a fear screening, including the opportunity for review by an immigration judge. 8 C.F.R. § 208.31. That screening takes place under a higher, “reasonable fear” standard, defined as a “reasonable possibility” that a noncitizen will be persecuted on account of a protected ground, or tortured, if removed to that country. *Id.* § 208.31(c). Screenings under this standard are intended to satisfy the U.S.’s non-refoulement obligations. 64 Fed. Reg. 8478, 8493 (Feb. 19, 1999). Noncitizens found to have a “reasonable fear” of persecution or torture are referred to an immigration judge for “withholding-only” proceedings, despite being ineligible for asylum due to the prior removal. *See* 8 C.F.R. § 208.31(e).

70. When noncitizens express a fear of persecution or torture about a particular country, DHS cannot send them to that country without conducting an inquiry into their fear and providing for review of that assessment by an immigration judge.

C. U.S. law provides special protections for unaccompanied minors.

71. The Trafficking Victims Protection Reauthorization Act (“TVPRA”) provides protections for unaccompanied minors. Under the TVPRA, unaccompanied noncitizen children who arrive at a port of entry or are apprehended at the border must be placed in a full removal

and-withholding-only” procedure rather than a full removal proceeding under 8 U.S.C. § 1229a. 85 Fed. Reg. 80274, 80276, 80392 (Dec. 11, 2020). These regulations have been preliminarily enjoined. *Pangea Legal Servs. v. U.S. Dep’t of Homeland Sec.*, No. 20-cv-09253, 2021 WL 75756, at *7 (N.D. Cal. Jan. 8, 2021).

proceeding in front of an immigration judge. 8 U.S.C. § 1232(a)(5)(D). The sole exception is that a child who is a “national or habitual resident” of Mexico or Canada may be allowed to “withdraw” a request for admission to the United States—and accept return to Mexico or Canada, respectively—but only if an immigration officer concludes that the child is “able to make an independent decision” to do so and “does not have a fear” of return, and the case does not raise certain human trafficking concerns. *Id.* § 1232(a)(2).

72. The Secretary of HHS “shall ensure, to the greatest extent practicable” that unaccompanied children “have counsel to represent them in legal proceedings.” *Id.* § 1232(c)(5).

73. Moreover, an unaccompanied child must be transferred to the care of ORR within 72 hours of being detained. *Id.* § 1232(b)(3). From there, the child “shall be promptly placed in the least restrictive setting that is in the best interest of the child.” *Id.* § 1232(c)(2)(A).

D. U.S. immigration law contains specific provisions to prevent the spread communicable diseases.

74. The INA includes provisions governing “health-related” grounds of inadmissibility under 8 U.S.C. § 1182(a)(1). The statute renders “ineligible for visas or admission” noncitizens who have “a communicable disease of public health significance,” those who have not been vaccinated against certain diseases, and those who have “physical or mental disorder[s]” that may present “a threat to the property, safety, or welfare” of themselves or others. *Id.* § 1182(a)(1)(A).

75. The INA also contains a detention provision that applies to certain noncitizens “arriving at ports of the United States” who may be inadmissible on the health-related grounds, or who come “from a country or have embarked at a place where any . . . diseases [of public health significance] are prevalent or epidemic.” 8 U.S.C. § 1222(a). Such noncitizens may be detained “for a sufficient time to . . . subject [them] to observation and an examination,” *id.*, but

may not be removed without the screening for persecution or torture that is required by the immigration statutes.

II. As a consequence of President Trump’s animus, the government acted to undermine and destroy the asylum process and keep out asylum seekers at all costs.

76. The Trump administration disliked the laws affording protections to people seeking asylum, and was especially hostile to asylum protections for people from Central American nations and people of color.

77. This hostility was due in substantial part to animus toward Central Americans and other people of color held by President Trump and others in his administration. On information and belief, in addition to his own bigotry, President Trump’s eagerness to harm Central American asylum seekers was also driven by his view that scapegoating Central Americans and people of color was politically advantageous.

78. Mr. Trump’s animus toward Central American asylum seekers who came to the U.S. seeking protection was so strong that, while President, he repeatedly voiced a desire to physically harm them. President Trump reportedly suggested electrifying the border wall, fortifying it with an alligator moat, installing spikes on top to pierce human flesh, and having soldiers shoot migrants’ legs to slow them down.⁶

79. While campaigning for President, Mr. Trump repeatedly made racist statements about people of color, stating that Mexican immigrants were “rapists,” and people who “bring[]

⁶ Michael D. Shear & Julie Hirschfeld Davis, *Shoot Migrants’ Legs, Build Alligator Moat: Behind Trump’s Ideas for Border*, N.Y. TIMES (Oct. 2, 2019), [nytimes.com/2019/10/01/us/politics/trump-border-wars.html](https://www.nytimes.com/2019/10/01/us/politics/trump-border-wars.html).

drugs . . . [and] crime,” and that others “coming from all over South and Latin America,” and “probably—from the Middle East” were “not the right people.”⁷

80. As President, Mr. Trump asked why the United States would want more people from Haiti, El Salvador, and other nations he called “shithole countries,” rather than people from countries like Norway,⁸ which is predominantly white. President Trump also said that Mexican migrants “aren’t people” but “animals.”⁹

81. This animus caused the Trump administration to seek out ways to undermine the laws that protect asylum seekers. President Trump and former USCIS head Kenneth Cuccinelli repeatedly described laws that preserve access to the asylum process as creating a “loophole”; President Trump also called asylum a “scam” and a “hoax,” and argued that most asylum requests are a fraudulent ploy to enter the country illegally.¹⁰ Indeed, President Trump repeatedly denounced the very existence of immigration courts or due process for asylum claims, suggesting

⁷ Donald J. Trump, Presidential Announcement Speech at the Trump Tower (June 16, 2015), in TIME, [time.com/3923128/donald-trump-announcement-speech](https://www.time.com/3923128/donald-trump-announcement-speech).

⁸ Ryan Teague Beckwith, *President Trump Called El Salvador, Haiti ‘Shithole Countries’*: Report, TIME (Jan.

11, 2018), [time.com/5100058/donald-trump](https://www.time.com/5100058/donald-trump)

p-shithole-countries/n Gomez, *Trump Ramps Up Rhetoric on Undocumented Immigrants: ‘These Aren’t People. These Are Animals.’*, USA TODAY (May 17, 2018), [usatoday.com/story/news/politics/2018/05/16/trump-immigrants-animals-mexico-democrats-sanctuary-cities/617252002](https://www.usatoday.com/story/news/politics/2018/05/16/trump-immigrants-animals-mexico-democrats-sanctuary-cities/617252002).

¹⁰ See, e.g., Rep. Tim Ryan Calls Trump’s History Visit to the DMZ an ‘Appeasement Tour’, FOX NEWS (June 30, 2019), [foxnews.com/transcript/rep-tim-ryan-calls-trumps-historic-visit-to-the-dmz-an-appeasement-tour](https://www.foxnews.com/transcript/rep-tim-ryan-calls-trumps-historic-visit-to-the-dmz-an-appeasement-tour); The White House, *President Donald J. Trump Is Working to Stop the Abuse of Our Asylum System and Address the Root Causes of the Border Crises* (Apr. 29, 2019), [aila.org/File/Related/19043070a.pdf](https://www.aila.org/File/Related/19043070a.pdf); *Trump Says Some Asylum Seekers Are Gang Members*, CBS NEWS (Apr. 5, 2019), [cbsnews.com/news/trump-says-some-asylum-seekers-are-gang-members-border-calexico-2019-04-05-today](https://www.cbsnews.com/news/trump-says-some-asylum-seekers-are-gang-members-border-calexico-2019-04-05-today).

that “[w]hen somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came from.”¹¹

82. Driven by this animus, the Trump administration implemented a series of measures aimed at destroying the asylum system through punishing and dissuading asylum seekers. One official described his strategy as “presenting aliens with multiple unsolvable dilemmas to impact their calculus for choosing to make the arduous journey to begin with.”¹²

83. The Trump administration punished asylum seekers by separating them from their children, and impeded their access to protection through an onslaught of measures including closing the ports of entry to asylum seekers, imposing new fees, limiting work authorization, reducing procedural protections, and redefining asylum eligibility through a series of regulations that created categorical bars to asylum and expanded the grounds for discretionary denials.¹³

84. DHS also took steps to implement President Trump’s command to keep out Central American asylum seekers.¹⁴ In January 2019, the administration began returning Central

¹¹ Jake Nevins, *Seth Meyers: ‘Trump’s One Political Skill Is His Inability to Feel Shame’*, THE GUARDIAN (June 26, 2018), [theguardian.com/culture/2018/jun/26/late-night-roundup-seth-meyers-trump-political-skill](https://www.theguardian.com/culture/2018/jun/26/late-night-roundup-seth-meyers-trump-political-skill).

¹² Julia Ainsley, *Stephen Miller Wants Border Patrol, Not Asylum Officers, to Determine Asylum Claims*, ABC NEWS (July 29, 2019), [nbcnews.com/politics/immigration/stephen-miller-wants-use-border-agents-screen-migrants-cut-number-n1035831](https://www.nbcnews.com/politics/immigration/stephen-miller-wants-use-border-agents-screen-migrants-cut-number-n1035831).

¹³ See Bill Frelick, *The Trump Administration’s Final Insult and Injury to Refugees*, HUMAN RIGHTS WATCH (Dec. 11, 2020), [hrw.org/news/2020/12/11/trump-administrations-final-insult-and-injury-refugees](https://www.hrw.org/news/2020/12/11/trump-administrations-final-insult-and-injury-refugees); Priyanka Boghani, *A Guide to Some Major Trump Administration Immigration Policies*, PBS FRONTLINE (Oct. 22, 2019), [pbs.org/wgbh/frontline/article/a-guide-to-some-major-trump-administration-immigration-policies](https://www.pbs.org/wgbh/frontline/article/a-guide-to-some-major-trump-administration-immigration-policies).

¹⁴ JULIE HIRSCHFELD DAVIS & MICHAEL D. SHEAR, *BORDER WARS: INSIDE TRUMP’S ASSAULT ON IMMIGRATION* 334-37 (2019) (Trump “gave Nielsen a direct order: Do not let any more people in”; he “wanted the troops to keep the ‘illegals’ out at all costs” and “refused to acknowledge that there were any legal limits on what the military could do”).

American asylum seekers to dangerous Mexican border cities under the MPP.¹⁵ The program was expanded to nationals of other countries and was used to send more than 70,000 migrants to Mexico before President Biden suspended new enrollments in the MPP on January 20, 2021.¹⁶

85. The Trump administration contemplated using Title 42 to keep out asylum seekers on multiple occasions long before the Covid-19 pandemic, with Senior Immigration Advisor Stephen Miller reportedly viewing Title 42 as a critical tool for advancing the administration's immigration agenda.¹⁷

86. With the emergence of Covid-19, the Trump administration seized their opportunity. The administration forced public health officials—on threat of firing—to issue orders requiring the systematic expulsion of asylum seekers at the southern border.¹⁸ In forcing the CDC to implement the measure, the White House “overrul[ed] the agency’s scientists who said there was no evidence the action would slow the coronavirus” and no valid public health reason to issue it.¹⁹

¹⁵ Press Release, Department of Homeland Security, Migrant Protection Protocols (Jan. 24, 2019), dhs.gov/news/2019/01/24/migrant-protection-protocols.

¹⁶ See American Immigration Council, Fact Sheet on The “Migrant Protection Protocols” (Jan. 22, 2021), americanimmigrationcouncil.org/sites/default/files/research/migrant_protection_protocols.pdf; MICHAEL GARCIA BOCHENEK, “LIKE I’M DROWNING”: CHILDREN AND FAMILIES SENT TO HARM BY THE US ‘REMAIN IN MEXICO’ PROGRAM (2021) (HRW Report), hrw.org/report/2021/01/06/im-drowning/children-and-families-sent-harm-us-remain-mexico-program; Press Release, Department of Homeland Security, DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program (Jan. 20, 2021), dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program.

¹⁷ See Caitlin Dickerson & Michael D. Shear, *Before Covid-19, Trump Aide Sought to Use Disease to Close Borders*, N.Y. TIMES (May 3, 2020), nytimes.com/2020/05/03/us/coronavirus-immigration-stephen-miller-public-health.html.

¹⁸ See Jason Dearen & Garance Burke, *Pence Ordered Borders Closed After CDC Experts Refused*, AP NEWS (Oct. 3, 2020), apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health-4ef0c6c5263815a26f8aa17f6ea490ae.

¹⁹ *Id.*

III. The Title 42 expulsion program dismantled protections for asylum seekers under the guise of a public health measure.

87. On March 20, 2020, the Trump administration announced that, as a result of the Covid-19 pandemic, the CDC would be acting under Title 42 to bar asylum seekers at the U.S. border. Under the CDC's order, DHS began turning away undocumented migrants without any legal process or asylum screening.

A. The Public Health Service Act's "quarantine and inspection" provisions

88. The CDC relied on 42 U.S.C. § 265, which generally authorizes the Surgeon General to "prohibit, in whole or in part, the introduction of persons" from countries in which a communicable disease is present, as necessary to decrease the "serious danger of the introduction of such disease into the United States." The statute provides in full:

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.

The CDC director now exercises this authority through delegation.²⁰

89. Section 265 was enacted in its current form in 1944. It is part of a set of provisions of the Public Health Service Act ("PHSA") that define HHS's authority pertaining to "quarantine and inspection." *See* 42 U.S. Code Part G, 42 U.S.C. §§ 264-72.

²⁰ In 1966, the Surgeon General's § 265 authority was transferred to what is now HHS. In 2001, HHS delegated this authority to the CDC. The President's functions under § 265 were assigned to the Secretary of HHS in a 2003 executive order.

90. HHS’s authority to make rules to implement these provisions of the PHSA is described in 8 U.S.C. § 264. Section 264 authorizes the CDC director to “make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable disease from foreign countries into the States” 42 U.S.C. § 264(a).

91. Section 264 of Title 42 also limits the scope of HHS’s rulemaking authority to control the spread of communicable disease. It provides, “[r]egulations prescribed under this section shall not provide for the apprehension, detention, or conditional release of individuals except for the purpose of preventing the introduction, transmission, or spread of such communicable diseases.” 42 U.S.C. § 264(b). Further limits on apprehension and detention apply where an individual is moving from one state to another, as opposed to “coming into a State or possession from a foreign country or a possession.” 42 U.S.C. § 264(c)-(d). Nowhere does the PHSA reference any authority to expel individuals out of a state or out of the United States.

92. The PHSA does provide for the assistance of immigration officers, again, mentioning nothing about expulsion. Under Section 268, “[i]t shall be the duty of the customs officers . . . to aid in the enforcement of quarantine rules and regulations” 42 U.S.C. § 268(b).

93. Finally, the PHSA sets out the penalties for individuals who violate its provisions or any regulations issued under its authority—a fine or imprisonment for up to one year. 42 U.S.C. § 271. The Act does not provide for expulsion or deportation as a penalty.

B. The CDC’s regulation regarding expulsion

94. On March 24, 2020, citing the authority conferred under §§ 264, 265, and other provisions of Title 42, the CDC issued an interim final rule that purported to authorize immigration agents to expel individuals from the United States without regard for the protections

and procedures provided by immigration law—including removal proceedings, asylum law, credible fear screenings, and the TVPRA. *See* 85 Fed. Reg. 16,559, 16,563 (Mar. 24, 2020) (effective date Mar. 20, 2020). The final version of the rule was published on September 11, 2020. 85 Fed. Reg. 56,424 (Sept. 11, 2020) (effective date Oct. 13, 2020).

95. These regulations enacted a new provision, 42 C.F.R. § 71.40.

96. Paragraph (a) of the new regulation contains language similar to 42 U.S.C. § 265, providing that the CDC director “may ***prohibit, in whole or in part, the introduction into the United States of persons*** from designated foreign countries” if he determines that “(1) By reason of the existence of any quarantinable communicable disease in a foreign country . . . there is ***serious danger of the introduction of such quarantinable communicable disease*** into the United States; and (2) This danger is so increased by the introduction of persons from such country . . . that a ***suspension of the right to introduce*** such persons into the United States is required in the interest of public health.” 42 C.F.R. § 71.40(a) (2020) (emphasis added).

97. In paragraph (b), the regulation adds a series of definitions that purport to grant the CDC authority to take actions not provided for in Title 42 itself, including the authority to expel noncitizens from the United States. Paragraph (b) states in relevant part:

(1) ***Introduction into the United States*** means the movement of a person from a foreign country . . . into the United States so as to bring the person into contact with persons or property in the United States, in a manner that the Director determines to present a risk of transmission of a quarantinable communicable disease . . . even if the quarantinable communicable disease has already been introduced, transmitted, or is spreading within the United States;

(2) ***Prohibit, in whole or in part, the introduction into the United States of persons*** means to prevent the introduction of persons into the United States by suspending any right to introduce into the United States, physically stopping or restricting movement into the United States, or physically expelling from the United States some or all of the persons;

(3) *Serious danger of the introduction of such quarantinable communicable disease into the United States* means the probable introduction of one or more persons capable of transmitting the quarantinable communicable disease into the United States, even if persons or property in the United States are already infected or contaminated with the quarantinable communicable disease; . . .

(5) *Suspension of the right to introduce* means to cause the temporary cessation of the effect of any law, rule, decree, or order pursuant to which a person might otherwise have the right to be introduced or seek introduction into the United States.

8 C.F.R. § 71.40(b) (2020).

98. The regulation also provides that, if an order suspending the introduction of persons “will be implemented in whole or in part” by CBP, “then the [CDC] Director shall, in coordination with the Secretary of Homeland Security or other applicable Federal department or agency head, explain in the order the procedures and standards by which any authorities or officers or agents are expected to aid in the enforcement of the order” 85 Fed. Reg. at 56,459; *see* 42 C.F.R. § 71.40(d)(2) (2020).

99. The regulation exempts U.S. citizens and lawful permanent residents from its provisions. 42 C.F.R. § 71.40(f) (2020).

C. The CDC’s expulsion order

100. On March 26, relying on its new regulatory authority, the CDC issued a 30-day order, effective March 20, 2020, “suspending the introduction” into the United States of “covered aliens.” 85 Fed. Reg. 17,060 (Mar. 26, 2020) (effective date Mar. 20, 2020). The March order was extended for an additional 30 days on April 20, 2020. 85 Fed. Reg. 22,424 (Apr. 22, 2020) (effective date Apr. 20, 2020). On May 21, 2020, the CDC extended the order indefinitely, with modifications not relevant here. 85 Fed. Reg. 31,503 (May 26, 2020) (effective date May 21, 2020). On October 16, 2020, after its final regulations became effective, the Trump

administration issued a new order replacing the prior orders, effective October 13, 2020. 85 Fed. Reg. 65,806 (Oct. 16, 2020) (effective date Oct. 13, 2020).

101. The October order, similar to those that preceded it, “suspend[s] the introduction of all covered aliens into the United States.” 85 Fed. Reg. at 65,807.²¹ It defines “covered aliens” as:

[P]ersons traveling from Canada or Mexico (regardless of their country of origin) who would otherwise be introduced into a congregate setting in a land or coastal Port of Entry (POE) or Border Patrol station at or near the United States borders with Canada or Mexico, subject to the exceptions detailed below.

Id.

102. Those exceptions include U.S. citizens, lawful permanent residents, people arriving at a port of entry with valid travel documents, members of the armed forces, and certain others.

103. The order asserts that “[t]he continued suspension of the right to introduce covered aliens requires the movement of all such aliens to the country from which they entered the United States, their country of origin, or another practicable location outside the United States, as rapidly as possible, with as little time spent in congregate settings as practicable under the circumstances.” 85 Fed. Reg. at 65,812.

104. Relying on 42 C.F.R. § 71.40, the CDC reiterated that the “[s]uspension of the right to introduce” covered noncitizens includes the “temporary cessation of the effect of any law . . . pursuant to which a person might otherwise have the right to be introduced or seek introduction into the United States.” 85 Fed. Reg. at 65,808 n.6.

²¹ At least one expulsion in this case, the first expulsion of Ms. Doe and her children, appears to have occurred under the CDC’s extension of the March order, which contained substantially similar language to the October order, with distinctions not relevant here.

105. The order is effective until it is no longer deemed “necessary to protect the public health,” with a review to occur every 30 days. 85 Fed. Reg. at 65,812.

106. Like the regulation, the order is silent on its application to people seeking asylum, withholding of removal, or CAT protection, as well as its application to unaccompanied minors.

107. The CDC order delegates implementation of the Title 42 Process to DHS. 85 Fed. Reg. at 65,812.

D. DHS’s Implementation of the Title 42 Process

108. On April 2, 2020, a CBP memorandum (“CBP Memo”) describing the agency’s implementation of the Title 42 Process, an effort it calls “Operation Capiro,” was made public.²²

109. Under Operation Capiro, CBP officers implementing the CDC order are instructed that they are not “operating pursuant to [their] authorities under Titles 8 and 19 [immigration and customs, respectively]” at any point during Title 42 expulsions. CBP Memo at 1.

110. To determine whether a noncitizen is “subject to the CDC Order,” the CBP Memo instructs officers to use “experience” and “physical observation” to determine whether they “believe[] that it is more likely than not” that the person whom they encounter anywhere “within the area of operation of a Border Patrol station or [port of entry]” is “seeking to enter” without proper travel documents. *Id.*

111. The memo provides that a noncitizen who is subject to the CDC order “will be transported to the nearest [port of entry] and immediately returned to Mexico or Canada,

²² Internal Memo, U.S. Customs and Border Protection, *COVID-19 CAPIO* (2020), documentcloud.org/documents/6824221-COVID-19-CAPIO.html. The CBP Memo was reportedly leaked to Pro Publica, which published it on April 2, 2020. See Dara Lind, *Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately – Ignoring Asylum Law*, PROPUBLICA, Apr. 2, 2020, propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law. On information and belief, DHS has not otherwise made public any guidance on the implementation of Title 42.

depending on their point of transit.” *Id.* at 3. Those who are “not amenable to immediate expulsion to Mexico or Canada, will be transported to a dedicated facility for limited holding prior to expulsion” to their home country. *Id.*

112. On information and belief, Mexico has agreed to allow nationals from Mexico, Guatemala, El Salvador, and Honduras to be immediately expelled into Mexico, but does not give them permission to remain there. The United States expels nationals of other countries under Title 42 by detaining them for days or weeks and flying them to their countries of origin.²³

113. This same process was also followed with regard to minors deemed “unaccompanied” for purposes of Title 42.²⁴ Contrary to the TVPRA, the CBP Memo treats as “unaccompanied” only minors who are under the age of 18 and not accompanied by “ANY relative.” *Id.* at 2.

114. Under the CBP Memo, an officer may process an individual who is eligible for Title 42 under the immigration law provisions of Title 8 “only for extenuating circumstances” and upon a decision by the Chief Patrol Agent. *Id.*

115. The CBP Memo provides no instructions on medical screenings or other procedures for determining whether a covered noncitizen may have Covid-19.

116. Nor does it instruct on the treatment of individuals who state a claim for asylum or express a fear of persecution. The exclusive “process” available to noncitizens subject to Title

²³ The CDC order states that “DHS will continue to use repatriation flights as necessary to move covered aliens on a space-available basis. . . .” 85 Fed. Reg. at 65,812.

²⁴ See Dara Lind & Lomi Kriel, *ICE is Making Sure Migrant Kids Don’t Have COVID-19—Then Expelling Them to “Prevent the Spread” of COVID-19*, PRO PUBLICA (Aug. 10, 2020), propublica.org/article/ice-is-making-sure-migrant-kids-dont-have-covid-19-then-expelling-them-to-prevent-the-spread-of-covid-19. The expulsion of unaccompanied minors was temporarily enjoined by *P.J.E.S. v. Wolf*, 2020 WL 6770508 (D.D.C. Nov. 18, 2020), stay granted, D.C. Cir. No. 20-5357 (Jan. 29, 2021). The Biden administration has reportedly stated that it would not resume the expulsion of unaccompanied minors.

42 is the possibility of a torture screening. *Id.* at 4. But the government does not provide notice that this procedure is available, instead providing a screening only if a noncitizen being processed under Title 42 makes “an affirmative, spontaneous and reasonably believable claim that they fear being tortured in the country they are being sent back to.” *Id.* On information and belief, CBP routinely fails to offer such screening to asylum seekers expelled under Title 42, even when they express a fear of harm that amounts to torture.

117. Chad Wolf, the then-acting director of DHS, stated in October 2020 that approximately 90% of individuals who would otherwise have been kept in CBP facilities since March were instead processed under Title 42 and returned to Mexico within two hours.²⁵ Between April 1, 2020 and December 31, 2020, U.S. Border Patrol made 373,396 expulsions under Title 42, while processing 43,773 noncitizens under the immigration provisions of Title 8.²⁶

118. Title 42 expulsions strand migrants in dangerous Mexican border cities—typically without any legal status to remain in Mexico—or send them directly back to the very countries

²⁵ See Nick Miroff, *Under Coronavirus Immigration Measures, U.S. is Expelling Border-Crossers to Mexico in an Average of 96 Minutes*, THE WASHINGTON POST (Mar. 30, 2020), [washingtonpost.com/immigration/coronavirus-immigration-border-96-minutes/2020/03/30/13af805c-72c5-11ea-ae50-7148009252e3_story.html](https://www.washingtonpost.com/immigration/coronavirus-immigration-border-96-minutes/2020/03/30/13af805c-72c5-11ea-ae50-7148009252e3_story.html); Blog, Department of Homeland Security, ‘Reversing Course is No Way Forward’: Acting Secretary Wolf Outlines Border Security and Immigration Policies of the Trump Administration (Oct. 22, 2020), dhs.gov/blog/2020/10/22/reversing-course-no-way-forward-acting-secretary-wolf-outlines-border-security-and.

²⁶ These numbers do not account for repeat apprehensions of the same individuals attempting entry multiple times. See *Nationwide Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, U.S. CUSTOMS AND BORDER PROTECTION, [cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics](https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics) (last visited Feb. 8, 2021); *CBP Enforcement Statistics*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics> (last visited Feb. 8, 2021).

they fled. In desperation, many noncitizens expelled under Title 42 try repeatedly to enter the United States.

119. Public health experts have criticized the Title 42 policy because it singles out asylum seekers without any basis in public health.²⁷

Claims for Relief

Count 1

Violation of immigration law and the APA

**8 U.S.C. § 1101 *et seq.*; 8 C.F.R. § 1.1 *et seq.*; international law;
5 U.S.C. § 706(2)**

120. The foregoing allegations are repeated and incorporated herein.

121. U.S. immigration law is a comprehensive scheme addressing the removal of noncitizens, the consideration of asylum claims, the protection of minors, and the threat of communicable disease. It is codified in the INA—as modified by the Foreign Affairs Reform and Restructuring Act and the TVPRA—and U.S. regulations, and it also includes certain mandates of international law, including the duty of non-refoulement.

122. U.S. immigration law bars removing noncitizens to countries where it is more likely than not that they will face persecution or torture, and protects the right of “[a]ny alien who is physically present . . . or who arrives in the United States” to seek asylum, with exceptions not applicable here. 8 U.S.C. §§ 1158, 1231(b)(3); 8 C.F.R. § 208.16.

²⁷ See Letter from leaders of public health schools, medical schools, hospitals, and other U.S. institutions to Alex Azar, HHS Secretary, and Robert Redfield, CDC Director, (May 18, 2020) (“The rule is thus being used to target certain classes of noncitizens rather than to protect public health.”), publichealth.columbia.edu/public-health-now/news/public-health-experts-urge-us-officials-withdraw-order-enabling-mass-expulsion-asylum-seekers; Physicians for Human Rights, Comment Letter on Proposed Rule 42 CFR 71 (April 23, 2020), phr.org/wp-content/uploads/2020/05/Physicians-for-Human-Rights-Public-Comment-on-Border-Closure-April-23-2020.pdf (asserting that Title 42 lacks a basis in public health).

123. The INA also provides the “the sole and exclusive procedure[s]” for determining the admission or removal of noncitizens at the border. 8 U.S.C. § 1229a(a)(3). As relevant here, those procedures are a full removal proceeding before an immigration judge under 8 U.S.C. § 1229a, or an expedited removal proceeding involving the opportunity for a credible fear screening and immigration judge review, under 8 U.S.C. § 1225(b)(1).

124. Under the TVPRA, unaccompanied noncitizen children apprehended at the border are entitled to special protections, including a full § 1229a removal proceeding and placement in the “least restrictive setting” consistent with their interests. 8 U.S.C. § 1232(a)(5)(D), (c)(2)(A).

125. The INA’s comprehensive scheme also provides “health-related” grounds for inadmissibility and a limited detention authority applicable to certain noncitizens “arriving at ports of the United States” who come “from a country or have embarked at a place where any of such diseases are prevalent or epidemic.” 8 U.S.C. §§ 1182(a)(1), 1222(a). The INA permits noncitizens subject to these provisions to seek asylum.

126. Ana Poe, Lina Roe and her family, and Jane Doe and her children were expelled from the United States without the procedures of U.S. immigration law. And Ana Poe and Lia Roe were unaccompanied minors but were denied the protections of the TVPRA.

127. The expulsions of Ana Poe, Lina Roe and her family, and Jane Doe and her children violated the INA and its regulations, and the duty of non-refoulement. The APA thus requires this Court to “compel” the legal procedures that were “unlawfully withheld” and to “hold unlawful and set aside” these expulsions, which were “not in accordance with law” and were “without observance of procedure required by law.” *See* 5 U.S.C. § 706.

Count 2
Violation of Public Health Service Act and APA
42 U.S.C. § 265; 5 U.S.C. § 706(2)

128. The foregoing allegations are repeated and incorporated herein.

129. Although Defendants claim to be acting under Title 42 of the U.S. Code, that statute does not authorize the expulsion of noncitizens from the United States.

130. Title 42 also does not authorize the expulsion of individuals seeking asylum in the United States without affording them the statutory protections afforded under the INA, or the expulsion of noncitizens into countries where they face persecution. Nor does it authorize the expulsion of minors without the protections of the TVPRA.

131. Even if that were not the case, Title 42 cannot be read to authorize the ongoing expulsion of asylum seekers on the basis of a disease already being widely transmitted in the United States.

132. The expulsions of Ana Poe, Lina Roe and her family, and Jane Doe and her children under this ultra vires authority violated the PHSA. The APA thus requires this Court to “hold unlawful and set aside” these expulsions, which were “not in accordance with law” and “in excess of statutory . . . authority.” *See* 5 U.S.C. § 706(2).

Count 3
Violation of the APA – Arbitrary, Capricious, and Unlawful Agency Action
5 U.S.C. § 706

133. The foregoing allegations are repeated and incorporated herein.

134. The APA requires courts to “compel agency action unlawfully withheld” and to “hold unlawful and set aside agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “contrary to constitutional right, power, privilege, or

immunity,” “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” or “without observance of procedure required by law.” 5 U.S.C. § 706.

135. Defendants’ actions unlawfully deprived plaintiffs Ana Poe, Lina Roe and her family, and Jane Doe and her children of the procedures required by U.S. immigration law for consideration of their potential removal and claims for protection. Defendants’ actions also deprived plaintiffs of due process and the equal protection of our laws.

136. Moreover, Title 42 process created by the CDC’s 2020 regulations and orders was ultra vires, was designed to curtail asylum rather than protect public health, and was implemented without consideration of measures that could protect public health while maintaining mechanisms for humanitarian relief. It is arbitrary, capricious, and otherwise unlawful. *See* 5 U.S.C. § 706.

Count 4
Violation of Equal Protection
U.S. Constitution, amend. V

137. The foregoing allegations are repeated and incorporated herein.

138. Plaintiffs have a right under the Fifth Amendment to the U.S. Constitution to equal protection of the laws.

139. President Trump and others in his administration harbored racial and other animus against immigrants from Central America and other predominantly non-white countries—including Ana Poe, Lina Roe and her family, and Jane Doe and her children. As a result of that animus, he directed that Central American asylum seekers be kept out and repeatedly proposed to harm them by shooting their legs or building a border wall that would impale people. His administration acted on that animus and grievously harmed asylum seekers through policies that included family separation, the MPP, and the Title 42 expulsion process.

140. Because a “discriminatory purpose” was “a motivating factor” for the regulations and orders requiring the expulsion of asylum seekers during the Covid-19 pandemic, these expulsions violated the Equal Protection Clause. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977).

Count 5
Violation of Procedural Due Process
(U.S. Constitution, amend. V)

141. The foregoing allegations are repeated and incorporated herein.

142. Noncitizens in the United States are entitled to due process of law, including adherence to the procedures provided by Congress for the fair adjudication of applications for relief and benefits made available under the immigration laws.

143. Plaintiffs Ana Poe, Lina Roe and her family, and Jane Doe and her children were expelled without any of the procedures required by law for removing noncitizens from the United States, and without any opportunity to assert claims to relief, in violation of due process.

PRAYER FOR RELIEF

Plaintiffs ask that this court grant the following relief:

1. Declare that the Title 42 Process is unlawful, and that Ana Poe, Lina Roe, Luna Roe, Lia Roe, Jane Doe, June Doe, and Jax Doe’s inclusion in the Title 42 process was and is unlawful;

2. Vacate Ana Poe, Lina Roe, Luna Roe, Lia Roe, Jane Doe, June Doe, and Jax Doe’s expulsion under Title 42, enjoin defendants from applying Title 42 to them, and order that their claims for protection be processed in the United States in accordance with U.S. immigration law;

3. Order that Ana Poe, Lina Roe, Luna Roe, Lia Roe, Jane Doe, June Doe, and Jax Doe be paroled into the United States while the government considers their immigration cases;
4. Award attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) and 5 U.S.C. § 504, if applicable; and,
5. Order any further relief this Court deems just and proper.

Respectfully submitted this 8th day of February, 2021.

/s/ Adam J. Kessel

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