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Restoring the Legal Right to Seek Asylum: The Case for Ending Title 42

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Introduction

On April 1, 2022, the Biden Administration [announced](#) that by May 23, 2022 it would end its use of the Trump-era Title 42 expulsion policy, a public health authority that was weaponized by the Trump administration to immediately remove people seeking safety at our border and deny them the ability to seek asylum. A Trump-appointed judge stepped in to block the end of the Title 42 expulsion policy and the rule remains in place while the Biden Administration appeals. Under the Title 42 policy, migrants seeking protection at the southern border have been [expelled](#) to Mexico, to their country of origin, or in some cases to [third countries](#) without any process at all, despite their legal right to seek asylum in the United States. During the more than two years since the Title 42 policy has been in effect, it has resulted in over 1.8 million expulsions.

The unprecedented misuse of Title 42 undermines the legal right to apply for asylum, putting people in [life-threatening danger](#), upending our immigration system, and [failing in its purported goal to protect public health](#). Title 42 also contravenes the United States' [stated goals](#) of building an “orderly, secure, and well-managed border while treating people fairly and humanely.” Human rights advocates, immigrant communities, public health professionals and progressive leaders celebrated the Biden Administration’s decision to end the use of Title 42 as an important step forward to reverse the cruel and inhumane anti-immigrant policies of the Trump Administration. They called for an immediate end to the policy and strengthening protection of the long-established legal right to apply for asylum.

Since September of 2021, the U.S. Department of Homeland Security (DHS) started [planning](#) for the end of Title 42 expulsions and on April 27, 2022, the Administration [revealed its plan](#) for processing the backlog of migrants at our southern border in an orderly and humane manner once this inhumane policy is rescinded. The rescission of Title 42 is a welcome step toward repairing our broken immigration system, but there is much more work to do. This is not the first time that public health has been used as an excuse for anti-immigrant policies in our history, but it should be the last.

What is Title 42?

Title 42 refers to [Title 42 section 265](#) of the United States Code established in the 1944 Public Health and Service Act. The World War II-era public health statute provides the government the authority to “prohibit...the introduction of persons” who pose a danger of spreading a communicable disease into the U.S. For years the Trump administration [tried](#) to unsuccessfully invoke Title 42 to close our borders. Beginning on March 20, 2020, despite [objections](#) from the Centers for Disease Control and Prevention (CDC), the Trump Administration invoked Title 42 to turn away tens of thousands of people seeking asylum, in violation of domestic law and [our international treaty obligations](#).

Throughout its history, the law was used to quarantine or block people of any and all immigration statuses, including U.S. citizens, who arrived in the U.S. from a place with a communicable disease outbreak. **Since 2020, the CDC has applied Title 42 in an unprecedented way: it subverted the legal right to apply for asylum while allowing business travelers, tourists and others arriving from the same areas to enter the U.S.** The right to seek asylum is a protected process codified by the Refugee Act of 1980, as well as under international law. *[For more information about the asylum process see our Appendix: Understanding Asylum]*

While the Trump Administration used the fear surrounding the COVID-19 pandemic as an excuse to block people seeking safety from applying for asylum, overwhelming [evidence](#) confirms it was merely a cover for their anti-immigrant agenda. In fact, it was not the first time the administration tried to misuse Title 42 to limit immigration and stop people from exercising their right to apply for asylum. Anti-immigrant officials, including [Stephen Miller](#), had [previously attempted to shut down our asylum system using Title 42](#) even before the COVID-19 pandemic. In 2018, then-President Trump argued that Title 42 should be employed to seal the southern border after dozens of migrants became [seriously ill](#) in a make-shift clinic in McAllen, Texas. A year later, the administration again attempted to use Title 42 to seal the border during a [mumps outbreak](#) that affected Customs and Border Protection (CBP) as well as Immigration and Customs Enforcement (ICE) facilities in at least six states. Later that year, the administration again attempted to use a [flu outbreak](#) that affected at least 32 migrants in Texas facilities as an excuse to invoke Title 42.

Title 42 is widely condemned by [public health professionals](#), [human rights advocates](#), [top Biden Administration officials](#), and the CDC’s [own top doctors](#). Vice President Pence reportedly [overruled CDC officials](#) to impose the policy after top public health officials had refused to comply and other public health officials warned that the policy “directly endangers tens of thousands of lives and threatens to amplify dangerous anti-immigrant sentiment and xenophobia.”

Leading epidemiologists, former CDC officials and other top health officials [condemned the policy](#) as “scientifically baseless and politically motivated” and called on the Biden Administration to immediately end the policy. While the Biden Administration initially defended the policy, they did implement exceptions for unaccompanied minors and later announced a [case-by-case exemption to Title 42](#)

expulsions for Ukrainian refugees attempting to enter the U.S. through the southern border, but continued to expel Haitians, Central Americans, and others who had been attempting to apply for asylum.

What Happens When Title 42 Ends?

Once the use of Title 42 is ended, people seeking safety at our border will be processed under Title 8 of the United States Code—including claims for asylum and hearings before an immigration judge to determine whether a migrant may remain. CBP Commissioner Chris Magnus has [already indicated](#) that CBP should follow “traditional immigration management authorities” (i.e., Title 8) because Title 42 is “not a border management authority.”

Ending the use of Title 42 is a critical step towards restoring our country’s commitment to the long-standing legal right to apply for asylum and reduce the danger to asylum-seekers imposed by Title 42. People seeking safety would once again be able to apply for asylum at CBP Ports of Entry. In addition to ending Title 42, the Biden Administration is fighting to end the [MPP program put in place by the Trump Administration in 2019. Also known as the so-called “remain in Mexico” policy](#)—this policy forces vulnerable people to wait for their immigration hearings in Mexico rather than being admitted into the U.S., leaving thousands of people stranded in makeshift camps and at risk of rape, kidnapping, murder and extortion. Ending “remain in Mexico” and the use of Title 42 would save lives, reduce strain on the immigration courts, and reduce the need for people fleeing for their lives to depend on human traffickers and cross at unsanctioned places.

Under our current laws, people seeking asylum must prove they are in imminent danger and have a well-founded fear of persecution if they are returned to their country of origin because of their race, religion, nationality, political beliefs, or membership in a particular social group. As part of the asylum process, people must pass a background and security check and prove that they have a valid ground for asylum before they are allowed to gain asylum.

Only a very small number of immigrants are granted asylum each year, while the vast majority of immigrants arriving at our borders without visas or prior status are denied admission under our existing immigration laws. For example, in FY 2020, U.S. Customs and Border Patrol reported that there were [402,806 land border enforcement encounters](#), but only 31,429 immigrants were granted asylum (a 32% decrease from FY2019). Under the Biden Administration, about [63% of asylum seekers](#) are denied asylum, down from a high under the Trump Administration of [71% of cases denied](#). *[For more information about the asylum process see our Appendix: Understanding Asylum]*

	FY 2019	FY 2020	FY 2021
New asylum applications to USCIS (affirmative applications)	97,192	93,224	130,132
New asylum applications in immigration court (defensive applications)	213,307	189,838	155,029
Total new asylum applications	310,499	283,062	285,161
Asylum applications granted	46,203	31,429	8,349

Once Title 42 is ended, the Biden Administration should rely on proven community-based alternatives to detention to process asylum cases in an orderly way and allow people to prepare their asylum cases and seek legal representation. [Numerous studies](#) have shown that community-based alternatives to detention have a higher than 90% compliance rate. In addition to being more humane than keeping people in unsafe detention facilities, community-based alternatives are [more efficient](#), saving taxpayers money and reducing the burden on our immigration system.

The Biden Administration [recently announced changes](#) to the asylum process to try to speed up applications by allowing immigration officers to make asylum determinations instead of immigration judges. However, many [legal experts](#) and [immigration rights advocates](#) are concerned that these changes will deny people seeking safety their right to due process and a full hearing of their cases. The Biden Administration must ensure that any changes to the asylum process do not sacrifice the rights of vulnerable people in the interest of clearing the backlog. The Biden Administration should also consider ways to ensure that people who were previously denied the chance to apply for asylum under Title 42 can still seek asylum in our country.

Title 42 Didn't Prevent the Spread of COVID - And it was Never About Protecting Public Health

Although the COVID-19 pandemic was used to justify this policy, families fleeing from danger are [no more likely](#) to have COVID-19 than people living in the U.S. Tourists, business travelers and U.S. citizens and legal permanent residents continued to traverse the border throughout the pandemic, with [some exceptions](#). Each of these categories of border crossers were equally likely to be infected with COVID-19. Further underscoring the fallacy that Title 42 had any impact on the COVID-19 pandemic or any validity as a public health measure, [a multivariate analysis of public health data conducted by the Center for American Progress](#) found no link between COVID-19 infections and Title 42 expulsions. In fact, this Trump-era mass expulsion policy [may have contributed to the spread of COVID-19](#) when people seeking asylum were temporarily detained in overcrowded and unsanitary facilities that do not offer

testing for COVID-19 or appropriate medical care, or forced to wait at the border in unsanitary and unsafe temporary camps while attempting to exercise their legal right to seek asylum. When the CDC decided to defend the use of Title 42 again in 2021 for families and adults, leading public health experts [laid out the lack of public health](#) justification in an open letter, accusing the CDC of making an “politically expedient, rather than scientifically based or ethically just” decision.

Title 42 not only exposed families seeking safety to potential infection in overcrowded detention facilities, but also prevented people fleeing for their lives from presenting themselves at the border to apply for asylum in an orderly manner where a health screening would be possible. **Instead, people are forced to cross the border at unsafe and unsanctioned locations, meaning that border patrol agents could not screen people for COVID symptoms.** This also put people seeking safety at greater risk from people smugglers and left them more exposed to dangerous conditions like heat, dehydration, kidnapping and abuse.

Title 42 Put People Seeking Safety in Danger

Since March 2020, CBP has expelled more than [1.8 million people](#) under Title 42, without allowing people to make an asylum claim or have their day in court. That includes [more than 13,000 unaccompanied children](#) even if those children were in imminent danger. The consequences for people seeking safety are dire: Human Rights First documented more than [10,250 kidnappings, rapes, and attacks](#) on people turned away at the border since the Biden Administration took office due to Title 42.

While advocates celebrated the Biden administration’s announcement to end Title 42 on May 23rd, many [public health leaders, immigration rights advocates](#) and Democratic leaders [called](#) on the Biden Administration to end the policy immediately rather than winding it down over seven weeks. In particular, advocates expressed concern for the families facing danger at home who will be expelled in the intervening weeks. Since 2021, the Biden Administration has used Title 42 to expel more than [20,000 Haitian refugees](#), including [chasing fleeing families on horseback](#) in Del Rio Texas, denying them access to due process, and holding Haitian families in deplorable conditions. The [U.S. special envoy to Haiti](#) and a [senior advisor to the State Department](#) resigned in protest over the treatment of Haitian migrants at the southern border and continued deportations. Despite a [promised investigation](#), Title 42 has [continued to disproportionately harm Haitians](#) and other Black immigrants exercising their legal right to apply for asylum. It is critical to provide immediate support for people who are currently seeking safety, especially those who were disproportionately harmed by the use of Title 42 over the last two years.

Ending Title 42 and the “remain in Mexico” policy would simply return us to our long-standing system of immigration enforcement and protections for vulnerable people. The asylum system was created in part as a response to the tragic deaths of hundreds of Jewish refugees aboard the *St. Louis*, who arrived on our shores in 1939 only to be sent back to Europe, where 254 passengers would be murdered during the Holocaust. Since the Trump Administration imposed Title 42, millions of people

have been turned away without a chance to plead their case. One recent report by Human Rights Watch found that [at least 138 asylum seekers from El Salvador](#) were murdered between 2013 and 2020 after being denied asylum and deported from the U.S. The total number of people who lose an asylum case and are harmed is impossible to track. However, this study points to the reality that many people who fear for their lives were not able to successfully navigate the asylum process even before the use of Title 42. The death of anyone who made it to the U.S. and sought safety only to be turned away is not only tragic, it should require us to re-examine how our system of protections failed. We must restore our asylum process and commitment to human rights protections.

Title 42 Created a Backlog

After over two years of expelling immigrants without any process, Title 42 has wreaked havoc on our established immigration processes and created a backlog at the border of people who were blocked from exercising their legal right to seek refuge. The Department of Homeland Security (DHS) [estimates](#) they will encounter anywhere from 6,000 to 18,000 migrants a day after Title 42 is officially rescinded. In February 2022, DHS was averaging 5,892 apprehensions a day at the southern border. It is likely that people who were turned away under Title 42 will try again to seek asylum in the U.S. when the policy is lifted, as DHS reports that people tried repeatedly to make asylum claims in the U.S. even after being expelled under Title 42. [According to DHS](#), “the large number of expulsions during the pandemic has contributed to a higher-than-usual number of noncitizens making repeated border crossing attempts: more than one in three encounters at the Southwest Border are repeat entrants, including almost half of single adult encounters.” These statistics demonstrate both the inefficiency of Title 42 as a policy as well as the ongoing dangers posed to people seeking asylum.

As of February 2022, immigration courts faced a backlog of over [1.7 million cases](#), with pending cases averaging almost three years to decide. While lifting Title 42 is expected to contribute to the already-severe backlog in the short term, this should not be used as an excuse to continue this cruel policy. **Extending Title 42 and continuing to deny people due process and their legal right to apply for asylum puts people fleeing for their lives in danger** and will only delay a needed resolution to the case backlog and worsen the eventual impact in the long term. Instead, increasing access to legal representation and due process in immigration courts not only saves lives and achieves more just outcomes, it [increases efficiency in the immigration court system](#).

Instead, the Biden Administration should direct federal resources to ensure that asylum seekers can be processed in a fair, humane, and efficient manner. The administration can deploy proven programs like community-based case management and partnering with community organizations on the ground in border communities to ensure that the people harmed by this policy have the chance to apply for asylum without further trauma.

Title 42 is Part of a Shameful History of Weaponizing Public Health Claims Against Immigrants in the United States

The weaponization of so-called public health concerns as an excuse for racist and xenophobic public policy has been interwoven into our immigration system since its inception. Racist and false claims that Chinese immigrants were spreading diseases like smallpox, leprosy, typhoid, bubonic plague, and malaria helped fuel violent attacks on Chinese-American settlements, including the [burning of homes](#) and the [lynching of 18 Chinese immigrants in Los Angeles in 1871](#). In 1880, the San Francisco board of health called for “[the Chinese cancer](#)” to be “[cut out of the heart of our city, root and branch, if we have any regard for its future sanitary welfare.](#)” False claims that Chinese immigrants were a danger to public health and morality were used to justify the passage of the Chinese Exclusion Act in 1882.

In the early 1900s, as Mexican immigration began to increase, Mexican immigrants were [falsely painted as “disease carriers”](#) and subjected to humiliating and harmful medical “inspections” and chemical baths at the border. Racist fearmongering around the Typhus outbreak in Los Angeles in 1917 [fueled the passage of the anti-immigrant Immigration Act of 1917](#). Dangerous and deadly “health” inspections at the border consisted of stripping people naked and [spraying them with kerosene, gasoline, and even DDT](#). Despite [resistance](#), this practice [continued for decades](#), including under the Bracero Program in the 1950s. These horrific abuses at the border not only traumatized and endangered generations of immigrants, especially Mexican and Latin American immigrants—they reinforced racist lies about immigrants as vectors of disease. The systematization of these chemical baths was even [cited by Nazi scientists](#) in building their systems of genocide.

The anti-immigrant objectives of these so-called “public health” policies have been clear for over a century. For example, ocean-liner passengers in first and second class were [not subjected to the same humiliating medical exams](#) that passengers in steerage endured. The U.S.’ first generalized immigration laws in 1891 barred anyone likely to spread a “dangerous and loathsome contagious disease” from the U.S. even if they caught that contagious disease *within* the U.S. These same laws pathologized and excluded people with disabilities. [Irish, Italian, and German](#) immigrants were blamed for diseases that spread due to unsanitary conditions in impoverished tenements at the turn of the 20th century. Anti-immigrant attacks cloaked in public health concerns were inextricably tied to the [eugenics movement](#), hatred and discrimination against [people with disabilities](#), and white supremacist movements at the dawn of the 20th century. Xenophobic and patently false claims that immigrants spread disease or were biologically inferior to white Americans [fueled the passage of the National Origins Act of 1924](#).

Scape-goating immigrants under the guise of public health concerns has continued unchecked into modern times. In 1994, voters passed Proposition 187 in California, requiring that doctors refuse to give medical treatment to undocumented immigrants and that medical personnel turn patients they suspected might not have documentation over to immigration authorities. Far from protecting public health, this proposition [actually endangered public health](#) because many immigrant

families were too afraid to seek necessary treatment for diseases. The Bush and Clinton Administrations deployed a similar policy targeting immigrants living with HIV and AIDS: from [1987 to 2009](#), the U.S. banned people with HIV from entering the country, despite the endemic nature of the virus within the U.S.

Title 42 was the latest example in a long and shameful history of using public health to launder discriminatory and often violent immigration policies.

The Administration's Plan to Address the Backlog Caused by Title 42

On April 26, Secretary of Homeland Security Alejandro Mayorkas released a detailed [memo](#) outlining the Biden Administration's plan to manage the anticipated increased encounters at the southern border and then [testified](#) about the plan before the Appropriations Committee and the Judiciary Committee in the House of Representatives. The plan includes increasing personnel along the border to more efficiently process migrants and prevent overcrowding, as well as expanding medical support and COVID-19 testing and vaccinations. It also includes improving communication and coordination between DHS and non-governmental organizations (NGOs) so that NGOs are better prepared to receive and assist migrants after they are screened, entered into immigration removal proceedings, and allowed into the U.S.

In anticipation of increased encounters at the border and the pre-existing backlog, the Administration has detailed its plans to speed the processing of both asylum claims and immigration court proceedings. According to the April 26 memo, DHS's planned changes could reduce wait times by years and cut down on the backlog significantly:

Individuals in Expedited Removal who establish a credible fear of persecution or torture are currently referred to an immigration court for full consideration of their applications for asylum and related protection. Under the new Asylum Office rule, effective May 31, DHS can instead refer these cases to USCIS for significantly more expeditious adjudication. The new rule will allow DHS and DOJ to conclude certain asylum cases in months instead of years, meaning that those deemed ineligible for asylum can be removed more quickly. While full implementation will take time, this will have a transformative impact on the asylum system.

While clearing the backlog of cases is an important priority, building an asylum system that [protects human rights must be paramount](#). The Biden Administration must ensure changes do not put people fleeing danger in harm's way. For example, the plan indicates that the administration plans to expand the use of expedited removal, a fundamentally flawed program that has [repeatedly returned those seeking protection, resulting in serious harm, up to and including, death](#). In addition, many people seeking asylum have endured significant trauma and often had to flee their homes without the necessary paperwork. Many asylum seekers need time to prepare their cases, find documents, find legal support, find an interpreter, and prepare for the often difficult experience of talking about their trauma and fear in a

legal or administrative setting. Any changes to the current asylum process must not increase unnecessary detentions, harm people trying to exercise their legal right to apply for asylum, or unfairly deny asylum seekers the opportunity to seek legal representation.

Legal Challenges

Before announcing the end of Title 42 by May 23, 2022, the Biden Administration had defended the policy in federal court. In [*Huisha-Huisha v. Mayorkas*](#), asylum-seeking families sued the federal government for humanitarian protection, arguing that by detaining and immediately expelling asylum-seekers, the federal government was in violation of the Public Health Service Act, Refugee Act, Foreign Affairs Reform and Restructuring Act of 1998, Immigration and Nationality Act, and Administrative Procedure Act. The federal government, however, argued that it had the power to ignore immigration laws and expel asylum-seeking families under Title 42 in order to mitigate the spread of COVID-19.

On March 4, 2022, the D.C. Circuit Court of Appeals affirmed that the **CDC provided no evidence that Title 42 prevents the spread of the coronavirus**, but upheld the government's authority to expel migrants under Title 42. However, the panel also held that section 241(b)(3) of the Immigration and Nationality Act (INA) prohibits the government from expelling migrants to countries where they may face persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

In a different case, Texas sued the federal government over its policy to temporarily exempt unaccompanied migrant children from expulsion under Title 42 and allow them into the state under the custody of the Department of Health and Human Services (HHS) until they were placed with a vetted sponsor. Texas argued that allowing migrant children into the state increased the spread of COVID-19 and placed a financial and administrative burden on the state. On March 4, the judge for the U.S. District Court for the Northern District of Texas ruled that the Biden Administration's decision to exempt unaccompanied children from Title 42 was "arbitrary" and "capricious" and failed to consider the impact the policy would have on the spread of COVID-19. The court also found that the CDC failed to explain its decision to treat unaccompanied children differently than other migrants also subject to Title 42. In response to the decision, the Biden Administration and the CDC officially terminated Title 42 for unaccompanied migrant children on March 12, 2022 but did not announce a planned end to the policy for migrant adults or families until April 1. In the order, the CDC argues that expelling unaccompanied migrant children is not warranted to protect public health, citing the nationwide decrease in COVID-19 cases, as well as mitigation protocols employed by HHS.

After the Biden Administration announced its intention to end Title 42, three Republican-led states filed a lawsuit in order to keep the policy in place. In the lawsuit, the attorneys general for Arizona, Louisiana, and Missouri argue that the move violates the Administrative Procedures Act by failing to allow for a public comment period. They also argue that the Biden Administration failed to estimate

the costs to states the move would have, citing increased health care costs and other administrative costs. After granting the states a two-week restraining order on April 25 preventing the Biden Administration from rescinding the policy, a federal judge for the U.S. District Court for the Western District of Louisiana officially blocked the lifting of Title 42 on May 20. In the decision, the federal judge agreed with the attorneys general that the federal government likely violated the rulemaking requirements of the Administrative Procedures Act and that lifting Title 42 would cause “irreparable harm” to the states. While the federal government is complying with the court’s injunction, the Justice Department maintains that the CDC lawfully determined that the continued use of Title 42 is unnecessary to protect public health and has filed an appeal.

Congressional Action

Leading up to the repeal of Title 42, several [lawmakers in Congress](#) urged the administration to repeal the Trump-era policy and allow refugees the opportunity to exercise their legal right to apply for asylum. On March 29, the Congressional Hispanic Caucus (CHC) sent a [letter](#) to Secretary of State Antony Blinken, Secretary of Health and Human Services Xavier Becerra, Secretary of Homeland Security Alejandro Mayorkas, and Director of the CDC Rochelle Walensky calling on the administration to officially terminate the use of Title 42. The CHC also released a [statement](#) calling on the Biden Administration to end the policy and “strengthen our legal pathways for immigrants, refugees, and asylum seekers.”

Congresswoman Cori Bush (D-MO-01) and Senator Cory Booker (D-NJ) also led a [bicameral letter](#) in February of more than 100 lawmakers to President Biden calling on him to end Title 42 and conduct a “wholistic review of the disparate treatment of Black migrants throughout our immigration system.” Black migrants face [disparate treatment](#) in the immigration enforcement process, comprising 5.4% of the undocumented population in the U.S., but 10.6% of all immigrants in removal proceedings between 2003 and 2015.

Following the D.C. Circuit ruling that DHS cannot use Title 42 to expel families to countries where they are likely to suffer persecution or torture, Senate Majority Leader Chuck Schumer (D-NY), along with Senators Bob Menendez (D-NJ), Cory Booker and Alex Padilla (D-CA), issued a [statement](#) calling on the Biden Administration to “fulfill its early promise to restore access to asylum and end the usage of Title 42 once and for all.”

House committees have also started to examine the policy. The House Committee on Homeland Security held a [hearing](#) on April 6 titled “Examining Title 42 and the Need to Restore Asylum at the Border.” In her opening statement, Chairwoman of the Subcommittee on Border Security, Facilitation, and Operations Rep. Nanette Diaz Barragán (D-CA-44) called the policy a “pretext to close the border to Black, Brown, and Indigenous people,” pointing out that the policy is not uniformly applied to migrants from Europe.

Not all lawmakers, however, are supportive of the Biden Administration's move to rescind the Trump-era policy. On April 7, Senators James Lankford (R-OK), John Thune (R-SD), John Cornyn (R-TX), Thom Tillis (R-NC), Shelley Moore Capito (R-WV), Rob Portman (R-OH), Kyrsten Sinema (D-AZ), Mark Kelly (D-AZ), Maggie Hassan (D-NH), Jon Tester (D-MT), and Joe Manchin (D-WV) introduced a bill that would temporarily block the administration's plan to end Title 42 until 60 days after an official notification is sent to Congress formally rescinding the COVID-19 public health emergency and the national emergency. The bill would also require the administration to submit a plan to Congress to prepare for a potential increase in the number of migrants seeking asylum, which the administration did on April 26.

Some Senators have already stymied critical legislation that would provide funding for near-term needs related to the ongoing pandemic, like purchasing more therapeutics, testing, and vaccines, unless an amendment in support of reinstating Title 42 is added to the bill. Some in Senate leadership, including Sens. Dick Durbin (D-IL) and Patty Murray (D-WA), have [signaled](#) that they are prepared to consider an amendment proposal related to Title 42, although the details of the proposal are unclear. The Congressional Hispanic Caucus, the Congressional Progressive Caucus and other lawmakers are supporting the Biden Administration's decision to restore our asylum system and are signaling that their memberships would [vote against](#) the funding bills if they contain language reinstating the Trump-era policy. Should these lawmakers indeed oppose the legislation, it may have insufficient votes to pass in the House.

Recommendations

Immediately end the use of Title 42

The federal government should immediately restore the asylum process at U.S. ports of entry so that people can exercise their legal and human right to seek safety. While restoring the asylum process, the Biden Administration must ensure that people can have their cases heard without unnecessary detention. Community-based alternatives to detention are proven to [work better than detention](#), save taxpayer money, and minimize unnecessary trauma for people seeking safety. Denying people the opportunity to use their legally protected right to apply for asylum does not protect public health and it will not prevent people from continuing to try to seek safety. Just like the Ukrainian refugees that are currently being admitted entry into the United States, the people applying for asylum are fleeing from imminent danger. Continuing to deny them the right to apply for asylum at the border subjects traumatized people to unnecessary pain and danger and will exacerbate inefficiencies and backlogs in our immigration system.

Use Executive Action to Clear the Backlog and Provide Relief to Families Seeking Safety

While many problems within our immigration system require Congressional action, the administration has the power to offer some relief now. The Biden Administration should use executive action to restore our gutted immigration system. Strategies

include **increasing immigration judges to process cases and using proven and compassionate strategies like community-based case management instead of unnecessary detentions**. Community-based case management works with community-based organizations to provide case management support like helping ensure applicants know about their court date and can access community support services. This model makes detention a last resort while cases are processed and [has been shown](#) to lower costs, reduce no-shows at court dates, and actually increase compliance with the immigration court process over detention-based solutions. Any changes to the asylum process must prioritize the rights of asylum seekers and their ability to defend their case in a fair and humane process.

In addition, the Biden Administration should use its executive authority to ensure that our immigration system reflects our values and the contributions that immigrants bring to our country. The Biden Administration **must fulfill its promise to increase refugee admissions, keep families together, and continue extending any other available protections like Deferred Enforcement of Departure (DED) and Temporary Protected Status (TPS) to people fleeing violence and unsafe conditions** including Central Americans, Haitians, Camaroonians, Ukranians, and others. Finally, the Biden Administration must continue investigating past abuses within our immigration system and hold officials accountable for those human rights abuses.

Our country is at its best when we are compassionate and fair to those seeking asylum. Our immigration system should reflect both our deepest values and the enormous contributions that our immigrant friends, families, neighbors, and co-workers bring to all of our communities. The enforcement of our existing immigration laws must be done in a manner that reflects the inherent dignity of every human being.

Reform Our Immigration System and Create a Pathway to Citizenship

Beyond ending the cruel and discriminatory use of Title 42, we must reform the current immigration system to prioritize keeping families together, treating immigrants with compassion, dignity and respect, restoring asylum, creating a pathway to citizenship for our friends and neighbors, ensuring that our existing immigration laws are enforced as fairly and humanely as possible and recognizing the huge contributions that immigrants bring to our country.

Congressional lawmakers have introduced a number of bills that would reform the immigration system and asylum process in the U.S. For example, the [U.S. Citizenship Act](#), introduced by Senator Bob Menendez and Congresswoman Linda Sanchez (D-CA-38), would end the one-year deadline for filing asylum applications in the U.S. The bill would also strengthen processing and resettlement capacity for refugees and asylum seekers by providing funding to increase the number of refugee and asylum officers and reduce asylum application backlogs, and allow asylum applicants to file a motion to reopen their cases within two years. The bill would also establish designated centers to register, screen, and process refugees to resettle or relocate them to the U.S. or other countries, as well as improve the national refugee and asylum registration systems.

Other bills, like the [New Way Forward Act](#) introduced by Representatives Chuy García (D-IL-04), Ayanna Pressley (D-MA-07), Pramila Jayapal (D-WA-07), and Karen Bass (D-CA-37) would restore fundamental principles of due process and compassion to our immigration system. Specifically, the bill would give immigration judges discretion to consider the individual circumstances of each person's life and provide people with deportation relief, end the federal government's use of for-profit detention centers, prohibit mandatory detention requirements for asylum seekers with a credible fear of persecution, ban local and state officers from performing immigration enforcement, and eliminate criminal penalties for improper entry or reentry into the U.S.

Similarly, the [Dignity for Detained Immigrants Act](#) introduced by Representatives Pramila Jayapal and Adam Smith (D-WA-09) and Senator Cory Booker would end inhumane conditions in detention centers, protect the civil and human rights of immigrants, and require the government to show probable cause that migrants pose a risk to the community in order to detain them.

Conclusion

Ending Title 42 is a critical step towards a fair and humane immigration system. The policy undermined the legal right to asylum, put millions of people in harm's way, failed to protect public health, and exacerbated backlogs and inefficiencies in the U.S. immigration system, wasting federal resources and endangering millions of people seeking safety in the U.S. Similar to the long history of medical xenophobia that came before, Title 42 used public health language to disguise anti-immigrant policies. Now, the Biden Administration and Congress have the opportunity to restore the right to asylum, reform the country's immigration system, and prevent future administrations from weaponizing public health.

Appendix: Understanding the Asylum Process

What is Asylum?

The right to apply for asylum is protected under both U.S. and international law. It is the process that allows someone who would qualify as a refugee to apply for safe haven if they are already in the country. That means they have a credible fear of persecution if they are returned to their country of origin. Asylum is a life-saving system that allows people who would face death, torture, imprisonment or other harm in their country of origin to seek safety and start again in the U.S. It is a reflection of our deepest held values. The asylum process was created in the wake of the Holocaust after many European Jews were [denied safe haven in the U.S. because of racist immigration quota laws](#) and were subsequently murdered by the Nazis. Our current asylum process was largely codified by the Refugee Act of 1980.

Who Qualifies for Asylum?

At its most basic level, asylum is the process that lets someone who would qualify as a refugee outside of the U.S. apply to stay here if they are already in the U.S. The United Nations [defines a refugee](#) as anyone who cannot return to his or her home country "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." This means that people who face death, torture, imprisonment or other persecution for who they are, who they love, who they work with, or what they believe can find safety in our country.

For many people fleeing for their lives, it is a difficult process to navigate, especially without access to an attorney (asylum applicants are not guaranteed legal representation and often have trouble finding an attorney, especially if they are put in detention). Many legitimate asylum seekers also struggle with the process because it requires them to relive traumatic experiences and provide documentation of their fear. This is especially challenging for people who are fleeing because of their membership in a particular social, religion or political group because proving their membership can be challenging. For example, [LGBTQIA people fleeing countries where being an LGBTQIA person is illegal](#) have often spent their entire lives hiding their sexual orientation or gender identity in order to survive and then must provide documentation of something that, in their country of origin, would have gotten them killed or imprisoned. Many asylum seekers also have had to flee quickly and may lack access to basic identity documents or other records they need to prove their cases.

One basis for asylum that has been recently contested is gender-based violence. The Trump Administration [ruled](#) that gender-based violence, domestic violence, and gang-violence were not legitimate grounds for asylum, endangering the lives of thousands of women, girls and transgender people and overturning established precedent. Thankfully, the Biden Administration vacated that decision and restored

this critical avenue for protection. However, [confusion in the courts and among asylum officers remains](#) and too often, victims of gender-based violence are still being turned away. In addition, many people fleeing gender-based violence struggle to prove their legitimate cases because of the highly stigmatized nature of this violence.

How Does the Asylum Process Work?

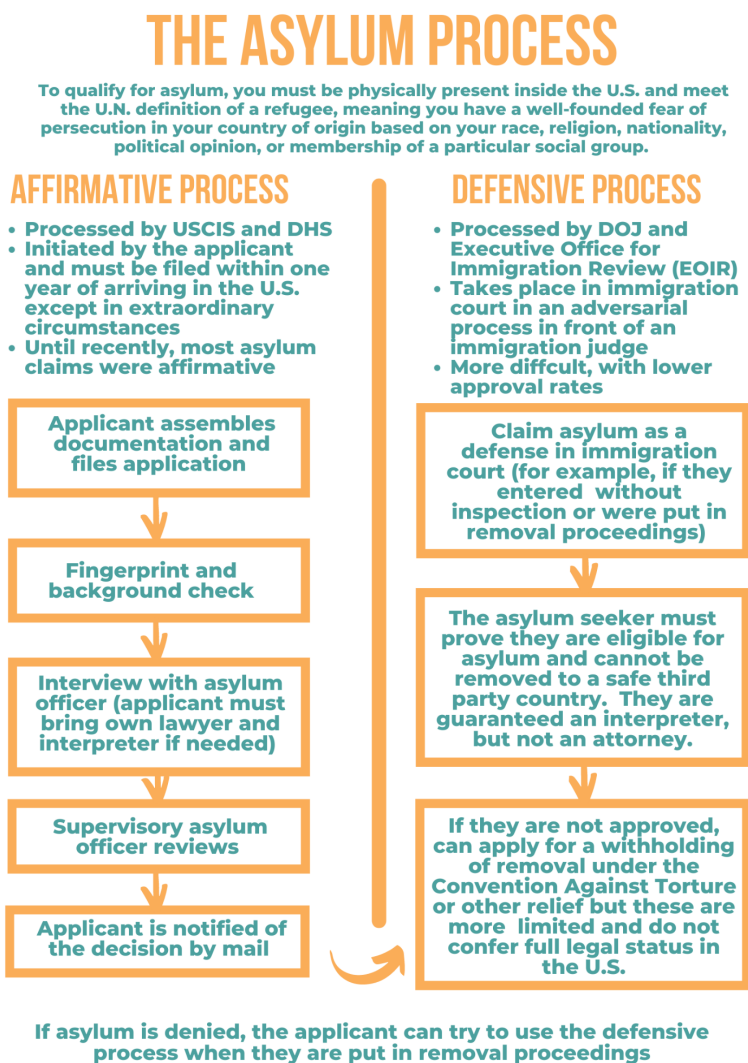
To apply for asylum, you must:

1. Be in the United States
2. Meet the definition of a refugee
3. Apply within one year of arrival (for affirmative processes) except in extraordinary circumstances OR apply during a defensive process

There are two types of asylum processes, affirmative and defensive, and they are processed in different ways. Both processes require applicants to prove they face danger if they are returned to their country of origin.¹

The Asylum Case Backlog

The U.S. immigration system is severely backlogged. According to a tracking project by Syracuse University, the immigration court system has a [backlog of 1.7 million cases](#) and asylum cases make up about [40% of that backlog](#). In addition, USCIS has a backlog of [9.5 million applications](#), which includes affirmative asylum applications, applications for DACA, applications



¹The Biden Administration [recently announced changes](#) to this process that would allow immigration officers instead of judges to review asylum cases which will go into effect in May and impact new cases

for legal permanent residence, applications for citizenship, and more. On average, immigration cases in the courts and through USCIS are pending for [2.5 years](#) or more before they are resolved. Legal permanent residents and U.S. citizens seeking to be reunited with their close family members [may wait 20 years or longer](#) for their cases to be processed.

The Biden Administration has sought to speed up the asylum process by introducing [the biggest changes to the asylum system](#) since 1996's [IIRIRA law](#). The new process would allow some cases to be heard by asylum officers instead of immigration judges in the defensive asylum application process. While reducing the backlog is critical, many immigration rights advocates [are concerned](#) that these changes could rush asylum seekers through the process without giving them due process and a fair chance to plead their cases. People with valid cases who are denied asylum or alternative relief are returned to their country of origin and sometimes [subsequently killed, tortured or imprisoned](#). It is critical that the Biden Administration ensure that any changes to the asylum process protect this fundamental right and give people fleeing for their lives the chance to defend their cases.

How Many People Apply For and Are Granted Asylum?

Most people who apply for asylum do not get it. Under the Biden Administration, about [63% of asylum seekers](#) are denied asylum, down from a high under the Trump Administration of [71% of cases denied](#). In fiscal year 2021, there were 130,132 new affirmative asylum applications and 155,029 defensive applications on top of a backlog of 667,229 pending cases either through USCIS or through the immigration courts. In 2021, USCIS decided 30,113 asylum cases and granted asylum in only 8,349 of those cases.

Generally speaking, people seeking safety have a better chance of winning their case through the affirmative process. They have the chance to prepare their case before filing and do not face an adversarial process where a government attorney is arguing against them. For

decades, most asylum cases ([around 60%](#)) were affirmative cases submitted to USCIS. When USCIS denies asylum, it usually refers cases to immigration court meaning unsuccessful affirmative applications often go through both the affirmative and defensive processes. Starting in 2003,

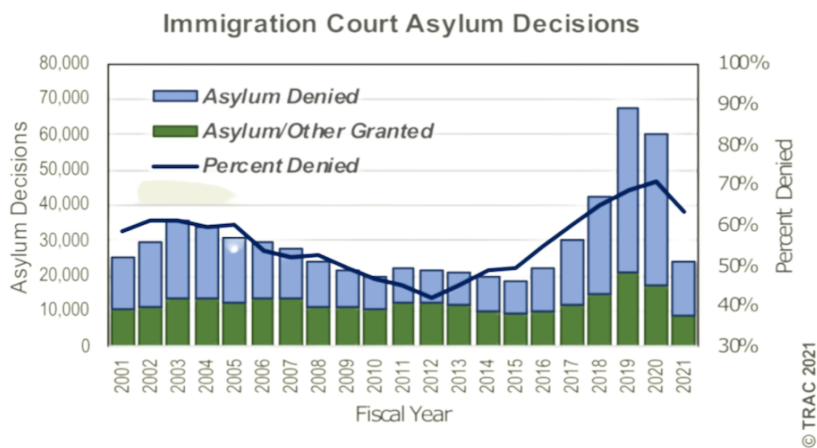


Figure 1. Immigration Court Asylum Decisions, FY 2001 - FY 2021
(Click for larger image)

USCIS began referring fewer cases to immigration courts. Beginning with the Trump Administration in 2016, defensive asylum applications grew dramatically, with [90%](#) of asylum cases happening through the defensive pathway. Title 42 blocked the vast majority of defensive asylum applications by denying people the chance to apply and instead summarily expelling people. This trend is likely to reverse once people are able to apply for asylum at the border again.²

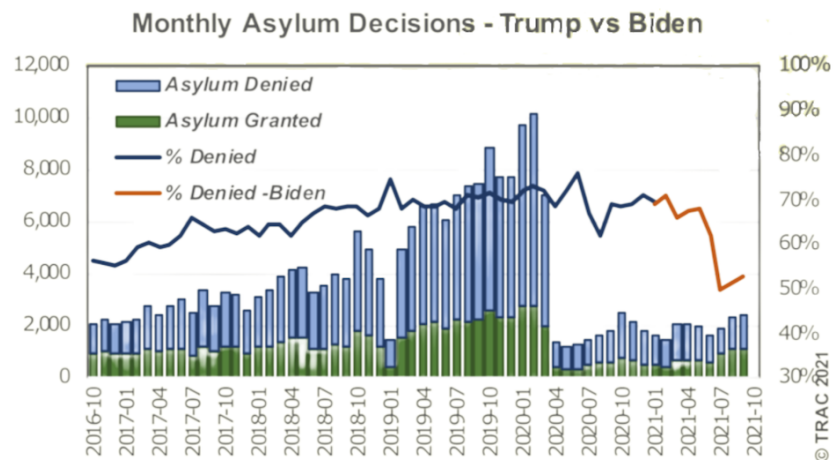


Figure 2. Immigration Court Asylum Decisions, October 2016 - September 2021
(Click for larger image)

Barriers Faced by Asylum Applicants

Applicants for asylum face a number of hurdles, including navigating an unfamiliar and complicated legal process, language barriers, lack of access to legal representation, lack of documentation of their experiences because they had to flee suddenly or had to hide their identity to stay safe, and the psychological and physical trauma that many asylum seekers have experienced.

The One-Year Bar

In 1996, Congress passed the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA), a punitive reform of our immigration laws. One of the most [damaging provisions was the creation of a one-year bar for asylum seekers](#). Prior to IIRIRA, people could seek asylum through the affirmative process whenever they were ready. Now, people must file for asylum within one year of entering the U.S. except in extreme circumstances. The one-year bar means that people who are navigating trauma, seeking an attorney, learning English, and getting established must also prepare a complex asylum application within one year or risk losing their chance to seek safety in the United States.

This bar disproportionately affects people with the strongest asylum claims, especially those suffering from post-traumatic stress disorder or other psychological impacts of the persecution they've survived. The one-year bar also disproportionately impacts women and LGBTQIA people. One study found that [women were 13% more](#)

² Graphs from TRAC, a nonpartisan, nonprofit data research center affiliated with the [Newhouse School of Public Communications](#) and the [Whitman School of Management](#), both at [Syracuse University](#). Original graphs available [here](#) and [here](#).

[likely to file for asylum after the one year limit](#). This is because women are far more likely to be fleeing based on sexual violence, domestic violence or other gender-based harm. They face social stigma in discussing these traumas with strangers and may be unaware that they can claim asylum based on this type of violence.

Access to Legal Representation

Access to an attorney is not guaranteed for asylum seekers, even though their lives are on the line, because immigration proceedings are considered civil court proceedings. For asylum seekers using the affirmative process, they must even supply their own interpreter for their interviews. It is critical that asylum seekers are able to access support, interpretation and legal representation as they navigate this process. People seeking safety through asylum, especially those who are detained before their case is heard, often struggle to find legal representation because of the cost, lack of community connections to find reliable legal help and a shortage of experienced immigration attorneys. Even people with valid cases may fail to be granted safety if they do not have an experienced helper to guide them through the process, especially if they are detained and unable to access community support to find an attorney and prepare their case. Asylum seekers who were able to obtain legal counsel [doubled their odds of winning their cases](#), yet [more than two-thirds](#) of all immigrants with cases before immigration court do not have access to legal counsel. This includes children as young as toddlers who are forced to represent themselves in immigration court. One study found that without a lawyer, [90%](#) of unaccompanied children were ordered removed.

Psychological Trauma and Lack of Documentation

Many asylum seekers also struggle with the process because it requires them to relive traumatic experiences and provide documentation of their fear. This psychological trauma is worsened when asylum seekers are detained and subjected to additional trauma as part of the application process. This is especially challenging for people who are fleeing because of their membership in a particular social, religious or political group because proving their membership can be difficult. For example, [LGBTQIA people fleeing countries where being an LGBTQIA person is illegal](#) have often spent their entire lives hiding their sexual orientation or gender identity in order to survive and then must provide documentation of something that, in their country of origin, would have gotten them killed or imprisoned. It is also extremely challenging for asylum seekers who have survived highly stigmatized forms of violence like rape or domestic violence because of shame and the culture of silence around these types of violence. In addition, many asylum seekers also have had to flee quickly and may lack access to basic identity documents or other records they need to prove their cases.