Practice Advisory

TITLE 42 IMMIGRATION SUSPENSION CASES, TRUMP'S FINAL ASYLUM RULE, & DEVELOPMENTS UNDER PRESIDENT BIDEN

November 2021

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Practice Advisory Forward

The Center for Human Rights and Constitutional Law is a non-profit, public interest legal foundation dedicated to furthering and protecting the civil, constitutional, and human rights of immigrants, refugees, children, prisoners, and the poor. Since its incorporation in 1980, under the leadership of a board of directors comprising civil rights attorneys, community advocates and religious leaders, the Center has provided a wide range of legal services to vulnerable low-income victims of human and civil rights violations and technical support and training to hundreds of legal aid attorneys and paralegals in the areas of immigration law, constitutional law, and complex and class action litigation.

The Center has achieved major victories in numerous major cases in the courts of the United States and before international bodies that have directly benefited hundreds of thousands of disadvantaged persons**.**

This advisory outlines cases related to the Trump administration's usage of Title 42 to suspend immigration; Trump's Final Asylum Rule; and the latest developments of both Title 42 and Trump's Final Asylum Rule under the Biden administration.

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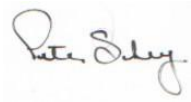

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I. INTRODUCTION

This advisory first outlines cases challenging the Trump administration's unprecedented procedure for restricting immigration along the Canadian and Mexican borders in the name of public health and under the purported authority of 42 U.S.C. § 265 during the COVID-19 pandemic.[1]

The Centers for Disease Control and Prevention ("CDC") published its final rule on September 11, 2020 which states "HHS/CDC identifies particular powers that it may exercise under [Section 265] by defining the phrase to '[p]rohibit, in whole or in part, the introduction into the United States of persons' to mean '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.'"[2] The Trump Administration used Title 42 "to allow for the summary expulsion of unaccompanied minors without standard procedural protections even when the child displays no symptoms of COVID-19, and even if the child is fleeing danger and seeking protection in the United States."[3]

On February 22, 2021, a joint letter from human rights organizations was sent to the to the Acting Secretary of the Department of Health and Human Services ("DHHS") and the director of Centers for Disease Control and Prevention ("CDC") to "reiterate pleas by public health experts to urgently rescind the CDC's order and remove or revoke HHS regulation to restore public trust that the CDC's actions are based on science, not political whims."[4] An earlier letter had been sent to the Biden administration on February 2, 2021 urging it to end the "misuse of Title 42 public

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[1] Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16559-01, 2020 WL 1330968, (March 24, 2020) ("Interim Rule")("CDC to suspend the introduction of persons from designated countries or places, if required, in the interest of public health.").

[2] See Control of Communicable Diseases; Foreign Quarantine: Suspension of the Right To Introduce and Prohibition of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 56424-01, 2020 WL 5439721, (Sept. 11, 2020) (Effective October 13, 2020) ("Final Rule").

[3] G.Y.J.P. v. Wolf complaint at p.3.

[4] February 22, 2021 Joint Letter to Norris Cochran, Acting Secretary and Dr. Rochelle Walensky, Director of Centers for Disease Control and Prevention *available at*: https://www.hrw.org/sites/default/files/media_2021/02/2021.02.22%20Letter%20to%20HHS%20and%20CDC.pdf.

health authority to illegally and inhumanely expel asylum seekers and migrants at the border."[5] The outline here reviews a few significant cases involving the misuse of Title 42.

Additionally, this advisory discusses the current status of the "Final Rule" regarding "Asylum Eligibility and Procedural Modifications." 85 Fed. Reg. 82, 260 (Dec. 17, 2020) (codified at 8 C.F.R. pts. 208, 1208) which the Northern District Court of California provided was "functionally equivalent to the interim final rule that [that] Court preliminarily enjoined (another court vacated)."[6] Under this Rule, asylum to most persons entering the United States at the southern border was categorically denied if they had not first applied for asylum in Mexico or another third country through which they passed depriving vulnerable asylum applicants of "procedural safeguards designed to avoid arbitrary denials of asylum." *See id.*

II. *G.Y.J.P. v. WOLF et al.* (1:20-cv-01511)

(D.D.C. June 9, 2020) voluntarily dismissed by Plaintiffs (D.D.C. January 7, 2021)
Doc 3 06-09-20 Complaint Link here

"This case presents the first legal challenge to the government's unprecedented new system for restricting immigration along the Canadian and Mexican borders in the name of public health and under the purported authority of 42 U.S.C. § 265. This system is established in a set of agency documents—a new regulation, several orders, and an implementation memo— which Plaintiff collectively refers to as the 'Title 42 Immigration Process' or 'Title 42 Process.'"[7]

"Plaintiff G.Y.J.P. is a 13-year-old girl from El Salvador. Her mother, a former police officer in El Salvador, was targeted by the notorious Salvadoran gangs after she refused to cooperate with them. Forced to quickly flee for her life, she was granted legal protection by the United States and now lives here lawfully. In April 2020, Plaintiff sought to join her mother in the United States, when the gangs who had targeted her mother began threatening her life in El Salvador."[8]

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[5] February 2, 2021 Joint Letter to Hon. Joseph R. Biden, Jr. *available at*: https://www.humanrightsfirst.org/sites/default/files/LetterBidenAdminTitle42.Updated.pdf.
[6] *E. Bay Sanctuary Covenant v. Barr*, No. 19-cv-04073-JST, 2021 U.S. Dist. LEXIS 31905 (N.D. Cal. Feb. 16, 2021) at 3.
[7] GYJP Complaint at 1.
[8] *Id.*

"When G.Y.J.P. arrived in the United States, she informed officials that she was fleeing danger, that her mother lives here, and that she had her mother's phone number. The officials did not contact her mother or process her for transfer to an Office of Refugee Resettlement ("ORR") facility for unaccompanied children. Instead, pursuant to the Title 42 Process, they summarily deported her to El Salvador without a hearing or any process. Plaintiff displayed no symptoms of COVID-19."[9]

"Prior to the Title 42 Process, and pursuant to longstanding immigration statutes protecting children and those seeking protection, G.Y.J.P. should have been given shelter in a children's facility until she could be released to her mother, and she would have been entitled to a full hearing, and appeals, to determine her right to seek safety in the United States with her mother."[10]

"Instead, Plaintiff remained in immigration custody for much longer than 72 hours in order for Defendants to arrange for her return to El Salvador, increasing the risk of exposure to COVID-19 for Plaintiff and border enforcement agents. Thus, the Title 42 Process increases the amount of time children spend with border agents, because it takes time to find air transportation to deport them."[11]

"The specific provision of Title 42 invoked by the Administration was § 265. That provision dates to 1893 and was later reenacted in substantially the same language in the modern Public Health Service Act of 1944. Section 265 provides in relevant part: the Surgeon General may 'prohibit . . . the introduction of persons or property' from designated places where '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.'"[12]

Argument

[9] *Id.*
[10] *Id at 4.*
[11] *Id.*
[12] *Id* at 14.

"The Title 42 Process is not justified by public health concerns. A principal justification is that border agents will have greater exposure if they are required to process individuals who lack documents and that it is therefore necessary to deport such individuals to reduce the risk to agents. But, as Plaintiff's facts illustrate, arranging for air transport to deport individuals will take longer than the 72 hours in which DHS must transfer children to ORR or family members. In addition, where the individual shows no signs of COVID-19 or is tested, as Plaintiff was, the risk is even less."[13]

Causes of Action:

1. Violation of the TVPRS, 8 USC § 1232, and APA, 5 USC 706(1), 706(2)(A)
2. Ultra Vires, Violation of the Public Health Service Act, 42 USC 265 and the APA, 5 USC § 706(2)(A)
3. Violation of 8 USC § 1231(b)(3), Withholding of Removal, and Administrative Procedure Act, 5 USC §§ 706(1), 706(2)(S)
4. Aylum: Violation of 8 USC § 1108(a), and Administrative Procedure Act, 5 USC §§ 706(1), 706(2)(A)
5. Violation of the Foreign Affairs Reform and Restructuring Act of 1998, 8 USC § 1231 Note, and APA Act, 5 USC §§ 706(1), 706(2)(A)
6. Violation of 8 USC § 1101, Et Seq., and APA, 5 USC §§ 706(1), 706(2)(A)
7. Violation of the APA 5 USC § 706(2)(A)

Outcome: Plaintiffs voluntarily dismissed on January 7, 2021 after the Court denied the Government's motion to dismiss for lack of jurisdiction and G.Y.J.P was reunited with her mother in the U.S. ACLU in a news report explained, "[t]he government moved to dismiss, arguing that the plaintiff's return to El Salvador made the case moot. In December 2020, the court denied the government's motion, explaining that whether or not it could order the plaintiff returned, it could still order meaningful relief by striking down the challenged policy and preventing her from being expelled under it should she reach the United States again. The Plaintiff was subsequently returned to the U.S. and reunited with her mother. We voluntarily dismissed the case in January 2021."[14] 46 Memorandum Order denying Defendants' Motion to Dismiss for Lack of Jurisdiction.

[13] *Id* at 23.

[14] G.Y.J.P v. Wolf – Defending Due Process Rights for Children Seeking Refuge in U.S. During COVID-19 Pandemic, *ACLU District of Columbia*, available at: https://www.acludc.org/en/cases/gyjp-v-wolf-defending-due-process-rights-children-seeking-refuge-us-during-covid19-pandemic.

III. *P.J.E.S. v. PEKOSKE* (No. 20-2245)

(D.D.C. Nov. 18, 2020), stayed (D.C Cir. Jan. 29, 2021)

PI filed: August 15, 2020 (Doc. # 15)

Brief Summary and Current Status (as of November 23, 2021):

'A federal district court enjoined a Center for Disease Control and Prevention rule—which restricted immigration due to the COVID-19 pandemic (by for example, requiring unaccompanied minor noncitizens to be detained in facilities pending their expulsion) on November 18, 2020, finding that, the plaintiff was likely to prevail on the argument that, under the applicable federal statute, the authority to prohibit the "introduction" of persons did not grant the agency authority to eject or evict persons subsequent to their entry. A federal appeals court subsequently stayed the injunction pending appeal. *P.J.E.S. v. Pekoske*, No. 20-02245 (D.C Cir. Jan. 29, 2021).'

Following the stay, on March 2, 2021, the Court of Appeals "granted the parties' Joint Motion to hold the briefing schedule in abeyance, and ordered the parties to file Joint Status Reports at 60-day intervals beginning May 3, 2021." Document # 1920493.

"On July 16, 2021, the CDC issued an order 'except[ing] unaccompanied noncitizen children . . . from the [CDC's] October [13, 2020] Order.' 86 Fed. Reg. 38,717, 38,718 (July 16, 2021). The CDC explained that the July 16 Order 'supersede[s]' the notice issued on February 11, 2021 excepting from expulsion unaccompanied noncitizen children encountered in the United States. Id. at 38,720. On August 2, 2021, the CDC issued an order that supersedes the October 13, 2020 Order, which is the order plaintiffs challenge in this case. 86 Fed. Reg. 42,828 (Aug. 2, 2021). The July 16 Order was 'made a part of [the August 2 Order] and incorporated by reference as if fully set forth' in the August 2 Order. Id. at 42,829 n.5." Document # 1920493.

"The parties have continued to engage in discussions about the implications of the July 16 and August 2 orders on this case. To facilitate the continuation of these discussions, the parties believe the most reasonable and efficient course of action is to continue the abeyance of the briefing schedule in this case." Document # 1920493.

Details of District Court Proceeding and Appeals:

***PJES v. WOLF* (No. 20-2245, D.D.C. Nov, 18, 2020)**

Complaint

"Plaintiff P.J.E.S. is a 16-year-old boy from Guatemala who came to the United States unaccompanied. P.J.E.S. was forced to flee to the United States to escape severe persecution in Guatemala. His father currently lives in the United States and is awaiting immigration proceedings. After P.J.E.S. came to the United States, CBP apprehended him and subjected him to the Title 42 Process. He is currently in CBP custody in the McAllen, Texas, area."[15]

Memorandum Opinion Adopting the R&R

"Upon careful consideration of the R. & R., the Government's objections, Plaintiff's response, and the relevant law, the Court hereby ADOPTS the R. & R., ECF No. 65, PROVISIONALLY GRANTS Plaintiff's (1) Motion to Certify Class, ECF No. 2, and GRANTS Plaintiff's (2) Motion for Preliminary Injunction, ECF No. 15." (p.2).

"Since his expulsion was imminent, he filed a motion for temporary restraining order ("T.R.O.") that same day, presenting many of the same arguments as presented in this case. See generally, J. B. B. C. Emergency Mot. for T.R.O., ECF No. 2. At a June 24, 2020 hearing, Judge Nichols granted the TRO, finding that the J. B. B. C. plaintiff was likely to succeed on the merits. J. B. B. C. Hr'g Tr., Dkt No. 20-cv-1509, ECF No. 39 at 49-50." (p. 19).

"Specifically, Judge Nichols found that: (1) Section 265 does not grant the CDC Director the power to return or remove, in light of the fact that immigration statutes directly "reference the power to return or to remove,' id. at 50; (2) Section 265 'should be harmonized, to the maximum extent possible, with immigration statutes,' id.; and (3) the CDC Director is not entitled to deference under *Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984), because Section 265 must be 'read in light of statutes that the CDC Director quite plainly has no

[15] PJES Complaint at 3.

special expertise regarding and . . . the order does very little by way of an analysis of what exactly the power to prohibit the introduction of persons and property means,' id. at 51-50. Notably, after Judge Nichols's ruling, the Government transferred the J. B. B. C. plaintiff to ORR, noting that he would 'no longer be subject to the challenged CDC Order' and claimed that the case was moot. J. B. B. C. Notice to Ct., Dkt No. 20-cv-1509, ECF No. 41 at 1. When the J. B. B. C. plaintiff filed an amended complaint, adding another plaintiff, E.Y.E., a 15-year-old boy from Guatemala, who claimed to be escaping an abusive grandfather and aunt, and who had siblings in the United States who had been granted asylum the previous year based on similar claims, the Government excepted him from the CDC Orders as well. See J. B. B. C. Mot. to Dismiss, Dkt No. 20-cv-1509, ECF No. 47 at 9. The J. B. B. C. plaintiffs thenvoluntarily dismissed the case. See J. B. B. C. Notice of Voluntary Dismissal, Dkt No. 20-cv-1509, ECF No 48." (p.20).

Class Certification

Magistrate provided that Judge Harvey found that Plaintiff's motion for class certification should be "provisionally granted" because plaintiff met all requirements. *See* p. 20.

"The Government's only objection to Magistrate Judge Harvey's recommendation is that the case upon which he relied—J.D. v. Azar-was wrongly decided because allowing a Plaintiff whose claims are moot to serve as a class representative 'is an improper relaxation of Article III's strict requirement of a case or controversy.' Gov't's Objs., ECF No. 69 at 38." (p. 21).

"However, J.D. v. Azar is binding precedent on this Court. See Hopkins v. Price Waterhouse, 920 F.2d 967, 975 (D.C. Cir. 1990)('[T]he trial court . . . [is] nonetheless bound by the law of the circuit.')." (p.22).

"Furthermore, the actions the Government has taken to avoid judicial scrutiny by mooting the claims of the unaccompanied children, Plaintiff's counsel bring to their attention, arguably reveals an intent to make Plaintiff's claim 'so inherently transitory that the [Court] will not have []enough time to rule on [the] motion for class certification before the proposed representative's individual interest expires.' J.D., 925 F.3d at 1309. However, the 'relation back' doctrine, which allows a

"motion for certification [to] 'relate back' to the filing of the complaint," id. at 1308; was created so that a class would not be deprived of its day in court by a defendant simply exempting the class representatives in order to moot the class' claims, see Cty. of Riverside v. McLaughlin, 500 U.S. 44, 51 (1991); see also Swisher v. Brady, 438 U.S. 204, 213 n.11 (1978) (holding that the State's action of excepting some of the named plaintiffs "did not deprive the District Court of the power to certify the class action"). Having addressed the Government's sole objection to this recommendation, and finding no clear error in this portion of the R. & R., the Court ADOPTS Magistrate Judge Harvey's recommendation, and PROVISIONALLY GRANTS Plaintiff's motion for class certification. Pl.'s Cert.Mot., ECF No. 2." (p.22).

Preliminary Injunction

Likely to Succeed on the Merits

a. Section 265 Likely Does Not Authorize Expulsions

"The Court disagrees. Even accepting that the phrase, 'prohibit[ing] . . . the introduction of,' means 'intercepting' or 'preventing'; the phrase does not encompass expulsion; but merely means that the process of introduction can be halted. Expelling persons, as a matter of ordinary language, is entirely different from interrupting, intercepting, or halting the process of introduction. Put another way, interrupting, intercepting, or halting the process of introduction does inexorably lead to expulsion." (p.26-27).

"Neither Section 265 nor any of the definitions provided by the Government contain the word 'expel.' They do not even contain synonyms of the word expel, such as 'eject' or 'evict.'...The Court finds this to be significant, because even 'broad rulemaking power must be exercised within the bounds set by Congress,' *Merck & Co. v. United States Dep't of Health & Human Servs.*, 385 F. Supp. 3d 81, 92 (D.D.C. 2019), *aff'd*, 962 F.3d 531 (D.C. Cir. 2020); and the CDC 'does not [have the] power to revise clear statutory terms,' *Util. Air Reg. Grp.*, 573 U.S. at 327. (p. 27).

b. Statutory Context Provides Support for Interpreting Section 265 to Likely Not Authorize Expulsions

"The statutory scheme reflects Congress's focus on the public's health, authorizing the CDC to create regulations that allow for the 'apprehension, detention, examination, or conditional release of individuals' entering from foreign countries to stop the spread of communicable diseases from those countries, 42 U.S.C. § 264; and then in times of serious danger, to halt the 'introduction of persons' from designated foreign countries. 42 U.S.C. § 265. Notably, Congress established specific penalties for violations of any of the CDC's regulations pursuant to Sections 264, 265, 266 (entitled 'Special Quarantine Powers in Time of War'), and 269 (entitled "Bills of health"). 42 U.S.C. § 271. However, not only is expulsion not mentioned in the statute, but all of these sections, including Section 265, are referred to as 'quarantine laws,' suggesting that the CDC's powers were limited to quarantine and containment. *Id*." (p.32).

c. Harmonizing Section 265 with Relevant Immigration Statutes Provides Support for Interpreting Section 265 to Likely Not Authorize Expulsions

"First, as Plaintiff points out and Magistrate Judge Harvey agrees, "the Supreme Court routinely points to other statutes as evidence that Congress knows how to legislate in particular ways." Pl.'s Combined Reply, ECF No. 52 at 15 (collecting cases); *see also* R. & R., ECF No. 65 at 30 n.11. In view of current immigration laws, which speak to deportation by using words such as "remove" and "return," *see* 8 U.S.C. § 1182(d)(3A) ("[t]he Attorney General shall prescribe conditions . . . to . . . *return* . . . inadmissible aliens"); § 1182(h)(2) ("No waiver shall be granted. . . . for a period of not less than 7 years immediately preceding the date of initiation of proceedings to *remove* the alien from the United States.") (emphasis added); the Court recognizes, as did Judge Nichols, that "[t]here's a serious question about whether [Section 265's] power includes the power…" (p.34).

d. The Government's Interpretation of Section 265 is Likely not Entitled to Chevron Deference

"Magistrate Judge Harvey found that because the statute is not ambiguous using traditional

tools of statutory interpretation, there was no need to reach step two of the *Chevron* analysis. R. & R., ECF No. 65 at 38 n.15. He stated, however, that even if there were ambiguity, he would find, as did Judge Nichols, that deference would not be justified because the question for the claim is purely legal and does not depend upon the CDC's scientific and technical expertise. *See id*." (p.37-38).

"Assuming for the purpose of responding to the Government's objections that the term is ambiguous, the Court disagrees that the CDC's interpretation implicates its scientific and technical expertise because the Government has not explained how that scientific and technical expertise lead it to interpreting 'introduction' to encompass 'expulsion.' *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019) (noting that "[a] court must make an independent inquiry into whether the character and context of the agency interpretation entitled it to controlling weight"). Accordingly, CDC is not entitled to deference with respect to its interpretation." (p.38-39). "For the reasons above, the Court **ADOPTS** Magistrate Judge Harvey's finding that Plaintiff is likely to succeed on the merits of his claim." *Id.*

Balance of Equities

"The Court is not persuaded by the Government's objections. Magistrate Judge Harvey directly addressed Deputy Director Sualog's rationale, but rejected it on the same grounds as did the court in *Flores*—specifically noting that 'there are sufficient numbers of currently under-utilized [ORR] facilities such that transfers can be allocated among facilities to avoid over-concentration or bottlenecking,' R. & R., ECF No. 65 at 46 (citing In Chambers Order at 4, *Flores*, No. CV 85-4544 DMG, ECF No. 990, (AGRx) (C.D. Cal Sept. 21, 2020)). Magistrate Judge Harvey also correctly pointed out that there was good reason to not credit Deputy Director Sualog's assertions because they were "highly speculative" and not supported by 'scientific or empirical analysis.'" (p.44-45).

The Injunction Applies to the Final Rule

"Magistrate Judge Harvey recommends that 'the preliminary injunction . . . be crafted to . . . prohibit[] expulsion from the United States under the Title 42 process whether that conduct has been permitted in orders issued by the CDC Director pursuant to the authority of the Interim

Final Rule or the Final Rule" because "there is no relevant material difference between the CDC Director's authority under the Final Rule and the authority that the government here has argued he enjoys under the Interim Final Rule.'" (Internal citations omitted, p. 48).

APPEALS

P.J.E.S v. PEKOSKE (USCA Case No. 20-5357)

"In a brief two-page order, a three-judge panel lifted the injunction at the December 2020 request of the Trump administration, saying the administration had 'satisfied the stringent requirements for a stay pending appeal.'" [16] Link to Order.

"The Trump administration appealed Judge Sullivan's injunction to the D.C. Circuit, pressing it to stay the order while it reviewed the case. It argued that the injunction prevented the government from implementing "critical public health measures" intended to curb the spread of COVID-19." *Id.*

"That argument swayed U.S. Circuit Judges Neomi Rao, Gregory Katsas and John Walker, who sat on the motions panel." *Id.*

IV. *J.B.B.C. v. WOLF* (1:20-cv-01509)

(D.D.C. June 9, 2021), voluntarily dismissed by Plaintiff on August 6, 2020 (Doc. #48)

Complaint:

"This case challenges the government's unprecedented new system for restricting immigration along the Canadian and Mexican borders in the name of public health and under the purported authority of 42 U.S.C. § 265. This system is established in a set of agency documents—a new regulation, several orders, and an implementation memo—which Plaintiff collectively refers to as the "Title 42 Immigration Process" or "Title 42 Process."[17]

[16] Alyssa Aquino, DC. Circ. Lifts Block on Migrant Children Expulsion Policy, Law 360 (January 29, 2021) *available at* https://www.law360.com/articles/1350276/dc-circ-lifts-block-on-migrant-children-expulsion-policy.
[17] J.B.B.C. Complaint at 3.

"Plaintiff J.B.B.C. is a 16-year-old boy from Honduras. His father suffered persecution in Honduras and was forced to flee to the United States. His father now lives in the United States and is awaiting his immigration proceedings. Recently, Plaintiff was also forced to escape severe persecution in Honduras and sought to join his father in the United States."[18]

TRO: See above p.9 for Judge Nichol's reasons for granting TRO.

Amended Complaint adding Plaintiff E.Y. filed 7-2-20 (Doc. #42): "a 15-year-old boy from Guatemala. He has suffered extreme familial abuse from his grandfather and aunt with whom he had lived in Guatemala, has been persecuted because his mother testified against her stalker, and has been threatened by gangs. E. was ultimately forced to flee to the United States to seek protection. His siblings live in the United States. Both were granted asylum protections last year and E.'s protection claims are materially the same as those of his siblings."[19]

Order: Court extended stay to the June 11, 2020 Order so Plaintiff was not to be "returned to his home country or removed or otherwise expelled from the United States unless and until the Court resolves action on the merits." (Doc. 38 Order).

Voluntary dismissal: *See* p.9 above for explanation of Plaintiff's voluntary dismissal.

V. *EAST BAY SANCTUARY COVENANT et al. v. BARR et al.* (No. 4:19-cv-04073)

Docket 138: Order by Judge Jon S. Tigar granting 131 Motion for Preliminary Injunction and Stay of Final Rule's Effective Date Pursuant to 5 U.S.C. § 705 (Filed and entered 02-16-21).

"On December 17, 2020, just weeks before a change in presidential administrations – and with an effective date of January 19, 2021, just one day before that change – the Department of Homeland Security ("DHS") issued the final third country transit ban rule, entitled "Asylum Eligibility and Procedural Modifications" (the "Final Rule"). 85 Fed. Reg. 82,260 (Dec. 17,

[18] *See id.*
[19] J.B.B.C. Amended Complaint p.3-4.

2020) (codified at 8 C.F.R. pts. 208, 1208). The Final Rule is functionally equivalent to the interim rule that this Court preliminarily enjoined (and another court vacated). 84 Fed. Reg. 33,829 ("Interim Rule"). It categorically denies asylum to most persons entering the United States at the southern border who did not first apply for asylum in Mexico or another third country.**"** (p. 1).

"Under controlling Ninth Circuit law, the Final Rule is invalid because it is inconsistent with existing asylum laws. As with the Interim Rule, the Final Rule deprives vulnerable asylum applicants of essential procedural safeguards designed to avoid arbitrary denials of asylum. Also, rather than ensure their safety, the rule increases the risk asylum applicants will be subjected to violence. *See E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 953-56 (N.D. Cal. 2019) ("*E. Bay I*"). For these reasons, and the additional reasons set forth below, the Court now enjoins the Final Rule from taking effect." *See id.*

Docket 140: Joint Motion to Stay (Filed 2-25-21)

"While Plaintiffs' motion for a preliminary injunction was pending, President Biden signed an Executive Order which directed '[t]he Attorney General and the Secretary of Homeland Security [to] promptly review and determine whether to rescind . . . the final rule titled 'Asylum Eligibility and Procedural Modifications,' 85 Fed. Reg. 82,260 (December 17, 2020), as well as any agency memoranda or guidance that were issued in reliance on th[at] rule[].' See Executive Order 14010, Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border (the "Executive Order"), § 4.a.ii.C, 86 Fed. Reg. 8257, 8269-70 (Feb. 5, 2021). In light of the ongoing review of the final rule by the new administration, the parties respectfully request that the Court hold the case in abeyance pending the conclusion of the Departments' review of the final rule."

Docket 145: Order and Amended Opinion of USCA (Filed 4-8-21)

"We hold that plaintiffs are likely to succeed on the merits of their claims. The Rule is "not in accordance with law" and "in excess of statutory limitations" because it is not "consistent with" 8 U.S.C. § 1158. *State Farm*, 463 U.S. at 43. The Rule is also "arbitrary and capricious" because it "runs counter to the evidence before the agency" and "entirely failed to consider . . . important aspect[s] of the problem." *Id.* We hold further that plaintiffs have shown that they will suffer irreparable harm, that the balance of equities lies in their favor, and that an injunction is in the public interest. Finally, we hold that the district court did not abuse its discretion in entering an injunction covering the four states along our border with Mexico."

VI. TITLE 42 UNDER THE BIDEN ADMINISTRATION

Many had hoped that President Biden would cease using Title 42, given his reputation and more humane stance on immigration. Instead, his administration has continued to employ it and, in fact, has defended its usage in court. "The Biden administration did carve out exceptions for unaccompanied migrant children. It has allowed the majority of parents and children arriving together to ask for asylum. But it has continued to expel many others, including some families and tens of thousands of single adults crossing the border." Joel Rose & Scott Neuman, *The Biden Administration Is Fighting In Court To Keep A Trump-Era Immigration Policy*, NPR (Sept. 20, 2021), https://www.npr.org/2021/09/20/1038918197/the-biden-administration-is-fighting-in-court-to-keep-a-trump-era-immigration-po.

In September, however, Judge Sullivan of the U.S. District Court for the District of Columbia "ordered a similar halt in the use of Title 42 to turn away families with children, setting a two-week deadline for the administration to comply." *Id.* On September 30, the Court of Appeals granted the administration's stay request. Until arguments commence at the D.C. Circuit in January, Title 42 remains in effect.

Department of Homeland Security Secretary Mayorkas defended the usage of Title 42 to "protect the American public. To protect the communities along the border. And to protect the migrants themselves." *Id.* But, as *NPR* stated, "physicians and immigrant advocates said that position is merely a pretext to remove migrants from the country quickly — with the most recent example being those sheltered under the international bridge at the Del Rio port of entry." *Id.* Indeed, Lee Gelernt, an ACLU attorney who has fought Title 42 in court across two administrations remarked, ""We would have thought that the Biden administration, given how

much they're talking about wanting a humane asylum system, would have at least grappled with the decision[.]" *Id.*