

*NOTE: On May 11, 2023, the Secretary of Health and Human Services terminated the COVID-19 Public Health emergency in effect since March 2020, thus ending the use of Title 42 as a border policy.*

# A Guide to Title 42 Expulsions at the Border

The United States has long guaranteed the right to seek asylum to individuals who arrive at our southern border and ask for protection. But since March 20, 2020, that fundamental right has been largely suspended. Beginning on that date, both migrants seeking a better life in the United States and those wanting to apply for asylum have been turned away and “expelled” back to Mexico or their home countries. These border expulsions are carried out under a little-known provision of U.S. health law—section 265 of Title 42—which the former Trump administration invoked to achieve its long-desired goal of shutting the border to asylum seekers. Over 1.8 million expulsions under Title 42 have been carried out since the pandemic began. However, nearly half of those expulsions were of the same people being apprehended and expelled back to Mexico multiple times. This is because Title 42 has led to a significant increase in repeat crossings at the border. Half of all single adults from Mexico, Guatemala, Honduras, and El Salvador who have been expelled to Mexico under Title 42 have been apprehended crossing the border again. As a result, Title 42 has significantly increased overall border crossings. In fact, 1 in 3 apprehensions since Title 42 expulsions began have been of a person on at least their second attempt to cross the border.

Despite the claim made by the Centers for Disease Control and Prevention (CDC) that this order was necessary from a public health perspective to protect the United States, public reporting has shown that the policy originated in the U.S. Department of Homeland Security (DHS) and the Trump White House.<sup>1</sup> Reports indicate that CDC scientists expressed opposition to the invocation of Title 42, arguing that there was no public health rationale to support it.<sup>2</sup> Ever since then, public health experts outside the CDC have continued to agree, arguing that while international borders largely remain open to other travelers, there is no need to turn away refugees and expel them to their home countries or Mexico.<sup>3</sup>

The Biden administration kept Title 42 in place until April 2022, when the CDC announced that it no longer believed Title 42 was necessary for public health purposes. The CDC cited the widespread availability of rapid tests and vaccination for COVID-19 as measures sufficient to limit concerns about public health. The termination of Title 42 was set to go into effect on May 23, but a federal court in Louisiana blocked the Biden administration from doing so.<sup>4</sup> As of the time of publication, Title 42 remains in effect following that court order.

There also are ongoing court battles as to whether expulsions under Title 42 were legal in the first place.<sup>5</sup> In March 2022, the D.C. Circuit Court of Appeals announced that it was unlawful to expel migrant families under Title 42 without giving them an opportunity to seek protection from persecution.<sup>6</sup>

# What is the Title 42 policy and how was it created?

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On March 20, 2020, the Department of Health and Human Services (HHS) issued an emergency regulation to implement a specific aspect of U.S. health law. Section 265 of U.S. Code Title 42 permits the Director of the CDC to “prohibit . . . the introduction” into the United States of individuals when the director believes that “there is serious danger of the introduction of [a communicable] disease into the United States.”<sup>7</sup> The HHS regulation allows any customs officers—which includes officers of U.S. Customs and Border Protection (CBP) such as Border Patrol agents—to implement any such order issued by the CDC.<sup>8</sup>

The same day, CDC Director Robert R. Redfield relied on this regulation to issue an order suspending the “introduction” into the United States of certain individuals who have been in “Coronavirus Impacted Areas.”<sup>9</sup> The order targets individuals who have entered the United States from Canada or Mexico and “who would be introduced into a congregate setting” at a port of entry or in a Border Patrol station.<sup>10</sup> This includes individuals who would normally be detained by CBP after arriving at the border, including asylum seekers, unaccompanied children, and people attempting to enter the United States without inspection. Citing the new CDC order, that same day the Border Patrol began “expelling” individuals who arrive at the U.S.-Mexico border without giving them the opportunity to seek asylum.<sup>11</sup>

The CDC order does not apply to U.S. citizens, lawful permanent residents, and their spouses and children, nor does it apply to U.S. military personnel or those who arrive at a port of entry with valid travel documents, although the CDC maintains that it has the authority to expel U.S. citizens under Title 42 if it chooses.<sup>12</sup> The CDC order also includes an exemption for anyone that DHS determines should be allowed into the United States on “consideration of significant law enforcement, officer and public safety, humanitarian, and public health interests.”<sup>13</sup>

On September 11, 2020, HHS published the final version of the March interim regulation enabling the CDC Director to issue orders suspending the “introduction” of people at the border.<sup>14</sup> In the final version of the regulation, the CDC acknowledged for the first time that its order is being used to turn away refugees and asylum seekers and declared its belief that doing so was legal.<sup>15</sup> This was followed by a new CDC order in October 2020 which was largely the same as the March order and reinforced the government’s plan to continue expelling people encountered at the southern border.<sup>16</sup>

The CDC’s order has been modified five times since the Biden administration took office, including the April 1, 2022, order to terminate Title 42 expulsions in May, which is currently on hold due to a court order.<sup>17</sup> On February 2, 2021, the CDC issued a notice temporarily exempting unaccompanied children from expulsion.<sup>18</sup> Following a “reassessment” of public health protocols, on July 16, 2021, the CDC again formalized this exemption for unaccompanied children.<sup>19</sup> On August 2, 2021, the CDC replaced the October 2020 order with a new order continuing Title 42 expulsions while exempting unaccompanied children.<sup>20</sup> On March 12, 2022, the CDC formally terminated Title 42 for unaccompanied children in response to a court order overturning the exemption.<sup>21</sup>

## How has Title 42 been implemented at the border?

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Under an agreement reached with the Mexican government in late March 2020, the Border Patrol began sending to Mexico most Mexican, Guatemalan, Honduran, and Salvadoran families and single adults encountered at the southern border.<sup>22</sup> The group of nationalities subject to expulsion to Mexico remained unchanged until May 2022, when the Biden administration reached an agreement with Mexico to accept “thousands” of Cubans and Nicaraguans as well.<sup>23</sup> Despite this agreement, there has been extensive documentation of individuals expelled to Mexico who do not fit within this category, including Haitian asylum seekers.<sup>24</sup> People expelled are usually driven by bus to the nearest port of entry and told to walk back to Mexico, often without their luggage and other belongings.<sup>25</sup> Since late January 2021, the Mexican state of Tamaulipas (which borders South Texas) has barred CBP from expelling families with children under the age of seven.<sup>26</sup> In response, CBP has carried out “lateral” transfers by plane or bus to other locations along the border, such as El Paso, where Mexican authorities will allow the agency to expel families with young children.<sup>27</sup> However, because the capacity to carry out “lateral flights” is limited, CBP has been forced to release the majority of families who cross the border in South Texas, despite President Biden’s prior insistence that he would expel all families if he could.<sup>28</sup>

People who are subject to Title 42 are not given an opportunity to contest their expulsion on the grounds that they would face persecution in the country to which they will be expelled. There is an extraordinarily limited exception to Title 42 for people who “spontaneously” inform CBP officers that they fear being tortured in the country to which they will be expelled.<sup>29</sup> However, in order to receive an official screening by an asylum officer for exemption under that provision, the CBP officer must first determine that the claim is “reasonably believable.”<sup>30</sup> From March 2020 through September 2021, just 3,217 people were screened for torture prior to being expelled, and only 272 people were granted an exemption and permitted to seek asylum.<sup>31</sup>

Those subject to Title 42 who aren’t sent to Mexico are held in U.S. Immigration and Customs Enforcement (ICE) or CBP detention and flown back to their home countries without any opportunity to seek asylum.<sup>32</sup> For example, since Title 42 expulsions began, over 18,000 Haitian nationals seeking asylum have been subjected to this process and summarily returned to Haiti.<sup>33</sup> Flights to Haiti were briefly suspended in summer 2021 after an outcry following President Biden’s inauguration.<sup>34</sup> In September 2021, over the objections of the United Nations High Commissioner for Refugees,<sup>35</sup> as well as advocacy groups and many Democratic members of Congress,<sup>36</sup> the Biden administration expelled by plane more than 8,000 Haitians who had sought asylum after crossing the border near Del Rio, Texas.<sup>37</sup>

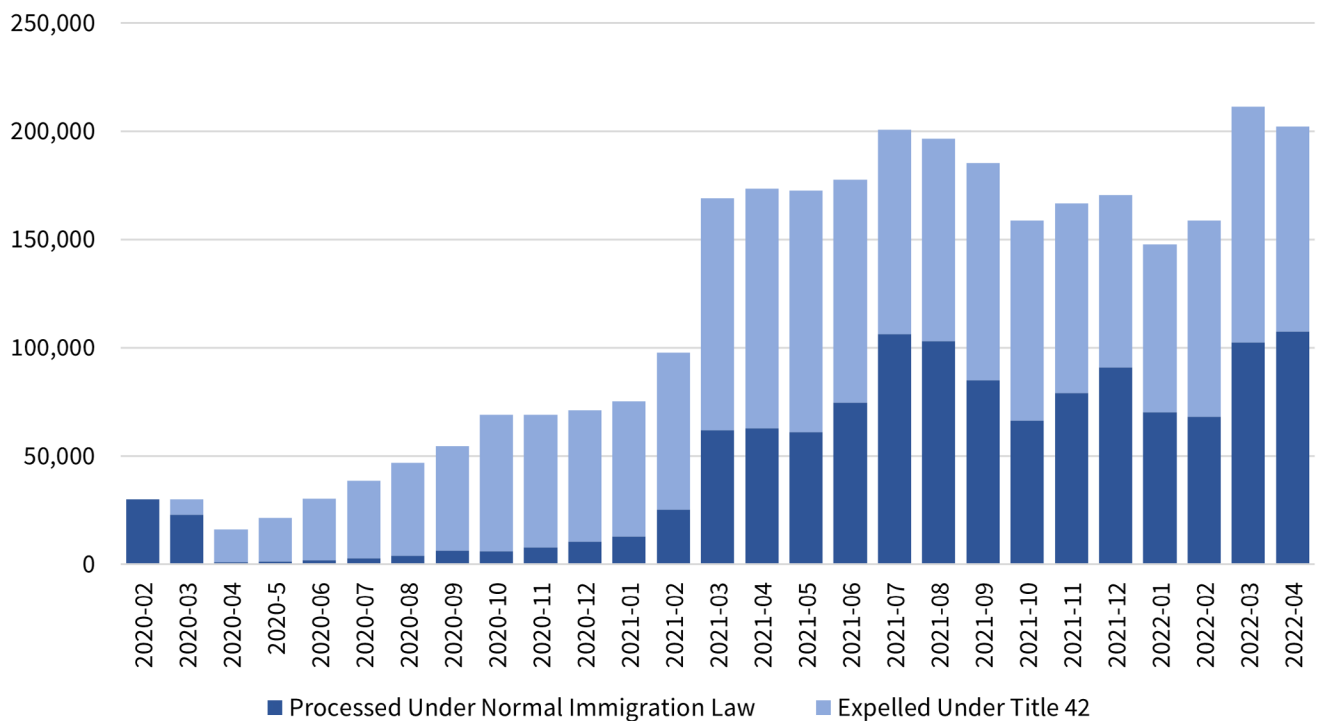
Individuals who are expelled do not receive an order of deportation, but CBP collects their biometrics and records their contact with the agency. It is unclear how this information will be used in the future, or how it may impact an individual’s ability to seek protection in the United States once the Title 42 policy is ultimately terminated.

Title 42 not only applies to individuals crossing the border between ports of entry, but also applies equally to individuals seeking asylum at ports of entry. In March 2020, as part of Title 42, CBP stopped processing all asylum seekers who arrive at ports of entry and ask for humanitarian protection.<sup>38</sup> This left nearly 15,000 people in limbo who had been waiting on lists for an opportunity to request asylum at ports of entry (a practice known as “metering”).<sup>39</sup>

Before the practice of expelling unaccompanied children was blocked in court and then later formally ended by the Biden administration, CBP used Title 42 to turn away and expel nearly 16,000 unaccompanied children.<sup>40</sup> These expulsions took place despite provisions of the Trafficking Victims Protection Reauthorization Act which require the government to protect children who arrive at the border without a parent or legal guardian.<sup>41</sup>

Through the end of April 2022, the Border Patrol carried out more than 1.87 million expulsions.<sup>42</sup> From April 2020 through April 2022, 60.5% of encounters at the U.S.-Mexico border led to an expulsion.

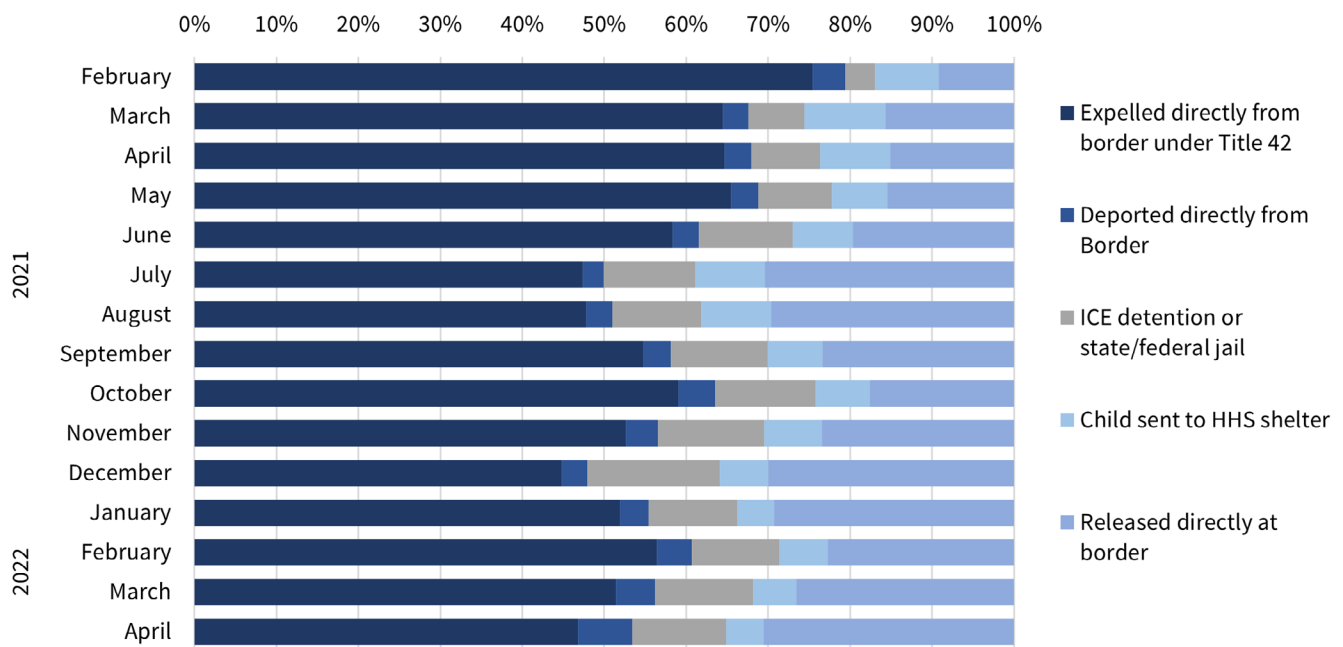
**FIGURE 1: OUTCOMES OF BORDER PATROL APPREHENSIONS, FEBRUARY 2020 - APRIL 2022**



Source: U.S. Customs and Border Protection, Southwest Border Encounters, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

It is important to keep in mind that, just because a person is processed under “normal immigration law” and not expelled, that does not mean they are released into the United States. Thousands are subject to “expedited removal” or have a prior order of deportation reinstated.<sup>43</sup> Many people who are not expelled are instead sent to ICE detention, where they may seek asylum through the credible fear process (CFI). Similarly, roughly 1 in 10 people encountered after crossing the border are unaccompanied children who are sent to federal shelters. At no point have more than a third of people apprehended after crossing been directly released at the border (see Figure 2).

**FIGURE 2: ESTIMATED OUTCOMES OF BORDER APPREHENSIONS, FEBRUARY 2021 THROUGH APRIL 2022**



Source: U.S. Customs and Border Protection, “Southwest Land Border Encounters,” <https://www.cbp.gov/newsroom/stats/south-west-land-border-encounters>; U.S. Customs and Border Protection, “Custody and Transfer Statistics FY2021,” <https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics>; U.S. Citizenship and Immigration Services, “Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions,” <https://www.uscis.gov/tools/reports-and-studies/semi-monthly-credible-fear-and-reasonable-fear-receipts-and-decisions>.

## What have public health experts said about Title 42?

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Despite the claim that Title 42 is needed to protect against the spread of COVID-19, many public health experts have called for an end to the practice of border expulsions. Starting as early as May 2020, and continuing to the present, public health leaders have called on the CDC to lift the order.<sup>44</sup> According to the experts, the fundamental problem with Title 42 expulsions is that they are targeted primarily at a small number of people seeking asylum at a time when other restrictions in place at ports of entry have been lifted and large numbers of people cross the border daily.<sup>45</sup>

In a letter to the Biden administration in September 2021, public health experts noted that the risk of infection from COVID-19 could be mitigated at the border with “social distancing, providing appropriate personal protective equipment (PPE), ensuring frequent testing, and offering vaccination” to migrants.<sup>46</sup> The experts also asserted that Title 42 expulsions themselves could pose a public health threat given that people are detained together “for days to weeks prior to transporting them” for expulsions, which heightens “the risk of COVID-19 transmission across national borders.”<sup>47</sup>

## How has Title 42 affected asylum seekers?

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Title 42 has led to the mass expulsion of thousands of asylum seekers, including those in desperate straits. Many individuals have been sent back to persecution in their home countries or forced to wait in Mexico for a time when the border will reopen to those seeking asylum. Over 215,000 parents and children have been expelled together since the restrictions went into place.<sup>48</sup>

After the Biden administration took office, Mexican officials in the state of Tamaulipas, which borders South Texas, began refusing to permit CBP to expel families with children under the age of seven, citing a new law relating to the treatment of migrant children.<sup>49</sup> As a result, more families are now being admitted to the United States rather than expelled. These families are generally provided with COVID-19 tests and are connected with local nonprofit organizations which help secure transportation to their ultimate destination or a place to quarantine if necessary.<sup>50</sup>

Asylum seekers expelled back to Mexico are often targeted by criminal cartels for violence and extortion. Advocates have documented through surveys and public media coverage nearly 10,000 reports of violence against migrants expelled back to Mexico under Title 42.<sup>51</sup> Hundreds of parents, fearing for the lives of their children, have chosen to self-separate and send their children across the border alone, knowing they will be safer in the United States than in northern Mexico.<sup>52</sup>

Some asylum seekers are expelled back to their home countries, which are the very same countries from which they fled persecution. For instance, over 7,000 Haitians have been expelled back to Haiti after arriving at the U.S. border since September 19.<sup>53</sup> Other asylum seekers have been expelled to southern Mexico, where the Mexican government then expels them to Guatemala in a process of “chain expulsions.”<sup>54</sup> The United Nations has expressed concerns that this practice is a violation of international law.<sup>55</sup>

However, not all migrants seeking asylum are expelled. Rising numbers of people from countries other than Mexico, Guatemala, Honduras, or El Salvador have been permitted to seek asylum in the United States because Mexico will not allow the Biden administration to expel them back to Mexico.<sup>56</sup> Many of these individuals are sent to ICE detention centers, and during the initial months of the Biden administration the number of people sent to detention from the border rose significantly.<sup>57</sup>

As a result, the outcome for asylum seekers crossing the border can vary wildly and depends more on their nationality and their family status than on any policies or laws inside the United States.

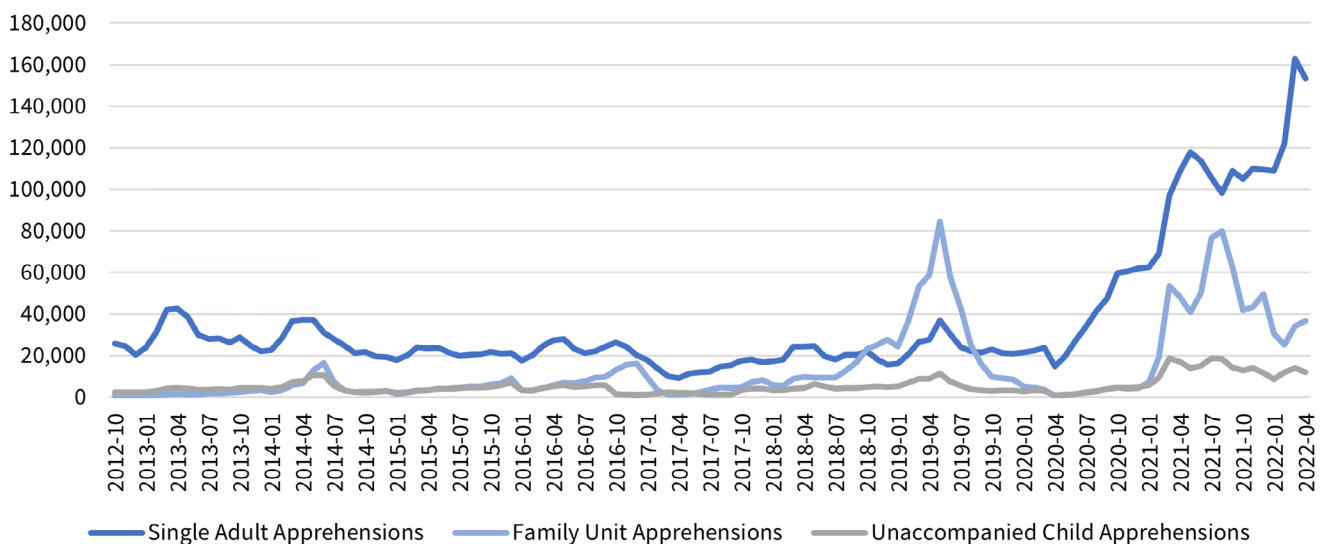
## How has Title 42 affected border crossings?

Despite claims that Title 42 is necessary for immigration deterrence purposes, it has actually had the counterproductive effect of significantly increasing the number of arrests at the border. That is because, under Title 42, individuals who are expelled to Mexico within hours after being apprehended at the border can simply try again a second or third time in hopes of getting through. Some individuals have made dozens of failed attempts to cross the border and been turned back under Title 42 each time.<sup>58</sup> This increase in apprehensions has been seen most among single adults who are not seeking asylum.<sup>59</sup>

Before the pandemic began, just 7% of people arrested at the border had crossed the border more than once. But by October 2020, 38% of all people arrested had crossed the border multiple times that year.<sup>60</sup> In Fiscal Year 2021, 1 in 3 people apprehended at the border had already crossed the border at least once that year. This has led to a dramatic shift in the demographics of border arrests, with the number of encounters of single adults rising every month from April 2020 through May 2021, reaching levels not seen in over a decade (see Figure 3).

FIGURE 3: APPREHENSIONS AT THE U.S.-MEXICO BORDER, OCTOBER 2012 TO APRIL 2022

Single adult apprehensions vs. family unit and unaccompanied child apprehensions

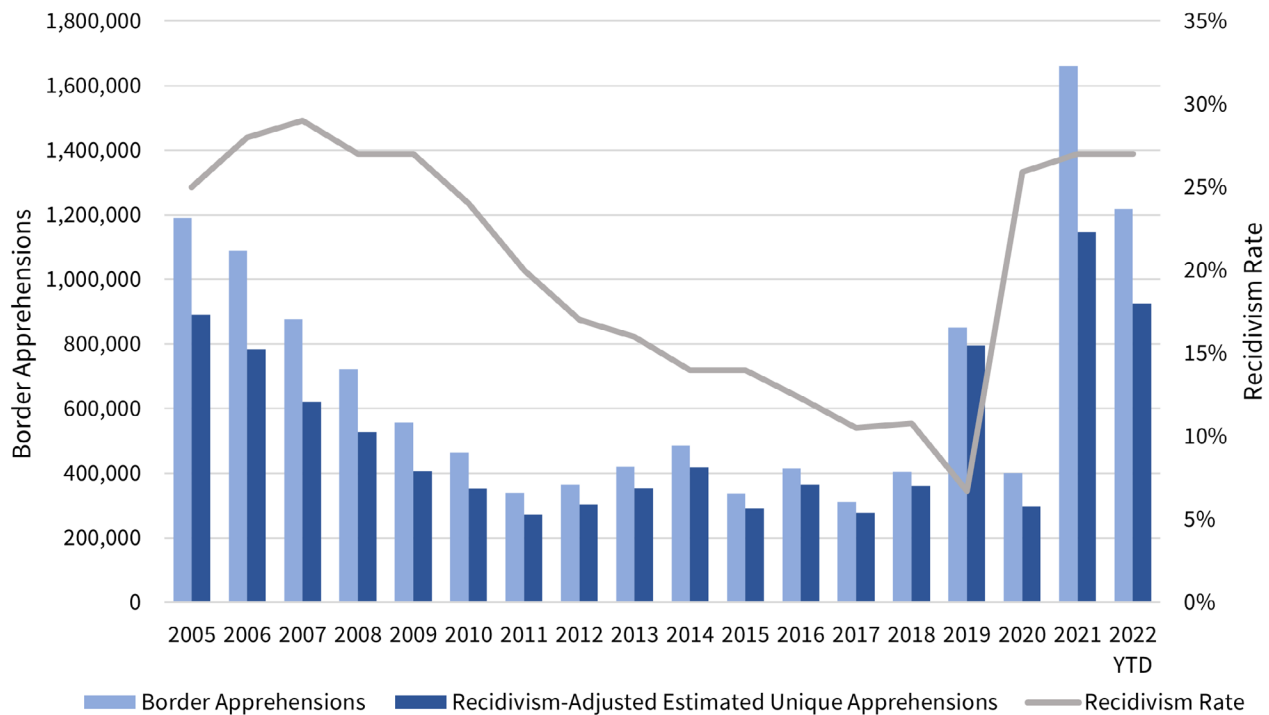


Source: U.S Customs and Border Protection, Stats and Summaries, <https://www.cbp.gov/newsroom/media-resources/stats?title=Border+Patrol>.

Because many people cross the border repeatedly after having been expelled under Title 42, the number of border encounters reported to the public greatly overstates the number of people who are crossing the border.<sup>61</sup> In the 19-month period from the start of Fiscal Year 2021 through April 2022, there were over 900,000 “repeat encounters,” meaning that 1 in 3 border encounters was of a person on their second or higher attempt to cross the border (see Figure 4).

Among some groups, recidivism rates are even higher. According to DHS, half of all single adults from Mexico, Guatemala, Honduras, and El Salvador who are expelled back to Mexico under Title 42 are later arrested on a subsequent attempt to cross the border.<sup>62</sup> And because not every person is apprehended on their second attempt, that means that more than half of individuals expelled to Mexico will cross the border at least one additional time.

**FIGURE 4: ESTIMATES OF UNIQUE APPREHENSIONS, FY 2005 TO FY 2022 THROUGH APRIL 2022**



Source: U.S. Customs and Border Protection, Congressional Budget Justifications FY 2005-2022; U.S. Customs and Border Protection, Southwest Land Border Encounters, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>; U.S. Customs and Border Protection, “U.S. Border Patrol Total Apprehensions (FY 1925 - FY 2020),” <https://bit.ly/3BNVUlp>.



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