

Biden administration goes to court to defend Trump anti-immigrant policies

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In separate statements last week, the Biden administration declared it would seek to continue two major features of the horrific Trump policies of attacking migrant workers fleeing poverty and repression.

On Wednesday, December 7, the Department of Homeland Security (DHS) announced it would appeal the ruling by federal judge Emmet Sullivan, of the US District Court for the District of Columbia, ordering the administration to lift the restrictions on asylum seekers imposed under Title 42 of a 1944 law on public health.

The Trump administration first invoked Title 42 in March 2020 on the initiative of Trump's fascist adviser Stephen Miller. While the administration was doing nothing to actually fight the COVID pandemic, Miller seized on the provision as a legal pretext for excluding immigrants at the US-Mexico border without any hearing to determine the validity of their asylum claims, on the grounds that they might be infected with coronavirus.

The Centers for Disease Control and Prevention (CDC) actually exercises the authority under Title 42, and CDC officials in both the Trump and Biden administrations have agreed to prostitute public health considerations to the anti-immigrant bigotry which pervades the Washington political establishment, Democrats as well as Republicans.

The Biden administration has continued the use of Title 42, under which some 2.4 million asylum seekers have been excluded under Trump and Biden combined. Title 42 has become the most important legal instrument of mass deportations.

While the White House claimed it would lift the invocation of Title 42 in May, the Biden administration was quite willing to continue the policy after a group of 24 Republican-ruled states filed suit and obtained a preliminary injunction from a friendly federal judge requiring its continued use. An appeal of this injunction is now set for January 2023.

In a separate lawsuit filed by attorneys for asylum seekers, federal District Judge Sullivan issued an order November 15 for immediate termination of the use of Title 42 against asylum seekers. He pointed to the contradiction between the administration's claim that the pandemic is over and the continued application of an exclusionary policy supposedly justified by the pandemic. After a plea from the administration's attorneys, Sullivan granted a six-week extension, setting December 21 as the deadline for termination of Title 42 removals.

The DHS will now file an appeal with the US Court of Appeals for the District of Columbia, the second-highest federal court, seeking a stay of Judge Sullivan's order until after the Fifth Circuit Court of Appeals in New Orleans hears the separate challenge to Title 42 brought by the Republican-led states.

Either appeal could end up being heard by the Supreme Court, particularly if the two appeals courts reach different conclusions.

In the other court proceeding, the Supreme Court agreed on Friday, December 9, to consider an appeal by the Biden administration to uphold a federal law that criminalizes encouraging immigrants to enter the country illegally. The law was struck down by the 9th US Circuit Court of Appeals last February, which found it in violation of the constitutional protection of free speech under the First Amendment.

While the case involved an apparent attempt to exploit immigrants for money—the defendant had promised undocumented immigrants that they could gain US citizenship if they paid him hefty fees to enter an “adult adoption” program he operated—the law could easily be applied to groups which provide aid to undocumented border-crossers, including shelter, food and water, and other assistance.

The ruling of the 9th Circuit found the law unconstitutional because it criminalized even verbal

encouragement of illegal entry, including anyone residing in the United States who encouraged a relative to cross the border, even a parent urging a child to join him, or vice versa, if there would be “financial gain” involved—that is, the child could go to work and increase the family’s income, or allow it to qualify for social benefits.

According to the court’s opinion in February, the law would “criminalize a substantial amount of otherwise legal speech. The statute in question makes it a crime for ‘any person who... encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law.’”

Among the actions that would be criminalized, the court declared, would be: “Encouraging an undocumented immigrant to take shelter during a natural disaster, advising an undocumented immigrant about available social services, telling a tourist that she is unlikely to face serious consequences if she overstays her tourist visa, or providing certain legal advice to undocumented immigrants...”

The Biden administration claimed that the law was directed against “smuggling,” the all-purpose excuse used by multiple administrations to criminalize actions in support of undocumented immigrants.

“As the Court has explained, ‘the constitutional freedom for speech’ does not ‘extend its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.’” US Solicitor General Elizabeth Prelogar wrote in the government’s brief.

In a clear indication of the viciously right-wing character of the Biden administration appeal, the attorney general of Texas, Ken Paxton, a fascistic advocate of persecuting immigrants, abortion seekers and other targets of the far right, filed an *amicus curii* brief supporting the White House position.



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