

Title 42: Overview and Impact



May 2021

1. What is Title 42?

“Title 42” refers to Title 42 of the U.S. Code, and in this context it is used as a shorthand for 42 U.S.C. 265 and 268, which empower the Secretary of the Department of Health and Human Services (HHS) to “prohibit, in whole or in part, the introduction of persons and property from such countries or places” where there exists “any communicable disease” and “there is serious danger of the introduction of such disease into the United States.”¹

On March 20, 2020, HHS [issued](#) an emergency regulation to implement this law and delegated authority to the Director of the Centers for Disease Control and Prevention (CDC) to carry it out.² That same day, CDC Director Robert Redfield [issued](#) an order suspending the “introduction” of certain individuals traveling from Canada or Mexico (regardless of their country of origin).³ The order was [extended](#) indefinitely, and it will remain effective “until [the CDC Director] determine[s] that the danger of further introduction of COVID-19 into the United States has ceased to be a serious danger to the public health, and continuation of the Order is no longer necessary to protect the public health.”⁴

2. Who is being impacted by Title 42?

The order targets those who have entered the U.S. from Canada or Mexico and “would be introduced into a congregate setting” at a port of entry or in a Border Patrol station.⁵ This includes individuals who would normally be detained by U.S. Customs and Border Protection (CBP) after arriving at the border, such as asylum seekers, unaccompanied children, and people attempting to enter the U.S. without inspection. The CDC order does not apply to U.S. citizens, lawful permanent residents, and their spouses and children, nor does it apply to those who arrive at a port of entry with valid travel documents. By the end of March 2021, the federal government had carried out over 600,000 expulsions under Title 42.⁶

3. Are their exceptions to this policy?

There are limited exceptions to the application of Title 42. The order itself includes an exception for anyone that the Department of Homeland Security (DHS) determines should be allowed into the U.S. on “consideration of significant law enforcement, officer and public safety, humanitarian, and public health interests.”⁷ Additionally, the Secretary of DHS has [stated](#) that the government does “not expel individuals with certain acute vulnerabilities.”⁸ Initially, unaccompanied children were among those impacted by the order. In late January, however, the CDC [issued](#) a notice that exempts unaccompanied children from expulsion under Title 42.⁹ There has also been [litigation](#) regarding the use of Title 42 against unaccompanied children.¹⁰ Further, some families and individuals have been allowed to remain in the U.S. and placed in immigration proceedings, given the inability or refusal of Mexico to accept them.

Recently, it was [reported](#) that an increased number of families are being processed into the U.S. through individual exemptions.¹¹ However, it remains the policy of the government for families and individuals to be expelled or denied entry under Title 42. While more formalized procedures for selecting families are expected sometime in the future, no such procedures currently exist, making the exemptions process highly unpredictable and inconsistent. The Biden Administration has denied having any immediate plans to end the use of Title 42.¹²

4. What happens to those covered by Title 42?

All persons who arrive at ports of entry and subject to Title 42 will be returned, or “expelled,” to their country of origin or the country from which they entered the U.S., in the vast majority of cases Mexico, as quickly as possible. This varies significantly from normal deportations because those expelled do not receive an order of deportation, nor do they receive formal documentation, and they are generally not given the opportunity to file for asylum or other legal protections provided by law.

5. What has been the impact of Title 42?

There have been several adverse consequences resulting from the use of Title 42. These include:

- **Inducing family separation:** Since the exclusion of unaccompanied children from Title 42, many families forced to reside in Mexico under dangerous and unsustainable conditions have sent their children to the border alone in an act of desperation, leading CBP to encounter 18,890 unaccompanied children in March 2021 alone.¹³
- **Overwhelmed facilities:** As more unaccompanied children enter the U.S., HHS has had to develop makeshift solutions in order to house an influx of minors who are transferred from CBP facilities. Resources, including staff, are being deployed to various cities around the country to expedite the processing of children at what are known as “emergency intake sites.” These facilities are often overcrowded and not ideal for children.
- **Returning migrants to dangerous conditions in Mexico and elsewhere:** Forced to wait in Mexico, migrants are often subjected to violence, threats, human trafficking, and other dangers, both at the hands of criminal elements, such as cartels, and government actors. Meanwhile, over one thousand Haitian migrants have been returned to Haiti, even though they could likely face harm there, and many have also been expelled to Mexico, where they’ve faced widespread discrimination and abuse on account of their race and inability to speak Spanish.¹⁴
- **Increased recidivism rate:** The number of people who have been apprehended by CBP, returned to Mexico, and apprehended again has grown significantly under Title 42. Before the pandemic began in the U.S., just 7% of people arrested at the border had unlawfully crossed the border more than once, but by October 2020, 40% of all people arrested had unlawfully crossed the border multiple times that year.¹⁵
- **Denial of due process:** Expulsions under Title 42 provide no opportunity for migrants to plead their case, and those expelled are not provided with instructions or information about future opportunities or proceedings.
- **Spreading COVID-19:** Migrants subjected to expulsions via air and ground transportation—sometimes after being held in the very same congregate settings Title 42 purportedly seeks to avoid or with regular deportees previously held in long-term detention facilities—have contracted COVID-19 in government custody; these individuals then spread the virus elsewhere, including regions with far fewer resources to manage outbreaks.¹⁶ Inconsistent testing and poor adherence to public health protocols by enforcement agencies have exacerbated this problem.

6. What do public health experts have to say about the use of Title 42?

Public health experts have repeatedly [argued](#) against the use of Title 42 and concluded that the CDC’s order has “no scientific basis as a public health measure.”¹⁷ It has also been reported that government officials outside the CDC put pressure on the agency to issue its order, overruling the conclusions of the agency’s medical experts.¹⁸ Per the order, the CDC is required to “review the latest information regarding the status of the COVID-19 pandemic and associated public health risks to ensure that the Order remains necessary to protect the public health.”¹⁹ However, no findings or methods from such reviews have ever been released.

7. Is this a lawful use of Title 42?

Immigration advocates argue that the authority given under Title 42 does not supersede the U.S. government’s legal responsibilities and that it is in direct violation of the obligations the U.S. has under domestic refugee law and international treaties to welcome those fleeing persecution in their home countries. Advocates specifically argue that the use of Title 42 violates the prohibition against refoulement, which is a widely recognized principle of international law that forbids any country receiving asylum seekers from returning them to a country in which they would be in likely danger of persecution. The United Nations High Commissioner for Refugees (UNHCR) has also [addressed](#) the risk of refoulement when “a blanket measure to preclude the admission of refugees or asylum-seekers” is imposed.²⁰ The U.S. is bound by the non-refoulement provision of the 1951 Refugee Convention as a signatory to the 1967 Protocol, over which UNHCR has supervisory responsibilities.

8. Won’t ending the use of Title 42 result in the increased transmission of COVID-19 within the U.S.?

Not necessarily. Then Acting Administrator of the Federal Emergency Management Agency (FEMA), Bob Fenton, [told](#) lawmakers in March 2021 that the positivity rates for migrants coming across the U.S. border at that time was less than 6%, while the average positivity rate in Texas during that same time was above 7%.²¹ CBP is working with state and local authorities and non-governmental groups to make sure that migrants entering the U.S. follow COVID-19 health and safety protocols, perform initial checks for symptoms, and consult with onsite medical staff. In place of Title 42, experts have [recommended](#) “evidence-based public health” measures that include testing, personal protective equipment, and physical distancing.²²

Additionally, Title 42 primarily targets asylum seekers, a relatively small population when compared to the 11.5 million people who crossed from Mexico into the U.S. through ports of entry during March 2021 alone.²³ Because the decision of whether or not to release asylum seekers awaiting adjudication of their cases is a matter of prosecutorial discretion, concerns regarding “congregate settings” could be addressed by limiting the use of detention to those who pose flight risks or threats to national security or public safety. A 2019 [study](#) of several hundred asylum seekers at the U.S.-Mexico border also found that almost 92% had family or friends with whom they could stay in the U.S.²⁴

9. How does this issue relate to Catholic teaching?

The Catholic Church recognizes the right of nations to control their borders and protect their citizens. At the same time, it maintains that those fleeing violence and persecution should be protected. In a recent statement, the bishops of the dioceses along the U.S.-Mexico border [stated](#), “Challenges such as these require humanitarian solutions. Undoubtedly, nations have the right to maintain their borders. This is vital to their sovereignty and self-determination. At the same time, there is a shared responsibility of all nations to preserve human life and provide for safe, orderly, and humane immigration, including the right to asylum.”²⁵

Endnotes

¹ 42 U.S.C. § 265.

² Control of Communicable Diseases; Foreign Quarantine: Suspension of the Right to Introduce and Prohibition of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 56,424 (Oct. 13, 2020).

³ Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17,060, 17,061 (Mar. 20, 2020).

⁴ Order Suspending the Right to Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists, 85 Fed. Reg. 65,806, 65,809 (Oct. 13, 2020) [hereinafter CDC Order].

⁵ *Id.* at 65,807.

⁶ CBP, *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, <https://bit.ly/3gZ3iCH> (last updated Apr. 23, 2021); CBP, *FY 2020 Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, <https://bit.ly/3eYakVX> (last updated Nov. 20, 2020).

⁷ CDC Order, *supra* note 4, at 65,808.

⁸ DHS, Statement by Homeland Security Secretary Alejandro N. Mayorkas Regarding the Situation at the Southwest Border (Mar. 16, 2021), <https://bit.ly/3nM1oqq>.

⁹ Notice of Temporary Exception From Expulsion of Unaccompanied Noncitizen Children Pending Forthcoming Public Health Determination, 86 Fed. Reg. 9,942 (Jan. 30, 2021).

¹⁰ *See generally What Is Happening With Unaccompanied Children and Border Closures Related to COVID-19?*, Justice for Immigrants (2021), <https://bit.ly/2PRobEU>.

¹¹ Alicia A Caldwell & Michelle Hackman, *Growing Number of Migrant Families Allowed Into U.S. to Seek Asylum*, *The Wall Street Journal* (Apr. 30, 2021), <https://on.wsj.com/33ibTZ8>.

¹² *Id.*

¹³ CBP, *CBP Announces March 2021 Operational Update* (Apr. 8, 2021), <https://bit.ly/3h2qEaH>.

¹⁴ *See, e.g., Barrett Limoges, 'I'm Trapped Here': Haitian Asylum Seekers Languish in Mexico*, *Al Jazeera* (Apr. 24, 2021), <https://bit.ly/3upArvi>.

¹⁵ *A Guide to Title 42 Expulsions at the Border*, American Immigration Council (Mar. 29, 2021), <https://bit.ly/3aZiZWS>.

¹⁶ *See, e.g., Natalie Gallón, 44 Migrants on One U.S. Deportation Flight Tested Positive for Coronavirus*, *CNN* (April 17, 2020), <https://cnn.it/3uj6dKw>.

¹⁷ Letter to Acting HHS Secretary Cochran and CDC Director Walensky (Jan. 28, 2021), <https://bit.ly/2QJtx5E>; *see also* Letter to HHS Secretary Azar and CDC Director Redfield Signed by Leaders of Public Health Schools, Medical Schools, Hospitals, and Other U.S. Institutions (May 18, 2020), <https://bit.ly/3efUZ3y> [hereinafter Letter to HHS].

¹⁸ Jason Dearen & Garance Burke, *Pence Ordered Borders Closed After CDC Experts Refused*, *The Associated Press* (Oct. 3, 2020), <https://bit.ly/3nIQnGl>.

¹⁹ CDC Order, *supra* note 4, at 65,808–09.

²⁰ UNHCR, *Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response* (Mar. 16, 2020), <https://bit.ly/3vUUwdn>.

²¹ *Federal and State Emergency Management Officials on COVID-19 Response*, C-SPAN (Mar. 16, 2021), <https://bit.ly/3eO456Q>.

²² Letter to HHS, *supra* note 17, at 2.

²³ U.S. Department of Transportation, Bureau of Transportation Statistics, *Border Crossing/Entry Data*, <https://bit.ly/3ufcVRD> (last visited May 4, 2021).

²⁴ Tom K. Wong, *Seeking Asylum: Part 2*, at 13 (Oct. 29, 2019), <https://bit.ly/33dEaQP>.

²⁵ U.S. Conference of Catholic Bishops, *Statement on the Situation at the U.S.-Mexico Border* (Apr. 1, 2021), <https://bit.ly/3aYDdQi>.



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