



U.S. House of Representatives  
Committee on Homeland Security  
Subcommittee on Border Security, Facilitation, & Operations

“Examining Title 42 and the Need to Restore Asylum at the Border”

April 6, 2022

Testimony of Aaron Reichlin-Melnick  
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Chairwoman Barragán, Chairman Thompson, Ranking Member Higgins, and distinguished members of the Subcommittee:

My name is Aaron Reichlin-Melnick, and I serve as the senior policy counsel for the American Immigration Council, a non-profit organization dedicated to the belief that immigrants are part of our national fabric and to ensuring that the United States provides a fair process for all immigrants, including those who are seeking protection at the border. The Council works to strengthen America by shaping how America thinks about and acts toward immigrants and immigration and by working toward a more fair and just immigration system that opens its doors to those in need of protection and unleashes the energy and skills that immigrants bring.

The Council has long brought attention through research, advocacy, and litigation to ways in which the Department of Homeland Security (“DHS”) has responded to migrants at the border. In 2015, we helped bring a successful lawsuit against the Border Patrol’s Tucson Sector challenging unconstitutional conditions of confinement for adults and children,<sup>1</sup> and we are currently suing U.S. Customs and Border Protection (“CBP”) for its unlawful policy of turning away asylum seekers at ports of entry, in part through a practice known as “metering.”<sup>2</sup>

I am grateful for the opportunity to be here today to help provide some perspective on the effect of Title 42 on border operations and management. Since Title 42 went into place over two years ago, the American Immigration Council has tracked the policy carefully and prepared research and analysis regarding its use, including through a dedicated publication on Title 42<sup>3</sup> and extensive analysis of rising border encounters in 2021 and the effect of Title 42 on the border during that time.<sup>4</sup>

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<sup>1</sup> American Immigration Council, “Challenging Unconstitutional Conditions in CBP Detention Facilities,” <https://bit.ly/2PhdT0z>.

<sup>2</sup> American Immigration Council, “Challenging Customs and Border Protection’s Unlawful Practice of Turning Away Asylum Seekers,” <https://bit.ly/32Eo4z5>.

<sup>3</sup> American Immigration Council, “A Guide to Title 42 Expulsions at the Border,” October 15, 2021, <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border>.

<sup>4</sup> American Immigration Council, “Rising Border Encounters in 2021: An Overview and Analysis,” March 4, 2022, <https://www.americanimmigrationcouncil.org/rising-border-encounters-in-2021>.

## Testimony For “Examining Title 42 and the Need to Restore Asylum at the Border”

I am here today with one clear message: Title 42 has failed. As you will hear from other witnesses today, public health experts have repeatedly confirmed that Title 42 does not protect the American public from COVID-19 and has led to severe consequences for thousands of people seeking humanitarian protections in the United States. But on top of those flaws, Title 42 has also failed as a border management policy, leading to the highest levels of recidivism in decades. Two years after Title 42 went into place and over 1.7 million expulsions later, border encounters are on track to hit record levels once again. The evidence is clear; Title 42 is neither a meaningful public health measure nor a successful deterrent.

Title 42 itself has been a major contributor to increased border crossings because it caused a significant increase in *repeat* border crossings. In Fiscal Year (FY) 2019, just 7% of people encountered by CBP had previously crossed the border that year. In the two years since Title 42 went into place, the rate of repeat crossings rose to 27%. This is due in large part to the fact that under Title 42, individuals expelled back to Mexico are not subject to any collateral consequence. This lack of collateral consequences (other than the inherent risk of death in the journey), combined with the desperation and insecurity faced by people waiting at the border for the asylum process to restart, strongly incentivizes many migrants expelled under Title 42 to try again.

One statistic most obviously demonstrates Title 42’s failure. Since Title 42 went into effect, the Border Patrol expelled a staggering 94% of single adult migrants it encountered who were from Mexico, Guatemala, Honduras, or El Salvador. If Title 42 were a successful deterrent, we would expect such a near total shutdown of the border to lead to declining apprehension numbers. Nothing of the sort has happened. Over the last 17 months, single adults from those four countries accounted for 1.5 out of 2.5 million total apprehensions. In total, there have been more than 750,000 repeat encounters under Title 42. Not only has this placed additional strain on the Border Patrol, it has also painted a distorted picture of the true number of individuals coming to the border.

Emboldened by this expulsion practice, within less than a year of Title 42 going into effect, smugglers began offering package deals that allow multiple attempts at crossing the border for one fee.<sup>5</sup> Last year one person even admitted to reporters that he had made 30 failed attempts to cross the border, each time being apprehended and expelled back to Mexico.<sup>6</sup>

In addition, DHS has been unable to expel most nationals of countries other than Mexico, Guatemala, Honduras, and El Salvador. Since Title 42 went into effect, Border Patrol agents expelled 72% of nationals of those four countries encountered at the border. By contrast, just 15% of nationals of other countries were expelled.

This nationality disparity is due to one of Title 42’s biggest flaws as a border management tool; it relies almost exclusively on Mexico as the final destination for most expulsions, and Mexico has significantly limited the groups of people who can be expelled there. Once a person is physically on United States soil, they can only be expelled to a country which will take them. And if a person cannot be expelled to Mexico,

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<sup>5</sup> Laura Gottesdiener, Sarah Kinoshian, “Migrant smugglers see boost from U.S. pandemic border policy,” *Reuters*, November 12, 2020, <https://www.reuters.com/article/us-usa-immigration-smuggling-insight/migrant-smugglers-see-boost-from-u-s-pandemic-border-policy-idUSKBN27S24A>.

<sup>6</sup> Kate Morrissey, “Mexican adults are crossing the border again and again in attempts to reach the United States,” *San Diego Union-Tribune*, July 11, 2021, <https://www.sandiegouniontribune.com/news/immigration/story/2021-07-11/mexican-adult-migrants>.

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they generally must be expelled by airplane to their home country. At the scale of current migration, this is simply impossible. ICE does not have, and has never had, the capacity to carry out mass deportation flights. And even if ICE had that capacity, many asylum seekers come from countries like Venezuela or Cuba which do not permit the United States to carry out mass deportation flights.

Thus, under the agreement with Mexico that allowed Title 42, Mexicans, Guatemalans, Hondurans, and Salvadorans subject to expulsion are sent right back to northern Mexico and incentivized to cross the border over and over again until they make it through. Individuals from other countries can cross the border between ports of entry and be safe in the knowledge that they are unlikely to be expelled.

Meanwhile, ports of entry have been almost entirely closed to asylum seekers for more than two years thanks to Title 42, which has created perverse incentives for even the most staunchly rulebound asylum seekers. If they cannot return home and face the persecution they fled, and if they find themselves unable to reside indefinitely in Mexico, the only way for them to access the United States asylum process is to cross the border and hope they are not expelled. These reasons are why Title 42 has failed.

As DHS prepares to lift Title 42 on May 23, it must take common-sense steps to restore orderly processing at the border. DHS should immediately surge processing resources to the ports of entry and work to make it possible to seek asylum once again *at the ports of entry*. At the same time, DHS should work to increase processing resources within the Border Patrol, including detailing other DHS employees to act as Border Patrol Processing Coordinators and standing up additional soft-sided facilities, all with the goal of ensuring that no individuals are held in overcrowded and constitutionally inadequate conditions at the border and that Border Patrol agents are not kept out of the field due to do paperwork.

Finally, we cannot discuss Title 42 without noting that migrants are on the move around the world, and not just on their way to the United States. Last year, a record number of people applied for asylum in Mexico. Hundreds of thousands of Nicaraguans have fled political persecution, some going north to the United States and others going south to Costa Rica. In recent years, millions of Venezuelans have fled their homes and sought refuge in surrounding nations. Most recently, nearly 3 million Ukrainians have fled the invasion of Russia and sought refuge in Poland and surrounding nations.

Migration, especially that of refugees, is not something that can be turned off with the push of a button. Title 42 is ostensibly about public health, but today many people speak of it purely in terms of deterrence.<sup>7</sup> Over the last decade, we have seen repeated cycles of failed deterrence policies, none of which have stopped people from coming to the border. Title 42 is the latest in that series of failures.

In times of global displacement, the United States has long stepped up and done the right thing. Rather than search around for yet another deterrent, we should be honest not only about the challenges and costs of border management, but also about the benefits that we as a nation receive from people who still view this country as a beacon of freedom. By acknowledging that Title 42 was a failure, we can use this as an opportunity to do better.

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<sup>7</sup> See, e.g., Letter from 22 Members of Congress to DHS Secretary Mayorkas, March 29, 2022, <https://www.cornyn.senate.gov/sites/default/files/Texas%20Delegation%20Letter%20to%20DHS%20and%20HHS%20on%20Title%2042%20Cancellation.pdf> (urging the Biden Administration to keep Title 42 in place as a deterrent).

The Origins of Title 42 and the Creation of “Expulsions”

To understand how we reached this point, it’s necessary to explain the origin of Title 42 and the way in which it has been used operationally at the border.

On March 20, 2020, the Centers for Disease Control and Prevention (CDC) issued an order suspending “covered aliens” from entering the United States. The “covered” group included only those individuals who would be placed into “congregate settings” upon their entry to the United States, exempting American citizens, lawful permanent residents, individuals possessing valid visas, and anyone who was entitled to enter the United States. As Professor Lucas Guttentag wrote, the order was “like a bullseye drawn on the side of the barn around the arrow that has already been shot” at asylum seekers and those “crossing the border without documentation.”<sup>8</sup> However, the CDC’s Title 42 order did not provide any guidance or instruction as to what would happen to individuals who had *already* entered the United States and were taken into the custody of Customs and Border Protection.

It was DHS, not the CDC, which created a concept that had never before existed in US history; “expulsions.” An expulsion is an exercise in raw power in which the U.S. government takes a person present on U.S. soil and forcibly sends them to another country. Unlike a deportation, an “expulsion” carries no further legal consequences—there is no “order of expulsion” entered by an immigration official that carries collateral consequences, no opportunity to appeal, and no process by which a migrant may challenge the decision to expel.

Thousands of people subject to Title 42 expulsions were not even issued the standard “A number,” but were simply fingerprinted and then pushed back across the border. Border Patrol agents did not even interview migrants to learn about how they had been smuggled into the country, a fact which Border Patrol agents told the Government Accountability Office (GAO) “negatively affected enforcement by reducing opportunities to gather intelligence.”<sup>9</sup>

Title 42 was put into place at a time when the United States had only limited, but not halted, international entry. Reporting suggests that the Trump administration used Title 42 as a transparent attempt to halt migration through the guise of public health, as Stephen Miller had apparently sought to do for years. Throughout the pandemic, even with border restrictions in place, millions of people drove or walked across the U.S.-Mexico border through the ports of entry each month.<sup>10</sup>

As the Trump administration planned Title 42 in mid-March 2020, it began negotiations with the Mexican government. On March 17, 2020, the Mexican government issued a statement in response to news reports that the Trump administration would soon begin expelling migrants, stating that the Government of Mexico had not received a formal request from the United States government to expel migrants. The

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<sup>8</sup> Lucas Guttentag, “Coronavirus Border Expulsions: CDC’s Assault on Asylum Seekers and Unaccompanied Minors,” *Just Security*, April 13, 2020, <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/>.

<sup>9</sup> U.S. Government Accountability Office, GAO-21-431: *CBP’s Response to COVID-19* June 2021, at 42, <https://www.gao.gov/assets/720/714997.pdf>.

<sup>10</sup> Aaron Reichlin-Melnick and Jorge Loweree, “Tracking the Biden Agenda on Legal Immigration in the First 100 Days,” American Immigration Council, April 29, 2021, <https://www.americanimmigrationcouncil.org/research/tracking-biden-agenda-legal-immigration-first-100-days>.

government then went on to note that if such a proposal were to be formally advanced, the Government of Mexico would consider it according to its own sovereign interests.<sup>11</sup>

Negotiations continued over the following days. On March 21, 2020, the Government of Mexico made the announcement that allowed Title 42 to go into effect at the southern border. It declared that “to minimize the buildup in United States Border Patrol stations,” it was considering “the regular internment of some citizens of El Salvador, Honduras, and Guatemala that are presented to Mexican immigration authorities.” The statement went on to declare that “The Mexican authorities will decide on a case-by-case basis whether these migrant persons will be admitted to [Mexico’s] national territory. For the sake of protecting vulnerable people, we will not accept minors or the elderly, among others. Likewise, citizens of other nationalities not mentioned previously will not be admitted....”<sup>12</sup> The statement concluded with a note that the Government of Mexico “has estimated that the number of migrant persons who will be subject to this legal entry into Mexican territory will be less than 100 persons per day.”

With that announcement, Title 42 began in earnest. The Mexican government’s estimates were proven wrong within days. Even though Title 42 was in effect for just 10 days in March 2020, the Border Patrol carried out 6,984 expulsions of Mexicans, Hondurans, Guatemalans, and Salvadorans. Over the next two years, DHS would carry out an average of over 2,250 daily expulsions to Mexico.<sup>13</sup>

#### **Title 42’s Negative Effect on Border Management Becomes Apparent in 2020**

Within a week of Title 42 going into effect, much of the world shut down due to the coronavirus. On March 30, Mexico’s Ministry of Health declared a national emergency and called for widespread lockdowns to slow the spread of the pandemic. As Mexico closed down in April 2020, the number of migrants taken into custody by the Border Patrol plummeted to the lowest level for an April in 10 years. But despite international lockdowns and the use of Title 42, migrants still came to the United States seeking protection or a better life. In total, the Border Patrol carried out 15,003 expulsions in April 2020, the overwhelming majority to Mexico.

Once lockdowns lifted in Mexico, the number of migrants crossing the border began picking up. Driven by deteriorating security situations and increased political repression across Central America, economic shocks caused by the pandemic, and two Category 4 hurricanes in November 2020 that left hundreds of thousands homeless, migration to the United States border rose every single month from May 2020 through July 2021. By October 2020, border apprehensions were at the highest level for a fall in 15 years,

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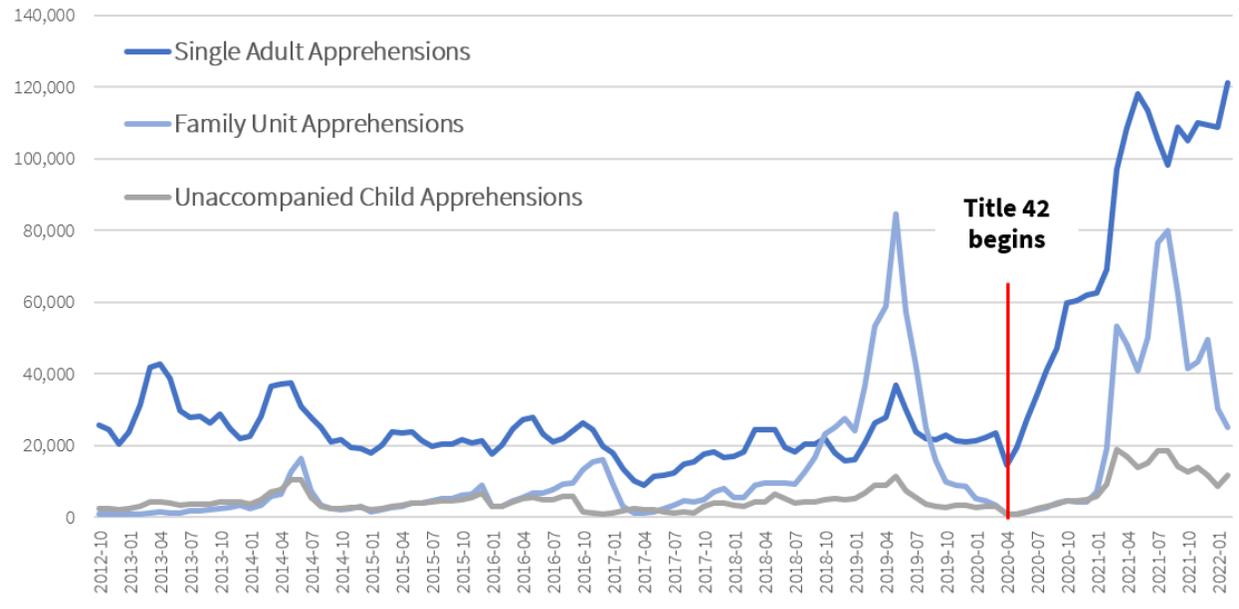
<sup>11</sup> Government of Mexico, “Nota informativa RELACIONES EXTERIORES,” March 17, 2020, <https://www.gob.mx/sre/documentos/nota-informativa-relaciones-exteriores?state=published>.

<sup>12</sup> Government of Mexico, “Nota informativa RELACIONES EXTERIORES No.11,” March 21, 2020, <https://www.gob.mx/sre/documentos/nota-informativa-relaciones-exteriores-no-11>.

<sup>13</sup> DHS has not provided exact figures on the number of migrants expelled to Mexico. As a result, this figure is an estimate, based on the assumption that nearly 100% of the 1.6 million Title 42 expulsions of nationals of Mexico, Guatemala, Honduras, and El Salvador since March 21, 2020, have been to Mexico. This assumption is supported by the GAO’s June 2021 report on CBP’s response to COVID-19, which indicated that through the end of December 2020, 92% of Title 42 expulsions occurred via land border to Mexico. U.S. Government Accountability Office, GAO-21-431: *CBP’s Response to COVID-19*, June 2021, at 41, <https://www.gao.gov/assets/720/714997.pdf>. Over that same time period, 93.7% of all Title 42 expulsions were of nationals of Mexico, Guatemala, Honduras, and El Salvador, suggesting a near 100% rate of expulsions to Mexico for that demographic. See U.S. Customs and Border Protection, “Nationwide Encounters,” March 15, 2022, <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

despite the fact that 91% of people encountered by the Border Patrol that month were expelled. This increase in encounters primarily consisted of single adult migrants, a demographic which has made up nearly two thirds of all border encounters since Title 42 went into place (see Figure 1).

Figure 1: Border Patrol apprehensions by demographic, October 2012 through February 2022



Source: U.S. Customs and Border Protection, Nationwide Encounters, <https://www.cbp.gov/newsroom/stats/nationwide-encounters>

Despite the fact that Title 42 technically permits the Border Patrol to “seal the border” in a way that had never been possible before, there is almost no evidence that it has a deterrent effect. This was true even in 2020, when Title 42 was used to the greatest extent. This is because (1) rapid returns to Mexico incentivize people to cross the border again, and (2) Mexico’s limitations on the use of Title 42 prevents it from being applied to nearly half of all people who crossed the border in the last two years.

Since Title 42 went into place, 79% of single adults have been rapidly processed at the border and sent right back to Mexico without a deportation order. This arrangement incentivized repeated attempted crossings for multiple reasons, including that:

- Many individuals become more desperate following an expulsion, as they lose stability, resources, and often their personal belongings following expulsions. Because the border region remains highly dangerous for asylum seekers expelled back to Mexico, and because the Biden administration has not resumed normal processing of asylum seekers at ports of entry along the border, many people feel as if they have no choice but to make a renewed attempt to seek safety in the United States.<sup>14</sup>

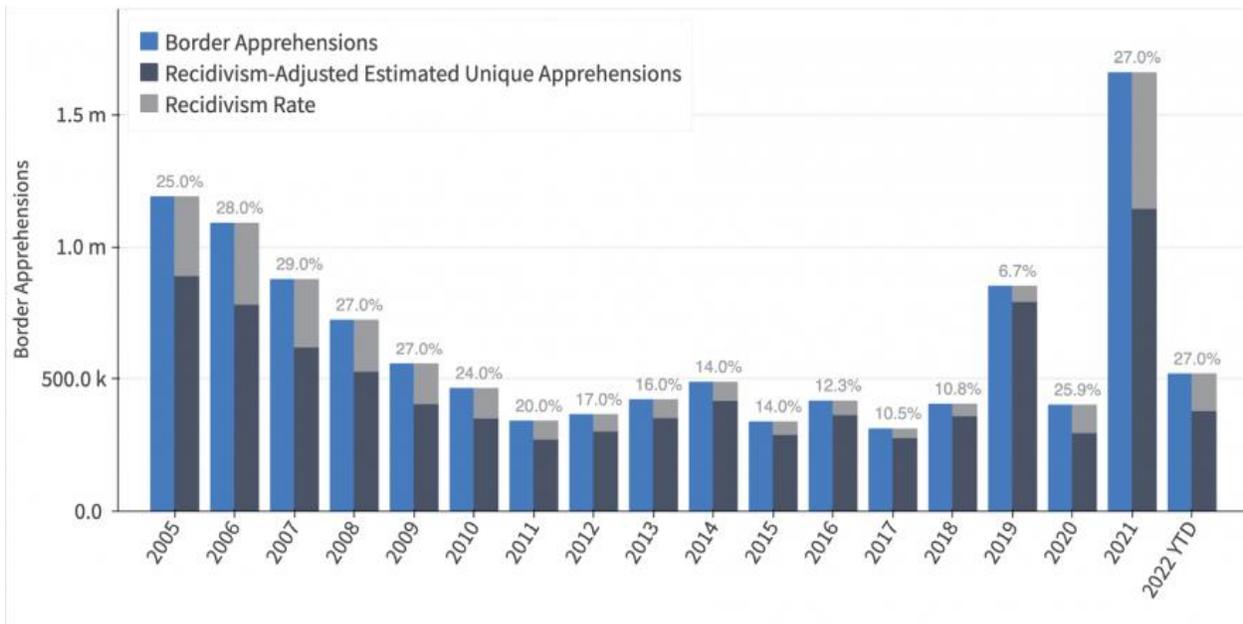
<sup>14</sup> Kathryn Hampton, Michele Heisler, Alana Slavin, “Neither Safety nor Health: How Title 42 Expulsions Harm Health and Violate Rights,” *Physicians for Human Rights*, July 28, 2021, <https://phr.org/our-work/resources/neither-safety-nor-health/>.

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- Due to post-COVID changes made at the Department of Justice in spring 2020, individuals who cross the border for the first time under Title 42 are largely exempt from federal prosecution for misdemeanor “improper entry.”<sup>15</sup> They are also not issued a deportation order.<sup>16</sup> For individuals crossing the border who are not planning on turning themselves in and asking for asylum, this policy eliminates two possible negative consequences of being apprehended by the Border Patrol. As a result, following a failed attempt to cross the border, some individuals are more willing to try again.<sup>17</sup>

In FY 2019, just 7% of people who crossed the border had done so more than once. In FY 2020, under Title 42, this rose to 27%, the level it has remained in FY 21 and FY 22. According to CBP, the average number of times a repeat crosser had been apprehended rose from 2.31 in FY 2019 to 3.14 in FY 2021, a 36% increase.<sup>18</sup> In total, more than half a million encounters at the U.S.-Mexico border over the last two years have been repeat encounters of individuals who had already tried and failed at least once before. Despite nearly twice as many border apprehensions in FY 2021 as in FY 2019, the actual number of *people* encountered at the border was only 45% higher (see Figure 2).

Figure 2: Estimates of unique apprehensions, FY 2005 to December 2021



<sup>15</sup> “Major Swings in Immigration Criminal Prosecutions during Trump Administration,” Transactional Records Access Clearinghouse, <https://trac.syr.edu/immigration/reports/633/>.

<sup>16</sup> American Immigration Council, “A Guide to Title 42 Expulsions at the Border,” October 15, 2021, <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border>.

<sup>17</sup> Andrew Rodríguez Calderón and Isabel Díaz, “Strict Border Enforcement Policies Put Migrants in Harm’s Way. Title 42 Is No Exception,” *The Marshall Project*, May 26, 2021, <https://www.themarshallproject.org/2021/05/26/strict-border-enforcement-policies-put-migrants-in-harm-s-way-title-42-is-no-exception>.

<sup>18</sup> Department of Homeland Security, “U.S. Customs and Border Protection Budget Overview, Fiscal Year 2023 Congressional Justification,” (2022), at CBP-4, [https://www.dhs.gov/sites/default/files/2022-03/U.S.%20Customs%20and%20Border%20Protection\\_Remediated.pdf](https://www.dhs.gov/sites/default/files/2022-03/U.S.%20Customs%20and%20Border%20Protection_Remediated.pdf).

**Source:** U.S. Customs and Border Protection, Congressional Budget Justifications, FY 2008-2022; Monthly Border Patrol Apprehensions, FY 2000-2020; data on file with author.

**Expulsions of Unaccompanied Children in 2020 Revealed Significant Difficulties in Using Title 42 on People Who Could Not Be Expelled to Mexico**

Once a person from any country other than Mexico, Guatemala, Honduras, or El Salvador arrives on U.S. soil, DHS can only expel that person under Title 42 if (1) their home country (or a third country such as Mexico) agrees to accept them, or (2) if ICE has sufficient resources to both detain the person and expel them by air within a short period of time after they entered the country.

Throughout 2020, it became increasingly apparent that DHS struggled to expel any individuals who could not be expelled to Mexico. To carry out an expulsion by air, CBP or ICE is required to detain the individual for potentially days while waiting for a plane to become available. Certain countries also impose their own restrictions on Title 42 flights due to COVID-19 restrictions. As of June 2021, DHS HQ staff told the GAO that even though the United States had signed Title 42 repatriation agreements with nine countries other than Mexico, due to COVID-19 “testing stipulations” on expulsions imposed by multiple countries, the agency was only carrying out Title 42 expulsion flights to Colombia, Dominican Republic, Haiti, and Ecuador.<sup>19</sup>

As the practice of expelling unaccompanied children in 2020 showed, expelling large numbers of people by air quickly became impractical. For nationals of some countries, the Border Patrol was required to hold people in custody for 72 hours or longer until a repatriation flight was available.<sup>20</sup> When Title 42 went into place, the Trump administration applied it to unaccompanied children, notwithstanding federal laws which provided unaccompanied children the right to have their cases heard in immigration court. But there are no ICE detention centers for unaccompanied children, and the Border Patrol didn’t want to hold children in their custody for days.

To carry out Title 42 expulsions of unaccompanied children, DHS was forced to secretly rent hotel rooms and hire private contractors to stand guard over hundreds of children while they waited for a deportation flight.<sup>21</sup> At one point, in order to meet the testing requirements put in place by Guatemala, DHS was first testing unaccompanied children to ensure that they weren’t positive for COVID-19, and then expelling them under Title 42—despite the lack of any public health need to expel children who’d tested negative.<sup>22</sup>

Even with these extreme measures, DHS was unable to expel most non-Mexican unaccompanied children as the number of children arriving at the border began rising back to pre-pandemic levels in 2020. In October 2020, the last full month in which unaccompanied children were expelled, only 35% of non-Mexican unaccompanied children were subject to Title 42 (see Figure 3).

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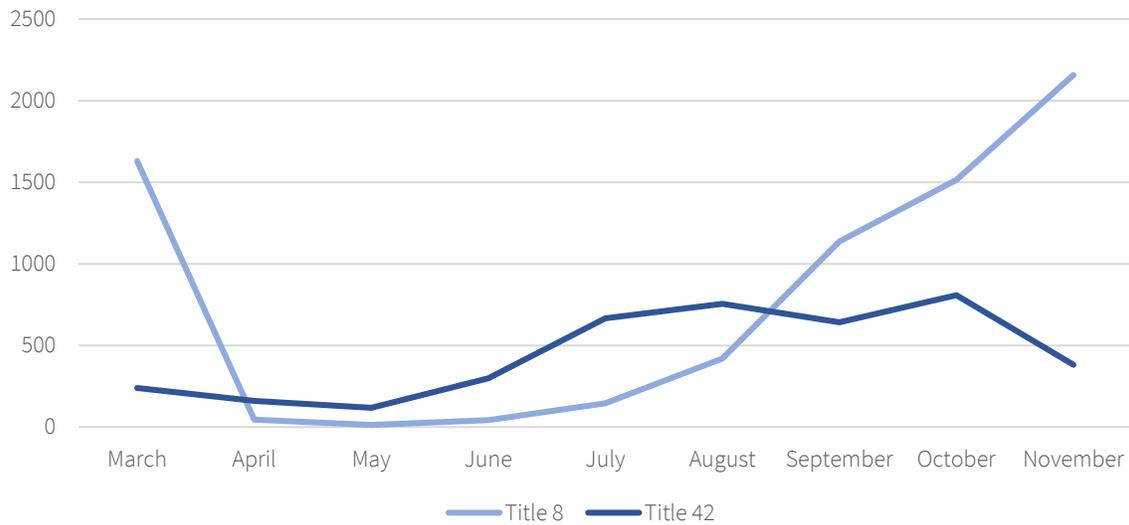
<sup>19</sup> U.S. Government Accountability Office, GAO-21-431: *CBP’s Response to COVID-19*, June 2021, at 41, <https://www.gao.gov/assets/720/714997.pdf>

<sup>20</sup> Ibid.

<sup>21</sup> Nicole Narea, “DHS is holding migrant children in secret hotel locations and rapidly expelling them,” *Vox*, August 21, 2020, <https://www.vox.com/2020/8/21/21377957/migrant-children-unaccompanied-hotels-dhs-expulsion>.

<sup>22</sup> Dara Lind and Lomi Kriel, “ICE Is Making Sure Migrant Kids Don’t Have COVID-19 — Then Expelling Them to ‘Prevent the Spread’ of COVID-19,” *ProPublica*, August 10, 2020, <https://www.propublica.org/article/ice-is-making-sure-migrant-kids-dont-have-covid-19-then-expelling-them-to-prevent-the-spread-of-covid-19>.

Figure 3: Processing outcomes of non-Mexican unaccompanied children encountered by the Border Patrol, February through November 2020



Source: U.S. Customs and Border Protection, Nationwide Encounters, <https://www.cbp.gov/newsroom/stats/nationwide-encounters>

DHS’s inability to expel more than 1,000 non-Mexican unaccompanied children by air in a month foreshadowed the problems the agency would have in carrying out Title 42 in 2021, when hundreds of thousands of people arrived at the border who couldn’t be expelled to Mexico.

### Title 42 Breaks Down Further in 2021

On January 24, three days after President Biden took office, the government of the Mexican state of Tamaulipas announced that it would no longer permit DHS to expel families back to Tamaulipas if a child in the family was under the age of 7.<sup>23</sup> As a result of Tamaulipas’ refusal to accept the expulsion of families with young children, when the numbers of families arriving at the border in south Texas began rising in early February, the Biden administration was unable to expel the majority under Title 42 and was forced to release thousands of families.<sup>24</sup> Likely as a result of this shift, the number of families crossing the border in south Texas rose significantly in spring 2021, and the Biden administration was unable to expel the majority of them despite its desire to apply Title 42 to them.<sup>25</sup>

<sup>23</sup> Elliot Spagat and Valerie Gonzalez, "Inside Biden’s border plans: How optimism turned to chaos," *Associated Press*, November 3, 2021, <https://apnews.com/article/immigration-coronavirus-pandemic-donald-trump-joe-biden-health-af698c3434cc31dfbce43a66fbf43b49>.

<sup>24</sup> Adolfo Flores and Hamed Aleaziz, "Border Agents In Texas Have Started Releasing Some Immigrant Families After Mexico Refused To Take Them Back," *Buzzfeed News*, February 6, 2021, <https://www.buzzfeednews.com/article/adolfoflores/border-agents-in-texas-have-started-releasing-some>.

<sup>25</sup> U.S. Customs and Border Protection, "Nationwide Encounters," <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

Although the number of families coming to the border peaked in summer 2021 and then fell throughout the fall and winter, other demographic groups that could not be easily expelled under Title 42 began arriving in larger numbers in the second half of 2021. Nationals of countries other than Guatemala, Honduras, El Salvador, and Mexico could not be expelled to Mexico. Asylum seekers from primarily Western Hemisphere countries such as Venezuela, Nicaragua, Brazil, Ecuador, and Cuba who came to the border and crossed could largely not be expelled under Title 42.

The exception that proved this rule came in September 2021, when nearly 15,000 Haitians arrived in Del Rio, Texas and sought asylum. In response, the Biden administration decided to send a message and massively ramp up expulsions by air to Haiti, a move that led to the resignation of multiple administration officials and accusations of racism. In order to carry out roughly 8,000 expulsions to Haiti in a matter of two weeks, ICE had to sign an emergency contract with GEO Group, a private prison company, to carry out dozens of charter flights. The cost to the U.S taxpayer was \$15,758,960, or nearly \$2,000 per expulsion.<sup>26</sup> Continued mass expulsions at that rate would quickly bankrupt the agency.

### **The Border Is Not Open—But Neither Is It Closed**

However, just because individuals were not expelled did not mean that they were released at the border. Our independent analysis of data produced by DHS reveals that in the 13-month period from February 2021 through February 2022, 73.1% of Border Patrol encounters resulted in a migrant being expelled, repatriated, or sent to an ICE detention center (see Figure 4). In total, from February 2021 through February 2022:

- 60.2% of Border Patrol encounters led to an immediate expulsion under Title 42, either by bus or plane to northern Mexico, or by plane to the migrant’s home country;
- 19.9% of Border Patrol encounters led to a person being released at the border under humanitarian parole, with a notice to report to an ICE office, or with a notice to appear in immigration court;
- 9.8% of Border Patrol encounters led to a person being sent to an ICE detention center or to a state, local, or federal jail for criminal prosecution.
- 7.0% of Border Patrol encounters were of an unaccompanied child who was sent to a shelter run by the Office of Refugee Resettlement.
- 3.1% of Border Patrol encounters led to an immediate deportation or other form of repatriation.

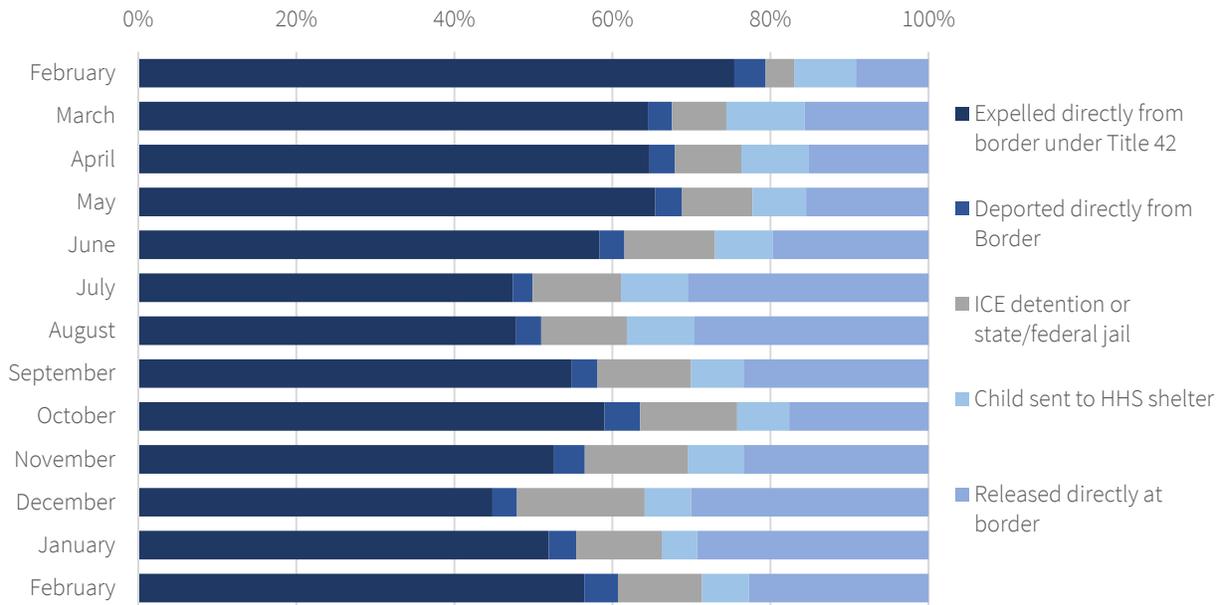
As Figure 5 shows, direct releases at the border over the last year (primarily families who cannot be expelled to Mexico) occurred in just 1 in 5 encounters. Roughly 2 out of every 3 encounters resulted in a failure to remain in the United States. For those individuals, the border was decidedly closed. Despite significantly increased crossings, CBP reports that its overall effectiveness at detecting and interdicting migrants in FY 2021 was 82.6%, higher than both the agency’s target of 81.0% and the previous result of 79.4% in FY 2020.<sup>27</sup>

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<sup>26</sup> Immigration and Customs Enforcement, “JUSTIFICATION FOR OTHER THAN FULL AND OPEN COMPETITION,” Sept. 27, 2021, <https://sam.gov/opp/91706b03fec145589a73c92959cbbf4d/view>.

<sup>27</sup> Department of Homeland Security, “U.S. Customs and Border Protection Budget Overview, Fiscal Year 2023 Congressional Justification,” (2022), at CBP-4, [https://www.dhs.gov/sites/default/files/2022-03/U.S.%20Customs%20and%20Border%20Protection\\_Remediated.pdf](https://www.dhs.gov/sites/default/files/2022-03/U.S.%20Customs%20and%20Border%20Protection_Remediated.pdf).

Figure 4: Estimated outcomes of apprehensions at the border, February 2021 to February 2022



**Source:** U.S. Customs and Border Protection, Nationwide Encounters Page; CBP Status Report, *Texas v. United States*, 2:21-cv-00067, ECF No. 133-1 (March 15, 2022); CBP Status Report, *Texas v. United States*, 2:21-cv-00067, ECF No. 129-1 (February 15, 2022); CBP Status Report, *Texas v. United States*, 2:21-cv-00067, ECF No. 124-1 (January 14, 2022); CBP Status Report, *Texas v. United States*, 2:21-cv-00067, ECF No. 119-1 (December 15, 2021).

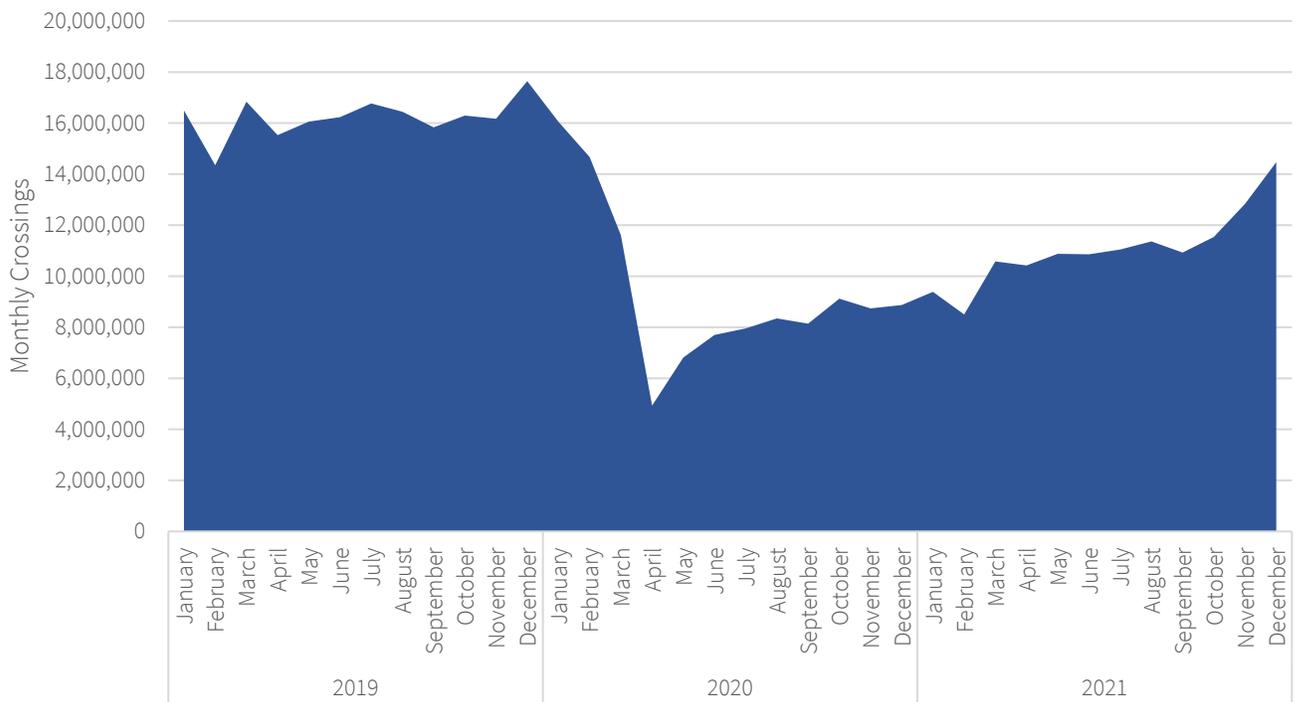
Importantly, when reviewing these numbers, it is important to consider the original stated purpose of Title 42—limiting the spread of COVID-19 from people crossing the border. But for the past two years, millions of people have crossed the border legally at the ports of entry each month. As Figure 5 shows, even at the height of the pandemic, closures in April 2020, more than 6 million people crossed the border. Until late 2021, there was no vaccine requirement to cross the border legally, nor were people crossing the border at ports of entry required to show a negative COVID-19 test.<sup>28</sup> At no point during the pandemic have U.S. citizens or lawful permanent residents been the target of any restriction on their entry from Mexico into the United States, because DHS declared in March 2020 that the reentry of U.S. citizens and lawful permanent residents was *per se* “essential travel.”<sup>29</sup>

Since Title 42 went into place, people crossed the U.S.-Mexico border at ports of entry more than 225 million times—over 100 times greater than the number of people who crossed between ports of entry. In short, people crossing the border between ports of entry has constituted less than 1% of traffic across the U.S.-Mexico border since Title 42 went into effect. Yet until very recently, only the far smaller group was turned away on the basis of public health.

<sup>28</sup> Zolan Kanno-Youngs and Emily Cochrane, “The U.S. will reopen its land borders for fully vaccinated travelers,” *New York Times*, October 12, 2021, <https://www.nytimes.com/2021/10/12/us/politics/us-canada-mexico-borders-open.html>.

<sup>29</sup> U.S. Customs and Border Protection, “Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico,” 85 Fed. Reg. 16547, 16548 (March 24, 2020).

Figure 5: Number of People Crossing into the United States from Mexico at Ports of Entry, January 2019 to December 2022



Source: U.S. Department of Transportation, Border Crossing/Entry Data, <https://explore.dot.gov/#/views/BorderCrossingData/Monthly>

Despite claims that “the border is open” to migrants, since Title 42 went into place, over 1.7 million border encounters have resulted in an expulsion and over 60,000 people have been deported or otherwise sent back to Mexico under Title 8. By contrast, less than one million people have been processed under normal immigration law and either permitted to apply for asylum or sent to ICE detention centers. And throughout that time, cross-border traffic has continued in the millions, with people able to cross back and forth every day for school, work, or simply a shopping trip—most without being tested for COVID-19.

**Title 42 and Increased Migration Has No Impact on the Flow of Opiates into the United States**

The overwhelming majority of hard drugs such as fentanyl, heroin, and methamphetamine enter the United States through ports of entry, usually concealed in commercial traffic or passenger vehicles.<sup>30</sup> At a recent hearing in the Senate Homeland Security and Governmental Affairs Committee, Diane Sabatino, the Deputy Executive Assistant Commissioner of Customs and Border Protection, testified that just 15% of commercial vehicles and only 2% of private vehicles are screened for narcotics.<sup>31</sup> As the Drug Enforcement Agency has

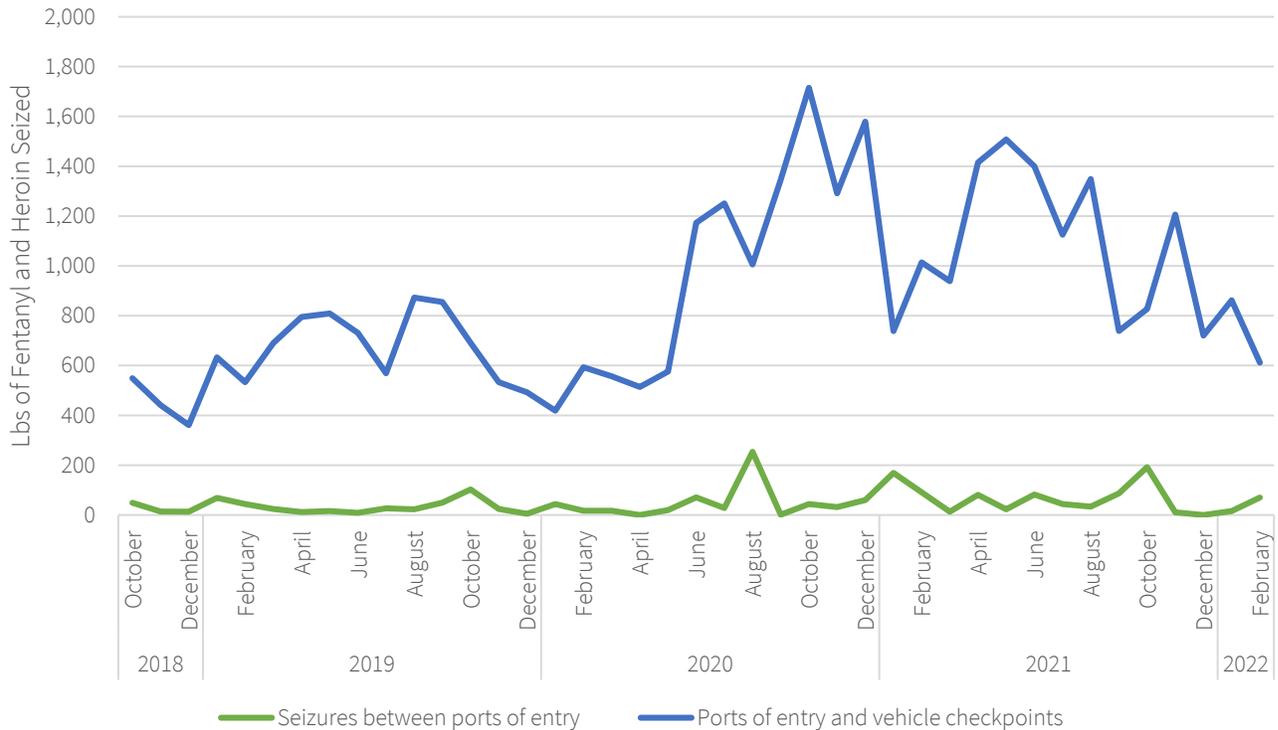
<sup>30</sup> Customs and Border Protection, Drug Seizure Statistics, <https://www.cbp.gov/newsroom/stats/drug-seizure-statistics>.

<sup>31</sup> Senate Homeland Security and Governmental Affairs Committee, Subcommittee on Government Operations and Border Management, “Federal Government Perspective: Improving Security, Trade, and Travel Flows at the Southwest Border Ports of Entry,” November 17, 2021, <https://www.hsgac.senate.gov/hearings/federal-government-perspective-improving-security-trade-and-travel-flows-at-the-southwest-border-ports-of-entry>

long recognized, commercial ports of entry are the primary means by which fentanyl and other drugs enter the United States.<sup>32</sup> Since the beginning of FY 2019, just 5% of opiates seized at the border (heroin and fentanyl) have been seized by Border Patrol agents between ports of entry, rather than at the ports of entry or internal vehicle checkpoints.

Despite these facts, defenders of Title 42 have at times attempted to link the policy to the flow of opiates and other hard drugs across the border from Mexico, arguing that an increase in migrants distracts Border Patrol agents from their normal duties and provides opportunities for drugs to be smuggled into the United States. This argument is not supported by the data, which shows little change in the pattern of drug seizures during times in which migration is high. As demonstrated by Figure 6, the overwhelming majority of opiates continue to be seized at ports of entry and vehicle checkpoints regardless of whether migration is high or low.

Figure 6: CBP opiate seizures at the southwest border, by location of seizure, October 2018 to February 2022



Source: U.S. Customs and Border Protection, Drug Seizure Statistics, <https://www.cbp.gov/newsroom/stats/drug-seizure-statistics>

<sup>32</sup> Salvador Rivera, “DEA: Local drug sales now fueling most of the bloodshed south of the border,” *Border Report*, March 7, 2022, <https://www.borderreport.com/hot-topics/border-crime/dea-local-drug-sales-now-fueling-most-of-the-bloodshed-south-of-the-border/>.

Migration increased significantly in 2019, fell through early 2020, increased throughout the second half of 2020, then doubled again in 2021. Despite these massive swings in migration across the southern border, there is no evidence that Border Patrol seizures of opiates between ports of entry were affected. Instead, the most likely driver in recent shifts in fentanyl seizures is the port of entry restrictions that were in place from March 2020 through November 2021 and which correspond to a period of higher seizures at the ports of entry (see Figure 6). This is because the restrictions caused reduced traffic through the ports of entry and a shift in the demographics of the smugglers, which made it possible for CBP to detect and intercept a higher percent of narcotics.<sup>33</sup> Not surprisingly, after the restrictions ended in November and traffic across the border increased, CBP’s ability to detect and intercept illicit narcotics at ports of entry has fallen, leading to reduced opiate seizures from December through February.

### How the Biden Administration Should Implement an End to Title 42

Over the last eight years, in 2014, 2018-2019, and 2021, the United States has gone through successive times of high humanitarian migration. Each time, the response from the U.S. has been similar; aggressive, enforcement-centric, and focused on deterrence. Title 42 was intended to be the ultimate deterrent, blocking nearly all who came across and implementing a near-total denial of access to asylum. But Title 42 failed miserably in that goal, as this statement has already articulated. Our experiences over the last decade have shown that deterrence-based programs are limited in their effectiveness at best and actively harmful at their worst. The overarching lesson we’ve learned from a decade of attempts to slow or stop humanitarian migration is that U.S. border policy alone cannot solve the humanitarian crises that are driving migrants to the United States.

To prepare for the lifting of Title 42, DHS should immediately surge resources and manpower to the Office of Field Operations that would permit all ports of entry along the southern border to rapidly restart humanitarian processing of asylum seekers at levels at least twice or three times as high as in 2016. If necessary, Congress should provide additional funding targeted solely to facilitate DHS processing of individuals seeking asylum at ports of entry. DHS should cross-detail employees from across the agency and seek volunteers from other federal agencies to assist with this mass operation to resume asylum processing at ports of entry. The Office of Refugee Resettlement (ORR) should also prepare additional shelter capacity and detail ORR caseworkers to the border to assist with the increased number of unaccompanied children crossing in recent months.

In addition, DHS should coordinate with humanitarian and legal NGOs that operate on both sides of the border to spread accurate information about restoration of asylum at ports of entry and to create an orderly, dignified, and humane process to access asylum. The State Department should simultaneously coordinate with Mexico to further increase shelter capacity on the Mexican side of the border, to encourage people to avoid the smugglers and instead come to the ports of entry. In addition, the State Department should work with Mexico to increase security surrounding the ports of entry, with a focus on limiting cartel access to vulnerable asylum seekers who are waiting to access asylum.

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<sup>33</sup> Deborah Bonello and Luis Chaparro, “Mexican Cartels Are Using More U.S. Citizens to Smuggle Drugs Because of COVID,” *VICE News*, November 5, 2020, <https://www.vice.com/en/article/88aazb/mexican-cartels-are-using-more-us-citizens-to-smuggle-drugs-because-of-covid>, <https://www.vice.com/en/article/88aazb/mexican-cartels-are-using-more-us-citizens-to-smuggle-drugs-because-of-covid>

## Testimony For “Examining Title 42 and the Need to Restore Asylum at the Border”

DHS should focus its strategy first on the ports of entry where flow would likely be highest; San Diego, El Paso, and Brownsville, and then smaller ports secondarily. The agencies should simultaneously begin a messaging campaign encouraging people seeking asylum to come to the ports of entry rather than crossing between POEs. The agencies should extensively coordinate with Mexican and U.S. border NGOs and build trust with allies, ensuring that those who are admitted are paroled in or placed in Alternatives to Detention (ATDs) rather than being sent to detention.

In addition to resourcing the ports of entry to resume asylum processing, DHS should immediately cross-detail as many people as possible to be Border Patrol processing coordinators and/or issue contracts to third parties to act as temporary processing coordinators. Congress should provide additional funding to the Department to help facilitate this expansion of processing, ensure increased transparency of Border Patrol spending and resource allocation, and provide for additional supervision of Border Patrol processing.

The increase in humanitarian processing will serve two primary goals; reduce the deprivation of rights that asylum seekers face in Border Patrol custody, while simultaneously permitting the Border Patrol to continue to carry out their primary law enforcement duties.

More efficient humanitarian processing of asylum seekers that frees up Border Patrol agents to carry out their enforcement functions will also mean that a higher percentage of migrants who are not seeking asylum will be subject to the Biden administration’s plan to restore many of the deterrent-focused policies that existed prior to Title 42.<sup>34</sup> While we do not condone the use of “consequence-based” policies, which generally lack sufficient procedural safeguards to avoid *refoulement* of asylum seekers, there is little doubt that the mass use of expedited removal and increases in immigration prosecutions will have at least some temporary deterrent effect on migrants, especially on those who were crossing the border repeatedly under Title 42. Thus, after an initial influx of asylum seekers who have been waiting in Mexico, the end of Title 42 is likely to lead to an eventual *reduction* in border crossings.

However, in discussing the deterrent effect of certain border policies, we must acknowledge that long-term border management should not adopt a goal of zero migration. “Operational control” of the border can and should include opportunities for desperate people to seek protection in the United States. And we must acknowledge that the flow of individuals seeking a better life has been a constant at the U.S. border for over a century. Even the harshest border policies, like the deliberate separation of families, did not stop people coming to the United States. We cannot change human nature, and there is nothing more human than seeking to protect yourself and/or your family, including by striking out for a new land to seek a better life.

### Conclusion

Two years of evidence have shown that Title 42 was a failure. Rather than continuing to try to deter our way out migration, we need to make a sustained investment in the creation of an orderly humanitarian protection system that reduces the incentives to cross the border between ports of entry and helps

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<sup>34</sup> U.S. Department of Homeland Security, “FACT SHEET: DHS Preparations for a Potential Increase in Migration,” March 30, 2022, <https://www.dhs.gov/news/2022/03/30/fact-sheet-dhs-preparations-potential-increase-migration>.

Testimony For “Examining Title 42 and the Need to Restore Asylum at the Border”

address the root causes of migration. Medium and long-term solutions to asylum processing require time and political will, not simply yet another attempt to crack down.

The American Immigration Council looks forward to working with the Subcommittee on these solutions.

Sincerely,

Aaron Reichlin-Melnick  
Senior Policy Counsel  
American Immigration Council