

## Background:

In the last few months there has been a lot of news and discussion about Title 42, the COVID-era Centers for Disease Control and Prevention (CDC) order that has been used at the border to expel more than 2.6 million migrants who have arrived since March 2020. Of note, the Supreme Court was due to rule on a motion brought by more than a dozen states to intervene in a case in the D.C. District Court that had ordered Title 42 to end in December. In agreeing to hear that motion, the Supreme Court stayed that order, keeping Title 42 in place for now. However, the Biden Administration, in a filing to the court, noted its intention to terminate the COVID Public Health Emergency on which the border policy rested by May 11, and thereby end Title 42, putting the Supreme Court case in uncertainty. On February 23, the administration published a proposed regulation to limit eligibility for asylum for border crossers that don't use current or new "orderly" pathways. This memorandum will provide background on the Title 42 order, data on its use, the current state of play with various court cases, and what the end of Title 42 might mean at the border.

## What is Title 42?

*Title 42 is an order issued by the CDC that allows border officials to expel (send immediately out of the country) immigrants who arrive at the land borders, both at a port of entry or between ports of entry, and do not have valid entry documents or are admissible under immigration law. Under this order, border officials do not process anyone under immigration law, meaning that people expelled have no opportunity to ask for asylum. However, expulsion under Title 42 is not considered a formal deportation under immigration law and carries no immigration penalties like a formal deportation would.*

- "Title 42" refers to Title 42 of the United States Code, which is the official codification of all laws enacted in the United States. Each title of the code refers to a specific body of law by topic area. Title 42 broadly covers the Public Health Service and public health law among other topics.
  - Section 265 of Title 42 grants authority to the Surgeon General (later delegated by regulation to the Director of the CDC), to prohibit "in whole or in part the introduction of persons..." when they determine that there is a serious danger of the introduction of a communicable disease from a foreign country.
- In March 2020, at the outset of the COVID Public Health Emergency, the CDC issued such a prohibition by an order prohibiting the entry of "persons traveling from Canada or Mexico (regardless of their country of origin) who would otherwise be introduced into a congregate setting at a land Port of Entry or Border Patrol station." The order specifically referred to people

who lacked valid travel documents. The original order was reviewed and extended through October 2020, when a new order was issued indefinitely. Following President Biden's inauguration, in August 2021, his administration replaced that order again, but the new order continued the main policies of the previous orders (although specifically excepting unaccompanied minors from expulsion under the order).

- Under the current Title 42 order, which expires on May 11, 2023, immigrants who arrive at a land border, whether or not at a port of entry, and who are not admissible (don't have appropriate passport, visa or other entry documents) can be "expelled," that is, sent back out of the United States without any immigration processing.
  - Migrants may be expelled to Mexico if they are Mexican citizens or are of a nationality that Mexico has agreed to receive back into its territory. Migrants not received by Mexico may be sent back to their country of nationality.
  - As of the end of February 2023, more than 2.7 million Title 42 expulsions have been carried out by US Customs and Border Protection (CBP) at U.S. land borders.

## What is the current status of Title 42?

*Title 42 remains in effect currently due to a Supreme Court order issued in a 5-4 decision in December, and a case will be heard in the court on whether a group of Republican-led states have the ability to appeal a DC court judge's decision that the Title 42 order should be ended. However, the administration indicated in January 2023 its intention to end the Public Health Emergency for COVID-19 that the Title 42 order relies on May 11th.*

- In April 2022, the Biden administration issued a notice of termination of Title 42, that would have gone into effect in May 2022. However, a group of 24 Republican-led states sued in federal court in Louisiana and a federal judge ruled in May 2022 that the administration had not provided proper notice and comment on its decision and ordered the government to continue the policy.
  - The Biden administration appealed that decision to the Fifth Circuit Court of Appeals, which is still pending. However, due to later developments (see below), the government recently asked the Fifth Circuit to hold its decision on the appeal until after a separate Supreme Court case.
- Meanwhile, in a separate class action case in federal court in Washington, D.C., the ACLU, and other organizations, sued on behalf of families that were denied the ability to apply for asylum. The federal judge in D.C. issued an opinion in November, 2022 that the Title 42 order was illegal, and ordered the government to end the policy by December 21.
  - Shortly before that date, however, 19 states who had sued in the Louisiana case filed a motion in the DC Appeals Court to intervene in the case to appeal the lower court's decision and therefore continue Title 42. The DC appeals court denied that motion, and days before the December 21 deadline, the states asked the Supreme Court to hear their request.

- Chief Judge John Roberts issued an emergency stay of the DC order, and on December 27, 2022, in a 5-4 decision, the Supreme Court issued an indefinite stay of the DC court's ruling while it heard the states' appeal, thus keeping Title 42 in effect for now.
- The Supreme Court was scheduled to hear oral arguments on the states' request to intervene on March 1 but following the announcement by the administration that it intends to end the public health emergency for COVID-19 by May 11, the court canceled the arguments (see below).

## What does the end of the Public Health Emergency mean for the Title 42 Order?

*On January 30, 2023, the Biden administration announced that the COVID Public Health Emergency on which Title 42 is based will end on May 11, and told the Supreme Court that the Title 42 order will end at that time, asking the Court to end the litigation over the policy.*

- After its announcement of the end of the COVID emergency, in a separate filing with the Supreme Court, on February 7, 2023, the administration clarified its stance that the end of the Public Health Emergency would also mean the end of Title 42, thus rendering the pending case moot.
  - The states that asked the Supreme Court to intervene, and several Congressional Republicans, have indicated they do not believe that the end of the COVID emergency necessarily means the end of Title 42, even though the House passed legislation to end the public health emergency on January 31, 2023.
  - However, on February 21, the Supreme Court cancelled oral arguments in that case, which could indicate their agreement with the administration's position.

## What will happen at the border after the lifting of Title 42?

*While the litigation is pending, the Department of Homeland Security (DHS) has been preparing for the end of Title 42 at the border since last spring. In an announcement in early January, DHS outlined its proposals for operations after the end of Title 42. The announcement stated that DHS will use its Title 8 immigration authorities to process arriving migrants. Specifically, the department intends to use expedited removal, a process that allows CBP to formally remove migrants, without a hearing in immigration court, who do not have legal ability to enter or remain in the country. DHS also announced new humanitarian parole programs for Cubans, Haitians, Nicaraguans, and Venezuelans, as well as expansion of port of entry processing for asylum-seekers using its CBP One app to schedule appointments. On February 23, 2023, DHS and the Department of Justice (DOJ) issued a proposed regulation that would restrict who can apply for asylum at the US-Mexico border to be in place at the end of Title 42.*

- Regardless of their method entry to the United States, under current immigration law migrants who express a fear of return must be allowed to have a "credible fear" hearing as a threshold

matter before making an asylum claim and before they can be removed from the country.

- The administration has indicated that it intends to expand expedited processing of these cases.
- The administration also is leaning heavily on the nationality-based parole programs as alternatives to illegal entry and may extend them to other nationalities. However, a group of 20 states sued the Biden administration over these parole programs in January.
- Additionally, the proposed asylum rule would bar eligibility for asylum to migrants who pass through other countries before arriving at the border but did apply for asylum there. They would be eligible in the U.S. if they applied in another country but were denied.
  - The rule also would deny asylum eligibility to those who arrive at ports of entry without using the CBP One app or were eligible for one of the parole programs and did not use them. There are exceptions to these rules that the migrant would have to overcome, such as immediate danger to them, or the failure of the CBP One app, but the stated purpose of the rule is to deter migrants from making the trip to the border and entering between ports of entry to ask for asylum.
  - Advocates have claimed this seems very similar to a previous Trump-era rule that was struck down in court, although the Biden administration claims its exceptions make its proposal fundamentally different.
  - In its recent Supreme Court filing, the Biden administration indicated its intent to finalize this rule by May 11 the current ending of the public health emergency. Meanwhile migrant and civil rights groups have stated their intention to sue the administration when the rule becomes final.
- Recent reports also indicate that the administration may be pursuing an agreement with Mexico to allow deportation of non-Mexicans to Mexico after the end of Title 42.
  - Mexico has been receiving non-Mexican migrants expelled under Title 42 since the Trump administration, but limited to nationals from El Salvador, Guatemala, and Honduras, and recently adding nationals of Venezuela, Haiti, Nicaragua and Cuba, as the Biden administration rolled out humanitarian parole programs for those nationalities.
  - However, allowing formal deportations to Mexico is not currently part of those agreements.
- Still, many Republicans and others have expressed skepticism that these plans will in fact be sufficient to manage the large numbers of migrants arriving at the border.

## What is Congress looking to do about Title 42?

*Since 2022 when the Biden Administration first indicated an intention to end Title 42, several bills have been introduced in Congress to either simply extend the current Title 42 order or create conditions on border policy that must be met before it can be lifted. On May 10, the day before Title 42 will be lifted, the House of Representatives will begin consideration of a Republican bill, H.R. 2, the*

*Secure the Border Act, that would require DHS to implement a new Title 42-like authority, unrelated to the pandemic, in addition to other border security measures. H.R. 2 combines three bills that have already been marked up by the House Foreign Affairs, Homeland Security and Judiciary committees: H.R. 2640, H.R. 2794 and H.R. 1690.*

*The Biden Administration issues a Statement of Administration Policy (SAP) on May 8, announcing the President would veto H.R. 2, stating that the bill does nothing to address the root causes of migration, reduces humanitarian protections, and restricts lawful pathways, which are critical alternatives to unlawful entry.*

- In the last Congress, efforts to continue Title 42 attracted bipartisan support, and became a flash point during debate on the Senate's budget reconciliation bill. In December 2022, during negotiations on the end of the year omnibus spending bill, a pending Title 42 amendment threatened to take down the whole bill, before it was settled.
- In the 118th Congress, new bills have been introduced on Title 42, including another bipartisan Senate bill by many of the same Senators who were on the 2022 bill.
  - On January 31, 2023, the House passed the "Pandemic is Over Act", H.R. 382, on a largely partisan basis. H.R. 382 would end the public health emergency. The threat of this bill led the Biden administration to issue a veto threat that outlined its intention to end the health emergency on May 11. However, the bill did not address the Title 42 order at all.
- Meanwhile, the House of Representatives was supposed to vote in January on a bill by Representative Chip Roy (R-TX), H.R. 29, the Border Safety and Security Act, which would give DHS the same authority as the current Title 42 order to suspend entry of immigrants at the border, without the need of a public health justification.
  - The bill would require the suspension of entry of all migrants any time that they cannot be detained during expedited removal proceedings nor sent to Mexico under a "remain in Mexico" program.
  - The bill would further allow state attorneys general to sue DHS if they feel this law is being violated. However, some Republicans objected to this bill, most vocally Rep. Tony Gonzales (R-TX), who has called it an end to asylum.