

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

J.B.B.C., A MINOR CHILD, by) Civil Action
and through his father and) No. 1:20-cv-01509-CJN
4 Next Friend, Carlos Emilio)
Barrera Rodriguez,)
5)
Plaintiff,)
6) **Telephonic Motion**
vs.) **Hearing**
7)
CHAD F. WOLF, Acting)
8 Secretary of Homeland)
Security, in his official)
9 capacity, et al.,) Washington, D.C.
) June 24, 2020
10 Defendants.) Time: 10:00 a.m.

Transcript of **Telephonic Motion Hearing**
Held Before
The Honorable Carl J. Nichols (via telephone)
United States District Judge

A P P E A R A N C E S

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P R O C E E D I N G S

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2 (REPORTER'S NOTE: This hearing was held during the
3 COVID-19 pandemic stay-at-home restrictions and is subject to
4 the limitations of technology associated with the use of
5 technology, including but not limited to telephone and video
6 signal interference, static, signal interruptions, and other
7 restrictions and limitations associated with remote court
8 reporting via telephone, speakerphone, and/or
9 videoconferencing.)

10
11 THE COURT: Good morning. This is Judge Nichols.
12 Ms. Lesley, could you please call this matter.

13 THE COURTROOM DEPUTY: Good morning, Judge. Yes,
14 sir.

15 This is Civil Case Year 2020-1509, J.B.B.C. v. Chad F.
16 Wolf, et al.; movant: Scholars of Refugee and Immigration Law;
17 amicus: International Refugee Assistance Project.

18 Counsel, please introduce yourselves for the record,
19 beginning with the plaintiffs.

20 MR. GELERNT: This is Lee Gelernt from the ACLU for
21 plaintiffs.

22 THE COURT: Mr. Gelernt, good morning.

23 MR. GELERNT: Good morning, Your Honor.

24 MR. WOFSY: Good morning. This is Cody Wofsy, also
25 from the ACLU, for plaintiff.

THE COURT: Good morning.

MR. KANG: Good morning. This is Stephen Kang from
the ACLU for plaintiffs.

THE COURT: Mr. Kang.

1 MS. CROOK: Good morning. This is Jamie Crook from
2 the Center for Gender and Refugee Studies for plaintiff.

3 THE COURT: Ms. Crook, good morning.

4 MS. LIN: Good morning. This is Jean Lin for the
5 government, and with me is Erez Reuveni.

6 THE COURT: Ms. Lin, good morning.

7 MS. LIN: Good morning.

8 MR. REUVENI: Good morning, Your Honor.

9 THE COURT: Good morning.

10 Is there anyone else representing any of the parties who
11 would like to state an appearance.

12 MR. SPITZER: Yes, Your Honor. This is
13 Arthur Spitzer from the ACLU of D.C. for the plaintiffs.

14 THE COURT: Mr. Spitzer, good morning. Anyone else?

15 Okay. So we're obviously here on the plaintiff's
16 motion. Mr. Gelernt, are you going to take the lead this
17 morning for plaintiff?

18 MR. GELERNT: I will, Your Honor.

19 THE COURT: Let me start with you then. And here --
20 let me back up for a second. Here's -- here's how I intend to
21 conduct this hearing. I'd like to hear from plaintiff's
22 counsel to start. We'll then hear from the government. We'll
23 hear briefly, I hope, from plaintiff again in rebuttal, and the
24 government -- I will give the opportunity to the government to
25 have a short surrebuttal, if it so chooses.

1 I intend to conduct this very much like an oral argument
2 if we were all in the courtroom together. I recognize there
3 are obvious technological limitations that we have here. In
4 the event that there's a -- someone gets disconnected or it's
5 difficult to hear someone, we'll just pause and -- and note
6 that and rewind as necessary.

7 And for the court reporter, I would ask that any time
8 someone new begins speaking, if the person who begins speaking
9 could state his or her name so that the court reporter knows
10 who's speaking; that would be very helpful.

11 So with that, Mr. Gelernt, please go ahead.

12 I -- I should also say that I have read all of the
13 papers, including the sealed declarations. So I am quite
14 familiar with -- I should say and also to include the amicus
15 briefs. I'm quite familiar with the arguments that have been
16 made and the facts. So with that, why don't you go ahead and
17 start and present your argument for why I should, I think,
18 extend the stay of removal or return beyond today.

19 MR. GELERNT: Thank you, Your Honor. This is
20 Mr. Gelernt.

21 There are, obviously, as the Court knows, two basic
22 prongs to this. There is the merit, and then there is the
23 balance of harms and equities. With the Court's permission,
24 I'd like to start with the merits.

25 THE COURT: Please do.

1 MR. GELERT: On the merits -- on the merits we have
2 three arguments. The first is, of course, that section 265
3 does not authorize the expulsion of any individual. The second
4 is even assuming that section 265 does authorize the expulsion
5 of some individuals, it needs to be read in conjunction with
6 the child protection and asylum protection statutes, and at
7 least for children seeking protection, they cannot be expelled
8 without the procedures afforded by Congress in The Immigration
9 Act, and the full argument is that this is -- that the rule is
10 arbitrary and capricious under the APA. And I'd like to start
11 with the 265 argument and why it doesn't authorize expulsions.

12 The government recognizes, of course, that 265 doesn't
13 state that the government may expel someone. So they're asking
14 for an implied power. That's an enormous power to expel
15 someone. We are not aware of any time in the history of the
16 country where the government's power to deport someone has not
17 been stated expressly, and, of course, it's always been in
18 The Immigration Act. Beyond that, of course, the government's
19 argument has enormous implications, because, as the government
20 recognizes, the statute doesn't, on its face, differentiate
21 between citizens and noncitizens.

22 And while the government has only exercised their power
23 in the regulation at this point as to noncitizens, the
24 question, of course, is what the statute authorizes. So if the
25 statute were read to provide for expulsions, it would

1 necessarily have to provide for expulsions of citizens, and I
2 think it -- it's inconceivable that Congress was saying the
3 government can actually expel a United States citizen without
4 any procedure. Not only would it be unconstitutional, but
5 for Congress has -- not only has taken that step but it does so
6 with -- with implicit authority; I think it is inconceivable.

7 THE COURT: Mr. Gelernt, your brief either argues or
8 suggests that the -- that 265 is a grant of authority to the
9 Surgeon General/CDC director to prohibit third parties, like
10 transportation companies, from bringing persons or property to
11 the United States. You believe that the director of the CDC
12 could not have -- or could not, consistent with 265, prohibit
13 the entry of persons through Mexico in any manner, including if
14 an alien attempted to walk across the border and the CDC
15 director was concerned, for example -- just to use a
16 differentiate hypothetical -- about an Ebola outbreak in
17 Mexico, could the CDC director not say all entry is prohibited
18 in any fashion?

19 MR. GELERNT: So, Your Honor, we do not believe that
20 it would authorize expulsions, but what could be barred are
21 entries of third parties. But I think what -- what I would --
22 I want to address Your Honor's question where -- I think
23 getting to the central point is what would happen in that
24 situation is if the individual walked over the border, he could
25 be arrested. CDC could authorize quarantines. There could be

1 potentially criminal penalties and fines, and then he could be
2 expelled pursuant to the immigration laws.

3 We -- we are simply saying that the 265 provision itself
4 does not authorize expulsions and Congress did not intend to do
5 that because it was fixing a very specific problem and it
6 recognized that the immigration laws were there running
7 parallel. And if someone was going to be deported, they would
8 be deported through the mechanism of the immigration laws that
9 provided whatever procedural protections Congress believes were
10 necessary, but that 265 itself would not bar expulsion. So
11 they could bar entry of -- and the government has another
12 provision, 212(f) of The Immigration Act, which does allow the
13 barring of entry, but 265 itself would not allow the
14 expulsions.

15 If the individual insisted on walking across the
16 country, he would be arrested, potentially quarantined, and
17 subject to immigration. So it's not as if the government can't
18 remove them. What -- what 265 did not set up is a parallel
19 deportation process. The government can remove people, but it
20 would be according to the immigration laws.

21 THE COURT: So I understand that is your argument,
22 but I'm trying to understand, first, what power section 265 of
23 Title 42 does confer, and it seems to me that your brief argues
24 that the power is limited to -- because of the use of the term
25 "introduction," that the power is limited to prohibiting third

1 parties from bringing to the United States persons from
2 countries, you know, assuming that there are the -- the
3 appropriate reasons to do so. And my question is would -- if
4 that's right, then wouldn't that mean that the CDC director
5 actually lacks the authority to prohibit persons from entering
6 from another country who aren't being transported by third
7 parties?

8 MR. GELERNT: Yes, Your Honor. And I apologize if I
9 didn't answer that really. That's correct under our broadest
10 theory, that it regulated third parties; that Congress was
11 looking at a very specific problem from Europe with cholera,
12 thought this was the proper fix, and didn't authorize 265 to go
13 beyond third parties. And I -- I -- so that -- that is our
14 argument, Your Honor.

15 And in the legislative history, as we've pointed out,
16 Senator Harris, who was particularly involved in the
17 legislation, one of the co-sponsors, actually made a point of
18 saying there are other acts that deal with, quote/unquote, land
19 crossings. And so what -- what -- the legislative history, I
20 think the text and context shows very clearly, is that it was
21 directed at third parties. And I -- I was simply making the
22 point that the government would not, of course, be unable to
23 deal with someone who walked across the border. There are all
24 sorts of powers.

25 And they can, in fact, use 212(f) as a power to bar

1 entry. I think the reason that the government has not used
2 212(f) in this context is because the immigration laws are very
3 clear that they don't -- even someone with a communicable
4 disease can still apply for asylum, and especially a child.
5 And so they're trying to use this power that's never before
6 been used to bar expulsions throughout history: Spanish flu,
7 meningitis. And the government says it's never been used, but
8 the truth is it has been used. It's just never been -- against
9 persons. It's just never been used for expulsions, and I think
10 ultimately what -- what the government's argument comes down
11 to -- and I think Your Honor put his finger on it, without a
12 question, is the government's saying, well, we must have to
13 have that power because we think it's necessary.

14 And that's, of course, as Your Honor knows, not the way
15 legislation works. I think the *D.C. v. DOL*, D.C. Circuit case,
16 that -- that then Judge Kavanaugh wrote, I think specifically
17 addresses that Congress sometimes picks specific means, and
18 even if people think the statute might need to be updated or
19 need other powers, the courts cannot update a statute or
20 rewrite it. But, again, I do think the government has
21 significant powers with respect to individuals. And with
22 children in particular, Congress has gone out of their way to
23 make clear that you cannot just expel a child summarily.

24 And so what -- what we believe is that the government
25 has not actually offered an interpretation of 265's text,

1 context, structure, or history and that -- their argument
2 reduces to Congress must have given us this power because we
3 think we need it. And, of course, again, that's not the way
4 legislation works. There is very specific evidence that
5 Congress was focusing on third parties in 1893, and the
6 government concedes that when the provision was recodified in
7 1944, it wasn't changed substantively, and, in fact, the
8 wording is virtually identical.

9 But beyond that 265 argument --

10 (Indiscernible simultaneous cross-talk.)

11 THE COURT: Mr. Gelernt --

12 MR. GELERNT: I'm sorry, Your Honor.

13 THE COURT: -- is a different version of it -- or
14 maybe it's the same argument -- but a different argument is
15 that "introduction" is potentially an ambiguous term. We are
16 entitled to some form of deference in interpreting
17 "introduction." Introduction could be the bringing by a third
18 party to the United States, but it could also be something like
19 permitting a person to, I guess, enter society or something
20 like that, to be introduced to. That is what the CDC has
21 interpreted this provision to include, and so this provision
22 and its prohibition on introduction, or the grant of authority
23 to prohibit introduction, includes the grant of authority to
24 prohibit persons from entering society, or something like that.

25 And that, while that may not be the only plausible

1 interpretation of the statute, it is at least a reasonable one
2 as to which the CDC gets some deference. What is your answer
3 to that argument?

4 MR. GELERNT: Yes, Your Honor. So -- so two basic
5 points. The -- the first is that we don't believe that the
6 government gets *Chevron* deference here because there really was
7 no considered interpretation laid out anywhere of the term
8 "introduction" by the agency. Obviously counsel in a brief has
9 tried to do a better job. As this Court knows, ultimately you
10 have to look to what the agency did, and I think that there was
11 a conclusory or nonexistent interpretation. So I think under
12 this Court's decisions -- under D.C. Circuit's decision in *Fox*
13 and other decisions, conclusory statements would not get
14 deference. And so we don't think *Chevron* applies at all.

15 But we also believe -- our second point is even if you
16 were to apply *Chevron*, we don't believe that the statute is
17 ambiguous. And, you know, I take Your Honor's point that
18 "introduction" conceivably could have different meanings. We
19 think the better meaning would be third parties, because it
20 would be too awkward to say you're introducing yourself into
21 the country. And I think the Supreme Court decision we cited
22 using that term bears that out.

23 But I think it goes beyond just the text. If it was
24 just the text, I think it would be a closer case, but I think
25 when you look at the context, all the provisions are dealing

1 with vessels in 1894. The penalties are on vessels. And then
2 you look at the legislative history, and it's very clear that
3 this was not creating implicitly a parallel deportation
4 process. I mean, that would have been a remarkable thing for
5 Congress to do by implication. And it's -- this is laser
6 focused on third parties and ships.

7 So I think when you use all the tools of statutory
8 construction, we don't believe that the government's
9 interpretation is even reasonable. But I don't think the
10 government truthfully has grappled -- you know,
11 respectfully has grappled with all of those tools and really
12 dug into the legislative history. The only point they've made
13 is that the legislation move from just regulating immigration
14 to regulating all persons, including citizens, but, again, that
15 doesn't bear on the distinction between ships, third parties,
16 and nonthird parties. And, in fact, I think it helps our side
17 because it seems highly unlikely that Congress implicitly would
18 authorize the expulsion of citizens.

19 But -- but our central point on the deference is I think
20 Your Honor can look at the IFR and all the orders and can see
21 no actual considered interpretation of the word "introduction."
22 And beyond that, I -- I would note, again, what Judge -- then
23 Judge Kavanaugh said in the *D.C. v. DOL* case; when all of a
24 sudden there's a new interpretation of a statute after decades
25 and decades in that case, 80 years, the Court should be very

1 hesitant to find a new interpretation of a statute that's
2 proper. And in our case, it's well over 80 years. It's 127
3 years.

4 Contrary to the government's suggestion, the government
5 has used section 265, has invoked it. It has never invoked it
6 for expulsions, including the meningitis outbreak in 1929, the
7 Spanish flu. And so now all of a sudden this is a very new
8 interpretation after more than a century without any considered
9 discussions. So at a minimum, I think the agency would have to
10 go back and offer some interpretation in order to get
11 deference.

12 THE COURT: Thank you. I -- I interrupted you. You
13 were, I think, going to move on to another merits-related
14 point.

15 MR. GELERNT: Your Honor, I was -- thank you, Your
16 Honor.

17 I was going to move on to our second argument, which is
18 even if the Court decides that section 265 does authorize
19 expulsions for some people or the Court wants to pretermite that
20 question, that broader question, and just focus on the narrow
21 question of whether people -- children or those seeking asylum
22 can be removed without any procedures based on section 265. We
23 believe the answer is clear; that, you know, as the
24 Supreme Court, this Court has said over and over, the courts
25 needs to look at the entire legal landscape and try to

1 reconcile them. We have Congress enacting the TVPRA and the
2 various asylum statutes recently and continuing to update those
3 statutes and providing very specific protections to children.
4 And Congress then put in very specific instructions when those
5 statutes would not apply and has never once said communicable
6 diseases or public health emergencies override that. And
7 that's, of course, consistent with international law as -- as
8 some of the amicus briefs indeed -- it's not as if Congress was
9 not aware of the problem of communicable diseases. It has been
10 aware of that issue obviously in the immigration context back
11 to the 1890s, and it has always said people with communicable
12 diseases can be removed.

13 But one thing Congress has not allowed is the
14 communicable disease inadmissibility ground to override the
15 protections for children or asylum seekers. And so what we're
16 talking about is simply providing the process to those subset
17 of groups. I don't think the government has offered any real
18 interpretation of those provisions, given the exemptions in
19 those provisions and given that they do not provide an
20 exemption for public health or communicable diseases, that
21 would allow this Court to find that a child is not entitled to
22 those protections that the Congress has afforded for -- for
23 minors.

24 And -- and in terms -- I just want to address the
25 deference point, because our deference point is, to some

1 extent, the same as in the first question, but I think there's
2 an additional point. One point is we don't believe *Chevron*
3 should apply because it's conclusionary. Again, that -- that
4 point remains, but I think also this -- the way where the
5 courts have been very clear, that where there are two statutes
6 that need to be reconciled, that that is a place for the courts
7 to do, especially here where you have the CDC having no
8 expertise about the immigration laws and, conversely, DHS
9 having no expertise about the -- the public health laws; that
10 that is not a place where the courts would defer. And so -- so
11 we do think that Congress has paid specific attention to
12 children, has decided what exemptions there should be for
13 asylum laws, and is not creating one for public health.

14 So unless the Court has questions about that, I would
15 just maybe briefly talk about our arbitrary and capricious
16 claim and then move to irreparable harm, unless -- I don't want
17 to --

18 THE COURT: Yes.

19 MR. GELERNT: Okay. Thank you, Your Honor.

20 THE COURT: Thank you.

21 MR. GELERNT: Our arbitrary and capricious claim, I
22 think, is -- is fairly straightforward. We are not asking the
23 Court to second-guess different determinations by the CDC.
24 What we are simply saying, I think in line with the
25 Supreme Court's most recent decision on this in the DACA case,

1 is that the agency did not consider various factors and, in
2 particular, did not consider various factors about children.
3 That with respect to children, that children have a sponsor to
4 go to, that they are -- they spend very little time in CBP.
5 They have to be transferred within 72 hours out of CBP
6 facilities. That although, as the government points out,
7 children can, of course, get COVID and can spread it, there are
8 differences in the rates and that that's something that the
9 government should have taken into account, as well as just the
10 severe harm to children of sending them back to danger.

11 These are unaccompanied children, and the government
12 does not have an age limit. So this child before you is 16,
13 but the reports are that the children are much younger than 16.
14 And so I think the agency was required to consider the harm,
15 consider the difference in transmission rates, consider the
16 fact that children, unlike adults, have to be transferred out
17 of CBP immediately, within 72 hours, to ORR facilities. They
18 are then not held in congregate settings for too long. They
19 are sent to sponsors.

20 So our -- our point is -- again, is a straightforward
21 one, I think, and most recently reaffirmed by the Supreme Court
22 in DACA, that those things should have been carefully
23 considered with respect to children. Whatever else the agency
24 was going to do, it had an obligation to look at children very
25 specifically.

1 And the government, of course, says, well, the agency
2 doesn't have to look at every possible scenario, but I think --
3 I would be surprised if counsel comes on next and says, well,
4 the government wasn't aware that children come as
5 unaccompanied. I mean, that has been an issue that has been an
6 enormous one in the immigration world. There is -- there's
7 been national litigation for decades over that. The government
8 specifically has provisions about unaccompanied children. Of
9 course, most importantly, Congress has the TVPRA, and so this
10 wasn't some sort of incidental aspect of the issue that the
11 government didn't consider. It was a central part of these
12 expulsions, and yet there is no specific discussion of it in
13 the IFR or any of the three orders.

14 Unless the Court has questions about the arbitrary and
15 capricious claim, I thought I would turn to the irreparable
16 harm, unless the Court wants to leave that for later.

17 THE COURT: No, please. I would like to hear you on
18 irreparable harm.

19 MR. GELERT: Okay. Thank you, Your Honor.

20 So on irreparable harm, we have three basic points. One
21 is, as the Court knows, irreparable harm wouldn't go to the
22 legal questions. If Congress has decided that section 265
23 doesn't permit expulsions or that at least for asylum seekers
24 and children expulsions are prohibited, then that would not be
25 part of the irreparable harm analysis. The irreparable harm --

1 I mean, the harm analysis. The harm goes to right now the
2 irreparable harm prong of the TRO.

3 And on that we have two basic points. One is that this
4 case involves one 16-year-old boy. The government has
5 understandably tried to broaden it and say the Court at this
6 state in this emergency motion should try and determine the
7 balance of irreparable harm to the country as a whole versus
8 all the children who may be -- who may be expelled. And we
9 don't believe that's proper given that the relief we're asking
10 for is only that this Court stay this one boy's removal. And I
11 think on that, the government really hasn't made a claim that
12 this one boy could not stay in the United States until this
13 Court, on an expedited schedule, resolves a summary judgment
14 motion, or however the Court wants to deal with it, whether
15 it's a preliminary injunction or summary judgment.

16 And we, of course, are ready to move at whatever speed
17 the Court and the government wants to move at, but I don't --
18 this boy does not have COVID. He has been kept safely here.
19 He can live with his father. I don't think there really is --
20 and I don't think the government seriously claims -- that
21 there's harm from keeping this one boy here, and that's the
22 only relief we are really requesting.

23 Then -- so because that's the only relief we're
24 requesting, we have not put in affidavits and not made broad
25 arguments about the systemic harms generally and the balance of

1 harms. We would note, just in passing almost, that from the
2 IFR through the final May indefinite order, the government has
3 retreated to some extent and said -- well, you know, they
4 originally said testing takes three to four days. It's not
5 available. The latest order doesn't make that point, of
6 course, because testing is available now and it can be done
7 very quickly.

8 We would also note just broadly looking at children,
9 because they only stay in CBP for 72 hours at most -- and
10 usually it's less than a day or -- or a night -- that they're
11 going to spend less time in CBP if they're transferred to ORR
12 than they would if they have to be put on a plane. What
13 happened to this boy is what's routinely happening, is that the
14 child spends time in CBP, then goes to a hotel where CBP has to
15 guard the child, or at least accompany the child, in the hotel
16 room for up to a week before they can find a plane. So I think
17 when you -- even when you look at it broadly, it's hard to say
18 that the CBP would be suffering harm by sending children to
19 ORR.

20 But, again, I don't want to lose our central point,
21 which is we are asking for very limited relief, and this is
22 just staying this one boy's order, and I do not believe the
23 government can say allowing this boy to go to his father's
24 house or even a limited amount of time in an ORR facility and
25 then be transferred to his father would cause irreparable harm.

1 On -- on the other side of the ledger, this boy is in
2 serious, serious danger if he goes back to Honduras. I don't
3 want to get too deep because we're on a public call. And I
4 know the Court has looked at the sealed affidavit, but he would
5 be in very serious danger. And as a comparator measure, he
6 would be in more danger than the government would be in keeping
7 this one boy here.

8 So unless the Court has further questions, I -- I will
9 stop there.

10 THE COURT: I will -- I have one procedural question,
11 which is if I were to extend the order prohibiting the
12 plaintiff's return or removal, how quickly would you be
13 prepared to file merits summary judgment briefs if I concluded
14 that the -- the right procedural approach here was to, on a
15 fairly -- the ultimate adjudication of this case -- but not
16 have it mooted out by his return, could you -- could you file a
17 motion for summary judgment?

18 MR. GELERNT: Yes, Your Honor. So -- so I want to --
19 we are prepared to do it on any speed the Court -- any schedule
20 the Court would want. And so we don't believe that we should
21 rewrite everything. We will refer to these briefs where
22 necessary and can do it in less than a week, file an opening --
23 opening brief.

24 The one caveat that I would say is that if the Court
25 wants the administrative record before it -- and I assume it

1 probably does -- that we would need time to look at the
2 administrative record to make sure that there are no additional
3 arguments we would want to make or nothing that the Court would
4 want us to address, and also to resolve any disputes if we
5 thought that the administrative record was lacking something or
6 wasn't complete in what we got. But the bottom line is we are
7 prepared to move as quickly as the -- as the Court would want
8 us to do, subject to the government providing the
9 administrative record.

10 THE COURT: Thank you.

11 Why don't we turn then -- thank you for the argument --
12 to the government. Ms. Lin, will you be taking the lead?

13 MS. LIN: Yes, I will.

14 THE COURT: So obviously there are a number of
15 substantive arguments that I would like to get to, but because
16 we were on this topic -- and this is obviously without
17 prejudice to your contending that this is not at all the course
18 I should take, but if I were to conclude that the appropriate
19 procedure here would be to extend the stay or injunction of the
20 removal or return for some period of time while the parties
21 brief summary judgment motions, how quickly could the
22 government, in your view, move and -- and, realistically, how
23 soon from now could we have fully briefed summary judgment
24 motions?

25 MS. LIN: Your Honor, I think that the -- the best

1 information on the speed in which the agency can compile -- the
2 agency can compile the administrative record is something close
3 as possible to July 10th. And -- and part of the reason is
4 also that there are -- there is sensitive information in the
5 administrative record that would need to be carefully vetted,
6 not only among the agencies with equity, and there could also
7 be diplomatic sensitive information. So we would first need to
8 seek a protective order to protect that, but we're still in the
9 process of trying to assess all of the information that was
10 considered. So July 10th will be the outset best possible
11 scenario for us to do it properly but expeditiously.

12 THE COURT: For purposes of the administrative
13 record. And then, thereafter, I assume the government would be
14 prepared to move reasonably quickly on merits briefs?

15 MS. LIN: Yes.

16 THE COURT: Okay. So why shouldn't that be the right
17 course here? I obviously don't have before me the
18 administrative record. There are a number of arguments that
19 have been made that are not particularly dependent on the
20 administrative record, but why not extend the stay of removal
21 or return, or however one wants to phrase it? But the order
22 I've already entered -- until we can on a very expedited basis
23 resolve the merits here?

24 MS. LIN: Your Honor, I think that what it comes down
25 to is this case is really trying to determine a legal question,

1 which is what the section 265 authorizes the CDC to do, and we
2 think that question answers the entire challenge here. And --
3 and, you know, even in the context of an emergency motion, it
4 is clear that you need to have a likelihood of success in order
5 to get the PI or the TRO in this instance.

6 And putting aside the degree of irreparable harm, the
7 Supreme Court since *Winter* has addressed PI motions in the
8 context -- for example, in the context of the Eighth Amendment
9 of lethal injection challenges. And there the Supreme Court
10 says, you know, we balance the likelihood of success. It
11 doesn't matter as to the other factors, because the likelihood
12 of success will be independent.

13 And so here we have a situation where the pure question
14 of law before this Court can be decided based on the Court's
15 interpretation of the language and the available textual --
16 structural, textual, or even legislative history that
17 plaintiff wants to rely on, and all those strong indicators
18 suggest that the CDC has the authority to do what is currently
19 happening to the plaintiff.

20 THE COURT: But can I meaningfully decide the
21 arbitrary and capricious challenge without the administrative
22 record?

23 MS. LIN: Yes, Your Honor, because the CDC order
24 thoroughly considers many factors and many questions relating
25 to the public health. Remember, this is a public health order

1 designed precisely to address a very unique situation of a
2 pandemic. And the -- the APA's arbitrary and capricious
3 standard is highly deferential, and so there is a no basis to
4 say this is somewhat arbitrary given that the Court can fairly
5 discern the path that the agency took to reach its decision and
6 the factual findings of the CDC director considered are all
7 presented in the orders themselves, particularly the first
8 order and -- and as well why subsequently the order need --
9 needed to be extended. So all those considerations are there.

10 And in terms of interpretation of the terms of the
11 statute, which is particularly the phrase introduction of the
12 persons or prohibition of introduction of persons, we -- we
13 only currently have an interim final rule. There is not a
14 rulemaking record in the sense of having received public
15 comments, considered the comments, and then issuing a final
16 rule. So all of the basis the agency is thinking are reflected
17 in the -- in the order itself.

18 THE COURT: So let's focus on the statute then, and I
19 understand the argument, and I also understand that in at least
20 some respects this case presents some relatively pure questions
21 of law. What in the government's view is the power to prohibit
22 the introduction of persons? What does that mean?

23 MS. LIN: Your Honor, our position is that the power
24 to prohibit -- for it to be effective, the power necessarily
25 has to include the physical removal of persons from the

1 United States, even after the person has surreptitiously
2 crossed the border and is apprehended while in process of -- of
3 getting into the interior of the border. And that --

4 (Indiscernible simultaneous cross-talk.)

5 THE COURT: Ms. Lin, does that mean that if in a
6 different hypothetical, but one that I teed up a little bit
7 earlier, if there was an Ebola outbreak in Mexico and it was
8 determined that it was unbelievably contagious, and even more
9 so by -- by matters of degrees than COVID-19, and the CDC was
10 concerned about anyone coming from Mexico to the United States,
11 including nonaliens, including U.S. citizens, and some -- some
12 U.S. citizens -- and the CDC, I take it, in your view, would
13 have the power both to prohibit all entry from Mexico to the
14 United States by anyone and then to effect the return to Mexico
15 of anyone who slipped through, including citizens?

16 MS. LIN: Yes, Your Honor. I mean, obviously right
17 now, the -- the language is broad. It says persons, and that
18 would include both citizens and noncitizens, but -- but the
19 idea about barring the entry of U.S. citizens, I think that it
20 kind of -- the -- the fundamental premise of the plaintiff's
21 argument, it seems to me that they're saying because you
22 necessarily cannot bar the reentry of U.S. citizens, so,
23 therefore, clearly you can't bar anyone. And that's a faulty
24 premise, because, you know, in a case -- in the hypothetical
25 scenario that Your Honor describes, if there is compelling

1 government interest in preventing the entry of U.S. citizens
2 for a short duration during a very serious pandemic or Ebola
3 outbreak of the type you described and the -- and the barring
4 of the entry is done so in a very narrowly tailored way to
5 address a particular public health crisis, then there is no
6 reason to think that that would necessarily be unconstitutional
7 and, therefore, it then impacts how Your Honor interprets the
8 language, which is --

9 (Indiscernible simultaneous cross-talk.)

10 MS. LIN: -- and broad.

11 THE COURT: It seems to me, though, that there's a
12 difference between barring the entry of persons, including U.S.
13 citizens and -- on the one hand and on the other authorizing
14 the removal of persons who have made it into the physical
15 United States. And for your argument to work, for the power
16 for the introduction of persons to include the power to remove
17 or return someone in the plaintiff's situation, I think you
18 have to acknowledge that this would -- that that language would
19 also permit the removal of U.S. citizens who, in my
20 hypothetical, make it into the United States from Mexico in the
21 context of the Ebola outbreak.

22 MS. LIN: Yes. If, Your Honor, the CDC order -- the
23 CDC director determines that -- that such a removal is also
24 required -- remember, the language of section 265 itself is
25 it's broad and unambiguous, but it also recognizes that there

1 would necessarily be regulations that -- that would address
2 particular circumstances. And that is precisely our point;
3 that this is entrusted to the judgment of the public health
4 officials to make that determination because --

5 (Indiscernible simultaneous cross-talk.)

6 THE COURT: But that is a remarkably broad power
7 found in a provision that talks about prohibition of
8 introduction. And so, again, I return to the question of what,
9 in your view, does the power to prohibit the introduction mean
10 exactly?

11 MS. LIN: Your Honor, this -- this -- the term is
12 defined by the CDC in the interim final rule itself, and it
13 lays out what introduction of persons details, and it's in the
14 interim rule final -- final rule 42 C.F.R. 71.40(b)(1). And it
15 says it's to -- to -- it means the movement -- introduction
16 into the United States of persons from a foreign country or
17 place means the movement of a person from a foreign country and
18 to place that -- and to place that person within -- in contact
19 with -- with people within the United States. And so this also
20 then means that it's the removal of such person, is amidst of
21 that movement.

22 And this is what the CDC order interpreted to say that
23 it means that people who are apprehended and who are then
24 brought to the -- the congregate setting would then be returned
25 as soon as possible; that kind of -- using Congress's term

1 prohibition of introduction, because that's why prohibition is
2 there, to stop someone from doing something.

3 And, you know, Your Honor is right that this is a very
4 broad power, but, again, you know, it is -- again, I refer
5 Your Honor to section 265's language itself, is to say that
6 this -- whatever the Surgeon General determined and then, you
7 know, these -- obviously these conditions have to be met. But
8 it also says ". . . in accordance with regulations . . . shall
9 have the power to prohibit . . ." So clearly Congress is not
10 trying to think all possible scenarios in terms of how this
11 would apply in any particular circumstance. That's where the
12 regulation comes in. And, you know, I think we dispute the
13 idea that this section 265 is to address purely a precise
14 analysis that might have been in Congress's mind at the time
15 they enacted 265.

16 So we -- first of all, we think it's simply incorrect to
17 say that this section 265 was enacted to address the specific
18 problem of people coming in on ships, because that's -- that
19 problem was addressed in a different part of section -- of the
20 Act of 1893. It's addressed in section 6, which talks about
21 quarantine, talks about sanitation, talks about all these other
22 things relating to conditions that may present a public health
23 risk if vessels were to dock or to come to the ports of our
24 country. So for section 7, it doesn't say anything about the
25 situation having to do with vessels.

1 So, yes, it is meant to be a very broad power, and, you
2 know, the -- the legislative history we cited shows that it
3 was -- it's the intention -- initial language of -- bars only
4 immigration was amended, was rejected, and ultimately the
5 decision was to say it's going to bar all persons. So that
6 shows that Congress is trying to conceive a situation where
7 there could be a significant outbreak.

8 And -- and, again, as Your Honor is well aware, this --
9 this type of communicable disease doesn't stop at the border.
10 It's not -- it doesn't lend itself to limitations by geographic
11 boundaries. So Congress's intention is to mitigate the public
12 health threat, and so this interpretation is in line and
13 consistent and is plainly contemplated in the statute itself.

14 So if I could just make one more point about the
15 interpretation as to why this sounds so broad. One other thing
16 to -- to note is, you know, the fact that Congress might not
17 have thought about the situation that we're confronting today,
18 this doesn't fully fit that, does not mean that it wouldn't --
19 that the statute doesn't extend to that degree. It's only the
20 statute is plain, that's what controls, and as Your Honor may
21 be aware, the Supreme Court just about a week ago decided the
22 *Bostock* case, and that has to do with Title VII of the
23 Civil Rights Act of 1964, prohibits an employer from firing
24 someone simply for being gay or lesbian or transgender. And so
25 the Supreme Court said that those who adopted the Civil Rights

1 Act might not have participated a world to this particular
2 result, but -- and likely that they weren't thinking about many
3 of the Act's consequences that have become apparent over the
4 years, but the limits on the drafters' imagination supply no
5 reason to ignore as the law demands. And so what we have here
6 is there's law, broad and unambiguous language, and that's what
7 should be given effect to.

8 THE COURT: So don't I need to read this -- and I
9 surely am familiar with *Bostock* and what the court said about
10 language, but don't I have to read this statute, to the extent
11 possible, in harmony with other statutory provisions out there?
12 And it seems to me that there are three aspects of other
13 statutes that are relevant to how one would harmonize this
14 statute with those.

15 The first is that other statutes clearly use the term
16 "removal" or other verbs or -- or subjects that at least more
17 clearly comes to a grant of the power to send someone back,
18 where here that power is being implied from the definition of
19 introduction. That's the first -- first issue.

20 The second is there are provisions in the immigration
21 statutes that deal with communicable -- communicable diseases
22 and quarantines, and I think one has to read this provision in
23 harmony with those.

24 And the third -- and I think this is where the plaintiff
25 spends most of his time on the harmonization question, is one

1 needs to read this provision potentially in light of Congress's
2 special treatment of minors through statutory protection that
3 apply only to them and upon their having entered the country.
4 And so I -- I understand your argument about this provision,
5 but don't I have to ensure that it can be read consistent with
6 other statutory provisions that do have some relevance here?

7 MS. LIN: Yes, Your Honor, and if I may address each
8 of those concerns in turn.

9 On the term -- on the idea that the immigration laws do
10 provide procedures for removal for expulsion or -- the --
11 the -- putting aside the proper terminology, that may be the
12 case, but by interpreting 265 to -- to give it the effect that
13 we urge doesn't mean that the immigration laws, therefore, are
14 rendered ineffective or that they are no longer, you know,
15 applicable. What we have here is that a -- a temporary
16 suspension of application of these immigration procedures to a
17 subset of aliens determined to be posing public health risks.
18 And so they apply across -- those provision apply across the
19 board where the section 265 scope is very limited and very
20 targeted.

21 It is the most rarest of the situation as we have today,
22 a global pandemic, which is unprecedented. So you can -- you
23 can harmonize the two statutory schemes in that way because
24 Congress clearly intended that when there's a public health
25 emergency threatening the American public, that has to take

1 precedent.

2 THE COURT: But I'm not sure you're quite grappling
3 with my question, which is -- and maybe -- I apologize -- I
4 didn't frame it quite clearly enough.

5 It seems to me that the immigration statutes -- well,
6 let me back up for a second. It seems to me that there are at
7 least three relevant terms that we need to define or at least
8 potentially think about defining. One is entry, one is
9 introduction, and one is removal or return. And it's quite
10 clear that one thing Congress did not do in the statute was
11 expressly grant the Surgeon General and the director of the CDC
12 the power to order the return or removal of persons.

13 The question is whether the prohibition on introduction
14 includes the power to remove. Plaintiffs say it doesn't. You
15 say it does. But why is that so? If Congress in the
16 immigration statutes knows how to grant either protections
17 around or authority regarding removal but did not do so at
18 least expressly here, why don't we infer from that that
19 Congress didn't intend to grant the Surgeon General or director
20 of the CDC the power to remove?

21 MS. LIN: So, Your Honor, the term "introduction"
22 kind of -- kind of -- if I -- or should ride on how we
23 determine what return means. But, yeah, Congress didn't use
24 the word "removal," but it's also not doing that in
25 section 265. Remember, the government's position and the

1 interpretation is this is -- only applies to those who are
2 still in the midst of moving into the United States, just
3 crossed the border, and they're near the border. We're not
4 talking about the situation that plaintiff is positing, which
5 is a situation where someone who's already in the United States
6 was no longer being introduced, and so this you can see from
7 the cases that the plaintiff relies on. *Valentine v.*
8 *United States* case that they say we failed to discuss in our
9 opposition brief, it involved the extradition -- extradition --
10 sorry -- extradition of native-born U.S. citizens who are
11 charged with crimes in foreign crimes, or in *Padilla v.*
12 *Kentucky*, we're talking about a lawful permanent resident who
13 has lived in the United States for 40 years and was being
14 deported. We're clearly not talking about those kinds of
15 situations.

16 So to say that it's because this is akin to, you know,
17 perhaps ex- -- extradition or the type of deportation due to
18 criminal convictions, that's not -- that's not what we're
19 saying, and that's not -- how the 265 should be interpreted
20 anyway.

21 THE COURT: And a year ago, if -- if the plaintiff
22 had been apprehended as he was, he would have been placed in
23 so-called removal proceedings; correct?

24 MS. LIN: Yes, I believe so.

25 THE COURT: So Congress at least would have thought

1 that -- that even when he was apprehended, you know, very close
2 to the border and before entering society in the sense that you
3 discuss, Congress would have described the proceedings into
4 which he would have been placed as removal proceedings even at
5 that very, very, very early stage of his entry. Why doesn't
6 that suggest that what is happening here is also a removal or
7 would also be a removal?

8 MS. LIN: Because the Public Health -- the Public
9 Health Service Act provisions are not thinking in the framework
10 of immigration. So it's not using terminologies as they would
11 in an immigration context. It's talking about what the
12 government is authorized to do, the chief public health
13 official is authorized to do in the face of a pandemic such as
14 this, and using the word prohibiting -- shall have the power to
15 prohibit the introduction, for that to have meaning, it has to
16 encompass a scenario that we're talking about here because,
17 again, Congress was clear --

18 (Indiscernible simultaneous cross-talk.)

19 THE COURT: Well, you just said it has to encompass.
20 Why can't this provision mean that the director of the CDC or
21 the Surgeon General can prohibit anyone from entering Mexico --
22 entering from Mexico?

23 MS. LIN: It certainly can do that and it does do
24 that, but as Your Honor must realize -- right? -- because a lot
25 of times covered aliens will present themselves to that -- at

1 the ports of entry or the border patrol stations. And so
2 they're going to be people who are apprehended near the border.
3 And so this is the kind of situation that Congress intended
4 that, you know, in the future, you will issue regulations to
5 govern that kind of scenario and, so again, because the disease
6 doesn't stop at the border. So -- so it's -- it doesn't -- it
7 doesn't mean that the power stops at the border.

8 And so here in formulating the regulations, the CDC
9 considers the risk of the disease can be traveling into the
10 United States through travelers, and so that was something that
11 underlies the concept that when you're -- when you have the
12 power to prohibit, it necessarily includes for those who slip
13 through the border even for -- for -- for a mile or less, you
14 know, or anywhere has to be effective in order to achieve the
15 purpose of the statute, which is to stop the spread of the
16 disease.

17 So, again, you know, there is significant discussion by
18 the CDC director talking about that because these kinds of
19 aliens, these kinds of covered aliens, present the same risk as
20 those who present themselves at the border because they're all
21 held at the congregate setting. So -- so it is certainly --
22 it's not entirely directed by the plain language. It is
23 certainly a reasonable interpretation as authorized by the
24 statute for the CDC to do.

25 THE COURT: Can you -- can you address the two other

1 ways in which -- my question indicated the statute needs to be
2 harmonized with others, and one is, you know, obviously the --
3 the ways in which the immigration statutes deal with
4 communicable diseases and quarantine issues, and then the
5 second is the special protections that are granted in the
6 immigrations statutes to minors?

7 MS. LIN: Sure, Your Honor. So I was moving on. So
8 on the question about the health -- health-related grounds for
9 inadmissibility, so that certainly is there and they -- in
10 fact, they've been there since the plaintiffs said even before
11 the enactment of the predecessor statute section 265. And so
12 they -- so just like their existence cannot mean that
13 Congress -- that Congress didn't also intend to authorize the
14 CDC or the Secretary to address a situation of a pandemic.

15 Again, we're not saying that these provisions, the
16 health-related grounds or inadmissibility, are -- are
17 inapplicable. All we're saying is it's trying to address an
18 entirely different situation. They're trying to address the
19 individual circumstances of the people who are seeking
20 admission to the United States. So if you look at the
21 provisions, for example, talking about, you know, this is --
22 referring to 8 U.S.C. 1222, it says for purposes of determining
23 whether an alien is admissible, it can detain the alien for
24 observation and an examination for a sufficient amount of time
25 to determine whether he belongs in an inadmissible class. And

1 the -- having a communicable diseases is an inadmissible ground
2 for -- is the ground that an alien is not admitted. So that
3 process, you know, firmly -- would work in the normal ordinary
4 case when we're not facing a public health crisis. So that is
5 not more specific in any particular -- it's not -- any
6 particular way, because it applies across the board to all
7 aliens who present themselves to try to enter the
8 United States.

9 So, again, the -- the rule of the statutory construction
10 of the specific versus general would -- would -- should lend
11 support to the interpretation that 265 should override
12 temporarily and, to a limited extent, to the covered aliens
13 that are addressed by the CDC order. So, yes, in the sense
14 that the -- the -- these precise provisions aren't applicable
15 in that short duration, but that, by no means, suggests that
16 265 should be rendered a nullity because -- which is kind of
17 what the plaintiff is proposing here.

18 THE COURT: All right.

19 MS. LIN: Does that answer your questions?

20 THE COURT: Why isn't their reading not rendering 265
21 a nullity but authorizes the CDC to prohibit, in my view,
22 perhaps the entry of people from Mexico, notwithstanding all
23 other substantive immigration laws or orders, perhaps to
24 include U.S. citizens, so it could have true teeth, but to
25 harmonize that power, or at least the statute with other

1 immigration statutes, is to say but there are other statutes
2 that deal with the treatment of persons once they are on U.S.
3 soil, generally and specifically minors, and that saying the --
4 the CDC still has the power to basically shut the border with a
5 country in the context of a true communicable disease concern
6 is not to read no power for the CDC but is to simply say
7 that -- but that once the person is in the United States, there
8 are all these other statutes that apply. And nothing in 265,
9 at least by its terms, includes language like notwithstanding
10 any other law, and there's nothing at least expressly in 265
11 saying that 265 takes precedent over those other statutory
12 protections.

13 MS. LIN: Your Honor, I think that the language --
14 the questions that I answered is -- is answered by 265 itself;
15 right? That it doesn't draw a line at the border. Congress
16 could have, but Congress didn't draw the line at the border.
17 And, again, for there to be power to prohibit the -- the
18 scenario Your Honor describes is -- will present the kind of
19 public health risk that the CDC order is designed to address.
20 Because we're talking about people who then would seek entry or
21 cross the border illegally between ports of entries and those
22 are taken into congregate settings and, therefore, present the
23 kind of public health concerns that the CDC director is trying
24 to avoid.

25 So, again, because the statute doesn't draw the line at

1 the border and is an invisible line in that sense -- so we have
2 to look what is the power that is given as opposed to drawing
3 an arbitrary line that Congress itself doesn't even draw, and,
4 in fact, Congress must have known that, you know, diseases
5 don't stop at the nation's borders. So I think that the fair
6 interpretation and the correct interpretation is not to then
7 arbitrarily set a line to the power of the 265 that Congress
8 has given the CDC to enforce.

9 THE COURT: Thank you.

10 Do you want to turn to the arbitrary and capricious
11 argument and then address irreparable harm? And then -- and
12 then I think we'll turn back to the plaintiffs for rebuttal --
13 or plaintiff for rebuttal.

14 MS. LIN: Your Honor, I would like to just address --
15 I'm sorry. I didn't touch on the third question that you
16 actually had about --

17 THE COURT: Oh.

18 MS. LIN: -- children in particular and why there was
19 no carve out for children. And I think that this is -- you
20 know, just going back to the idea that this is a public health
21 order designed to address a public health emergency. So we
22 have a situation where the covered alien includes adults and
23 children, and the consideration that the CDC director had was
24 that who was presenting public health risk and who are the ones
25 that need to be -- whose -- whose introduction need to be

1 prohibited.

2 And so it's in that context that the children and adults
3 are treated alike. Because what -- from the public health
4 prospective, the CDC director's view is that this is -- this
5 collective group is a group that's presenting a risk.

6 So if you look at the covered alien groups, they're not
7 homogeneous. They -- you can probably put them in various
8 different kinds of categories, but that's not the public health
9 consideration before the CDC. So, of course, the CDC director
10 was aware of the impact on covered aliens, and that would
11 include both adults and children and -- and particularly about
12 their -- their right to pursue procedures under the immigration
13 laws. But he drew the line as to those who he determined to
14 present the serious health risk, and he's, again --
15 Your Honor -- as Your Honor's aware, he's the nation's top
16 official on how to best protect the public, and, you know, just
17 as Your Honor has recognized and Chief Justice Roberts has
18 recognized, that the situation on the ground is rapidly
19 changing. And this is -- this is -- the public officials are
20 trying to actively shape their responses to changing facts.
21 And this is, you know, again, the first pandemic that the
22 United States has faced since the early -- early 20th century.
23 So -- so all these need to be taken into account in
24 assessing -- well, maybe the order should have been carved this
25 way or tweaked this other way. So that -- it's a kind of

1 public health determination that we urge the Court not to
2 engage in.

3 THE COURT: Thank you.

4 MS. LIN: So I guess, you know, moving on to the
5 arbitrary and capricious point, I kind of -- or the preview,
6 which is these arguments that I've just said, you know, apply
7 equally to the arbitrary and capricious discussion, but, again,
8 the standard for reviewing agency action under the arbitrary
9 and capricious standard is highly deferential and is very
10 narrow, and the Court -- the Court's review is very limited to
11 see where the CDC director articulated reasons that justifies
12 his actions in a way that even if this Court does not agree
13 with the CDC director's determination.

14 So there are four central points that underlie the CDC
15 director's assessment, which is that there are just practical
16 constraints related to the physical structure and operation of
17 the CBP facilities at or near the border, and those are, at
18 least in the short term, insurmount- -- insurmountable and
19 practical problems that must be taken into account for -- for
20 the -- the public health measure to be effective.

21 And also this is a disease that is highly contagious.
22 There are no vaccines. There are no widely spread
23 therapeutics. And -- and because of the nature of that -- this
24 particular disease, that causes the physical structures and
25 operations to be -- key facilities to be even more vulnerable

1 to -- to be incub- -- incubators of diseases.

2 And the third is the consideration of the public health
3 care resources that we have at the -- near the border region,
4 you know, states. The CDC director determined that the states
5 along the southern border have some of the lowest numbers of
6 hospital beds per hundred thousand people. And, you know,
7 three of those states -- I think Arizona, California, and
8 Texas -- they have the largest numbers of residents living in
9 primary care shortage areas. And so that is another
10 significant consideration of having an influx of people who may
11 need to seek health care, could potentially severely affect the
12 resources available for the domestic population.

13 And, you know, there are also significant considerations
14 about potentially infecting DHS personnel who have very
15 important functions they have to perform at the border. It's
16 not just immigration functions. They also have law enforcement
17 functions and many other things to make sure that the people
18 crossing borders and -- and, you know, supplies crossing
19 borders are moving smoothly. So all those very important
20 compelling government considerations underlie the CDC
21 director's decision.

22 And, you know, this is not something that they do so
23 just as a preventative measure in -- in that way, because both
24 Mexico and Canada are severely impacted by COVID-19. And
25 especially recently Mexico has a huge spike in the number of

1 cases. So these are serious and considerable harms that the
2 United States could be facing if there's free flow of people.
3 And, in fact, you know, as we lay out in briefs, the -- the
4 countries themselves -- the three countries themselves have
5 closed the border to travel. So, yes, all of this seems like
6 very drastic measures, but we are -- but these are
7 extraordinary times, and the measures have to meet -- measure up
8 to what is necessary to meet the -- the crisis that's being
9 presented. And the CDC director did so. And so, again, given
10 the deference that he's entitled both as recognized by the
11 Supreme Court and this Court about the importance of the
12 scientific basis of the public official's determination, all
13 those determinations are entitled to strong deference even
14 beyond just the typical, you know, APA arbitrary and capricious
15 review.

16 THE COURT: Thank you. Do you want to briefly
17 address the balance of harms, Ms. Lin?

18 MS. LIN: Yes. So the balance of harms here, again,
19 as I mentioned earlier, that the likelihood of success on the
20 merits should be determinative of the balance of harm question
21 because, you know, again, as I -- I don't -- I sound like a
22 broken record, but -- but here the harm that we're assessing is
23 the public health measure that has been determined to be
24 necessary by the top health -- public health official, and
25 he -- he determined that this -- his order is in the public

1 interest.

2 And so there is every government interest and public
3 interest in ensuring that his order is implemented. And, in
4 fact, the -- the -- it's well recognized that any time the
5 government is enjoined by the court from effectuating the law,
6 it suffers the form of irreparable injury. So this is
7 particularly the case here given the nature of the CDC order
8 before this Court.

9 And so, you know, the concern, of course, is that the
10 efficacy of the order will be compromised if we start chipping
11 away looking at each and every individual, whether, perhaps,
12 this person should be accepted and that person should be
13 accepted. And that's not the premise, and that's not how the
14 CDC order can be effected. So for those reasons, we think that
15 the balance of equities tips against issuing an injunction.

16 THE COURT: Thank you very much, Ms. Lin.

17 Mr. Gelernt, would you like, I think, a short rebuttal?

18 MR. GELERNT: Thank you, Your Honor.

19 Just a couple of very brief points. It sounds like the
20 government would -- is saying the outer limit they need to get
21 the administrative record is July 10th, and I want to
22 reemphasize that we can be prepared to move very quickly once
23 we get the record in whatever amount of days the Court feels is
24 appropriate. Certainly a week or less is fine with us.

25 Again, I want to just reemphasis on the irreparable

1 harm, we are only talking about this one boy so that the Court
2 can issue a considered summary judgment decision, and then if
3 either side wants to appeal that, it's a full decision.

4 The third point I would just make is on the other
5 countries. I think we have put in evidence -- and I think the
6 Court can find evidence from UNHCR or other places, that asylum
7 seekers and children are not being turned way by other
8 countries. Canada has expressly exempted unaccompanied
9 children. So that, I think, is correct.

10 And, you know, again, on the children's point,
11 Your Honor, Congress has specifically said a child who shows up
12 at the border needs to be placed in removal proceedings. And
13 whatever the government wants to call that expulsion, whatever,
14 it's clear they're being sent back to their -- their home
15 country like removal, and Congress has said whether they're
16 inside the country, right at the border, it doesn't matter.
17 These protections apply. And I don't think the government
18 seriously contests that.

19 And so -- and our final point is just that the
20 government's position would suggest a very serious delegation
21 of power to an agency by implication, and that's in -- in
22 contrast to how the -- that Congress has always treated
23 removal, expressly stating it, and that's specifically tied to
24 children and asylum seekers.

25 So unless the Court has further questions, I would -- I

1 would leave it at that.

2 THE COURT: Thank you. Ms. Lin, anything you would
3 like to add?

4 MS. LIN: No, Your Honor.

5 THE COURT: Thank you. So when we last convened and
6 we discussed the possibility of a briefing schedule and the
7 government's agreement not to return or remove the plaintiff
8 but for 11:59 p.m. today, I indicated that I would likely to
9 rule on the motion orally, I think in part, because of the
10 government's concern this move relatively quickly. And so,
11 whereas in the normal course I might have written an opinion, I
12 am, in fact, going to do my best to rule orally here.

13 And in particular, I am going to extend the order
14 staying or enjoining the return of plaintiff to his home
15 country or his removal from the United States until I resolve
16 what I hope to be expedited summary judgment motions that --
17 that I intend to have briefed very quickly, but as to which in
18 the first instance, I'm going to have the parties meet and
19 confer for purposes of proposing a schedule, both for their
20 submission and then for their oral argument.

21 So that is the order that I will enter today. So to be
22 clear, the plaintiff shall not be returned to his home country
23 or removed from the United States unless and until I resolve
24 the case on the merits.

25 As to the procedure for doing so, I'm going to order the

1 parties to meet and confer and propose to me either joint --
2 jointly a schedule or their own view for the schedule for the
3 submission of summary judgment briefs and oral argument on
4 those motions, taking into account, of course, the
5 representations by the government about the administrative
6 record.

7 Now as to the basis of the extension of the stay of the
8 prior order, it is true course that a party seeking preliminary
9 injunction or stay must demonstrate likelihood of success on
10 the merits, likely irreparable harm in the absence of
11 preliminary relief, a balance of the equities in its favor, and
12 in accord with the public interest. Many cases say that,
13 including the *League of Women Voters of the United States v.*
14 *Newby*, 838 F.3d 1 at 6, D.C. Circuit (2016).

15 Plaintiff is a 16-year-old boy from Honduras whose
16 father is located in the United States and has a pending asylum
17 case. Plaintiff was apprehended on June 4th, approximately
18 1 mile from the Texas-Mexico border after apparently having
19 crossed the border without presenting himself to U.S.
20 officials. There's no indication that plaintiff has COVID-19
21 or any symptoms.

22 It is undisputed that if plaintiff had been apprehended
23 a year ago, he would have been entitled to various protections
24 applicable to minors in his circumstances. Among other things,
25 the Trafficking Victims Protection Reauthorization Act created

1 safeguards related to the care, custody, and removal
2 proceedings of unaccompanied children and confirmed ORR's
3 responsibility to ensure their care. Children from countries
4 other than Canada and Mexico must be transferred to ORR custody
5 within 72 hours of apprehension absent exceptional
6 circumstances. ORR's responsible for housing the children and
7 properly placing them in the least restrictive setting. ORR
8 does not operate its own housing facilities but, instead,
9 contracts with providers.

10 Further, TVPRA includes safeguards related to removal
11 proceedings, including full removal proceedings before an
12 immigration judge with the opportunity for administrative
13 appeal. Those no fast-track removal process and unaccompanied
14 children are also entitled to access to counsel and a child
15 advocate. The parties have -- the plaintiff has briefed other
16 protections that likely would have -- would have applied to
17 plaintiff here.

18 Defendants argue, however, that these protections are
19 inapplicable to plaintiff because an order from the Center of
20 Disease Control regarding COVID-19, which is derived from
21 statutory authority contained in 42 U.S. Code § 265, permits
22 the return of individuals in circumstances similar to the ones
23 that the plaintiff is in and to include plaintiff.

24 In my view, the plaintiff is likely to succeed on the
25 question of whether 42 U.S.C. 265 grants the director of the

1 CDC the power the government articulates here for three related
2 reasons. The first is that the statute authorizes the director
3 of the CDC to prohibit the introduction of persons and property
4 by its plain terms. There's a serious question about whether
5 that power includes the power also to remove or exclude persons
6 who are already present in the United States. There are other
7 provisions, obviously, in the immigration statutes that
8 reference the power to return or to remove. The fact that
9 Congress did not use those terms here, I think, is -- suggests
10 at a minimum that the power to remove is not granted by section
11 265.

12 Even if the power to remove were read by section 265,
13 the plaintiff has likelihood of success because the provision,
14 in the Court's view, should be harmonized, to the maximum
15 extent possible, with immigration statutes, including those
16 already referenced that grant special protections to minors and
17 also those immigration statutes that deal with communicable
18 diseases and quarantines.

19 Because the Court concludes that the plaintiff has a
20 likelihood of success on whether -- I apologize. The Court, in
21 addition, does not believe that the CDC director is likely
22 entitled to *Chevron* deference; whereas, here the provision at
23 issue, 42 U.S. Code 265, needs to also be read in light of
24 statutes that the CDC director quite plainly has no special
25 expertise regarding, and also whereas, here the order does very

1 little by way of an analysis of what exactly the power to
2 prohibit the introduction of persons and property means.

3 Having concluded that the plaintiff is likely to succeed
4 on the argument that the CDC director does not have this power
5 under 42 U.S.C. 265, the Court need not reach the question of
6 whether the CDC's order is otherwise arbitrary and capricious.
7 Although the Court does find that the government's arguments
8 regarding the current pandemic steps that would be appropriate
9 to ensure the -- the reduced communication of the disease and
10 similar questions are well founded and if the Court were to
11 reach the arbitrary and capricious question, the Court would
12 likely conclude that the order is not arbitrary and capricious.
13 But for the reasons stated, the Court need not reach that
14 question.

15 As to the balance of harms, the plaintiff has submitted
16 under seal a declaration describing the possible harms that
17 would result from plaintiff's return to Honduras. It is
18 certainly the case that plaintiff has not established that
19 those harms are certain to occur, but there is at a minimum the
20 risk that those harms, which are specified in some detail,
21 could occur. And so the Court concludes that the plaintiff has
22 established -- the plaintiff has established the -- that he is
23 likely to suffer irreparable harm in the absence of an order
24 here.

25 On the other side of the ledger, as the parties note,

1 the third and fourth factors for preliminary injunctive relief
2 when the government is the defendant merge, and while there is,
3 of course, a general concern about the transmission of COVID-19
4 that the Court, of course, recognizes, as noted earlier, this
5 is a -- and as the plaintiff has stressed, this is a single
6 plaintiff case where the plaintiff has, so far as the Court is
7 aware -- there appears to be no evidence to the contrary. The
8 plaintiff has -- does not have COVID-19 and has no symptoms of
9 COVID-19 and at this point was apprehended well more than 15
10 days ago. So to the extent that he may have had COVID-19, any
11 potential harm, it seems to the Court, would have occurred
12 already from his presence in the United States. And at least
13 that kind of harm would not be remedied by his return; that is,
14 to say, the transmission by him of COVID-19.

15 And, more generally, while the Court, of course,
16 understands that the government has an interest in
17 administering in the immigration context the system and the
18 rules relevant to reducing transmission of COVID-19, the Court
19 concludes that in the context of this matter, that the balance
20 of harms tips in the plaintiff's favor in light of the showing
21 he has made under seal of the possibility of harm to him upon
22 return, balanced against the fairly reduced or, if any, showing
23 of harm by the government from his continued nonremoval.

24 Having said all of that, the Court does not intend for
25 this order to extend indefinitely. I do believe that the most

1 appropriate procedural mechanism here is to, for the reasons
2 stated, keep the plaintiff in the United States -- or at least
3 not to have him removed to Honduras or Mexico -- but to resolve
4 fully and finally this case on the merits on an expedited basis
5 so that he can either be removed, as the government argues, or
6 can continue to stay in the United States, as plaintiff will,
7 of course, urge.

8 So with that, I intend to get an order out today
9 delineating just the basics of the order. That is to say, that
10 plaintiff is -- shall not be returned to his home country or
11 removed from the United States until resolution of this case on
12 the merits and ordering the parties to meet and confer and
13 propose summary judgment briefing.

14 But do the parties have questions about my rulings,
15 which, of course, I'm doing as quickly as possible in part
16 because I believe that was at least implied by the government's
17 consent to not remove the plaintiff before today. But if there
18 are any ambiguities or questions the parties would like to ask,
19 please do so.

20 I'll start with plaintiff's counsel, Mr. Gelernt.

21 MR. GELERNT: Nothing from us, Your Honor.

22 THE COURT: Ms. Lin.

23 MS. LIN: Nothing from the government, Your Honor.

24 THE COURT: Okay. So you will see hopefully an order
25 from me today, and -- and, again, I will stress that I would

1 like the merits briefing to move quickly. Obviously we have to
2 wait on the administrative record, to some extent, but I hope
3 to receive from the parties in relatively quick fashion the --
4 either the joint proposal or the competing proposals for
5 further briefing schedule. So thank you all. Have a nice rest
6 of your day.

7 (The proceedings concluded at 11:38 a.m.)

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Nancy J. Meyer, Registered Diplomate Reporter,
Certified Realtime Reporter, do hereby certify that the above
and foregoing constitutes a true and accurate transcript of my
stenograph notes and is a full, true, and complete transcript
of the proceedings to the best of my ability.

Dated this 24th day of June, 2020.

/s/ Nancy J. Meyer

Nancy J. Meyer

Official Court Reporter

Registered Diplomate Reporter

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