



variants of the COVID-19 virus, there remains no valid public health basis for expelling immigrant families.

**Highly Effective, Widely Available Vaccines Protect Against All Known Variants of the COVID-19 Virus and Reduce the Risk of Transmission in the United States.**

6. In the United States, COVID-19 vaccines are now widely available and accessible to all individuals over the age of 12, at no cost to the recipient. Vaccines are available on demand in convenient locations, including local pharmacies.
7. As of August 10, 2021, 71% of adults in the United States have received at least one COVID-19 vaccination shot, exceeding President Biden's national goal.<sup>2</sup> Vaccination rates are higher among older, more vulnerable demographics, with more than 90% of adults 65 or older having received at least one dose; over 80% of adults 65 or older are fully vaccinated.<sup>3</sup>
8. Overall, as of August 10, 2021, more than 195,000,000 people in the United States (more than 58% of total population) have received at least one dose of the COVID-19 vaccine, and more than 166,000,000 are fully vaccinated (more than 50% of total population).<sup>4</sup> With respect to those individuals who are vaccine-eligible (people ages 12 and up), 68.9% of that population has received at least one dose and 58.8% is fully vaccinated.
9. Although the CDC Order claims that "vaccination uptake has plateaued," CDC Order at 10, the CDC's own data show that the daily administration of first doses has more than doubled over the last month (seven-day moving average increased from 218,696 daily doses to 438,461 daily doses between July 7 and August 7, 2021).<sup>5</sup>
10. The widespread availability of vaccines has no doubt changed the course of the COVID-19 pandemic. As shown below, the number of new daily cases, hospitalizations, and deaths from COVID-19 have fallen drastically in the United States as vaccination numbers have increased. Even as restrictions have been lifted, cases, hospitalizations, and deaths are now a fraction of their peak.

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<sup>2</sup> CDC, *COVID-19 Vaccinations in the United States* (last updated Aug. 10, 2021), <https://covid.cdc.gov/covid-data-tracker/#vaccinations>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> CDC, *Trends in Number of COVID-19 Vaccinations in the US* (last updated Aug. 10, 2021), [https://covid.cdc.gov/covid-data-tracker/#vaccination-trends\\_vacctrends-onedose-daily](https://covid.cdc.gov/covid-data-tracker/#vaccination-trends_vacctrends-onedose-daily).

Daily Trends in Number of COVID-19 Cases in the United States Reported to CDC

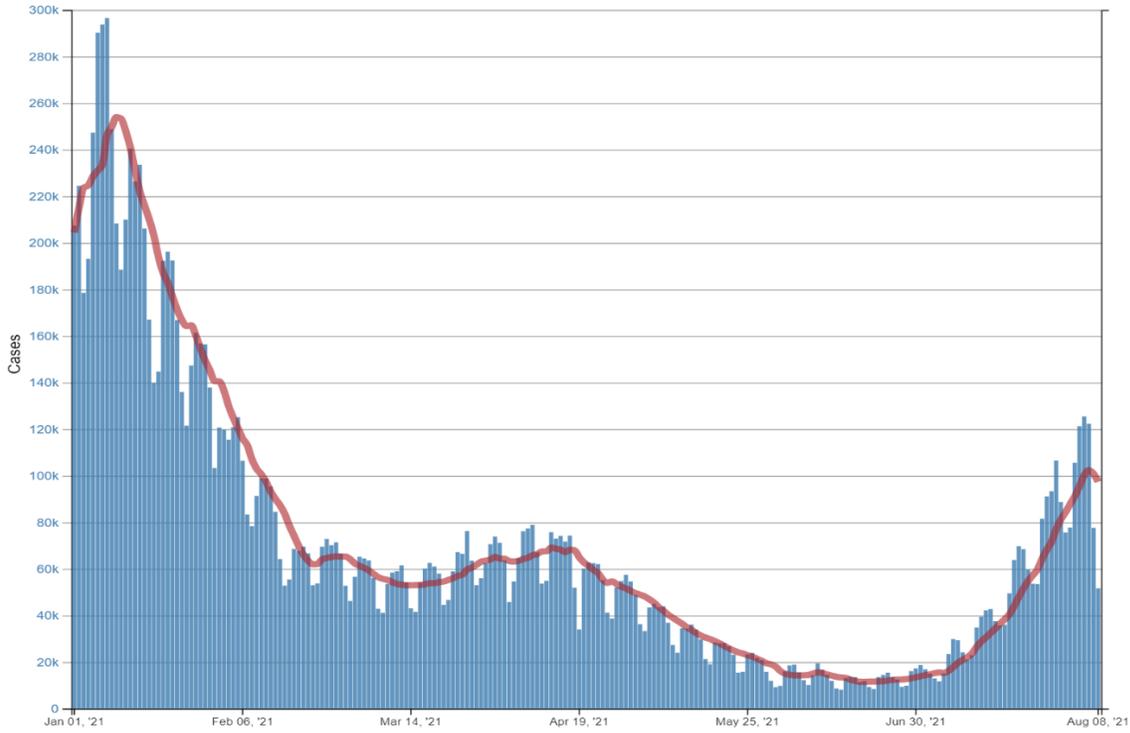


Figure 1 - Source: CDC, Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC (last visited Aug. 10, 2021), [https://covid.cdc.gov/covid-data-tracker/#trends\\_dailytrendscases](https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases).

### Prevalent Hospitalizations of Patients with Confirmed COVID-19, United States August 01, 2020 – August 08, 2021

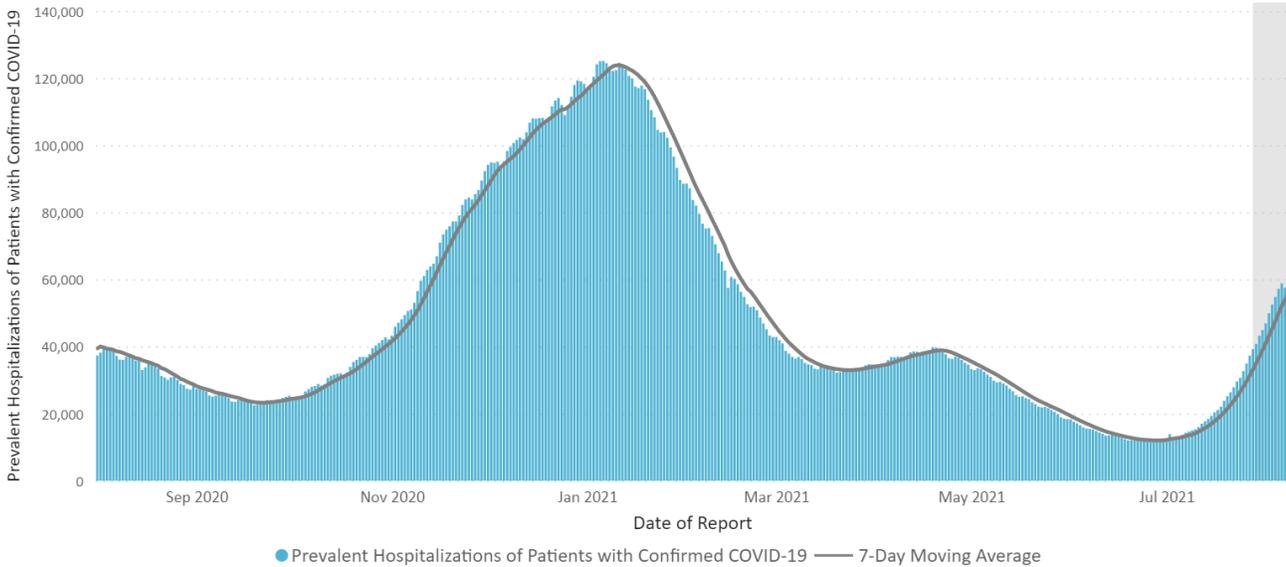


Figure 2 - Source: CDC, Prevalent Hospitalizations of Patients with Confirmed COVID-19, United States, August 01, 2020 – August 08, 2021 (last visited Aug. 10, 2021), <https://covid.cdc.gov/covid-data-tracker/#hospitalizations>.

Daily Trends in Number of COVID-19 Deaths in the United States Reported to CDC and Cumulative Count of Total Doses Administered.

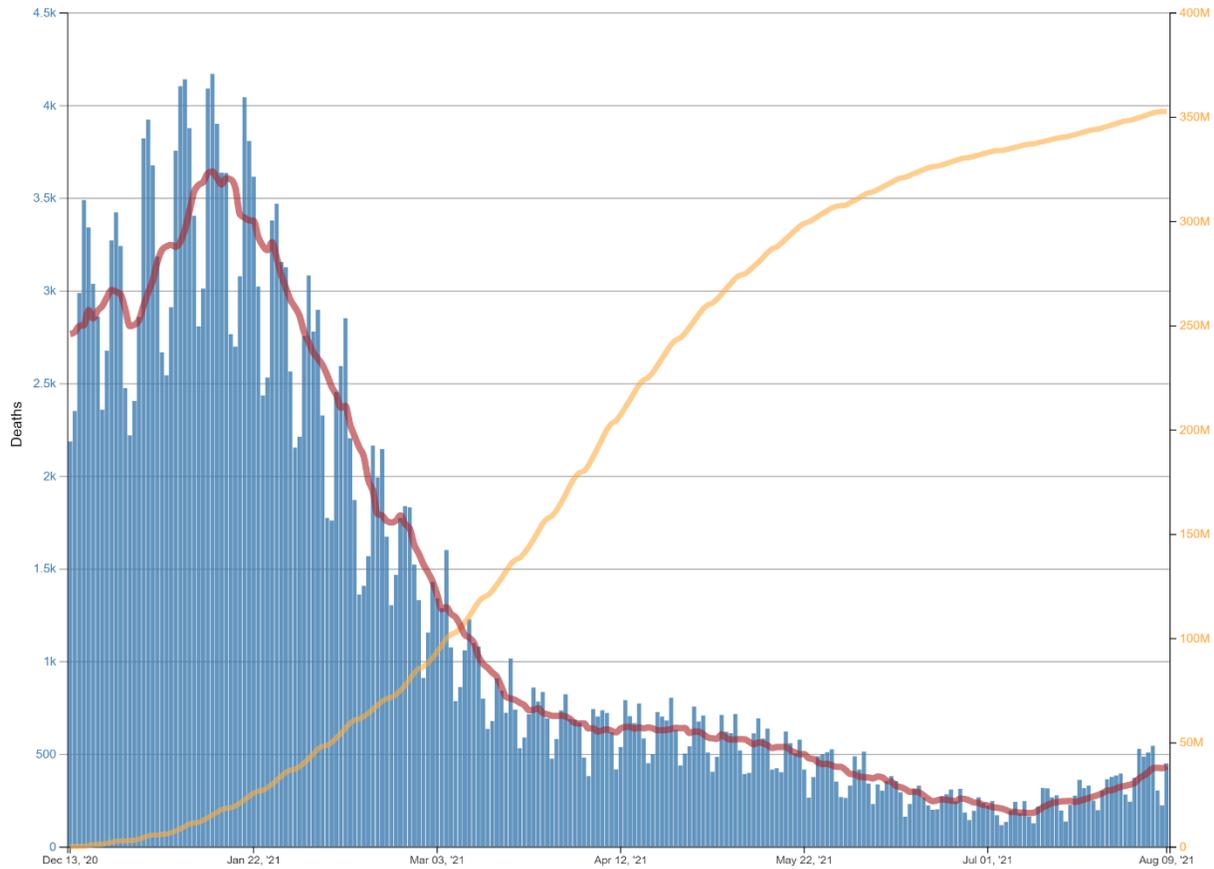


Figure 3 - Daily Number of COVID-19 Deaths vs. Total Vaccine Doses Administered. Source: CDC, Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory (last visited Aug. 10, 2021), [https://covid.cdc.gov/covid-data-tracker/#trends\\_dailytrendscases](https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases).

11. Since vaccines became widely available in February and March 2021, the number of individuals who die from or are hospitalized due to COVID has dropped significantly. Figure 3, above, shows the inverse relationship between COVID-19 deaths and administered vaccine doses.
12. According to the CDC, studies show that all vaccines authorized for use in the United States—Pfizer-BioNTech, Moderna, and Johnson & Johnson—are effective against all known variants, including the Delta variant. CDC, *About Variants of the Virus that Causes COVID-19* (Aug. 6, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant.html>.
13. Individuals who are vaccinated against COVID-19 are far less likely to become infected, to require hospitalization, and to transmit the virus to others. Individuals receive significant protection even after one dose of a two-dose vaccine. Vaccination produces better protection from infection and illness than surviving a naturally occurring case of

COVID-19 illness. If fully vaccinated people become infected with COVID-19 (though still rare), they are less likely to have symptoms or to transmit the virus to others.

14. The vaccines commonly used in North America are very effective at preventing illness, hospitalization and death from all known forms of the virus, including the Delta variant that has become the dominant form.
15. While so-called “breakthrough” infections are possible in vaccinated individuals, vaccinated individuals remain unlikely to develop a symptomatic illness and only very rarely will they become seriously ill or require hospitalization even if infected.
16. According to CDC data, less than 0.001% of vaccinated individuals have died from COVID-19.<sup>6</sup> Unvaccinated individuals account for more than 99% of recent COVID-19 deaths.<sup>7</sup>
17. According to a survey of 50 hospitals around the country, unvaccinated individuals make up the overwhelming majority (nearly 95%) of COVID-19 hospitalizations and deaths.<sup>8</sup>
18. There is some evidence that individuals with breakthrough infections from the Delta variant can carry the virus and potentially transmit infection to others, but according to the CDC, mitigation methods such as masking, social distancing, and proper building ventilation are effective ways of preventing transmission. *See, e.g.*, CDC Order at 7, 9, 13.
19. Apart from vaccinations, an additional 10 to 15% of the U.S. population has likely recovered from a prior COVID-19 infection.<sup>9</sup> Although prior infection confers less protection than a vaccination, studies show that individuals who have recovered from COVID-19 are unlikely to become infected again, and such individuals tend to develop milder symptoms even if re-infected.<sup>10</sup>

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<sup>6</sup> CDC, *COVID-19 Vaccine Breakthrough Case Investigation and Reporting* (last updated Aug. 5, 2021), <https://www.cdc.gov/vaccines/covid-19/health-departments/breakthrough-cases.html>.

<sup>7</sup> NPR, *U.S. COVID Deaths Are Rising Again. Experts Call It A ‘Pandemic Of The Unvaccinated’* (July 16, 2021), <https://www.npr.org/2021/07/16/1017002907/u-s-covid-deaths-are-rising-again-experts-call-it-a-pandemic-of-the-unvaccinated>.

<sup>8</sup> ABC News, *Vast majority of ICU patients with COVID-19 are unvaccinated, ABC News survey finds* (July 29, 2021), <https://abcnews.go.com/US/vast-majority-icu-patients-covid-19-unvaccinated-abc/story?id=79128401>.

<sup>9</sup> Frederick J. Angulo, *Estimation of US SARS-CoV-2 Infections, Symptomatic Infections, Hospitalizations, and Deaths Using Seroprevalence Surveys*, JAMA Network Open (Jan. 4, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7786245/>.

<sup>10</sup> *See, e.g.*, Adnan Qureshi et al., *Reinfection With Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) in Patients Undergoing Serial Laboratory Testing*, Clinical Infectious Diseases (Apr. 25, 2021), <https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciab345/6251701>

20. Even in the face of a more transmissible variant form of the virus, current cases detected in the U.S. remain far below what they were at the peak of the epidemic, even while many restrictions and regulations have been relaxed. COVID-19 vaccines have almost certainly contributed to suppressing transmission and are the best form of protection against illness, hospitalization and death.
21. Given that asylum-seeking families make up a tiny percentage of daily inbound individuals, expelling asylum seekers at the southern border would do almost nothing to reduce the number of cases or the rate of transmission in the U.S. Instead, layered protection including masking, physical distancing, and improved ventilation, along with vaccination and testing, should be expected to prevent additional cases among this group and the Customs & Border Protection (CBP) personnel they interact with.

### **Defendants' Expulsion Practices Are Inconsistent with Public Health.**

22. A basic public health concept is that most public health actions produce a combination positive and negative effects, which must be weighed against one another. Notably, the CDC Order appears to be nearly devoid of any consideration of the adverse consequences of the Title 42 policy, both to the asylum seekers and to the health of the U.S. public.
23. The CDC Declaration acknowledges that, notwithstanding COVID-19 variants, numerous safety measures remain effective in preventing the transmission of COVID-19, including in congregate settings. *See, e.g.*, CDC Order at 7, 9, 13. Those measures including rapid testing, quarantining, providing vaccines, masking, distancing, improving ventilation, and others.
24. According to reports by advocates and the media,<sup>11</sup> Defendants are carrying out “lateral” expulsions, which involve flying or bussing untested migrants already in the United States from one part of the border to another region before expelling them into Mexico.
25. We also understand from attorneys representing immigrants subject to Title 42 that some of their clients are detained in congregate facilities for days or weeks, before they are

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<sup>11</sup> *See, e.g.*, NBC News, *Biden admin again flying migrants who cross border in one place to another place before expelling them* (June 18, 2021), <https://www.nbcnews.com/politics/immigration/biden-admin-again-flying-migrants-who-cross-border-one-place-n1271211>; Washington Post, *Fewer migrant families being expelled at border under Title 42, but critics still push for its end* (June 13, 2021), [https://www.washingtonpost.com/immigration/fewer-migrant-families-being-expelled-at-border-under-title-42-but-critics-still-push-for-its-end/2021/06/13/422c702c-c7cc-11eb-81b1-34796c7393af\\_story.html](https://www.washingtonpost.com/immigration/fewer-migrant-families-being-expelled-at-border-under-title-42-but-critics-still-push-for-its-end/2021/06/13/422c702c-c7cc-11eb-81b1-34796c7393af_story.html); San Diego Union-Tribune, *Biden expelling asylum-seeking families with young children to Tijuana after flights from Texas* (Apr. 9, 2021), <https://www.sandiegouniontribune.com/news/immigration/story/2021-04-09/biden-expelling-families-tijuana>.

expelled from the United States, sometimes after testing negative for COVID-19 or after completing quarantine or isolation. *See, e.g.*, Hidalgo Decl. (ECF No. 57-8) ¶ 6; Levy Decl. ¶ 30.

26. Such practices, if undertaken by the Department of Homeland Security, increase the risk of transmission on both sides of the border, compared to actual public health strategies such as testing and quarantining or offering vaccines to migrants and releasing migrants from congregate settings.
27. Migrants in Mexico have also begun receiving COVID-19 vaccines since at least May 2021, according to multiple media reports.<sup>12</sup> Like other vaccinated individuals, migrants who have received a vaccine are extremely unlikely to transmit COVID-19, compared to unvaccinated travelers who are permitted to cross the Southwest border daily.
28. There is no public health basis for expelling immigrant families, particularly those who have been vaccinated against, tested negative for, or previously recovered from COVID-19, while allowing hundreds of thousands of other travelers to enter the United States daily via the Southwest border with no restrictions.

#### **Immigrant Families Subject to Title 42 Are Not a Significant Source of COVID-19 in the United States.**

29. The CDC premised its Title 42 order on the need to prevent the “introduction” of COVID-19 into the United States. CDC Order at 1.
30. In public health and epidemiology, “introduction” generally refers to first contact with a disease in an area where it was previously unknown or undocumented.<sup>13</sup>
31. Since the first confirmed case of COVID-19 in January 2020, there have been nearly 36,000,000 confirmed cases of COVID-19 in the United States as of August 10, 2021.<sup>14</sup> The actual number of infections is likely much higher.

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<sup>12</sup> Reuters, *Mexico to vaccinate migrants in Baja California under new border initiative* (June 18, 2021), <https://www.reuters.com/world/americas/mexico-vaccinate-migrants-baja-california-under-new-border-initiative-2021-06-19/>; Reuters, *U.S. bound-migrants vaccinated for COVID-19 in Mexican border city* (May 6, 2021), <https://www.reuters.com/world/americas/us-bound-migrants-vaccinated-covid-19-mexican-border-city-2021-05-06/>.

<sup>13</sup> KE Nelson and CM Wilson [eds] (2007), *Infectious Disease Epidemiology Theory and Practice*, 2<sup>nd</sup> Edition. Sudbury, MA: Jones and Bartlett.

<sup>14</sup> CDC, *United States COVID-19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction* (last updated Aug. 10, 2021), <https://covid.cdc.gov/covid-data-tracker/#cases>.

32. According to the CDC, there were over 91,000 new confirmed COVID-19 cases reported on July 31, 2021, more than 80% of which were caused by the Delta variant.<sup>15</sup> There is no evidence that the Delta variant originated in a migrant crossing the Southwest border, and, at this point, asylum-seeking families cannot meaningfully introduce the variant into the United States, where it is already the dominant strain.
33. According to public data from CBP, the agency has expelled an average of 8,600 family unit noncitizens per month in the last two months, or approximately 285 people per day.<sup>16</sup>
34. Even if 100% of those approximately 285 people per day were to test positive for COVID-19 (which they will not), they would still represent only a negligible addition to the more than 70,000 new cases that have been reported each day in the United States on average over the most recent week.<sup>17</sup>
35. Given that noncitizen families represent a very small fraction of the hundreds of thousands of inbound people allowed to cross the Southwest border each day (without COVID-19 testing or vaccination requirements),<sup>18</sup> even with entry to congregate conditions, asylum seekers cannot plausibly constitute a meaningful additional COVID-19 risk to the U.S. public. That minimal risk is further diminished by a majority of Americans and a large majority of vulnerable age groups receiving COVID-19 vaccinations.
36. The minimal risk that those few asylum-seekers could infect others could be further mitigated by a testing and quarantine process or via widely available vaccinations. According to Defendants, DHS has already developed, in coordination with state, local, and NGO partners, capacity to test, quarantine, or isolate noncitizen families. Shahoulian Decl. ¶¶ 8–9. Apart from that capacity, noncitizen families can be directed to self-quarantine with the help of their family, friends, or other sponsors in the United States. A recent study found that “91.9% [of asylum seekers] have family or close friends who live in the U.S.”<sup>19</sup>

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<sup>15</sup> CDC, *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory* (last visited Aug. 10, 2021), [https://covid.cdc.gov/covid-data-tracker/#trends\\_dailytrendscases](https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases). CDC, *Variant Proportions* (last visited Aug. 10, 2021), <https://covid.cdc.gov/covid-data-tracker/#variant-proportions>.

<sup>16</sup> CBP, *Southwest Land Border Encounters*, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

<sup>17</sup> CDC, *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC* (last visited Aug. 10, 2021), [https://covid.cdc.gov/covid-data-tracker/#trends\\_dailytrendscases](https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases).

<sup>18</sup> Department of Transportation, *Border Crossing Entry Data* (last visited Aug. 9, 2021), <https://explore.dot.gov/views/BorderCrossingData/Annual?:isGuestRedirectFromVizportal=y&embed=y>.

<sup>19</sup> U.S. Immigration Policy Center at UC San Diego, *Seeking Asylum: Part 2* 13 (Oct. 29, 2019), [https://usipc.ucsd.edu/publications/usipc-seeking-asylum-part-2-final.pdf?fbclid=IwAR07M\\_jP1Wy8KIn85d0jnw0Kobiz-MR7XeAIT77c9afuRInkd7sHL21FE1Q](https://usipc.ucsd.edu/publications/usipc-seeking-asylum-part-2-final.pdf?fbclid=IwAR07M_jP1Wy8KIn85d0jnw0Kobiz-MR7XeAIT77c9afuRInkd7sHL21FE1Q).

37. Additional quarantine or isolation capacity can be acquired by expanding the use of hotel or by utilizing temporary, mobile housing units that can be rapidly deployed by HHS and CDC in coordination with local partners.

**Defendants Make Misleading Claims About the Infection Risks That Agency Personnel Face.**

38. Defendants' suggestion that CBP employees are at elevated risk for COVID-19 due to contact with immigrants is unfounded.
39. If vaccinated with one of the widely available vaccines, CBP employees would be highly unlikely to contract COVID-19 and develop symptomatic or serious illness.
40. Defendants assert that the rate of infection has been increasing among CBP officers, despite significant numbers of fully vaccinated employees since January 2021. *See* ECF No.113-1, ¶ 13. However, Defendants do not indicate whether any of the recently infected CBP officers had been vaccinated, or whether any breakthrough infections had led to serious disease. Moreover, Defendants' infection figures appear to include all CBP employees, including those who are not located at the Southwest border (or even in the United States).<sup>20</sup>
41. Defendants also do not disclose how many CBP employees have actually been vaccinated. We understand that the federal government has only recently required all federal employees and contractors to either attest to vaccination, or otherwise comply with testing and masking requirements.<sup>21</sup> As more CBP employees get vaccinated or begin to follow more rigorous testing and masking protocols, infection and hospitalization rates should correspondingly decrease.
42. Because CBP employees are far more likely and able to be tested than the average American citizen, the fact that 12.36% of CBP employees may have tested positive for COVID-19 (as of February 15, 2021) compared to 8.16% nationally is not probative. *See* ECF No. 76-2, ¶ 18. Indeed, a nationwide sero-prevalence survey conducted prior to the availability of vaccines, suggested that 14.3% of the United States population had been infected as of mid-November 2020, more than twice the number of confirmed cases.<sup>22</sup>

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<sup>20</sup> CBP, *Agency COVID-19 Information* (last updated Aug. 6, 2021), <https://www.cbp.gov/newsroom/coronavirus>.

<sup>21</sup> Safer Federal Workforce Task Force, *COVID-19 Workplace Safety: Agency Model Safety Principles* (July 29, 2021), [https://www.saferfederalworkforce.gov/downloads/revised%20COVID19\\_Safe%20Federal%20Workplace\\_Agency%20Model%20Safety%20Principles\\_20210728.pdf](https://www.saferfederalworkforce.gov/downloads/revised%20COVID19_Safe%20Federal%20Workplace_Agency%20Model%20Safety%20Principles_20210728.pdf)

<sup>22</sup> Frederick J. Angulo, *Estimation of US SARS-CoV-2 Infections, Symptomatic Infections, Hospitalizations, and Deaths Using Seroprevalence Surveys*, JAMA Network Open (Jan. 4, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7786245/>.

43. In fact, based on CBP’s latest public data, CBP employees have likely had a lower incidence of confirmed COVID-19 cases compared to the overall adult population in the United States. Between February 15 and August 6, 2021, 1,905 CBP officers tested positive for COVID-19, out of 63,457 employees.<sup>23</sup> Accordingly, approximately 3.00% of CBP personnel contracted COVID-19 during that time. During that same period, 3.01% of adults in the United States tested positive for COVID-19.<sup>24</sup> Because CBP officers are tested more frequently than the average adult in the United States, the fact that they have almost identical rates of confirmed cases suggests that CBP officers are less likely to be infected with COVID-19 than the rest of the adult population in the country.
44. The fact that CBP officers likely have a lower rate of infection compared to the American public as a whole suggests that CBP is able to process immigrants safely, given vaccinations and other mitigation measures, despite having to work in congregate settings at times.
45. Notably, the CDC Order cites no evidence for its contention that the Title 42 policy has “helped lessen the introduction, transmission, and spread of COVID-19 among border facilities and into the United States while also decreasing the risk of exposure to COVID-19 for DHS personnel and others in the facilities.” CDC Order at 15-16. Given the likely lower incidence in CBP personnel, including during the asserted period of increased facility crowding in 2021, this statement is likely incorrect.

**Defendants Make Misleading Claims About the Risk of Infection Posed by Travelers from Mexico.**

46. Defendants note that Mexico has “had the third highest total number of deaths from COVID-19 in the world,” Opp. at 4, which is no longer the case. Moreover, the statement omits noting that the United States has reported the *most* COVID-19 deaths in the world cumulatively and that the COVID-19 death rate on a per capita basis is nearly identical in the US and Mexico.<sup>25</sup>
47. In any event, Defendants’ reliance on total deaths as a measure of infection risk is misguided: National death counts vary depending on factors such as the quality of

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<sup>23</sup> See Miller Decl. (ECF No. 76-2) ¶ 18; CBP, *Agency COVID-19 Information* (last updated Aug. 6, 2021), <https://www.cbp.gov/newsroom/coronavirus>.

<sup>24</sup> CDC, *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory* (last visited Aug. 10, 2021), [https://covid.cdc.gov/covid-data-tracker/#trends\\_dailytrendscases](https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases).

<sup>25</sup> World Health Organization, WHO Coronavirus Disease (COVID-19) Dashboard (last updated Aug. 10, 2021), <https://covid19.who.int/table>; Johns Hopkins University of Medicine Coronavirus Resource Center, Mortality Analysis (last updated Aug. 10, 2021), <https://coronavirus.jhu.edu/data/mortality>.

medical care once infected and differences in population and demographics, none of which reveals the likelihood that a traveler from Mexico is carrying the virus that causes COVID-19. Not only is quality healthcare less accessible in Mexico, the Mexican population also suffers from high rates of obesity and other chronic conditions that place them at particular risk for severe illness and death from COVID-19.<sup>26</sup>

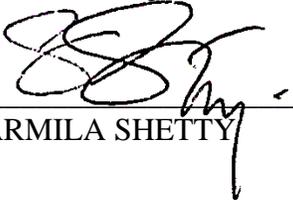
48. In the latest CDC Order, the only data that the agency cited regarding COVID-19 prevalence in Mexico show that the United States is experiencing more than twice as many cases per capita compared to Mexico. CDC Order at 4. The Order also cites data indicating that the recent rate of increase of confirmed COVID-19 cases in the United States is three times higher than Mexico's. *Id.*
49. While Defendants have previously asserted that Mexico is underreporting its COVID-19 cases and deaths, sero-prevalence studies, as explained in our initial declaration, confirm that Mexico's lower counts cannot be fully explained by differences in reporting. *See* ECF No. 57-6, ¶ 24.
50. In short, the CDC has not provided any evidence or reason to believe that migrants arriving from Mexico are more likely to have COVID-19 than the average person in the United States.

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<sup>26</sup> Diego Rolando Hernández-Galdamez, et al., *Increased Risk of Hospitalization and Death in Patients with COVID-19 and Pre-existing Noncommunicable Diseases and Modifiable Risk Factors in Mexico*, Archives of Medical Research (July 22, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7375298/>.

I, Sharmila Shetty, declare under penalty of perjury of the laws of the State of New York and the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

Executed on August 10, 2021 in Massapequa Park, New York.

  
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SHARMILA SHETTY

I, Stephen Patrick Kachur, declare under penalty of perjury of the laws of the State of New York and the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

Executed on August 10, 2021 in New York, New York.

  
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STEPHEN PATRICK KACHUR

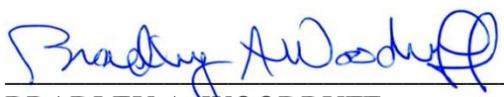
I, Leslie Roberts, declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

Executed on August 11, 2021 in Bocaranga, Central African Republic.

  
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LESLIE ROBERTS

I, Bradley A. Woodruff, declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

Executed on August 11, 2021 in Victoria, British Columbia, Canada.

  
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BRADLEY A. WOODRUFF