



Lutheran Immigration and Refugee Service

Written Testimony of
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For a Hearing of the
HOUSE COMMITTEE ON HOMELAND SECURITY
SUBCOMMITTEE ON BORDER SECURITY, FACILITATION, & OPERATIONS
(117TH CONGRESS)

“Unaccompanied Children at the Border: Stakeholder Perspectives on the Way Forward”
Tuesday, April 27, 2021, at 2:00 p.m.
Virtual Hearing

CBP Data Shows the Rise of Unaccompanied Children under Title 42

LIRS has decades of experience in policy and programming with children who come into the immigration enforcement system in the United States. We are a solutions-oriented organization that works closely with our Federal partners and a national network of local affiliates to ensure every child who enters the United States is treated with the dignity and care that we would wish for our own children.

Introduction:

Mounting evidence indicates that the historic number of arrivals of unaccompanied children at the Southern border is the result of a specious “public health order,” Title 42 – a Trump-era U.S. policy that can and should be reversed.

Evoked in March 2020, the regulation halted asylum access for families and individuals presenting themselves at southern ports of entry, while the border remained open to hundreds of thousands of people crossing daily for non-essential travel. When legal challenges arose, federal courts found reason to make exception for unaccompanied children and President Biden chose to keep the carve out in place - making unaccompanied children among the select few individuals permitted access to life-saving refuge. This policy functionally forced families to decide to stay

together amid unsafe conditions in Mexico or to separate in the hopes of safeguarding their children.¹

While the impact of two devastating hurricanes and regional instability have pushed migrants out of the Northern Triangle in Central America, many of these asylum seekers and migrants are also pulled by the hope of safe haven, the assurances of seasonal work (i.e. agriculture), and annual weather patterns that make the route to the border more survivable. These colliding factors, timed with pent up demand from delayed travel during the 2020 pandemic, have driven a cyclical migration influx that we have seen in previous years, including each year of the 1980s and as recently as 2014 and 2019.² As many have noted, what is unusual this year is the historic number of arrivals of unaccompanied children at the border, which could be decreased if the Biden administration were to end Title 42.

What is Title 42?

On March 20, 2020, the Trump White House – in collaboration with then-Acting Secretary Chad Wolf – directed a new order, stipulating that those “introducing” themselves at Southern ports-of-entry to apply for asylum should be turned away and “expelled” back to Mexico or their home countries.³ This directive functionally suspended the long-guaranteed right to seek asylum for individuals who arrive at our southern border and ask for protection. The expulsions were carried out by Customs and Border Protection (CBP) under the evocation of a little-known provision of U.S. health law, section 265 of U.S. Code Title 42. Despite being billed as a public health order at the time, the Center for Disease Control’s (CDC) own scientists disputed the public health merit of the order while the U.S. still permitted robust commerce and non-essential travel across the border, and CDC officials refused to sign it.⁴ Originating from the West Wing and then-Acting Secretary Chad Wolf’s agency, the order would remain in effect despite wide-spread criticism by leading public health officials.⁵

CBP would subsequently report that 90 percent of expulsions in May 2020 were under the Title 42 Order.⁶ Subsequent investigations found that CBP had controversially and possibly illegally expanded the jurisdiction of the original Title 42 order to apply beyond those “introducing”

¹ David Bier, “Immediate Solutions for Migrant Children,” Cato Institute,” March 17, 2021, <https://www.cato.org/publications/immediate-solutions-migrant-children#release-children-nonparental-adult-family>.

² Refugee Council USA “No Justification: The Administration’s Crusade to Ban All Refugees,” July 19, 2019, <https://rcusa.org/resources/strongno-justification-the-administrationsnbspcrusade-to-ban-all-refugeesnbspstrong/>

³ Dara Lind, “Democratic Senators Demand Answers on Trump’s Secretive Border Expulsions,” *ProPublica*, April 8, 2020, <https://www.propublica.org/article/democratic-senators-demand-answers-on-trumps-secretive-border-expulsions>.

And “Acting DHS Secretary Wolf Speaks to Reporters,” *C-SPAN*, March 20, 2020, <https://www.c-span.org/video/?470541-101/dhs-secretary-wolf-limiting-cross-border-travel-coronavirus-crisis>.

⁴ James Bandler et al, “Inside the Fall of the CDC,” *Pro Publica*, October 15, 2020, <https://www.propublica.org/article/inside-the-fall-of-the-cdc>.

⁵ “Public Health Experts Urge U.S. Officials to Withdraw Order Enabling Mass Expulsion of Asylum Seekers,” *Columbia University Mailman School of Public Health*, May 18, 2020, <https://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-urge-us-officials-withdraw-order-enabling-mass-expulsion-asylum-seekers>.

⁶ Rafael Bernal, “90 percent of People Apprehended at Border Expelled under New Coronavirus Order,” *The Hill*, May 7, 2020, <https://thehill.com/latino/496632-90-percent-of-people-apprehended-at-border-expelled-under-new-coronavirus-order?rl=1>.

themselves to the U.S., deciding that the order extended authorization to also expel those who had already crossed into the U.S.⁷

Who is crossing the border under Title 42?

Hundreds of thousands of people cross the U.S.-Mexico border on a daily basis, mostly for commerce and non-essential travel.⁸ Sixteen million individuals crossed the U.S.-Mexico border in March 2021 alone.⁹ However, a combination of the previous administration's Remain in Mexico program as well as the Title 42 order has ensured that shamefully few of those millions of individuals crossing monthly are those seeking life-saving asylum.

Recent analysis by the American Immigration Council indicates, "last month, 72% of all people encountered at the border were sent back to Mexico or expelled to their home countries. And while unaccompanied children and some families at the border have been allowed to come into the country and challenge their deportation in immigration court, they represent a fraction of overall entrants."¹⁰

What evidence is there that Title 42 is creating the influx of unaccompanied children?

CBP officials have reported the phenomenon publicly. Brian Hastings, who leads the busiest Border Patrol sector in the United States reported, "what we are seeing, more and more, is the families are self-separating in Mexico."¹¹ From February 24 to March 23, 2021, Border Patrol documented 435 incidents in just one sector (in the south Texas region) where children were apprehended crossing the border alone after previously being expelled with their family under the Title 42 order. When the unaccompanied children arrive at ports of entry or are found alone by border patrol, they are first placed in the custody of CBP – most of them held in in-take facilities that we have seen images of in the news, with children laying in overpacked pods, wrapped in mylar blankets behind plastic screens. The children are then transferred to the custody of Health and Human Services – most after spending an average of 122 hours in CBP custody, despite mandates that they be transferred within 72 hours.¹²

⁷ United States District Court for the District of Columbia, "*PJES v. Chad Wolf, Case 1:20-cv-02245-EGS-GM U.S. District Court for the District of Columbia*," November 18, 2020, <https://www.dropbox.com/s/plbuy0knoth1623/PJES%20opinion.pdf?dl=0>.

⁸ "Border Crossing/Entry Data," Bureau of Transportation Statistics, April 26, 2021, <https://www.bts.gov/browse-statistical-products-and-data/border-crossing-data/border-crossingentry-data>.

⁹ "Border Crossing/Entry Data," Bureau of Transportation Statistics, April 26, 2021, <https://www.bts.gov/browse-statistical-products-and-data/border-crossing-data/border-crossingentry-data>.

¹⁰ "Facts About the Current Situation at the Border," American Immigration Council, March 23, 2021, <https://www.americanimmigrationcouncil.org/news/facts-about-current-situation-border>.

¹¹ Geneva Sands, "Families are 'self-separating' in Mexico after being expelled from the US, Border Patrol says," *CNN*, April 6, 2021 <https://www.cnn.com/2021/04/06/politics/families-self-separating-mexico-border-patrol/index.html>.

¹² Priscilla Alvarez, "How the Biden Administration is Responding to a Record Number of Unaccompanied Children at the US-Mexico Border," *CNN*, April 23, 2021, <https://www.cnn.com/interactive/2021/04/politics/biden-administration-border-crisis/>.

In March, Border Patrol apprehended 18,656 unaccompanied minors at the Southwest border, a record since at least October 2009. This is about twice as many apprehensions as in February and continues an upward trend dating back to last fall, according to the agency's data.¹³

We Have Seen This Before

In January of 2020, under the Trump administration's Remain in Mexico program, which forced asylum applicants to wait in Mexico pending their asylum hearings, we saw record numbers of unaccompanied minors arriving after border patrol officials had initially encountered them with family members and deported them.¹⁴ How they separated from their family members varies, but reports suggest both concerning disappearances of family members as well as self-separation of families that decided that the squalid and unsafe conditions in Mexico were too dangerous for their children.¹⁵

Other Important Implications

An additional implication of Title 42 is its unjustified and immoral use to deport Black Haitian immigrants to Mexico or back to Haiti without asylum proceedings or access to legal representation, violating codified U.S. law forbidding refoulement.¹⁶ Given that many of the expulsions and deportations of immigrants back to Mexico were based on agreements with the Mexican government related to Central American asylum seekers, its use to violate American law and deport Haitian asylum seekers back to Haiti is unconscionable. As Tom Ricker, Policy Director with the Quixote Center, points out, "the entire justification for the Title 42 policy is the claim that the United States lacks the capacity to safely detain people. Yet, the United States is holding people for weeks....How do you deny someone asylum who has been placed in detention – with no legal representation at all – based on the argument that there is no capacity to detain them?"

Rescinding Title 42

For the reasons stated above, Lutheran Immigration and Refugees Service joins UndocuBlack Network, Southern Border Communities Coalition, the National Council of Churches, the CATO Institute, and 186 other groups and leaders in calling for the end of the meritless Title 42 policy.¹⁷ Rescinding Title 42 would create a path forward for families who wish to remain together as they seek safety, one that is consistent with our values as a nation and would end the continuance of a deeply shameful policy of family separation under the Trump administration.

¹³ Priscilla Alvarez, "How the Biden administration is responding to a record number of unaccompanied children at the US-Mexico border," *CNN*, April 23, 2021, <https://www.cnn.com/interactive/2021/04/politics/biden-administration-border-crisis/>.

¹⁴ Priscilla Alvarez, "At least 350 children of migrant families forced to remain in Mexico have crossed over alone to US," *CNN*, January 24, 2020, <https://www.cnn.com/2020/01/24/politics/migrant-children-remain-in-mexico/index.html>.

¹⁵ Priscilla Alvarez, "At least 350 children of migrant families forced to remain in Mexico have crossed over alone to US," *CNN*, January 24, 2020, <https://www.cnn.com/2020/01/24/politics/migrant-children-remain-in-mexico/index.html>.

¹⁶ Dara Lind, "Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately — Ignoring Asylum Law," *Pro Publica*, April 2, 2020, <https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law>.

¹⁷ David Bier, "Immediate Solutions for Migrant Children," *Cato Institute*, March 17, 2021, <https://www.cato.org/publications/immediate-solutions-migrant-children#release-children-nonparental-adult-family>.

Lutheran Immigration and Refugee Services

For 80 years, Lutheran Immigration and Refugee Service has assisted forcibly uprooted people from round the globe. As the largest faith-based organization focused on serving migrants and refugees, we seek to provide assistance and protection to vulnerable populations when they can no longer safely remain in their home countries. Informed by a Lutheran legacy of welcoming the stranger, the sanctity of family, and decades of experience with migrants and refugees, we have empowered more than 500,000 families and individuals fleeing conflict, persecution, and war. We provide a host of services, which include:

Migrant Services

LIRS coordinates services for asylum seekers at the southern border, departing immigration detention, and at their final destinations, including the provision of necessities such as food, clothing, and hygiene supplies, medical triage and basic care, Know Your Rights counseling, emergency housing, and case management services.

Safe Release Support Services

Safe Release Support sites perform background checks on potential guardians to ensure that children are reunited into safe and secure homes. Safe Release staff identify various needs of the family such as pro bono legal counsel, food banks, counseling services, English classes, job training, and medical care, and connect them to these services. During the 2018 family separation crisis, LIRS was one of only two agencies working to reunite families.

Transitional Foster Care for Unaccompanied Children

The Transitional Foster Care program provides safe and caring foster homes to particularly vulnerable children who will be reunified with their families. The program specializes in serving minors under the age of 12, pregnant/parenting youth, youth with disabilities, and sibling groups while their families are located. All children in transitional care receive individualized assessments, acculturation and adaptation services, case management, education, weekly group and individual counseling, legal support, mental and medical health care, and access to religious services.

Long Term Foster Care for Unaccompanied Children

Unaccompanied children without family reunification options but who have the possibility of receiving legal immigration protections are placed in Long Term Foster Care where they receive ongoing case management support as they integrate into their new communities. Children in Long Term Foster Care are placed with loving foster families until their immigration case is resolved and typically will transition into the Unaccompanied Refugee Minors program

Home Study and Post-Release Services

For particularly vulnerable unaccompanied children, LIRS offers community-based case management services. These include inspection of home environments once the child and the caregiver are together in the home, connecting families to community resources, and empowering families with the resources and knowledge they need to make informed decisions about schooling, legal representation, medical health, mental health, and recreational and religious services.