

The Path Forward: Ensuring Humane and Orderly Processing at the U.S.-Mexico Border

The Biden Administration should swiftly end use of Title 42 and port of entry closures that restrict access to asylum and result in summary returns of protection seekers under the guise of public health. Simultaneously, the Administration must take proactive steps to ensure safe and orderly reception of unaccompanied children and other migrants arriving at the U.S.-Mexico border. Access to protection should be immediately restored through processing consistent with U.S. and international law, including the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA).

Since March 2020,¹ the U.S. government has unlawfully used purported “Title 42” public health authority to carry out more than 1.7 million expulsions of individuals arriving to the United States between ports of entry² — including unaccompanied children — without providing them with a meaningful opportunity to request protection or legal safeguards. Human rights organizations have documented the grave dangers facing expelled migrants, tracking more than 9,800 violent attacks, acts of torture, rape, and kidnappings of people blocked from seeking protection since President Biden took office.³ Independent public health experts have made clear that these Title 42 expulsions lack a valid public health rationale.⁴

The Department of Homeland Security (DHS) has also illegally maintained entry restrictions that prevent unaccompanied children and other protection seekers from requesting humanitarian relief at ports of entry. Despite these restrictions, DHS has allowed access to ports of entry for other reasons that include shopping and tourism.

In February 2021, the Centers for Disease Control and Prevention (CDC) temporarily exempted unaccompanied children from Title 42 expulsions.⁵

KIND spoke to teenage brothers who had been brutally attacked by members of a cartel in their home state in Mexico. Despite the boys expressed fear of return to Mexico, and visible injuries from the attack, they were expelled by CBP without any clear questioning or explanation of the process.

¹ Centers for Disease Control and Prevention (CDC), [85 Fed. Reg. 17060](#) (March 20, 2020); [42 USC § 265](#).

² Customs and Border Protection, “Southwest Land Border Encounters” (updated March 15, 2022); <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters#>.

³ Human Rights First, “Two Years of Suffering: Biden Administration Continues Use of Discredited Title 42 Order to Flout Refugee Law” (March 2022); <https://www.humanrightsfirst.org/sites/default/files/TwoYearsofSuffering.pdf>.

⁴ See, e.g., Physicians for Human Rights, “After Two Years of Health and Rights Abuses, it’s Past Time to End Title 42 Border Expulsions: PHR” (March 17, 2022); <https://phr.org/news/after-two-years-of-health-and-rights-abuses-its-past-time-to-end-title-42-border-expulsions-phr/>.

⁵ CDC, [86 Fed. Reg. 9942](#) (February 17, 2021); This followed a November 2020 decision by the D.C. District Court that found that the application of Title 42 was unlawful – a ruling that was temporarily stayed. See Nick Miroff, “Judge stops Trump policy of ‘expelling’ child migrants, questioning legality of border controls linked to covid crisis,” (November 18, 2020); https://www.washingtonpost.com/immigration/judge-halts-expulsion-minors-border-covid/2020/11/18/80e58c52-29b8-11eb-b847-66c66ace1afb_story.html. Prior to this exemption, DHS carried out more than 15,000 expulsions of unaccompanied children. Camilo-Montoya-Galvez, Adam Verdugo, “Nearly 19,000 unaccompanied children entered U.S. border custody in March — an all-time high” CBS News (April 2, 2021); <https://www.cbsnews.com/news/immigration-unaccompanied-children-border-custody-record-19k/>.

In March of this year, CDC terminated Title 42 for unaccompanied children.⁶

While that termination was a necessary step, grave dangers posed by the use of Title 42 persist, including for families and single adults who remain subject to expulsions. Importantly, many children traveling with a parent or guardian have been rendered unaccompanied by the Title 42 policy, as expulsions of their families have left them with no other meaningful choice but to seek safety alone in the United States rather than remain in peril with their loved ones.⁷

Though unaccompanied children are not subject to expulsion under Title 42, they remain unable to access protection at ports of entry. These port closures compel children to pursue more hazardous routes between official crossings, or outright deny them an opportunity to seek humanitarian relief. There are also serious concerns that unaccompanied children traveling with non-parental relatives, and Mexican children traveling on their own, are not being screened and protected in accordance with the TVPRA. Altogether, without required due process safeguards intended to recognize unaccompanied children's particular vulnerability to exploitation, trafficking, and other threats, children face return to the very dangers they fled and/or areas where they confront pervasive violence or may be targeted for harm.

To begin restoring humane and orderly processing at the U.S.-Mexico border, the Biden Administration must terminate the use of Title 42 in full, along with port of entry restrictions and the use of the "Remain in Mexico" policy that forces protection seekers to await U.S. immigration proceedings in dangerous, unstable conditions.⁸ The Administration should complement those measures with adoption of the below recommendations on both an immediate and long-term basis, which would help ensure appropriate reception and treatment of unaccompanied children and other protection seekers now and in the future.

Recommendations for Implementing Humane and Orderly Border Processing Following Termination of Title 42 and the Reopening of Ports of Entry to Protection Seekers

- **Hire child welfare professionals to administer screenings and care of children in Customs and Border Protection (CBP) custody:** Children are held at the U.S.-Mexico border in CBP facilities originally designed for single adults and fundamentally unsuited to children's unique needs. CBP agents and officers trained in law enforcement, together with other personnel who lack child welfare expertise, administer these children's protection screenings and care. While broader reforms are critical to ensure the humanitarian reception of children in child-appropriate spaces, DHS can take immediate steps toward improved treatment of children in CBP custody by hiring state-licensed child welfare professionals to administer screenings and care of children in CBP facilities along the border. By assuming child welfare functions currently being performed by CBP agents

⁶ CDC, "Title 42 Termination with Respect to Unaccompanied Noncitizen Children" (March 12, 2022); <https://www.cdc.gov/media/releases/2022/s0311-title-42-termination.html>. This termination followed a decision in *Texas v. Biden*, in which a federal district court enjoined DHS from categorically exempting unaccompanied children from Title 42. No. 4:21-cv-0579-P (N.D. Tex. Mar 4, 2022).

⁷ In a recent ruling, the D.C. Circuit Court of Appeals in *Huisha-Huisha v. Mayorkas* barred the use of Title 42 to expel families to countries where they are likely to face persecution or torture.

⁸ See KIND, "Forced Apart: How the "Remain in Mexico" Policy Places Children in Danger and Separates Families (February 24, 2020); <https://supportkind.org/wp-content/uploads/2020/02/MPP-KIND-2.24updated-003.pdf>.

and officers, child welfare professionals would not only improve conditions for migrant children but also ensure that CBP agents and officers are able to dedicate their time to the law enforcement functions for which they are specially trained.

FY 2022 omnibus legislation provided \$14.55 million to DHS to hire licensed child welfare professionals at border facilities. It is critical that DHS promptly onboard these experts.

- **Co-locate specialists from the Department of Health and Human Services (HHS)’s Office of Refugee Resettlement (ORR) in CBP border facilities:** Some unaccompanied children arrive at the U.S.-Mexico border with family members such as aunts, uncles, grandparents, or adult siblings who are trusted caregivers but not their parents or legal guardians. These children meet the legal definition of an “unaccompanied alien child,” as defined by the Homeland Security Act of 2002 and the Trafficking Victims Protection Reauthorization Act of 2008, under which they are afforded certain procedural protections.⁹ Though under current practice, these children are separated from their non-parent family members, CBP and ORR can avoid unnecessary separation from loving caregivers by immediately commencing the family reunification process in CBP custody. Through the placement of ORR federal field specialists in CBP facilities, ORR could consider caregivers traveling with a child as potential sponsors and help facilitate the simultaneous release of the child and caregiver together. ORR staff can also rapidly identify children with known vulnerabilities or special needs and ensure their initial placement in facilities best suited for their needs and similarly ensure that the process of identifying potential sponsors for all unaccompanied children begins as soon as possible. This reform would also reduce children’s length of stay in CBP or ORR facilities. The federal government recently demonstrated its capacity to deploy a coordinated co-location model through its reception of unaccompanied Afghan children at airports and military bases. The agency should identify improvements needed to refine and scale this approach and to adopt a similar model at points along the southern border at the earliest date possible.
- **Undertake broader reforms to create a humanitarian reception model:** Through engagement of a nongovernmental humanitarian actor, DHS and HHS can help ensure the appropriate reception, screening, and care of children who arrive in the United States at or between ports of entry. DHS’ engagement of the American Red Cross to assist with reception during a period of significant border arrivals in 2021 was an important step. Efforts to formalize a humanitarian reception model over the long-term should continue beyond the current response and involve outreach to and engagement with nongovernmental humanitarian organizations.

Modification of border facilities is also critical to ensure the availability of child-friendly spaces for temporary processing, designated areas in which children can be screened by child welfare professionals in a confidential and child-appropriate manner, basic hygiene accommodations, and meeting spaces for in-person “Know Your Rights” presentations and other legal assistance by nongovernmental organizations. In addition, DHS should work to improve accountability and oversight of CBP’s compliance with legal requirements in the

⁹ P.L. 107-296; William Wilberforce Trafficking Victims Protection Reauthorization Act, Pub. L. No. 110-457, 122 Stat. 5044 (2008) (TVPRA).

TVPRA, the *Flores* Settlement Agreement, and the Transport, Escort, Detention, and Search (TEDS) standards by allowing access to CBP facilities and monitoring by independent third parties, including nongovernmental organizations. The emphasis must be on ensuring the welfare, best interests, and rights of children, minimizing detention, and ensuring the safe and swift reunification of children with sponsors.

- **Expand legal representation of unaccompanied children:** Congress and the Biden Administration should prioritize the provision of legal representation to unaccompanied children in immigration proceedings before the Executive Office for Immigration Review (EOIR). Despite their unique vulnerabilities in the immigration system, many if not most unaccompanied children lack an attorney to assist them in navigating immigration proceedings with the highest of stakes for their lives and safety. Government data illustrate that unaccompanied children without an attorney have virtually no meaningful chance of receiving a fair day in court: EOIR statistics on completed immigration court cases from FY 2018 through the first half of FY 2021 show that immigration judges were almost one hundred times more likely to grant legal relief to unaccompanied children with counsel than unaccompanied children without legal counsel.¹⁰

Though ORR currently provides financial support to a network of nonprofit legal services providers to enable legal representation of unaccompanied children, current needs far exceed existing funding and allocation. Amid continuing high numbers of unaccompanied children arriving to the United States, this due process crisis will only expand unless Congress and the Administration prioritize measures to ensure that no child faces immigration court alone.

- **Enhance bilateral coordination between U.S. and Mexican officials to ensure safe transfer of unaccompanied children to the United States when it is in their best interests:** At times, Mexican child welfare authorities encounter migrant children who are in Mexico but wish to reunite with family members in the United States and apply for protection there. When these authorities determine that it is in the child's best interest to do so, children should be safely transferred to the United States and reunified with U.S.-based family, where they can seek legal protection. The U.S. and Mexican governments must develop and implement formal mechanisms for the safe transfer of unaccompanied migrant children in these circumstances.

¹⁰ KIND calculated this figure based on Executive Office for Immigration Review (EOIR) data published by the Congressional Research Service in its report titled "Unaccompanied Alien Children: An Overview, p. 16 (September 1, 2021); <https://sgp.fas.org/crs/homesec/R43599.pdf>.