

Congress of the United States
Washington, DC 20510

March 29, 2022

The Honorable Alejandro Mayorkas
Secretary
U.S. Department of Homeland Security
3801 Nebraska Ave NW
Washington, DC 20016

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, D.C. 20201

Dear Secretary Mayorkas and Secretary Becerra:

As Members of the Texas Congressional Delegation, we are writing to express our concern about reports that the Department of Homeland Security (DHS) may soon lose its authority to rapidly expel migrants pursuant to 42 U.S.C. § 265 (“Title 42”). We understand that this legal authority is temporary and tied to the COVID-19 public health emergency, but DHS appears unprepared to handle a likely unprecedented increase in apprehensions along the southwest border. Furthermore, since January 2021 DHS has eliminated measures designed to deter migrants from undertaking the dangerous journey to the southwest border. We strongly urge that DHS retain Title 42 authority until appropriate deterrent measures are put in place to ensure that Federal government facilities and local communities will not be overwhelmed by a sudden increase in migrant apprehensions.

The Centers for Disease Control and Prevention (CDC) first promulgated its Title 42 Order in March 2020, and to your credit, you resisted pressure from groups that advocated for its complete rescission when you first assumed the position of Secretary of Homeland Security. Following a surge of migrants into the Del Rio Sector last September, you stated that DHS was “still enforcing the CDC Title 42 order, and those attempting irregular migration here will not be allowed to enter the United States.”¹ You also remarked that the CDC had “made the

¹ *Secretary Mayorkas Delivers Remarks in Del Rio, TX*, U.S. DEPARTMENT OF HOMELAND SECURITY (Sept. 20, 2021), <https://www.dhs.gov/news/2021/09/20/secretary-mayorkas-delivers-remarks-del-rio-tx>. We cite this as evidence of your past statements of support for using title 42 authority, but recall the previous concerns laid out by 38 Members of the Senate that “DHS did not actually carry out this plan” to expel the majority of migrants under title 42. See Letter from Sen. John Cornyn et al to Hon. Alejandro Mayorkas, Secretary of Homeland Security (Oct.

determination that the public health of the migrants themselves, our personnel, local communities, and the American public require” that Title 42 authority be exercised.²

Earlier this month, Reuters reported that the Biden Administration was “leaning toward ending” the CDC’s Title 42 order.³ And a recent report from Axios indicates that the Administration is discussing a multi-agency plan to “deal with the potentially record-breaking spring influx of migrants”⁴ that will result from the CDC order’s rescission. Former CDC Director Redfield premised the CDC original Title 42 order on the “serious danger of the introduction of COVID-19 into the POEs and Border Patrol stations . . . and the interior of the country as a whole”⁵ We readily acknowledge that, at some point, DHS will have to revert to relying exclusively on its traditional Title 8 authorities. However, the Department appears woefully unprepared to make such a transition at this time.

First, DHS remains heavily reliant on Title 42 to prevent local communities in Texas from becoming more overwhelmed than they already are with the migrants DHS has paroled into the United States. For the past nine months, the percentage of migrants encountered along the southwest border and expelled under Title 42 has hovered between 45 and 57 percent.⁶ Last month 55 percent of these migrants were expelled. In other words, there has been no gradual phase-out of Title 42, and so its rescission will cause a sharp spike in the number of migrants that DHS will have to fully process under Title 8. In fact, Axios reports that DHS estimates that 25,000 migrants reside in Mexican shelters just south of the U.S. border, waiting for Title 42 to end. And some U.S. intelligence estimates reportedly indicate that an influx of more than 170,000 migrants could materialize if the public health authority is lifted.⁷

Second, instead of implementing measures to deter migrants from making the perilous journey to the southwest border, DHS has paradoxically removed many of the deterrents against irregular migration. Since June, DHS has sought to terminate the Migrant Protection Protocols, under which migrants wait in Mexico until the immigration courts can resolve their asylum claims.

6, 2021), available at

[https://www.cornyn.senate.gov/sites/default/files/Del%20Rio%20Migrant%20Surge%20Letter%20to%20Mayorkas-FINAL%20\(002\).pdf](https://www.cornyn.senate.gov/sites/default/files/Del%20Rio%20Migrant%20Surge%20Letter%20to%20Mayorkas-FINAL%20(002).pdf).

² *Press Briefing by Press Secretary Jen Psaki and Secretary of Homeland Security Alejandro Mayorkas*, THE WHITE HOUSE (Sept. 24, 2021), <https://www.whitehouse.gov/briefing-room/press-briefings/2021/09/24/press-briefing-by-press-secretary-jen-psaki-and-secretary-of-homeland-security-alejandro-mayorkas-september-24-2021/>.

³ Ted Hesson, *U.S. leaning toward ending COVID-era expulsions of migrants at Mexico border – sources*, REUTERS (Mar. 9, 2022, 5:44 p.m.), <https://www.reuters.com/legal/litigation/us-leaning-toward-ending-covid-era-expulsions-migrants-mexico-border-sources-2022-03-09/>.

⁴ Jonathan Swan & Stef W. Kight, *Scoop: Biden officials fear “mass migration event” if COVID policies end*, Axios (Mar. 17, 2022), <https://www.axios.com/biden-border-mexico-migrants-title-42-a91b6441-2197-463f-ab1f-2435824a9566.html>.

⁵ U.S. Department of Health & Human Services, Centers for Disease Control and Prevention, *Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists* (Mar. 20, 2020), available at https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf.

⁶ See *Southwest Land Border Encounters*, U.S. CUSTOMS & BORDER PROTECTION (last modified Mar. 15, 2022), <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

⁷ Jonathan Swan & Stef W. Kight, *Scoop: Biden officials fear “mass migration event” if COVID policies end*, Axios (Mar. 17, 2022), <https://www.axios.com/biden-border-mexico-migrants-title-42-a91b6441-2197-463f-ab1f-2435824a9566.html>.

DHS has also issued immigration enforcement guidelines that signal to prospective illegal immigrants that U.S. Immigration and Customs Enforcement (ICE) is unlikely to take action to remove them, establishing that “[t]he fact an individual is a removable noncitizen . . . should not alone be the basis of an enforcement action against them.”⁸ These guidelines purport to prioritize illegal border crossers, but from February 18, 2021 through the end of Fiscal Year 2021, ICE Enforcement and Removal Operations (ERO) removed only around 25,000 aliens under the ‘threat to border security’ category.⁹ In comparison, sources indicate that in FY 2021 Border Patrol recorded around 400,000 aliens entering the interior after evading apprehension.¹⁰ And most recently, DHS issued an interim final rule which could significantly expand the practice of paroling apprehended migrants into the United States.¹¹ Removing these deterrents has made it impossible to transition back to a Title 8-only framework at this time, without imposing significant costs on local communities, DHS officials, and the migrants themselves.

Finally, at the current levels of cross-border migration, DHS currently lacks adequate capacity to process and detain all migrants apprehended along the southwest border under its Title 8 authorities. A report published by the DHS Office of Inspector General (OIG) in January of this year found that Border Patrol stations in the Rio Grande Valley were overcrowded and that the high volume of apprehensions limited the effectiveness of COVID-19 mitigation measures.¹² DHS’s practice of releasing migrants with a so-called “Notice to Report” or otherwise releasing them on parole may have reduced the time they are held in detention at Border Patrol facilities, but likely acts as a pull factor for even more migration,¹³ imposes substantial costs on local communities, and is an inappropriate substitute for taking measures to construct adequate facilities and reduce the overall number of migrants crossing the border.

Furthermore, small border communities lack the appropriate housing, transportation, and healthcare infrastructure to manage the ongoing release of migrant populations into their jurisdictions. South Texas mayors inform us that the local non-governmental organizations are

⁸ Memorandum from Hon. Alejandro Mayorkas, Secretary of Homeland Security, to Tae Johnson, Acting Director, U.S. Immigration & Customs Enforcement, *Guidelines for the Enforcement of Civil Immigration Law*, at 2 (Sept. 30, 2021), available at <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>.

⁹ U.S. Immigration & Customs Enforcement, *ICE Annual Report Fiscal Year 2021*, at 9 (Mar. 11, 2022), available at <https://www.ice.gov/doclib/eoy/iceAnnualReportFY2021.pdf>.

¹⁰ See Anna Giaritelli, *More than 400,000 sneaked over southern border and got away in past year, former Border Patrol head says*, WASHINGTON EXAMINER (Oct. 5, 2021, 7:53 p.m.), <https://www.washingtonexaminer.com/news/many-sneaked-over-southern-border-and-got-away-in-past-year>.

¹¹ *Interim Final Rule with Request for Comments: Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, RIN 1615-AC67 and RIN 1125-AB20, at 37 (scheduled to be published Mar. 29, 2022), available at <https://public-inspection.federalregister.gov/2022-06148.pdf>.

¹² Department of Homeland Security, Office of Inspector General, *Rio Grande Valley Area Border Patrol Struggles with High Volumes of Detainees and Cases of Prolonged Detention but Has Taken Consistent Measures to Improve Conditions in Facilities*, OIG-22-22, at 7-8 (Jan. 27, 2022), available at <https://www.oig.dhs.gov/sites/default/files/assets/2022-02/OIG-22-22-Feb22.pdf>.

¹³ According to data DHS has supplied in response to letters from United States Senators, a very substantial percentage of migrants issued a “notice to report” or otherwise released on parole do not report to U.S. Immigration and Customs Enforcement as instructed. See Letter from Hon. Alejandro Mayorkas, Secretary of Homeland Security, to Sen. John Cornyn (Feb. 9, 2022) (of 158,576 migrants released without a charging document, 47,258 had not completed even the initial check-in at an ICE field office as of Dec. 27, 2021).

completely at capacity in terms of lodging and other services, and that local transportation hubs have been overwhelmed with migrants, many of whom lack the financial means to purchase tickets. If the CDC were to rescind its Title 42 order at this time, Border Patrol facilities and local communities would be forced to absorb at least double the current number of migrants, likely with catastrophic results.

We urge that the CDC's Title 42 order remain in place and that DHS continue to use it until such time as the number of apprehensions along the southwest border drops to a manageable level. We also ask that you collaborate with Congress to develop an appropriate plan for an orderly transition back to relying exclusively on Title 8 authorities. Finally, we request answers to the following:

- 1) What plans have DHS and the CDC made to ensure that rescission of the Title 42 order will not result in an unmanageable spike in migrant apprehensions along the southwest border?
- 2) According to Axios, the U.S. Government has created a "Southwest Border Mass Irregular Migration Contingency Plan."¹⁴ Please provide a copy and/or summary of the contingency plan.
- 3) General Glen VanHerck recently stated that DHS had requested additional support from the Department of Defense to respond to increases in unlawful border crossings.¹⁵ Please confirm Gen. VanHerck's statement, and provide further details on what this request entails.
- 4) Aside from the use of Title 42 to expel migrants encountered along the southwest border, what measures has DHS taken to deter migrants with weak asylum claims from taking the dangerous journey to the southwest border?
- 5) Did DHS consider the potential effects of the following policy changes on incentives to unlawfully migrate to the United States?
 - a) Termination of the Migrant Protection Protocols
 - b) Implementation of the Guidelines for the Enforcement of Civil Immigration Law
 - c) Rescission of Prioritization-Based Queue Management ("Metering")¹⁶
 - d) Designation of Haiti for Temporary Protected Status on August 3, 2021

¹⁴ Jonathan Swan & Stef W. Kight, *Scoop: Biden officials fear "mass migration event" if COVID policies end*, AXIOS (Mar. 17, 2022), <https://www.axios.com/biden-border-mexico-migrants-title-42-a91b6441-2197-463f-ab1f-2435824a9566.html>.

¹⁵ Adam Shaw, *DHS requesting additional Pentagon support at border amid fears of massive migrant surge*, FOX NEWS (Mar. 24, 2022, 1:00 p.m.), <https://www.foxnews.com/politics/dhs-requesting-pentagon-support-border-massive-migrant-surge>.

¹⁶ See Memorandum from Troy A. Miller, Acting Commissioner, U.S. Customs and Border Protection, to William A. Ferrara, Executive Assistant Commissioner, Office of Field Operations, *Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry* (Nov. 1, 2021), available at <https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/CBP-mgmt-processing-non-citizens-swb-lpoes-signed-Memo-11.1.2021-508.pdf>.

- e) Decision to issue a “Notice to Report” or otherwise release migrants into the interior on parole instead of issuing a “Notice to Appear”
- 6) Please share any analysis DHS has conducted regarding the effects of its response to the migrant surge on local communities, including stresses placed on transportation infrastructure and potential increases in crime rates.
- 7) What measures has DHS taken to limit the impact of the rescission of the CDC’s Title 42 order on border communities in Texas?
- 8) What percentage of Border Patrol agents in the Rio Grande Valley, Laredo, Big Bend, Del Rio, and El Paso Sectors are currently assigned to processing apprehended migrants or otherwise providing care to migrants in a detention facility?
- 9) What additional resources does DHS require to reduce and deter unlawful border crossings on the southwest border?

As Members of the Texas delegation, we urge you to consider the dangerous impact rescission of the Title 42 order would have on our communities at this time and request a response to our questions by April 15, 2022.

Sincerely,

John Cornyn
United States Senator

Ted Cruz
United States Senator

Tony Gonzales
Member of Congress

Kay Granger
Member of Congress

Michael T. McCaul
Member of Congress

Kevin Brady
Member of Congress

Henry Cuellar
Member of Congress

Vicente Gonzalez
Member of Congress



John R. Carter
Member of Congress



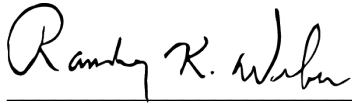
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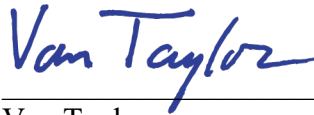
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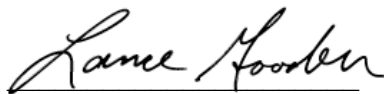
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